Blissful Enterprises, Inc. v. Cincinnati Insurance Company

2019 | Cited 0 times | D. Maryland | September 30, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BLISSFUL ENTERPRISES, Inc. * Plaintiff, * v. * Civil Action No. GLR-18-1221 CINCINNATI INSURANCE * COMPANY, * Defendant. ***** MEMORANDUM OPINION

THIS MATTER is before the Court on

and Cross- -Mot The Motions are ripe for disposition, and no hearing is necessary. See Local Rule 105.6 (D.Md. 2018). For the reasons outlined belo

I. BACKGROUND 1 Blissful owns and operates a hotel at 2112 Emmorton Park Road in Edgewood, Maryland . (Compl. ¶¶ 1, 11, ECF No. 2). Blissful insured the

1 Unless otherwise noted, the facts outlined here are set forth in Complaint (ECF No. 2). To the extent the Court discusses facts that Blissful does not allege in its Complaint, they are uncontroverted and the Court views them in the light most favorable to the non-moving party. The Court will address additional facts when discussing applicable law.

(Id. ¶ 11; id. , ECF No. 2-1). 2

The Policy provides All Risk Coverage, or Open Peril coverage, that is, coverage for all risk of loss unless excluded by the Policy. (Id. ¶ 13). Blissful purchased additional coverage included in a Hotel Commercial Property Endorsement (the . (Compl. ¶ 20; Policy at 82 102). The Property contains a storm water drainage system connected to the Hotel that water from off the roof of the building, through a system of pipes which feed into an undergroun Id. ¶ 23). On January 14, 2016, 3

Blissful employees cleaning up leaves on the Property , ECF No. 21-5 Ex. 1(A) Claim at 8, ECF No. 21-6). 4 underground pipes may be damaged. (Id.; Compl. ¶ 29). On January 20, 2016, John Gregory, a Cincinnati Senior Claims Specialist, sent Blissful a Reservation of Rights letter and noted Cincinnati Claim Notes at 8). Blissful retained William Baker to investigate the loss and

metal pipe

2 Electronic Case 3 - Motion Summ J. at 3, ECF No. 23)

4 Citations to the Cincinnati Claim Notes refer to the CM/ECF pagination.

has failed at the connection to the existing concrete manhole [which resulted in] a large amount of soil be[ing] displace[d] down the pipe, . . . caus[ing] two small retaining walls to fail and to void soil from under concrete and stone inlet aprons located in a drainage -8). Baker referred to the loss (Id.). In a February 4, 2016 email, Gregory emailed a Blissful representative this statement: provide coverage for the underground piping, however, as you are aware, the policy will

not respond to filling the Compl. ¶ 30; Cincinnati Claim Notes at 11). Blissful then submitted an estimate of the repair and restoration cost, $335,484.00, (Compl. ¶ 31; id. ECF No. 2-2). Surprised by the repair cost, Cincinnati chose to inspect the loss and evaluate the proposal. (Gregory Aff. ¶ 16). Upon investigation, Cincinnati wrote to Baker, asking him to explain how the loss satisfied Cincinnati Claim Notes at 29 30). Baker could not confirm that it was, in fact, a sinkhole, so Cincinnati and Blissful each retained an expert, and the parties arranged a joint inspection of the Property for May 23, 2016. (Gregory Aff. ¶¶ 18 21). bottom portion of the metal pipe was significantly corroded resulting in a loss in the

structural integrity of the pipe that in turn appears to have contributed to the lateral (Ex. 2 21-12). , agreed that manhole

Ex. 1(E) at 4, ECF No. 21-10 ground depression caused by the dissolving of soft rocks naturally by groundwater

whereas the Loss was related to pipe collapse. (Id.). On August 1, 2016, having concluded the loss was not actually a sinkhole or otherwise covered, Cincinnati denied claim. (Compl. ¶ 32; Gregory Aff. ¶ 25). On or about March 23, 2018, Blissful sued Cincinnati in the Circuit Court for Harford County, Maryland. (Not. Removal at 1, ECF No. 1). In its two-count Complaint, Blissful alleges: breach of contract (Count I); and, in the alternative, promissory estoppel (Count II). view, and/or due to defective material or methods by which the pipe was installed, or due Compl. the underground pipe sustained sinkhole damage for which Cincinnati agreed coverage Id. ¶ 25). Blissful alleges the Loss is covered by the Collapse Coverage Extension, (id. ¶¶ 17 19), or via the Endorsement underground pipes, flues or drains, (id. ¶¶ 20 22).

