IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERIDIAN/STATE FARM AUTO INSURANCE COMPANY	:	CIVIL ACTION
v.	:	
JOHN FRANKLIN	:	NO. 04-573

MEMORANDUM

Baylson, J. **December 23, 2004**

I. Introduction

This case presents the question whether claims alleged in a state court complaint against an insured are covered by a general liability insurance contract such that the insurer is required to defend the insured in the state court action. Presently before the Court are the parties' Motions for Summary Judgment, filed on October 22, 2004.

II. Background

On February 2, 2004, Plaintiff Meridian/State Auto Insurance Company ("Meridian"), a corporation and insurance company with its principal place of business in Indianapolis, Indiana, filed this declaratory judgment action against Defendant "John Franklin i/t/a Franklin Artisans, Ltd." John Franklin is the sole shareholder of Franklin Artisans, Ltd. ("Artisans"), a Pennsylvania corporation with its principal place of business in Quakertown, Pennsylvania, which is currently in bankruptcy. The Court has jurisdiction due to the diversity of citizenship of the parties. 28 U.S.C. §1332.

The claim arises out of a civil action in the Court of Common Pleas of Bucks County, Langenborg v. Franklin (No. 03-03462)(the "underlying action"), filed against Franklin by Ralph

and Kim Langenborg on August 8, 2003, regarding the design and construction of their residence by Artisans pursuant to a contract between the Langenborgs and Artisans. The Langenborgs' complaint in the underlying action alleges that Franklin's design for the residence was defective in numerous ways, that Franklin failed to supervise the construction and/or implementation of the design adequately, and that as a result of the design defects and inadequate supervision the residence was not completed until two years after the original completion date and the Langenborgs "have been required to retain the services of several licensed professional and independent contractors and consultants to review and evaluate the aforesaid design defects, the resultant structural defects and to attempt to rectify those defects." (Complaint, Langenborg v. Franklin, Plaintiff's Trial Exh. C, p. 7-8). On the basis of these allegations, the Langenborgs brought the following claims against Franklin:

Count I:	Breach of Contract Implied In Fact
Count II:	Breach of Contract Implied at Law (Quantum Meruit)
Count III:	Breach of Express Contract
Count IV:	Fraudulent Misrepresentation
Count V:	Negligent Misrepresentation
Count VI:	Negligence
Count VII:	Fraud
Count VIII:	Negligent Supervision
Count IX:	Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 210-9.2

On or about December 23, 2003, Meridian issued a reservation of rights letter to Franklin, advising of the basis for its reservation of rights to deny coverage and a defense in the Langenborg case. Meridian then filed this declaratory judgment action in federal court on February 2, 2004, requesting that judgment be entered declaring that Meridian has no duty to insure, to defend, or to indemnify Franklin in relation to any claims in the state court proceedings and that insurance coverage under the Commercial General Liability Policy issued to Franklin as a named insured by Meridian, Policy No. CPP7519206, policy period 3/15/00 to 3/15/01 (the "Policy"), does not apply in the Langenborg case.

Both parties filed Motions for Summary Judgment on October 22, 2004. On October 27, 2004, the Court entered a stipulation and order amending the caption of this matter to reflect that only John Franklin would proceed as the defendant and that Artisans was dismissed as a defendant without prejudice.

III. The Parties' Contentions

A. Plaintiff's Contentions

In support of its Motion for Summary Judgment, Meridian argues that, although Meridian has thus far provided a defense to Franklin in good faith, Meridian does not owe coverage under the Policy because the Policy insures only tort claims for "bodily injury" and "property damage" caused by an "occurrence." (Section I(A)(1)). An "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Section V(13)). Meridian thus argues that the Policy does not insure negligence claims when the gist of the underlying action is breach of contract, because there was no "occurrence" causing "property damage" and because "contractual liability" is specifically

excluded under the Policy (Section I, 2 (b)).

According to Meridian, the Langenborgs' complaint does not allege that the defective design and/or negligent supervision injured any person or damaged any other property (i.e. property other than the faultily-designed house itself) as required to trigger coverage under the Policy. Therefore, because there was no "occurrence," the inclusion of the negligence claims, Meridian argues, cannot transform an uninsured breach of contract claim into an insured tort claim.

Meridian also contends that a defense is not owed to Franklin because the Policy's exclusions regarding "damage to property" (Section I(A)(2)(j)), "damage to your product"(Section I(A)(2)(k)), "damage to your work" (Section I(A)(2)(l)), and "damage to impaired property" (Section I(A)(2)(m)) apply to the Langenborgs' claims. Meridian notes that only one of these exclusions need apply to preclude Meridian's duty to defend.

