

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**HOME-OWNERS INSURANCE COMPANY,
Plaintiff,**

v.

**Case No. 15-144956-CK
Hon. James M. Alexander**

**MDG ENTERPRISES, INC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. Plaintiff issued a commercial general liability policy to Defendant. During the policy’s term, Defendant was involved in the construction of a condominium complex in Royal Oak. Non-party Sachse Construction was the general contractor on the project. In turn, Sachse subcontracted some of the rough carpentry work to Defendant.

In underlying litigation, Sachse was ordered to pay \$79,000 pursuant to an arbitration award for damaged and substandard workmanship. Sachse then turned to Defendant – seeking indemnification for allegedly defective work performed by Defendant.¹

Plaintiff claims that it has no duty to defend or indemnify Defendant for damages arising from breaches of contract and defective workmanship because the underlying claims only involve allegations of Defendant’s faulty workmanship without damage to other work. As a result, Plaintiff argues that the alleged damages are not covered by the insurance policy. For this

¹ Oakland County Circuit Court case no. 14-143498-CH, *Sachse Construction and Development v. MDG Enterprises*.

reason, Plaintiff filed its single-count declaratory Complaint – seeking a declaration that it has no obligation to defend or indemnify Defendant with respect to the Sachse construction project.

Defendant argues that Plaintiff owes a duty to defend (and possibly indemnify) because Defendant’s alleged faulty workmanship “resulted in third-party property damages which was required to be repaired and replaced by Sachse.”

Plaintiff now moves for summary disposition under MCR 2.116(C)(10), which tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Defendant moves for summary disposition under (I)(2).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

An insurance policy is construed in the same manner as any other type of contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Insurance contracts, however, are to be construed in favor of coverage. See *Rory v Continental Ins Co*, 473 Mich 457, 517; 703 NW2d 23 (2005); *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982); and *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259

(1985) (finding “A policy should not be construed to defeat coverage unless the language so requires since the purpose of insurance is to insure.”).

“Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage.” *Auto Owners v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

Plaintiff argues in order for there to be coverage under the policy, there must have been “property damage” caused by an “occurrence.” The term “occurrence” is defined in the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

The term “accident” is not defined by the policy, but our Supreme Court has defined the term as “an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.” *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999).

Plaintiff argues that “commercial liability policies do not insure the policyholder for breach of contract, breach of warranty claims, and shoddy workmanship claims where the damage is limited to the insured’s own product or work,” citing *Radenbaugh v Farm Bureau General Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000).

And, Plaintiff argues, Sachse only alleges damages to Defendant’s work or product in the underlying litigation.

Both parties rely heavily on *Radenbaugh*, 240 Mich App 134 and *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990), and Defendant on *Bundy*

Tubing Co v Royal Indemnity Co, 298 F2d 151 (CA 6, 1962) (a case analyzed by the *Hawkeye* Court), in support of their positions.

In *Hawkeye*, Vector was subcontracted to complete some concrete work on waste-water treatment plant project. After the concrete was poured, Vector learned that the concrete it had ordered from a third-party did not comply with the project's specifications. As a result, 13,000 yards of concrete had to be removed and replaced.

The general contractor then sued the Vector, who submitted a claim to its insurer. The insurer then filed a declaratory action – seeking a determination whether the Vector's own defective work product could constitute an “occurrence” within the meaning of its commercial general liability policy. The *Hawkeye* Court determined that “the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract.” *Hawkeye*, 185 Mich App at 378.

In *Bundy Tubing*, Bundy manufactured thin-walled steel tubing installed in concrete floors for radiant heating systems. Bundy ultimately manufactured some of this tubing with defects that caused it to leak. When Bundy was sued by various parties, it submitted the claims to its insurer, Royal. The parties eventually ended up on court about whether the policy covered the claims.

Because the failure of the defective tubing constituted an accident that damaged the property **of others**, the Court ruled the same was covered under the policy. The replacement of the tubing itself, however, was not covered.

The *Hawkeye* Court summarized *Bundy* as follows:

Bundy stands for nothing more than the proposition that an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by “accidents” where the insured's faulty work product **damages the property of others**. In the instant case Vector

seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured. *Hawkeye*, 185 Mich App at 377 (emphasis added).

This “property of someone other than the insured” distinction is further explored in *Radenbaugh v Farm Bureau General Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000).

In *Radenbaugh*, the plaintiffs sold a double-wide mobile home and provided “erroneous schematics and instructions to contractors hired by [the homeowners] for the construction of the home’s basement foundation and erection of the home on its basement.” *Radenbaugh*, 240 Mich App at 136. As a result of the improper schematics, the home and basement suffered damages. The plaintiffs ultimately settled with the homeowners, but then sought indemnity from their insurer – who refused to provide the same because the underlying claims were not the result of an “occurrence.”

The *Radenbaugh* Court analyzed *Hawkeye* and concluded that the homeowners’ allegations included damages “broader than mere diminution in value of the insured’s product caused by alleged defective workmanship, breach of contract, or breach of warranty.” *Radenbaugh*, 240 Mich App at 141.