On April 26, 2018, Cincinnati removed the case to this Court. (ECF No. 1). On December 11, 2018, Cincinnati filed its Motion for Summary Judgment. (ECF No. 21). On January 2, 2019, Blissful filed an Opposition and Cross-Motion for Summary Judgment. (ECF No. 23). On January 22, 2019, Cincinnati filed an Opposition to the Cross-Motion and Reply with respect to its Motion. (ECF No. 24). On January 31, 2019, Blissful filed a Reply. (ECF No. 25).

II. DISCUSSION A. Standard of Review

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In reviewing a motion for summary judgment, the Court views the facts in a light

Ricci v. DeStefano, 557 U.S. 557, 586 (2009); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 59 (1970)). materials in the record, including depositions, documents, electronically stored

information, affidavits or declarations, stipulations . . . admissions, interrogatory answers,

1)(A). Significantly, a

Fed.R.Civ.P. 56(c)(4).

Once a motion for summary judgment is properly made and supported, the burden shifts to the nonmovant to identify evidence showing there is genuine dispute of material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 87 (1986). Othentec Ltd. v. Phelan, 526 F.3d 135, 141

(4th Cir. 2008) (quoting Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)).

Anderson, 477 U.S. at 248; see also JKC Holding Co. v. Wash. Sports Ventures, Inc., 264 F.3d 459, 465 (4th Cir. 2001) (citing Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001)).

law will pro Anderson, 477 U.S. at 248; accord Hooven-Lewis, 249 F.3d at 265. arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the

noAnderson, 477 U.S. at 248. If the nonmovant has failed to make a sufficient showing on an essential element of her case where she has the burden of proof, failure of Celotex Corp. v. Catrett, 477 U.S. 317, 322 23 (1986).

When the parties have filed cross-motions for summary judgment, the court must

Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 62 n.4 (1st Cir.

Id. (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). The Court, however, must also abide by its affirmative obligation to prevent factually unsupported claims and defenses from

going to trial. Drewitt v. Pratt, 999 F.2d 774, 778 79 (4th Cir. 1993) (quoting Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)). If the evidence presented by the nonmovant is merely colorable, or is not significantly probative, summary judgment must be granted.

Anderson, 477 U.S. at 249 50. B. Analysis Cincinnati argues that the Policy does not cover the Loss, regardless of which coverage part Blissful cites in support of its claim. Cincinnati also argues that it is not estopped from asserting Policy defenses and that Blissful should not be permitted to claim damages for a retaining wall. Blissful maintains the Policy covers the Loss, either under the Collapse Coverage Underground Property Extension, that Cincinnati is estopped, and that the Court should allow the retaining wall to be part of its claim. At bottom, the Court agrees with Cincinnati. Because it will focus the analysis that follows, the Court will first address the retaining wall issue.

1. Retaining Wall In its Cross-Motion, Blissful argues that the retaining wall that was destroyed is included in the Loss coverage because it was mentioned in discovery and that the Court s Mot. at 3, 35). Cincinnati moves to strike the reference to the retaining wall because Blissful did not allege damages to the retaining wall in its Complaint, its expert does not mention it in his report, and Blissful has made no damages claim for it. The Court agrees with Cincinnati.

