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NO. X10-UWY- CV-07-5007640-S	:	SUPERIOR COURT
PHILBIN BROTHERS, LLC	:	JUDICIAL DISTRICT OF WATERBURY
VS.	:	AT WATERBURY
HARTFORD FIRE INSURANCE COMPANY	:	DECEMBER 11, 2008

MEMORANDUM OF DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#121) AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (#122)

Introduction

Before the court are the Plaintiff's motion for summary judgment and the Defendant's cross motion for summary judgment, each seeking judgment on the sole remaining count in this action claiming breach of contract. The Plaintiff, Philbin Brothers, LLC ("Philbin"), claims that the Defendant, Hartford Fire Insurance Company ("Hartford") breached its contractual obligations under an insurance policy issued to the Plaintiff, by failing to defend Philbin in a lawsuit brought against it by James R. Heinzman and Cheryl L. Heinzman (the "Heinzmans"). In that lawsuit the Heinzmans alleged that they purchased a house constructed by Philbin. In

their six count complaint[1] they alleged various defects in the house including improper installation of the wood flooring; the use of wood for the floor that had not been properly seasoned; and loose stair railing and spindles creating a risk of injury.

The complaint here alleges that Hartford issued a Commercial General Liability Policy to Philbin which covered acts of negligence committed by Philbin. *Complaint, paragraph 4.* Philbin claims that the Heinzmans brought a cause of action against it for negligence in failing to advise them concerning certain uses of their home, specifically, what type of furniture could be placed in their kitchen on the hardwood floors. *Complaint, paragraph 6.* Philbin claims that Hartford breached its contractual duty by denying all coverage and refusing to provide a defense or indemnification for the Heinzman matter. *Complaint, paragraphs 7, 8.* Philbin claims that after Hartford denied coverage, in order to mitigate its damages, it negotiated an agreement with the Heinzmans. *Complaint, paragraph 10.*

In its motion for summary judgment, Hartford claims that it did not breach its duty to defend or its duty to indemnify Philbin, as the insurance policy does not cover the Heinzmans' claim. In its motion for summary judgment, Philbin claims that under Connecticut law to determine whether there is a duty to defend one compares the complaint to the insurance contract

[1] The First Count of the complaint alleges a breach of express warranty. The Second Count alleges a breach of implied statutory warranties. The Third Count alleges reckless endangerment. The Fourth Count alleges intentional infliction of emotional distress. The Fifth Count alleges negligence, and the Sixth Count alleges a violation of CUTPA.

and if the "...complaint *appears* to *possibly fall* within the coverage area of the policy, negligence, the duty to defend should have been triggered." *Plaintiff's Memorandum of Law*, p. 3. Philbin argues that the allegations of negligence in the Heinzmans' complaint fall within the coverage of the policy and that no further analysis as to the sufficiency of the pleadings is necessary or required to make the determination that Hartford had a duty to defend.

Discussion

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law. . ." (Internal quotation marks and citation omitted.) *Hopkins v. O'Connor*, 282 Conn. 821, 829 (2007).

"[T]he duty to defend is considerably broader than the duty to indemnify." *DaCruz v. State Farm Fire and Casualty Company*, 268 Conn. 675, 687 (2004). "The question of whether an insurer has a duty to defend its insured is purely a question of law, which is to be determined

by comparing the allegations of [plaintiff's] complaint [in the underlying action] with the terms of the insurance policy." (Citation omitted.) *Community Action for Greater Middlesex County v. American Alliance Insurance Co.*, 254 Conn. 387, 395 (2000). "In construing the duty to defend as expressed in an insurance policy, the obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint. . . .Hence, if the complaint sets forth a cause of action within the coverage of the policy, the insurer must defend....If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks and citations omitted.) *Hartford Casualty Insurance Company v. Litchfield Mutual Fire Insurance Company*, 274 Conn. 457, 463 (2005). "[T]he burden of proving an exception to a risk is on the insurer. . . . The insurer has the burden of demonstrating that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and further, that the allegations . . . are subject to no other interpretation." (Citation omitted.) *Allstate Insurance Company v. Devin*, 50 Conn. Sup. 140, 147 (2006). "Further, it is well

established . . . that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered. An insurer, therefore, is not excused from its duty to defend merely because the underlying complaint does not specify the connection between the stated cause of action and the policy coverage. Thus, the relevant question is whether the party claiming coverage is an insured party in the capacity in which he was sued." (Internal quotation marks and citation omitted.) *Hartford Casualty Insurance Company v. Litchfield Mutual Fire Insurance Company*, supra, 464.

