

DOCKET NO. CV 05-4009532S : SUPERIOR COURT
 JAMES BARBER, ET AL : JUDICIAL DISTRICT OF NEW HAVEN
 V. : AT NEW HAVEN
 CRAIG BERTHIAUME : OCTOBER 19, 2009

Judicial District of New Haven
 SUPERIOR COURT
 FILED
 OCT 19 2009

MEMORANDUM OF DECISION

CHIEF CLERK'S OFFICE

In the process of repairing and expanding the Plaintiff James Barber's house by the Defendant Craig Berthiaume, a contractor, it was necessary to raise the house in order to construct new piers and the house toppled causing damage in the amount or \$26,000.00. A judgment for said damages was entered in favor of Barber against Berthiaume which was not paid. The Plaintiff, Those Certain Underwriters at Lloyd's of London (Underwriters), who insured Barber under a home owner's policy, paid the damages of \$25,000.00 (\$26,000.00 less the policy deductible of \$1,000.00) and became subrogated to the rights of Barber. Berthiaume, was insolvent, but was insured by the defendant Hanover Insurance Company (Hanover).

This action was brought by the Plaintiff James Barber to recover the policy deductible of \$1,000.00 and the Plaintiff Underwriters pursuant to General Statutes 38a-321¹ to recover the \$25,000.00 paid to Barber against Hanover, who insured Berthiaume under a general liability policy.

Hanover refused to indemnify the Plaintiffs claiming that although the insurance policy for Berthiaume covered "property damage", it became obligated to pay only for an "accident" or

¹ General Statute 38a-321 provides in relevant part: "If the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

Judgment Entered 10-19-09
 Counsel for the Parties notified 10-20-09
 by [Signature] Copy of Memo [Signature]

“occurrence”. The Court in its original Memorandum of Decision found that the toppling of the house was an accident or an occurrence and entered judgment in favor of the Plaintiffs.

However, the Court did not address the “business risk exclusion” in the policy, which was clearly raised by Hanover. The exclusion (Exclusion 1(k)(5)) provides: “This insurance does not apply to ‘property damage’ to: [t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the ‘property damage’ arises out of those operations.”

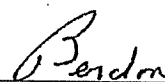
It is clear that the house in this case was being raised as part of the contract Berthiaume was obligated to perform and that the house would not have toppled if it was not raised by Berthiaume, therefore the damages to the house comes within the business risk exclusion of the policy.

Although counsel for both parties agree Connecticut does not have a case in point addressing this issue, an identical fact pattern and issue was addressed by the Supreme Court of North Dakota in the case of Grinnell Mutual Renaissance Co. v. Lynne, 686 N.W. 2d 118 (2004). The Grinnell Court held that “The language of the policy indicates that particular part of real property on which [the contractor] was working is subject to the exclusion. The particular part of real property on which [the contractor] was working was the house.”

In this case Berthiaume was working on the entire property because he had to raise the building in order to construct the new piers. The damage occurred when he was in the process of raising the building and excluded under the exclusion provision of 1(k)(5). It makes no difference that the house toppled when “he was walking from the back of the house to the front

of the house”,² he was in fact working on the house which clearly comes under the business risk exclusion of the policy (Exclusion 1(k)(5)).

Accordingly, the Court enters judgment in favor of the defendant Hanover Insurance Company plus taxable cost.



Robert I. Berdon
Judge Trial Referee

² Argument of counsel for the plaintiffs.