NO. CV 06 5002176

JEREMIAH FUENTES, ET AL

SUPERIOR COURT

V.

JUDICIAL DISTRICT OF NEW LONDON
AT NEW LONDON

NEW LONDON COUNTY MUTUAL
INSURANCE CO., ET AL

JULY 16, 2009

MEMORANDUM OF DECISION

FACTS

The underlying case is between Margaret M. Mack and Jeremiah Fuentes, the plaintiff, a minor, through his mother Alexandra Fuentes. The facts allege that Mack sold a house to the plaintiffs where Mack made the representation that the house did not contain any lead paint. The house contained lead paint and subsequently resulted in the injury to the minor child. At the time of the property sale, Mack was covered by an occurrence based policy issued by the defendant, New London County Mutual Insurance Company (NLC). Mack requested that NLC defend and indemnify her in the case but was refused. Subsequently Mack settled the underlying case with the plaintiffs for one hundred and fifty thousand dollars. As part of the stipulated judgment the plaintiffs agreed to seek enforcement of the stipulated judgment against NLC. On March 13, 2009, the plaintiffs filed a motion for summary judgment against the defendant, NLC, to seek coverage for the stipulated judgment. On April 14, 2009, the defendant, NLC, filed an objection to the plaintiffs' motion for summary judgment and filed a cross-motion for summary judgment. On April 23, 2009, the plaintiffs filed an objection to the defendant's cross-motion for summary judgment and filed a reply to the defendant's objection to the plaintiffs' motion for summary judgment. On April 30, 2009, the defendant filed a reply

to the plaintiffs' objection to the defendant's cross-motion for summary judgment. This matter was heard on short calendar on May 4, 2009.

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." (Internal quotation marks omitted.) *Provencher* v. *Enfield*, 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "A genuine issue has been variously described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Development Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969).

"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 [the] complaint with the terms of the insurance policy." *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 599 n.7, 840 A.2d 1158 (2004). According to our Supreme Court, "[a]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint. . . . 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. . . . Moreover, [i]f an allegation of the complaint falls *even possibly* within the coverage, the insurance company must defend the insured." (Citations omitted; internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687-88, 846 A.2d 849 (2004).

"[An Insurer], after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions. Nor should the [insurer] be permitted, by its breach of the contract, to cast upon the [insured] the difficult burden of proving a causal relation between the [insurer's] breach of the duty to defend and the results which are claimed to have flowed from it." *Missionaries of Co. of Mary, Inc.* v. *Aetna Casualty and Surety Co.*, 155 Conn. 104, 114, 230 A.2d 21 (1967). The Connecticut Supreme Court has found "sufficient and logical support for the well established rule in many jurisdictions that an insurer who denies liability under a policy is liable for the amount of a settlement made by the insured . . . where the claim against the insured is found to have been covered by the policy." *Alderman* v. *Hanover Ins. Group*, 169 Conn. 603, 611, 363 A.2d 1102 (1975).

The plaintiffs moves for summary judgment on the grounds that there is no issue of material fact in dispute as there has already been a stipulated judgment agreed to by the plaintiffs and Mack. The plaintiffs argue they are entitled to a payment of the stipulated judgment by the defendant as a matter of law because the defendant had a duty to defend Mack and by not doing so they waived their right to not pay the stipulated judgment.

The defendant articulates two reasons for objecting to the motion for summary judgment. First, the defendant alleges that the policy period had expired before the defendant

could move into the house. As the plaintiffs were not exposed to lead paint during the policy period then there is no duty to defend. Second, the defendant argues that the negligent misrepresentation by Mack is not considered an occurrence as defined under the policy. While an occurrence includes accidents, the misrepresentation was not an accident as understood by the policy. Moreover, in the disclosure provided to the plaintiffs, Mack had the option of stating she did not know whether there was lead paint in the house. Instead, Mack chose to state there was no lead paint. While Mack relied upon the prior owner's representation that there was no lead paint, such a misrepresentation cannot be construed as an accident under the terms of the policy.

Policy Expiration. The defendant argues that the policy expired on May 31, 2001 and the plaintiffs did not move in until after that date. As such, no exposure occurred while the policy period was in force and the defendant cannot be held liable. The defendant points to the language used in the complaint which states "[a]t all times relevant hereto and *subsequent* to May 31, 2001, the plaintiff Jose Fuentes has been a record owner of the premises at 899 Parker, Street, Manchester, Connecticut." (Emphasis added.) The defendant specifically highlights the use of the word "subsequent" as proof that the plaintiffs did not move into the house until after the policy had expired and were therefore not exposed to the lead paint during the policy period. However, the complaint also states, "[f]or some time *prior* to May 31, 2001 . . . Margaret M. Mack, was the owner of the premises known as 899 Parker Street in Manchester, Connecticut., a residential dwelling." (Emphasis added.) If we were to apply the defendant's analysis, then it could be proffered that the policy holder Mack moved out "prior" to May 31, 2001 and the plaintiffs moved in subsequently. It could also be proffered, by using the defendant's logic, that

no one owned the house on May 31, 2001 since the plaintiffs lived subsequent to the date and Mack lived prior to it. The defendant's argument that the plaintiffs' complaint admitted to the fact that the policy was not in effect cannot be accepted without straining logic or a complete abandonment of looking at the complaint as a whole. As such, the court rejects the defendant's argument that the plaintiffs did not move into the house by May 31, 2001.