A plaintiff and cannot, through the use of Zachair, Ltd. v. Driggs, 965 F.Supp. 741, 748 n.4 (D.Md. 1997) , 141 F.3d 1162 (4th Cir. 1998); see also Barclay 2008)

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Here, the Complaint does not mention a retaining wall and instead focuses on the damage to and replacement of the underground pipe. The Complaint alleges Cincinnati , in which Gregory states that Cincinnati will cover the underground

piping but not will fill in the sinkhole. (Compl. ¶¶ 27 30). In the next paragraph, the Complaint refers to the Estimate that Blissful submitted to Cincinnati in 2016 and attached to the Complaint as Exhibit 2. Titled Drain Pipe Replacement, the Estimate states the cost of the work would be $335,484.00 and contains no reference to a retaining wall. (Id. Ex. 2 at 1). In its next paragraph, the denial of the claim, at 1, ECF No. 21-

11). to a retaining wall deprived Cincinnati of adequate notice under Rule 8. See Fed.R.Civ.P. . Blissful notes that the retaining wall is mentioned in response to Ci But Cincinnati

should not have to guess what damages Blissful is claiming. The pre-suit correspondence, save for the Baker letter, concerned the underground pipes and the hole. If Blissful meant to include the retaining wall in its claim for damages, it should have made that clear in its Complaint

The Court will next turn to the Policy and the coverage parts under which Blissful claims coverage.

2. Coverage under the Policy Under Maryland law, e manner as Catalina Enters., Inc. Pension Tr. v. Hartford Fire Ins. Co., 67 F.3d 63, 65 (4th Cir. 1995) (citing Collier v. MD n, 607 A.2d 537, 539 (Md. 1992). Unlike some states, Maryland does not require courts to construe insurance policies against

the insurer. Id. intentions of the parties at the time of contracting. Id. (first citing Schuler v. Erie Ins.

Exch., 568 A.2d 873, 877 (Md.Ct.Spec.App. 1990); then citing Aragona v. St. Paul Fire and Marine Ins. Co., 378 A.2d 1346, 1348 (Md. 1977). To that end, the court must strue the instrument as a whole, id. (quoting Collier, 607 A.2d at 539), and as much avoid treating [any] term Rigby v. Allstate Indem. Co., 123 A.3d 592, 597 (Md. 2015) (citing Connors v. Govt Emps. Ins. Co., 113 A.2d 595, 603 (Md. 2015). Besides the contract the court may look to the character of the contract, its object and purposes, and the factual circumstances of the parties at the time of execution. Catalina Enters., 67 F.3d at 65 (quoting Collier, 607 A.2d at 539).

construed liberally in favor of the insured and against the insurer as drafter of the instrument. Dutta v. State Farm Ins. Co., 769 A.2d 948, 957 (Md. 2001) (quoting Empire Fire & Marine Ins. Co. v. Liberty Mutual Ins. Co., 699 A.2d 482, 494 (Md.Ct.Spec.App. 1997)). Unambiguous language, however, must be enforced as written. Catalina Enterprises, 67 F.3d at 65 (citing Bd. of Trs. of State Colls. v. Sherman, 373 A.2d 626, 629 (Md. 1977)). Unless there is an indication that the parties intended to use words in a special, technical sense, the words in a policy should be accorded their Id. (quoting Bausch & Lomb, Inc. v. Utica Mutual Ins. Co., 625 A.2d 1021, 1031 (Md. 1993)). Under burden to prove the applicability of an exclusion from coverage. Trice, Geary & Myers,

LLC v. Camico Mut. Ins. Co. ACE Am. Ins. Co. v. Ascend One Corp., 570 F.Supp.2d 789, 798 (D.Md. 2008)).

Here, the main coverage form of the Policy is the Building and Personal Property (Policy at 21 35). Its major sections, which govern coverage, are Covered Property, Property Not Covered, Covered Causes of Loss, and (Id.). The Endorsement that Blissful purchased references and interacts with the BPP Form to determine what losses are covered. Exactly how the terms of the Endorsement and the terms of the BPP interact is at the heart of this case. .

a. Coverage under the Collapse Coverage Extension Under the Collapse Coverage Extension, which appears under Section 5 (Coverage Extensions), the Policy states:

building or any part of a building insured under this Coverage Part, if the collapse was caused by one or more of the following: (a) (Policy at 39). Cincinnati accepts that the collapse at issue was caused by decay but challenges that the collapse caused a loss to Covered Property.

