



American Reliable Insurance Company v. Five Brothers Mortgage Company Services and Securing, Inc.

2018 | Cited 0 times | W.D. North Carolina | January 23, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

3:16CV159 AMERICAN RELIABLE INSURANCE) COMPANY,) Plaintiff,) Vs.) ORDER FIVE
BROTHERS MORTGAGE) COMPANY AND SECURING, INC.,) Defendant.)

_____)

Both motions have been fully briefed and are ripe for disposition. FACTUAL BACKGROUND This declaratory judgment action as filed by American Reliable Insurance Company nt Five federal district styled RoundPoint Mortgage Servicing Corp. v. Five Brothers Mortgage

Company Services and Securing, Inc., Civil Action No. 3:15-cv-00559-RJC-DCK (the . The facts in the case are undisputed but complex. Reliable issued two commercial general liability policies to . Stuart worked as an independent contractor for Five Brothers. The CGL policies name Five Brothers as an additional insured in certain limited circumstances. Five Brothers entered into a contract with RoundPoint Mortgage properties that secured loans serviced by RoundPoint. The Contract contained an indemnity clause in which Five Brothers agreed to indemnify RoundPoint for all losses, including its employees, subcontractors, or independent contractors while performing services for RoundPoint. In February of 2013, RoundPoint requested that Five Brothers perform property in Wilson, North Carolina. Five Brothers contracted with Stuart to provide these services at the Hayes uart, Five Brothers, and RoundPoint, alleging nineteen causes of action against these defendants in S The court in the Hayes suit entered summary judgment as to all claims except a trespass claim. Ms. Hayes ultimately entered into a settlement agreement with RoundPoint, Five Brothers, and Stuart. In November of 2015, RoundPoint filed the RoundPoint Suit asserting a claim against Five Brothers for breach of contract, alleging that it seeks indemnity for losses it incurred to defend itself in the Hayes Suit against allegations by Ms. Hayes that Five Brothers trespassed on her property, as well as the losses it incurred to settle the claim in the Hayes Suit. Five Brothers then demanded defense and indemnification from Reliable based upon its alleged additional insured status. Subject to a reservation of rights, Reliable has provided a defense to Five Brothers in the RoundPoint S as an additional insured 1

On June 23, 2017, the court in motion for summary judgment. See RoundPoint Mortgage Servicing Corp. v. Five Brothers



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1 Reliable does not concede that Five Brothers qualifies as an additional insured, but assumes that it does for purposes of its Motion for Summary Judgment. Mortgage Co. Services and Securing, Inc., 3:15-cv-00559-RJC-DCK, 2017 WL 2722304 (W.D.N.C. June 23, 2017) (slip copy). In its Order, the court notes that RoundPoint sent two

Id. at *3. The court further commented that RoundPoint and Five Brothers Id. With that in mind, the court stated that

contract even Five Brothers seems to admit that it owes some indemnification to RoundPoint rather, the Parties disagree Id. at *4. While Five Brothers did not necessarily dispute that it owed some indemnification to RoundPoint, the court nevertheless provided an analysis and discussion regarding whether Five

whether there was an agreement and whether RoundPoint performed its duties under the Contract. Furthermore, it is clear that RoundPoint suffered damages if it was entitled to Id Five Brothers has breached the indemnification clause and RoundPoint is entitled to damages as a matter of law Id. (emphasis added). 2

Reliable seeks a declaratory judgment from this Court that it has no obligation to defend or indemnify Five Brothers with respect to the RoundPoint Suit. Both Reliable and Five Brothers have moved for summary judgment.

2 mary Judgment. A bench trial was held on July 18, 2017, but the court has yet to issue its ruling on damages. DISCUSSION Summary judgment is appropriate in those cases in which there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry

into the facts is unnecessary to clarify the application of the *Haavistola v. Comty. Fire Co. of Rising Sun, Inc.* not lead a rational trier of fact to find for the non-moving party, disposition by summary *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

Insurance policies are construed in accordance with traditional rules of contract interpretation, so where the meaning of the policy is clear and only one reasonable interpretation exists the courts must enforce the contract as written. Servs insurance policy is to arrive at the insurance coverage intended by the parties when the policy

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 692 S.E.2d 605, 612 *Metropolitan Prop. and Casualty Ins. Co. v.*

Lindquist presumed the parties intended what the language used clearly expresses, and the [policy]



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must be

construed tHartford Acc. & Indemnity Co. v. Hood, 40 S.E.2d 198, 201 (N.C. 1946) (internal citations omitted). Hobson Constr. Co.v. Great Am. Ins. Co., 322 S.E.2d 632, 635 (N.C. Ct. App. 1984).