B. Defendant's Contentions

In his pretrial memorandum and in a hearing on these motions before the Court held on December 17, 2004, Franklin has conceded that there is no potential coverage under the Policy for the Langenborgs' claims involving breach of contract (Counts I-III), fraudulent misrepresentation (Count IV), negligent misrepresentation (Count V), fraud (Count VII), and violations of the UTPCPL (Count IX).

Franklin contends in his Motion for Summary Judgment that he could be financially liable for negligence (Count VI) and/or negligent supervision (Count VIII) because the Langenborgs' complaint alleges that Franklin "failed to adequately supervise the construction of the Residence and/or implementation of his drawings, plans and specifications" (¶14, ¶128-35).

Franklin argues that these negligence claims allege "property damage" caused by an "occurrence" because Paragraph 13 of Langenborgs' complaint lists damages including, inter alia, profuse leaking into the great room floor caused by defective design of an interior fountain (¶13 (k)), water damage and corrosion to electrical components and main electrical panels caused by a failure to design adequate water proofing for the exterior landing in the carriageway (¶13 (ee)), water damage to the interior walls caused by improper design of copper roof joints and seams over the conservatory (¶13 (hh)), continual water leakage from the pool and rapid stucco deterioration caused by a failure to design the pool trough for the vanishing edge properly (¶13 (mm)), and flooding of the basement due to improper design of the basement drainage system (¶13 (uu)).

Franklin asserts that he could be liable to the Langenborgs for these allegations of "property damage" caused by his alleged negligence, which he contends would be covered by the Policy. Under Pennsylvania law, Franklin notes, Meridian has a duty to defend Franklin on all his claims in the underlying action as long as he may be financially responsible for any allegations potentially covered by the policy. Franklin therefore seeks a declaration from this Court that Meridian is required to provide that defense.

Franklin also asserts that, although he signed the Construction Agreement between the Langenborgs and Artisans, he did so as an officer of Artisans, and all work on the residence was performed by Artisans and its subcontractors. Although the initial payment made by the Langenborgs was in the form of a check payable to Franklin as partial payment for the design, Franklin alleges that this payment was credited to Artisans, was included in the Construction Agreement, and was incorporated into the Draw Schedule as a payment to Artisans. He contends

that therefore the Langenborgs' suit against him as an individual arises from common law torts, not any contractual liability, and is therefore based on "property damage" caused by his alleged negligence, not breach of the contract.

Regarding the Policy's specific exclusions to coverage cited by Meridian, Franklin argues that the relevant facts will show that Billy Edwards, not Franklin, supervised the Langenborg job, whereas Franklin simply did marketing and sales work, and that exclusions regarding "your product" should not apply, as the construction of the house was Artisans' product, not Franklin's, and the work was performed by subcontractors working for Artisans. As for the exclusion for "your work," Section I(A)(2)(l), Franklin argues that the bulk of the work complained of in the underlying action was performed by subcontractors and thus the exception does not apply. As for Section I(A)(2)(m) regarding "damage to impaired property," Franklin complains that Meridian has raised this on the eve of trial.[1]

IV. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby,

[1]At the December 17, 2004 hearing, Franklin relied on Friestad v. Travelers Indemnity Co., 260 Pa. Super. 178, 188 (Pa. Super. Ct. 1978) and Harford Mutual Insurance Co. v. Moorhead, 396 Pa. Super. 234, 242 (Pa. Super. Ct. 1990) for the proposition that Franklin's "services" in the construction of the residence should be deemed distinct from Artisans' "product." Friestad and Harford address the interpretation of "Products Hazard" exclusions in general liability insurance policies, an issue not presently before the Court.

Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

"Interpretation of an insurance contract is a question of law that may properly be decided by the Court in a motion for summary judgment." Nutrisystem, Inc. v. National Fire Ins. Co. of Hartford, 2004 WL 2646598 *3 (E.D. Pa. Nov. 19, 2004).

V. Discussion

Both parties agree that, under Pennsylvania law, Meridian's duty to defend Franklin as a named insured under the Policy is triggered if Franklin may be financially liable for any allegations in the Langenborgs' action that might potentially come within the Policy's coverage. Pacific Indemnity Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985). Once this duty is triggered, the insurer must defend the insured on all claims, "until the suit can be clearly limited to a claim for recovery excluded from the policy's scope." American Planned Communities, Inc. v. State Farm Ins. Co., 28 F. Supp. 2d 964, 966 (E.D. Pa. 1998). However, if there is no possibility that the claims in the underlying action could be covered by the Policy, judgment in the insurer's favor is appropriate. Id. This Court has recently described the triggering of an insurer's duty to defend in the following manner:

> The duty to defend is triggered if the underlying complaint avers any facts that potentially could support a recovery under the policy. The obligation to defend is determined solely by the allegations of the complaint which are accepted as true and liberally construed in favor of the insured. If a single claim in a complaint is potentially covered, the insurer must defend all claims until there is no possibility of recovery on a covered claim.