As defined in the Policy, Covered Property do (Policy at 24). Blissful, however, argues that the Collapse Coverage

Extension covers the Loss of the underground pipes because the Underground Property Coverage Extension, which is included in the Endorsement Blissful added to the Policy, covers underground pipes attached to the building. But that misreads the operation of the Underground Property

Coverage Extension, applying one of its special provisions to the Policy as a whole. The Underground Property Coverage Extension states:

For this Coverage Extension, Section A. Coverage, 2. Property not Covered, n. Underground Pipes, Flues, or Drains is deleted in its entirety and replaced by the following: n. Underground Pipes, Flues, or Drains[:] Underground pipes, flues, or drains, except as provided in Section A. Coverage, 5. Coverage Extensions. (Policy at 101) shows the drafters of the Policy intended for the specified substitution only to apply to the

Underground Property Coverage Extension, not other extensions, like the Collapse Coverage Extension. Case 1:18-cv-01221-GLR Document 27 Filed 09/30/19 Page 11 of 18 the way Blissful urges, to apply to the entire Policy or to differentiate between attached and unattached pipes, would render the phrase, and the other subparts of the Underground Property Extension surplusage. See Rigby, 123 A.3d at 597.

b. Coverage under the Underground Property Coverage Extension The Underground Property Coverage Extension states that: We will pay for lting from any of the Covered Causes of Loss to: (b) Underground pipes, flues, or drains if they are attached to Covered

Property. (Policy at 100). With respect to potential coverage under this Extension, Cincinnati argues that the damage to the underground pipes did not result from a Covered Cause of Loss, which Blissful disputes.

(Id. at 25). Cincinnati identifies two exclusions and one exception to an exclusion that it contends are relevant here: (1) one concerning

, (id. at 27) , (id. at 25 26) Exclusion Exception), (id.).

i. Corrosion Exclusion The prefatory language for the list of exclusions that includes the Corrosion

(Policy at 27). rrosion of the pipe: If there was no corrosion of the pipe and its subsequent loss of integrity, there does not appear to be any other mechanisms to result in the exposure of the surrounding soils and there being impacted by flow within the storm drain. (Najewicz Report at 2). Blissful has offered a similar explanation of the incident elsewhere, including in an Interrogatory due to the presence of chemicals and salt in water which

(Ex. 4 [Blissful Interrog.] ¶ 19, ECF No. 21-14). that underground cast-iron sewer and water pipes had massive leaks resulting in the

in which o Gen. Accident Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., 288 F.3d 651, 652 (5th

Cir. 2002). The Fifth Circuit held that the underground pipes did not constitute covered property but also noted that the corrosion exclusion in the policy at issue would have

Id. at 657. The U.S. District Court for the District of Mississippi has also

Bishop v. Alfa Mut. Ins. Co., 796 F.Supp.2d 814, 823 (S.D.Miss 2011). Here, Blissful has conceded that the Loss was caused by corrosion inside the pipe. As a result, the Court concludes that there is no genuine dispute of material fact regarding

the application of the Corrosion Exclusion and therefore no coverage under this coverage part.

ii. Earth Movement Exclusion Cincinnati also argues for the application of the Earth Movement Exclusion, which provides that Cincinnati will not cover losses for, among other things:

including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface. (Policy at 25 26). Blissful argues that the corrosion of the pipes caused the collapse and that any was the result of the collapse, not its cause. But that reading misinterprets the prefatory language for this exclusion:

excluded regardless of any other cause or event that

contributed concurrently or in any sequence to (Policy at 25). the loss is excluded from coverage. Bao v. Liberty Mut. Fire Ins. Co., 535 F.Supp.2d 532,

Appeals would not apply the efficient proximate cause rule, but would instead follow the

plain language of the concurrent causation clause in the polic Here, the parties agree that corrosion was the efficient proximate cause of the collapse. But it stands to reason that earth movement contributed at least in part to the

collapse. After all, the pipes are underground, with earth above them. If the pipes were weakening or cracking due to corrosion, gravity would dictate that the weight of the soil above the pipe would cause it to collapse faster than if the pipe was bearing no weight. After the collapse, more earth would move, as Blissful contends, but that does not negate the earlier causation.