Once an insured demonstrates that the insuring language embraces the particular claim or injury, the burden shifts to the insurer to prove that the policy excludes the particular injury from coverage. Id State Capital Ins.

Co. v. Nationwide Mut. Ins. Co., 350 S.E.2d 66, 71 (N.C. 1986).

In North Carolina, the pleadings control the duty to defend. Waste Management of Carolinas, Inc. v. Peerless Insurance Company, 340 S.E.2d 374, 377 (N.C. 1986). To that end, the g that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the Id. (citations omitted). Accordingly, North Carolina courts employ a e context of the policy language to determine whether the insurer had a coverage obligation, noting the well-established principle under North Id. at 378. (citatio Id. (citations omitted).

While the duty to defend relies on the factual allegations of the complaint, the duty to Harleysville, 692 S.E.2d at facts as determined at trial are compared to the language of the insurance policy. If the insurance

policy provides coverage for the facts as found by the trier of fact, then the insurer has a duty to Id. at 611. Reliable contends that it owes no duty to defend or indemnify Five Brothers because there are no allegations or findings of personal injury or property damage, and there are no allegations or . Additionally, Reliable argues that the

y ding death resulting from any of

Id

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it, or b. Loss of use of tangible property that is not physically injured. All such loss d it. For the purposes of this insurance, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD- ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment. (Id. at p. 18, Section V.13). Suit. In that lawsuit, RoundPoint alleges that Five Brothers breached the indemnification clause

in its contract with RoundPoint by failing to indemnify RoundPoint for monetary losses incurred in



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the Hayes Suit Hayes to settle her claim. There are no allegations that RoundPoint has suffered any personal

injury or property damages. Five Brothers argues that because their obligation to perform under the indemnity is negligence, Reliable has a duty to defend and indemnify Five Brothers. In other words, Five

Brothers contends that it is entitled to coverage for the RoundPoint Suit because of allegations of The Court finds the case cited by Reliable, Westfield Insurance Co. v. Nautilus Insurance Company, 154 F.Supp.3d 259 (M.D.N.C. 2016), persuasive. In Westfield, a water remediation company sued a general contractor for breach of contract for failure to pay an invoice. The general contractor tendered a demand as an additional insured to the carrier for the subcontractor whose alleged negligence caused the water intrusion that necessitated the services of the water remediation company. Westfield, 154 F.Supp.3d at 262. In response to the demand, the carrier noted that, while the general contractor was an additional insured, the claim asserted by the water remediation company was for the breach of contract and was not covered under the policy. Id. at 262-63.

defense costs via a

declaratory judgment action. Id. at 263. Ruling on competing summary judgment motions, the seeking damages because of property damage. Id. at 267. Instead, the damages it sought arose

-accidental failure to honor its contractual obligations (i.e. pure economic loss) by failing to pay for services rendered. In sum, the court held that the suit duty to defend. Id. at 267-268 (citations omitted). In other words, while the original contract Id. at 271.

As in the Westfield underlying complaint for breach of contract is not RoundPoint is not seeking damages because of property damages. RoundPoint is seeking damages arising out of Five B -accidental failure to honor its See Id. at 267.

ding of fact

Brothers.

As noted above, (Doc. No. 2 at p.5, Section I.1.b.(1)). Reliable also argues that the claim for breach of contract set forth in the RoundPoint Suit does not allege and, and thus there is no coverage under the Policy. The Court need not address this argument, as the Court had already determined that the allegations and findings in the RoundPoint Suit do not amount to

Lastly, Reliable contends that the RoundPoint Suit falls within its policy exclusion for While the Court finds it likewise unnecessary to address this argument the Court will nevertheless briefly



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discuss the exclusionary language in the policy. In the RoundPoint S indemnity contract, RoundPoint suffered damages in the form of a settlement payment and

The conduct of Five Brothers was intentional, not accidental, as it relates to the breach of contract. Five Brothers breached its contract and RoundPoint suffered damages as a result. The foreseeable and expected result of refusing to indemnify a party pursuant to a contract Accordingly, the Court finds that the RoundPoint Suit is excluded from coverage pursuant to the language of the Policy.

here

Signed: January 23, 2018