Nutrisystem, Inc. v. National Fire Ins. Co. of Hartford, 2004 WL 2646598 *3 (E.D. Pa. Nov. 19, 2004)(internal citations and quotations omitted). The threshold question is thus whether any

allegations in the Langenborgs' complaint have triggered Meridian's duty to defend under the Policy. The central question for the Court, then, is whether any of the allegations in the Langenborgs' complaint indicate that Franklin might be liable under Counts VI and/or VIII for any damages potentially covered by the Policy, in which case Meridian would have a duty to defend Franklin against all of the Langenborgs' claims.

The Court initially focuses on whether the underlying complaint alleges an "occurrence" causing "property damage." The term "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Section V(13)). The Policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." (Section V(17)(a, b)). The underlying complaint basically alleges that Franklin breached his obligation to use professional skill to design the Langenborgs' residence, and as a result, damages were incurred. However, the basis for Franklin's potential liability is poor design and this cannot be an "occurrence" because it asserts what is essentially a breach of contract claim, not a claim of negligence, as discussed below.

A. The 'Gist of the Action' Doctrine

The "gist of the action" doctrine was adopted by the Pennsylvania Superior Court in cases such as Redevelopment Auth. of Cambria Co. v. Inter'l Ins. Co., 454 Pa. Super. 374 (Pa. Super. Ct. 1996), and Phico Inc. Co. v. Presbyterian Medical Serv. Corp., 444 Pa. Super. 221 (Pa. Super. Ct. 1995). These cases held that allegations sounding in tort fell within an insurance policy's exclusionary provision for claims arising out of breach of contract when the misconduct alleged occurred in the performance of the contract. This Court recently summarized the current state of

the 'gist of the action' doctrine thus:

> The Pennsylvania Superior Court appears to limit the gist of the action doctrine to claims based on allegations that a party committed a tort in the performance of duties under a contract. To state it another way, negligence in the performance of the contract fits the exclusion, but not negligence separate from the obligations under the contract. This interpretation is supported by the Phico court's distinguishing between torts that arise from the breach of duties imposed as a matter of social policy and torts that arise from the breach of duties imposed by the contract.

Nutrisystem, 2004 WL 2646598 at *5. Thus, if the breach of duties imposed by the contract is the gist of the action, the insurer's duty to defend is not triggered. If, on the other hand, the gist of the action arises from a breach of duties imposed as a matter of social policy "with the contract being collateral," Phico, 444 Pa. Super. at 757, the duty to defend is triggered.[2]

Although the Pennsylvania Supreme Court has not expressly adopted the "gist of the action" doctrine as of yet, the Third Circuit has recently predicted in a non-precedential opinion that it would do so and applied the doctrine on that basis. Williams v. Hilton Group PLC, 93

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[2]In a non-precedential case, the Third Circuit has found Pennsylvania's "gist of the action" doctrine to "dictate a finding that the injuries [involving negligent installation of copper pipes] did not result from 'an accident,' and, therefore, there was no 'occurrence,'" even when the jury verdict in the underlying action was based on negligence and the jury specifically failed to find that there was a breach of contract. ProDent, Inc. v. Zurich U.S., 33 Fed. Appx. 32, 34 (3d Cir. 2002)(not precedential). The court explained its decision thus:

> Here, the claim was not one arising out of injury that resulted from an accident, but, instead, was based upon negligent workmanship, similar to a claim of professional liability or poor performance such as would be covered by a performance bond. While, clearly, [the insured] was found liable for the negligent performance of its work, which fell below the applicable standard of care, that does not mean that the resulting damages were caused by "an accident." Here, all of the damages sustained, and the work that needed to be performed, were to undo the error or mistake made by [the insured] in using the copper pipe . . . . The injury and damages were suffered by virtue of this error or mistake, not by virtue of an accident or occurrence.

Id. at 35.

Fed. Appx. 384, 385 (3d Cir. March 17, 2004)(not precedential). In the same case, the Third Circuit noted that "[f]rom our examination of the Pennsylvania cases, we conclude that the 'gist of the action' doctrine cannot be captured by any precisely worded test. Instead, the doctrine appears to call for a fact-intensive judgment as to the true nature of a claim." Id. at 386.