(Policy at 25 26). Blissful also cites to Lower Chesapeake Assocs. V. Valley Forge Ins. Co., 532 S.E.2d 325, 331 32 (Va. 2000) in support of its assertion that the Earth Movement Exclusion does not apply here or that the Policy is ambiguous on that point. But the Earth Movement Exclusion unambiguously applies to the Underground Property Coverage Extension because that Extension requires a Covered Cause of Loss. (Policy at 100). It does not apply to the Collapse Coverage

Extension, where a Covered Cause of Loss is not a requirement for coverage. (Policy at 39).

As a result, the Court concludes that there is no genuine dispute of material fact that as defined under the Policy and is thus excluded from coverage.

iii. Sinkhole As just discussed, sinkholes are an exception to the Earth Movement Exclusion, that is, they are Covered Causes of Loss. (Policy at 25). To the extent Blissful alleges the collapse was due to a sinkhole in its Complaint and maintains that theory, Cincinnati

s of what a sinkhole is. The Court agrees the definition in the Policy

language is clear nions.

earth supporting the Covered Property into subterranean voids created by the action of

(Policy at 55) clude: . . . [s]inking or collapse of land into man- (Id.).

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corrosion within the pipe. Further, a pipe is clearly a man-made subterranean cavity. There is no genuine dispute of material fact, then, that a sinkhole collapse, as defined by the unambiguous words of the Policy, did not occur here. As a result, the Court concludes the

Exclusion.

In sum, viewing the evidence in the light most favorable to Blissful, the Court concludes that Cincinnati has shown there is no genuine dispute of material fact that the collapse was not covered by any of the Policy provisions Blissful asserted in its Complaint.

summary judgment in favor of Cincinnati and against Blissful. The result is the same when The Court acknowledges this is a harsh result for Blissful, but the Court must interpret the contract as

written, Catalina Enterprises, 67 F.3d at 65 unilateral expectations.

3. Estoppel Cincinnati argues that, even if Gregory intended to accept liability on behalf of Cincinnati and provide coverage for the Loss in his February 4, 2016 email, the email did not constitute waiver of Policy defenses or operate to estop Cincinnati from asserting any. Blissful counters that it detrimen a dispute of fact for a jury to decide. Under Maryland law, wavier or estoppel may occur only when it does not create new coverage Gordon v. Hartford Fire Ins. Co. (4th Cir. 2004) (quoting Allstate Ins. Co. v. Reliance Ins. Co., Md. Auto. Ins. Fund v. John, 16 A.3d 1008, 1016 (Md. 2011) (citing Sallie v. Tax Sale Investors, 814 A.2d 572, 575 (Md. 2002)). That is, if the loss

was not within the coverage of the policy contract, it cannot be brought within that coverage by invoking the principle of waiver or estoppel. Id. (quoting Prudential Ins. Co. v. Solomon Brookman, 175 A. 838, 840 (Md. 1934)). es that its (Policy at 7). Further, based

Loss Gordon

v. Hartford Fire Ins. Co. Because there could be no waiver or estoppel, 5 As a result, the Court concludes there is no genuine dispute of material fact with ppel claim. The result is the same when the Court

Court will grant summary judgment in favor of Cincinnati and against Blissful on the promissory estoppel claim.

III. CONCLUSION For the foregoing reasons, the Court will grant -Motion for Summary Judgment (ECF

No. 23). A separate Order follows. Entered this 30th day of September, 2019. /s/ George L. Russell, III

United States District Judge

5 Even if estoppel was a possibility under Contractors, 680 A.2d 547, 554 (Md.Ct.Spec.App. 1996) (holding that doctrine of estoppel must be applied to insu -by- evidence of detrimental reliance sufficient to create a genuine dispute of material fact. and the rest of their costs were incurred after Cincinnati had indic not its final decision regarding coverage (e.g., retaining counsel) or would have been incurred regardless (e.g., obtaining an estimate of the damage).