Occurrence. The defendant argues that the event that precipitated the lawsuit is not an occurrence. Occurrence, as defined in the policy, means "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions which results, during the policy period, in: a.) bodily injury; or b.) property damage." (Emphasis added.) The defendant notes that in the Residential Property Condition Disclosure Report, Mack answered that the property had no lead paint even though Mack had the option of answering "unknown". Mack utilized the "unknown" option when stating that she did not know whether there was asbestos in the property. The defendant notes that Mack based her answer on being misinformed by the prior owner. The defendant argues that this was not an accident but rather a misrepresentation and since Connecticut law does not recognize misrepresentation in the sale of real estate as an occurrence as defined in the liability insurance policy, there is no duty to defend. The defendant contends that without a duty to defend, the plaintiffs cannot hold the defendant liable for the stipulated judgment.

There is no Connecticut precedent exactly on point. The closest case on negligent misrepresentation regarding an insurance policy is *Electric Ins. Co.* v. *Santo*, judicial district of Waterbury, Docket No. CV 06 4011494S (August 6, 2007, *Upson, J.*) (44 Conn. L. Rptr. 41). The court in *Santo* explained, "negligent misrepresentations did not cause a property damage to

the house . . . Neither did the [insureds'] actions to conceal the cracks in the house cause any property damage to the house. The structural flaws in the house constitute tangible property damage, but these flaws predate the occurrence of concealment and misrepresentations by which the [insureds] incurred liability. The [buyers'] judgment covered the intangible losses incurred when the [buyers] relied to their economic detriment upon the [insureds'] misrepresentations. These damages are pecuniary in nature and are not property damage within the meaning on the [plaintiff's] insurance policies." The court, dealing with whether property damage is covered by the insurance policy in a negligent misrepresentation case, noted that the property damage is not relevant to the misrepresentation as it predates the misrepresentation. As such, the misrepresentation that occurred afterwards cannot be claimed under the insurance policy.

This case is similar in that it deals with negligent misrepresentation as an occurrence. However, this case is different since it deals with bodily injury that occurred after the misrepresentation. In fact, the *Santo* court identified the issue of bodily injury that occurred after the misrepresentation, but the court did not address the issue in its opinion because the injury occurred after the policy had expired. As there are no other cases in Connecticut that deal with this issue, the court examined cases outside of the jurisdiction. "Apart from intentional conduct, courts have routinely found almost any wrongful conduct to constitute an accident. For example, most courts have held that a negligent misrepresentation constitutes an occurrence.[1] The only courts that have refused to do so have held that a negligent

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[1] "See, e.g., *Universal Underwriters Ins. Co.* v. *Youngblood*, 549 S.2d 76,78 (Ala. 1989) (The innocent or reckless aspects of the misrepresentation claims present a sufficient basis to support the trial court's declaration of a duty to defend. . . . As to the negligence claims, Universal

misrepresentation did not constitute an occurrence because (1) in order to recover on such a theory, the plaintiff would have to establish that the misrepresentations were made for the purpose of inducing reliance by the plaintiffs, and (2) the intent to induce reliance would make the misrepresentations and conduct nonaccidental." A. Windt, Insurance Claims and Disputes (4th Ed. 2001) § 11-3. The courts appear to place an emphasis on whether the nature of the actions were intentional or negligent. If the purpose was to induce a certain action or purposefully mislead, then it would seem that the actions would not be considered an accident. However, negligent actions are not intentional and, as such, would be deemed to be an occurrence that is covered by the policy. Therefore, the defendant did have a duty to defend the negligent misrepresentation claim and the plaintiffs' motion for summary judgment is granted.

Martin, J.

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concedes that there was an occurrence); *International Ins. Co.* v. *West Am. Ins. Co.*, 255 Cal. Rptr. 912, 917-18 (Ct. App. 1989) ("In our view, the fact that a negligent act is verbal, rather than physical, is of no consequence. West American cites no authority, and we find none, precluding coverage under a general liability policy based on negligent misrepresentation"); *First Newton National Bank* v. *General Casualty Co. of Wisconsin*, 426 N.W.2d 618, 624 (Iowa, 1988) (affirming district court's holding that "the negligent misrepresentation theory constituted an occurrence under the policies."); *Transamerica Insurance Services* v. *Kopko*, 559 N.E.2d 322, 325-26 (Ill App. Ct., 1990) (negligent misrepresentation claims trigger coverage); *Keating* v. *National Union Fire Insurance Co.*, 754 F.Supp. 1431, 1440 (CD Cal, 1990) (negligent misrepresentation constitutes an occurrence); *Gaylord Chemical Corp.* v. *ProPump, Inc.*, 753 Co.2d 349, 353-54 (La. Ct. App. 1st Cir., 2000); *Wood* v. *Safeco Insurance Co. Of America*, 980 S.W.2d 43, 50-53 (Mo. Ct. App. E.D., 1998); *M.L. Foss, Inc.*, v. *Liberty Mutual Insurance Co.*, 885 P.2d 284, 285 (Colo. Ct. App., 1994) (court assumed that negligent misrepresentation can constitute an occurrence). Contra, *State Farm Fire and Casualty Co.* v. *Gwin*, 658 So2d 426, 428 (Ala., 1995)." A. Windt, Insurance Claims and Disputes (4th Ed. 2001) § 11-3, n.38.