The Court agrees with Meridian that the "gist of the action" in the Langenborgs' complaint is breach of contract and that therefore there was no "accident," and thus no "occurrence," covered by the Policy. Franklin admits that breach of contract is not an "accident" but denies that he contracted with Langenborgs, arguing instead that the Langenborgs contracted solely with Artisans and that the Construction Agreement expressly excluded any other agreements relating to the construction of the residence.

Franklin does not offer any authority for the proposition that the identity of the parties to the contract is in any way determinative under the "gist of the action" doctrine. Indeed, as the caselaw discussed above indicates, the "gist of the action" doctrine asks only whether the allegations in the complaint arise from duties imposed by contract or from duties imposed as a matter of social policy. In fact, the Third Circuit noted in Williams, in the context of barring torts claims against a seller, "the Pennsylvania courts have spelled out [that] the gist of the action doctrine bars tort claims against an individual defendant where the contract between the plaintiff and the officer's company created the duties that the individual breached." Id. at 387.

Of greatest significance, however, is the fact that the "property damage" relied on by Franklin in Paragraph 13 of the Langenborgs' complaint is unequivocally characterized by the Langenborgs as the result of Franklin's alleged defective design of the Residence, as the introductory sentence of Paragraph 13 clearly indicates: "The design of the Residence, and the

drawings, plans and specifications prepared by Mr. Franklin were defective in the following manner(s) . . . ." Franklin's duty of care in designing the Langenborgs' residence was clearly imposed by the contract between the Langenborgs and Artisans for the design and construction of the residence. Franklin's duties to the Langenborgs therefore arose from contractual duties, and the fact that Franklin, as an individual, was not a party to that contract is immaterial. The Langenborgs allegations regarding Franklin's "negligence" do not involve "bodily injury" or "property damage" caused by an "occurrence," and thus do not trigger Meridian's duty to defend under the Policy.[3]

VI. Conclusion

Based on the foregoing, the Court finds that Meridian has no duty to defend Franklin in the underlying state court action. Plaintiff's motion for summary judgment should therefore be granted, and defendant's motion denied.

An appropriate order follows.

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[3]As the foregoing discussion disposes of the parties' motions, the Court need not reach the question of whether any of the Policy's exclusions to coverage apply. The Court notes, however, that Pennsylvania law seems to support Meridian's contention that at least one, if not several, apply. While general liability policies provide coverage if the work or product of the insured causes injury to an individual or damage to another's property, there is no coverage if the damage is only to the work or product itself. "A liability policy excluding damage to any goods or products made or sold by the insured or for 'work completed by or for' the insured does not insure any obligations of the policyholder to repair or replace its own defective work or product." Ryan Homes, Inc. v. The Home Indemnity Co., 647 A.2d 939, 349 (Pa. Super. Ct. 1994)(quoting 43 Am. Jur. 2d, Insurance § 719). General liability policies "are intended to protect against limited risks and are not intended to act as performance bonds. An insured, therefore, must assume the risk of the quality of its product and its work." Id. On the other hand, if the damage is to property other than the insured's work or product which is excluded by the exceptions, the policy would provide coverage. Here, the "damages" alleged by the Langenborgs are the repairs and corrections necessary to rectify the defects caused by faulty design and workmanship in the Langenborgs' residence and not any damage to other property caused by those defects. Thus, the allegations of the complaint do not seem to fall within the coverage of the Policy.

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ORDER

AND NOW this 23rd day of December, 2004, upon consideration of the cross Motions for Summary Judgment, and all responses thereto, it is ORDERED that:

1. The Motion for Summary Judgment of Plaintiff Meridian/State Farm Auto Insurance Company is GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

2. Final judgment is hereby entered in favor of Plaintiff Meridian/State Farm Auto Insurance Company and against Defendant John Franklin, and the Court declares as a matter of law that:

   a. Plaintiff Meridian/State Farm Auto Insurance Company has no duty to insure, defend, or indemnify Defendant John Franklin in the case of Langenborg v. Franklin, Court of Common Pleas of Bucks County, No. 03-03462, or for any of the claims set forth in the complaint of that case.

   b. Insurance coverage under the Commercial General Liability Policy of Plaintiff Meridian/State Farm Auto Insurance Company, policy no. CPP7519206, policy period 3/15/00 to 3/15/01, including declaration pages, amendments and endorsements does not apply in the case of

Langenborg v. Franklin, Court of Common Pleas of Bucks County, No. 03-03462.

The Clerk is directed to close the case.

BY THE COURT:

Michael M. Baylson, U.S.D.J.

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