In the Fifth Count of the original Heinzman complaint dated November 10, 2006, the plaintiffs alleged that Philbin was negligent in that:

> "7. Pursuant to the Agreement, Philbin Brothers were to construct and install the railing securely and in a workmanlike manner, this it failed to do.
>
> 8. Prior to and after delivery of the Property to Plaintiffs, Defendant knew or should have known that the railing on the second floor of the stairs was improperly constructed and/or installed.
>
> 9. By personally directing, controlling, and undertaking the construction on the Property, Philbin Brothers had a duty at all times to use reasonable care in undertaking construction activities and in completing the Property. Such duties include, without limitation, taking reasonable precautions to prevent Plaintiffs and their minor children from being exposed to dangerous and hazardous conditions such as the one created by the railing on the second floor at the top of the stairs

and warning Plaintiffs of potential and actual exposure to said dangerous and hazardous conditions.

10. Philbin Brothers breached said duties by failing to properly construct and/or install said railing."

In the amended complaint dated January 17, 2007, the Heinzmans alleged, in the Fifth Count, that:

"7. Pursuant to the Agreement, Philbin Brothers, inter alia, were to

a. construct and install the railing securely and in a workmanlike manner;

b. install the flooring in a workmanlike manner;

c. warn or advise that the Plaintiffs could not place a pool table on the first floor of the house without compromising the structural integrity of some or all of the entire house.

8. Prior to and after delivery of the Property to the Plaintiffs, Defendant knew or should have known that:

a. the railing on the second floor of the stairs was improperly constructed and/or installed

b. the flooring was not installed in a workmanlike manner and/or was defectively installed;

c. they should have warned the Plaintiff that they risked compromising the structural integrity of some or all of the entire house."

In the amended complaint, paragraph 9 was the same as in the November 10, 2006 complaint except that it was amended to add the phrase: "warning the Plaintiffs of the adverse affects of placing a pool table on the first floor of the house." Paragraph 10 was also amended to allege:

> "Philbin Brothers breached said duties of care in one or more of the following ways:
>
> a. by failing to properly construct and/or install said railing;
>
> b. by failing to install the flooring in a workmanlike manner and/or installing the flooring in a defective manner;
>
> c. by failing to advise the Plaintiffs that by placing a pool table in the kitchen they would compromise the structural integrity of the some or all of the entire house."

The "Agreement" referenced in both the Heinzmans' original complaint and the amended complaint is the Sales Agreement entered into by Philbin and the Heinzmans to purchase the property. *Fifth Count, paragraph 4.*

Under the Commercial General Liability Coverage Form policy issued to Philbin by Hartford, coverage is provided for " . . . 'property damage' only if : (1) The... 'property damage' is caused by an 'occurrence' that takes place in the 'coverage' territory." *Section 1 - Coverages, Coverage A Bodily Injury and Property Damage Liability, 1. Insuring Agreement,*

b.(1). "'Occurrence' means an accident, including continuous or repeated consequential exposure to substantially the same general harmful conditions." *Section V - Definitions, 16.* The policy also provides that: "The insurance does not apply to: '. . . "Property damage" to: . . "your work" arising out of it or any part of it and included in the "products-completed operations hazard'.'" *Section I - Coverages, Coverage A Bodily Injury and Property Damage Liability, 2. Exclusions, L.* "'Products-completed operations hazard' a. Includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' . . ." *Section IV - Commercial General Liability Conditions, 19(a).* "'Your work': a. Means: (1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations. b. Includes (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work', and (2) The providing of or failure to provide warnings or instructions." *Section V - Definitions, 25.*

Hartford claims that the Heinzmans' complaint does not allege property damage that was caused by an "occurrence" within the meaning of the policy. It is clear that the allegations of the action do not fit the description of "an accident." No facts are alleged in the complaint regarding any accident, or injury or damages from what can be described as an "accident".