Plaintiff also cites *Groom v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840), which does a great job of summarizing the holding in *Radenbaugh* and the general law on defective workmanship claims:

the court in *Radenbaugh* concluded that, where defective workmanship results in damage to the property of others, an accident exists within the meaning of the CGL policy. However, where the “damage arising out of the insured’s defective workmanship is confined to the insured’s own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy.” Because the defective workmanship resulted in damage to the basement, which was the property of others, the court concluded that the defendant was obligated to defend and indemnify the plaintiff.

Based on the holdings in *Hawkeye* and *Radenbaugh* it is clear that Michigan follows the line of cases that hold that defective workmanship by itself does not constitute an occurrence. Rather, in order to constitute an occurrence, the defective workmanship must result in damage to persons or to property other than the work product itself. Hence, we must examine the nature of the damages resulting from the faulty workmanship to determine whether the faulty workmanship constitutes an “accident” and, therefore, an “occurrence” within the meaning of the CGL policy. *Groom, supra* (internal citations omitted).

In *Groom*, the plaintiff purchased a newly constructed condo from Knoll Construction. After she moved in, she discovered that the roof leaked. She then sued Knoll and obtained a judgment. When Knoll’s insurer (Home-Owners) refused to pay the judgment, the plaintiff filed a dec action against it – seeking a determination that the policy covered the leaking roof.

After analyzing *Hawkeye* and *Radenbaugh*, the *Groom* panel concluded that:

Knoll was responsible for constructing a condominium with a defective roof. The defective roof allowed water to leak into the condominium, which in turn damaged other parts of the condominium. The condominium itself was Knoll’s work product. Because the property damage caused by the defective roof was limited to the condominium, the faulty workmanship does not constitute an occurrence within the meaning of the CGL policy. *Groom, supra*.

In this case, Defendant was hired to complete some rough carpentry and other work. In the underlying litigation, Sachse alleges damages arising from its post-arbitration obligation to:

remove and re-install siding with new flashings, membranes and drains on the entire south side and southeast corner fo the structure at issue and to a much lesser extent on the north, east and west sides of the said (sic) structure which resulted from improper work performed by the siding and/or roofing subcontractors. [*Sachse v. MDG*, 14-143498-CH, Complaint at paragraph 15].

Based on the alleged damages, Defendant argues that “*Radenbaugh* is directly on point. Like the facts in *Radenbaugh*, Sachse is seeking damages from [Defendant] for damage to property . . . that [Defendant] did not furnish or install.” In support, Defendant cites to the Affidavit of its President, Lynn Grover, that claims that the damages sought by Sachse involve

damages to work performed by other trades. It, in fact, “did not furnish, install, or perform any work on the items of property that Sachse had to pay sums to repair and replace.”

Plaintiff, on the other hand, characterizes Sachse’s underlying Complaint as alleging solely damages relating to Defendant’s defective workmanship – without extension to other property or workmanship.

Indeed, perhaps not drafted with a subcontractor / insurance provider coverage dispute in mind, Sachse’s underlying Complaint lacks a bit of clarity necessary for our purposes. But reviewing the same, the Court keeps returning to paragraph 15 of Sachse’s Complaint, which describes the source of the damages in the underlying arbitration.

Quoting from the arbitration award, Sachse’s Complaint states that it is liable for \$75,893 in damages “for the reasonable portion of work the Association has indicated it will have to perform to remove and re-install siding with new flashings, membranes and drains . . . which resulted from improper work performed by the siding and/or roofing subcontractors.”

In the wherefore clauses at the end of each of its claims against Defendant, Sachse requests “a monetary award consistent with the damages awarded in the arbitration proceedings, together with costs, interest and actual attorney fees.” In other words, Sachse specifically seeks damages resulting from removal and reinstallation of siding with new flashings, membranes and drains. And this, at least in part, does not appear to be Defendant’s actual work product.

Michigan law is clear that “[t]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. If the policy does not apply, there is no duty to defend.” *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996), citing *Protective Nat’l Ins Co v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991).

The duty to defend, however, “is broader than the duty to indemnify.” *American Bumper*, *supra* at 450, citing *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980). The *American Bumper* Court further found that: “If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. This is true even where the claim may be groundless or frivolous.” *American Bumper*, *supra* at 450-451.

The Court finds that the allegations contained in Sachse’s Complaint at least arguably (and perhaps partially) come within the policy coverage, which obligates Plaintiff to defend Defendant.

But, that said, it is too soon to decide whether Plaintiff owes a duty to indemnify Defendant. This is so because, under *Hawkeye* and *Radenbaugh*, Plaintiff is only required to indemnify Defendant for damages to the property or workmanship of others caused by Defendant.²

For the foregoing reasons, Plaintiff’s motion for summary disposition is DENIED, and Defendant’s motion is GRANTED IN PART. Plaintiff has the duty to defend Defendant in the underlying litigation, but it is premature to decide whether Plaintiff has the duty to indemnify (and to what extent – as Plaintiff’s duty to indemnify is limited as outlined above).

This matter is stayed pending the outcome of Case No. 14-143498-CH, Sachse Construction and Development v. MDG Enterprises. Within 14 days of resolution of said case, the parties must contact the Court to lift the stay.

IT IS SO ORDERED.

November 4, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

² The Court further rejects Plaintiff’s reliance on exclusions j.(5), j.(6), k., l, m., and n. because said exclusions do not apply where the insured’s defective workmanship allegedly causes damages to other property or work.