

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: April 18, 2013)

EMPLOYERS MUTUAL CASUALTY COMPANY

:

v.

:

C.A. No. PC 2006-3960

:

ELJ, INC., TRACY UKURA and LANE UKURA

:

DECISION
(REGARDING SUMMARY JUDGMENT)

LANPHEAR, J. This matter came on for hearing on March 12, 2013 on Plaintiff’s Motion for Summary Judgment. The Court has reviewed the supplemental memoranda.

I

Facts and Travel

Plaintiff Employers Mutual Casualty Company issued a commercial general liability insurance policy to ELJ, Inc. ELJ operated a rock-crushing and loam-screening business in Bristol, Rhode Island. On December 19, 2005, the Co-Defendants Tracy and Lane Ukura initiated a lawsuit¹ against ELJ seeking recovery from the noise of ELJ’s operations and the accumulation of stone dust on the Ukuras’ property. After a demand, Employers Mutual denied coverage to ELJ and initiated this suit, seeking a declaratory judgment that it had no duty to defend ELJ from the Ukuras’ claim.

¹ See the First Amended Verified Complaint in Ukura v. ELJ, Inc., et al., Providence County Superior Court C.A. No. PC 2005-6471, Amended Complaint attached as Exhibit A to Plaintiff’s summary judgment memorandum of December 2012.

Pertinent to this matter are the defense and indemnity clauses included in the Policy.

Those provisions state:

We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.

Exclusions . . .

f. Pollution

“‘Bodily injury’ or ‘property damage’ arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants.’”
(Policy Section I, Coverage A, ¶ 2f).

The Policy defines “bodily injury” as “bodily injury, sickness, or disease sustained by a person.”

Id. Additionally, the Policy defines “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” Id.

II

Analysis

Generally speaking, the insured seeking to establish coverage bears the burden of proving a prima facie case, including but not limited to the existence and validity of a policy, the loss as within the policy coverage, and the insurer’s refusal to make payments as required by the terms of the policy. See Providence Journal Co. v. Travelers Indemnity Co., 938 F. Supp. 1066, 1073 (D.R.I. 1996). The insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment, but only after the insured has

sustained its burden and established its prima facie case. General Accident Insurance Company of America v. American National Fireproofing, Inc., 716 A.2d 751, 757 (R.I. 1998).

Here, there is no dispute that the Policy is valid and enforceable; therefore, this Court need only look to the language of the Policy to determine if the language is sufficiently clear so as to require the insurer to defend and indemnify.

A

Duty to Defend

“In general, the duty to defend an insured in this jurisdiction is determined by applying the ‘pleadings test.’ That test requires the trial court to look at the allegations contained in the complaint, and if the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy, the insurer must defend irrespective of the insured’s ultimate liability to the plaintiff.” Peerless Insurance Co. v. Viegas, 667 A.2d 785, 787 (R.I. 1995); Hingham Mutual Fire Insurance Co. v. Heroux, 549 A.2d 265, 266 (R.I. 1988).² The duty to defend only requires the complaint in the underlying tort action to contain facts sufficient to potentially bring the case within coverage of the policy, regardless of whether plaintiffs in tort actions will prevail on the merits. Id. at 265. That duty, when blindly applied, may certainly result in the defense of “groundless, false or fraudulent” suits, but the insurer is duty-bound nonetheless. Employers’ Fire Insurance Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968). Also, where a policy requires the insurer to defend suits brought against an insured, any doubts as to adequacy of pleadings to

² Our high court has also described this procedure as placing the policy alongside the complaint. See National Grange Mutual Insurance Company v. Joseph, PC 02-6972, Indeglia, J., October 13, 2004 (citing Employers’ Fire Insurance Company v. Beals, 103 R.I. 623, 631 240 A.2d 397 (1968)).

encompass occurrences within coverage of policy are resolved against the insurer and in favor of insured. Id. at 240.

Thus, in order to determine whether the insurer here has a duty to defend ELJ, this Court first examines the underlying Amended Complaint. The Ukuras' allegations sound in private nuisance, continuing trespass, and intentional infliction of emotional distress. (Pl.'s Ex. A). Allegedly, stone dust accumulated from ELJ's property and noise was caused by the operation of ELJ's machinery. Id. As the facts recited in the complaint are wide ranging (for example, see Ukuras' First Am. Verified Compl., ¶¶ 18, 21, 25, 27), the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy when broadly construed.

Moreover, the Ukuras allege the intentional infliction of emotional distress, apparently as they complained about the problem and ELJ continued to harm. The insurer alleges that expected or intentional harms, caused by the insured, are not covered. In suits such as this, it is not uncommon for discovery to notify plaintiffs of new facts, resulting in the allegation of additional causes of action. In Rhode Island, pleadings are concise and direct. Super. R. Civ. P. 8(e). Motions to amend are liberally allowed. Super. R. Civ. P. 15.

Obviously, the insured does not accept the allegations of Mr. and Mrs. Ukura. They dispute whether they 'intentionally' harmed anyone, and that they 'polluted.'

The insurer suggests that the claims fall within the pollution exclusion to the Policy, and are not entitled to a defense. However, such a determination is not as clear, as stone dust and sound are not explicitly included in the list of "pollutants." Counsel's research confirms that no Rhode Island court has so broadly construed this exclusion to limit any likelihood for coverage. As insurance policies are to be read in favor of the insured, this Court finds that the insurer is not entitled to judgment as a matter of law regarding the duty to defend.

Therefore, the insurers' request for summary judgment and declaratory judgment are denied. The Court cannot find that the insurer has no duty to defend. The insurer is therefore obligated to defend.

B

Duty to Indemnify

The test for whether coverage is provided is even more difficult to apply, particularly as there has been no finding of liability and if liability is found, it is not clear which theory the Ukuras will succeed on. Though these cases are aged, it appears litigation of the underlying complaint is just commencing in earnest. Simply put, the facts are not ripe to determine coverage.

As indicated, the insurer contends that damage resulting from pollution is exempted from coverage. The parties question whether the exclusion applies. By its terms, Section V, Paragraph 15 includes solid, liquid and gaseous contaminants, including smoke. The type of discharge which may be established is also uncertain. See Policy Section I, Coverage A, Paragraph 2(a) and Section I, Coverage B, Paragraph 2(m). While rock dust may be a pollutant, odors may not. (The Court makes no such findings at this time.) In short, the facts are not clear, and it is best left to the trier of fact in the liability case to determine the type of harm, if any. Before doing so, this Court cannot determine the type of harm that occurred. As indicated above, the underlying case is still moving forward, and it is far from clear what will be established at trial. In short, issues of material fact remain, so the question of indemnification is not ripe. Accordingly, the insurer's motion for summary judgment on the indemnification claim is denied without prejudice.

III

Conclusion

For the reasons stated, Plaintiff's motion for summary judgment on the duty to defend is denied. The motion for summary judgment relative to the duty to indemnify is denied without prejudice.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Employers Mutual Casualty Company v. Elj, Inc., et al.

CASE NO: PC 06-3960

COURT: Providence Superior Court

DATE DECISION FILED: April 18, 2013

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

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