Hartford also claims that comparing the exclusionary provisions of the policy to the Fifth Count of the Heinzmans' amended complaint, which alleges a failure to warn, leads to the conclusion that there is no duty to defend. The court agrees. Coverage is specifically excluded for property damage that results when work was incorrectly performed by Philbin and its "failure to provide warnings or instructions."

The allegations of the Heinzmans' complaint indicate that they focus on two areas. One, that Philbin's construction was not performed in a workmanlike manner, and two, that Philbin failed to warn the Heinzmans of the risks created by Philbin's poor construction or from the putting a pool table on the floor of the house it constructed. These allegations are not covered by the policy since they do not constitute an "occurrence" and are excluded from coverage since they relate to Philbin's "work" within the meaning of the policy. Since the duty to defend is broader than the duty to indemnify Hartford had no duty to indemnify Philbin under the policy as well.

The Plaintiff agrees that Connecticut law requires a comparison between the complaint and the insurance policy to determine whether coverage is afforded. However the Plaintiff contends that "[a]ny analysis of the sufficiency of the allegations contained within the negligence count of the complaint goes beyond this requirement. Likewise, any analysis of

applicability of exclusions goes beyond this requirement. If the Court compares the operative complaint to the policy in this case, the Court will see that the complaint has an allegation of negligence, and the policy provides coverage for negligence. [O]nce this comparison is made, The Hartford Insurance Company has a contractual duty to defend its insured, subject to its right to bring a declaratory action to determine whether the allegations of the complaint fit within the coverage provided or whether an exclusion applies." *Plaintiff's Memorandum of Law In Support of its Motion for Summary Judgment*, pp. 1-2. The essence of the Plaintiff's argument is that in determining whether there is a duty to defend afforded under the insurance policy one must look at the "absolute broadest interpretation of the underlying complaint" (*Plaintiff's Memorandum of Law In Support of its Motion for Summary Judgment*, p.8) and the insurance contract in a cursory manner and, had this been done, coverage should have been automatic as the first complaint alleged negligence which was not based on a "failure to warn". Further, the Plaintiff argues that even if the "failure to warn" exclusion is considered there are other parts of the original complaint that would trigger the duty to defend.

The Plaintiff is asking the court to read the complaint narrowly, looking at the Fifth Count isolated from the other counts in the complaint, and argues that because the Fifth Count states negligence that is all that is necessary to trigger a duty to defend. No further inquiry into

the complaint is necessary and Hartford should have defended Philbin. Looking at the Heinzman complaint as a whole, the court disagrees with this narrow view.

In *Clinch v. Generali-U.S. Branch*, 110 Conn. App. 29, cert. granted, 289 Conn. 942 (2008), the plaintiff was confronted by three men who had been drinking and one of the men struck the plaintiff. The three men and the plaintiff had been ejected from the insured's restaurant and the physical assault continued outside. The plaintiff brought a suit against the insured and secured a judgment against it. At the time of the incident, the insured carried a general liability insurance policy and a liquor liability policy issued by the defendant, Generali-U.S. Branch. The plaintiff then initiated a suit against the insurer for refusing to defend its insured. Both policies contained an exclusionary provision for assault and battery. In the first count of the plaintiff's complaint in the underlying suit the plaintiff alleged negligence. The plaintiff argued that when the paragraphs of that count are read in isolation they do not fall within the exclusion for assault and battery. Citing *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745 (2006) the court rejected this argument, noting "[i]n Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its

entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Clinch v. Generali-U.S. Branch*, 110 Conn. App. 29, 37, cert. granted, 289 Conn. 942 (2008). "Reading the complaint in its entirety, as we must, the only cause of action alleged...is for injury arising from assault and battery that stemmed from the insured's negligence. The plaintiff argues that on the basis of the language of the complaint, one could entertain a variety of causes for some of his injuries unrelated to assault and battery. The negligent acts that he describes, however, are tied inextricably by the language of the complaint to assault and battery. He describes no other manner in which he sustained his injuries. Thus, we conclude that the only causes reasonably construed from the plaintiff's complaint, that is to say, that do not unreasonably contort the meaning of the language of the complaint, are for injury arising out of assault and battery" *Clinch v Generali-U.S. Branch*, supra at 39.

Likewise, in the Heinzman complaint, the negligence claim is tied inextricably to the claims of poor workmanship. In the Fifth Count of the Heinzmans' original complaint they allege:

> "7. Pursuant to the Agreement, Philbin Brothers were to construct and install the railing securely in a workmanlike manner . . .
>
> 8. Prior to and after delivery of the Property to Plaintiffs, Defendant knew or should have known that the railing on the second floor of the stairs was improperly constructed and/or installed.
>
> 9. By personally directing, controlling, and undertaking the construction on the Property, Philbin Brothers had a duty at all times to use reasonable care in undertaking construction activities and in completing the property. Such duties include, without limitation, taking reasonable precautions to prevent Plaintiffs and their minor children from being exposed to dangerous and hazardous conditions such as the one created by the railing on the second floor at the top of the stairs and warning Plaintiffs of potential and actual exposure to said dangerous and hazardous conditions.
>
> 10. Philbin Brothers breached said duties of care by failing to properly construct and/or install said railing.
>
> 11. As a direct and proximate cause of Philbin Brothers conduct as alleged herein, Plaintiffs have suffered damages."

Heinzmans Complaint, Fifth Count, paragraphs 7-11.

In their January 17, 2007 amended complaint, the allegations are only expanded so as to add further claims of improper workmanship, e.g., not installing flooring in a workmanlike manner, and failing to warn the Plaintiffs not to place a pool table on the first floor.

Thus the Fifth Count of the Heinzmans' complaint clearly alleges poor workmanship. Although the loose railing may have created a potentially dangerous situation, that situation is clearly the result of poor or shoddy construction. Viewing the Fifth Count in the context of the entire complaint, it is an inescapable conclusion that this count states negligence in name only. The First Count of the complaint alleges breach of express warranty in regards to defects in workmanship and materials. The Second Count alleges breach of implied statutory warranties, that the property was "A. Free from faulty Materials; B. Constructed according to sound engineering standards; C. Constructed in a workmanlike manner; D. Fit for habitation." *Heinzmans Complaint, Second Count, paragraph* 6. The Third Count alleges reckless endangerment due to the improper installation of the railing. The Fourth Count is for emotional distress due to the conduct of Philbin. The Sixth Count alleges a violation of CUTPA. What is evident from reading all the counts is that the thrust of the complaint is Philbin's alleged poor workmanship and not negligence.

Examination of the insurance policy reveals that it was not intended to insure Philbin against claims of poor workmanship but only negligence claims that may arise during the performance of the work itself, for example, a ladder falling on a car or a visitor slipping on building materials improperly stored at the site. "It is the function of the court to construe the provisions of the contract of insurance. . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . .[insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . [and construing] any ambiguity in the terms . . . in favor of the insured. . . ." (Citation omitted; internal quotation marks omitted.) *Hartford Casualty Insurance Company v. Litchfield Mutual Fire Insurance Company*, 274 Conn. 457, 463 (2005). "A Commercial general liability policy does not insure the insured's work itself; rather, it insures consequential damages that stem from that work." (Internal quotation marks and citations omitted.) Fn. 7, *Candid Corporation v. Assurance Co. of America*, Superior Court, Judicial District of New Haven at New Haven, Docket No. CV990431377 (*Skolnick, J.T.R.*, April 4, 2007).

Conclusion

For the reasons states above, the Defendant's motion for summary judgment is granted and the Plaintiff's motion for summary judgment is denied.

_____ *J.*

Jane S. Scholl