Insurance Commissioner of the State of California v. Golden Eagle Insurance Co.

2002 | Cited 0 times | California Court of Appeal | May 10, 2002

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Golden Eagle Insurance Company appeals from an order granting an application by its insured Aero-Crete, Inc., under Insurance Code section 1032. [1] The order directs the Insurance Commissioner to allow Aero-Crete's claim against Golden Eagle for indemnity under the terms of its Commercial General Liability policy. We reverse.

Aero-Crete supplied and installed concrete floors for the upper story units in an apartment complex. When the concrete began to deteriorate, with resulting damage to finished floor coverings, the owner of the complex sued the developer and Aero-Crete. The developer cross-complained against Aero-Crete, invoking the indemnity and attorney fee provisions in Aero-Crete's subcontract. Three insurers, Golden Eagle, USF&G, and Charter Oak, participated in Aero-Crete's defense. Aero-Crete settled the lawsuit for $1.25 million. Golden Eagle refused to contribute to the settlement, which was funded by USF&G and Charter Oak. USF&G assigned to Aero-Crete its right to seek contribution from other insurers.

In ruling that the claims administrator had erroneously denied Aero-Crete's claim against Golden Eagle, the trial court accepted as competent and persuasive an expert opinion offered by Aero-Crete concluding that only 25 percent of the damage to the floors was attributable to Aero-Crete's work, while 75 percent of the damage was attributable to the general contractor and unspecified "other trades." This expert believed the general contractor had failed to protect the concrete flooring after it was installed by Aero-Crete, allowing other tradesmen to scratch, scrape, and gouge the surface, which caused the concrete to deteriorate. The trial court concluded that the "work performance exclusion" in the Golden Eagle policy barred coverage for damage resulting from Aero-Crete's own negligence, but allowed recovery for damage attributable to the acts of others. Apportioning coverage by the various insurers' time on the risk, and reducing the recovery by 25 percent to account for Aero-Crete's degree of fault, the court calculated that Golden Eagle was responsible for $248,999 of the settlement, plus interest.

The parties agree that our review of legal questions is de novo. While the parties dispute the court's factual analysis, we conclude that Aero-Crete's claim must fail for legal reasons.

The policy at issue obligated Golden Eagle to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . `property damage' to which this insurance applies." "Property damage" was defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and as "[l]oss of use of tangible property that is not physically injured."

Excluded from coverage was " `[p]roperty damage' to `your work' arising out of it or any part of it and included in the `products completed operations hazard.' [¶] This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." The policy defined "your work" as "[w]ork or operations performed by you or on your behalf" and as "[m]aterials, parts or equipment furnished in connection with such work or operations." The policy defined "products completed operations hazard" to include "all . . . `property damage' occurring away from premises you own or rent and arising out of . . . `your work' except: [¶] . . . [w]ork that has not yet been completed or abandoned."

Golden Eagle contends the trial court erred by (1) applying the "work-performed" exclusion on a comparative fault basis; [2] (2) applying the exclusion even though Aero-Crete has never claimed that any part of its work was performed for it by a subcontractor; (3) ignoring evidence that USF&G settled the underlying case because it believed Aero-Crete was wholly responsible for the floor damage; [3] and (4) applying the exclusion when the floor damage did not qualify as "property damage" under the policy.

Aero-Crete responds that (1) the floor damage was "property damage" under the rule of Maryland Casualty Co. v. Reeder (1990) 221 Cal.App.3d 961, 969-970 (Reeder) [inferior materials or workmanship are not "property damage" themselves, but coverage exists if defect has caused physical injury to or lost use of property]; (2) language in a notice sent to Aero-Crete by Golden Eagle explaining revised terms in its policy, as well as industry publications and public policy, support the conclusion that the work-performed exclusion does not apply to damage caused by any third party; and (3) the trial court properly applied the work-performed exclusion on a comparative basis under the rule of Insurance Co. of North America v. National American Ins. Co., supra, 37 Cal.App.4th 195, 202 (INA).

Golden Eagle's second claim is correct. The work-performed exclusion did not apply because the third parties who damaged the floors were not subcontractors for whom Aero-Crete was responsible. Aero-Crete insists that insurance industry publications, particularly a circular Golden Eagle provided to Aero-Crete to explain changes in its policy, make it clear that the policy provided the same coverage as the former broad form endorsement analyzed in the Reeder and INA cases. Even under those analyses, however, the damage in this case was excluded.

The policy form at issue in Reeder and INA excluded coverage for "property damage to work performed by or on behalf of the named insured." The broad form endorsement replaced this exclusion with one barring coverage for "property damage to work performed by the named insured."

The effect of this alteration in terms was to provide coverage for property damage caused by subcontractors working for the insured. (Reeder, supra, 221 Cal.App.3d at pp. 971-972; INA, supra, 37 Cal.App.4th at pp. 201-202.) Aero-Crete's policy achieved the same result more directly, by simply stating that the work-performed exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

Aero-Crete contends the INA decision stands for the proposition that damage caused by any third party, not just the insured's subcontractor, falls outside the scope of the work-performed exclusion. We disagree. Such an interpretation finds no support in the terms of the policy. The insureds in INA and Reeder, unlike Aero-Crete, found themselves in positions of responsibility for the liability of subcontractors.

In INA, the insured was a subcontractor like Aero-Crete, and a jury determined that the damage at issue was caused by the insured, the general contractor, and other subcontractors. However, the INA insured had agreed to indemnify the general contractor for any "liability for injury contributed to by the negligence or other misconduct of [the general contractor], as long as the injury is caused in part by the negligence or misconduct of [the insured]." (INA, supra, 37 Cal.App.4th at pp. 199-200.) The court rested its holding on the insured's derivative liability under the indemnity agreement. (Id. at p. 202.) Because the insured had assumed the general contractor's liability, it also assumed the general contractor's liability for other subcontractors' work. (See Hansell v. Santos Robinson Mortuary (1998) 64 Cal.App.4th 608, 614-615 [contractor's duty to inspect subcontractors' work is non-delegable].) Aero-Crete's subcontract included no such broad indemnification clause. Aero-Crete agreed to indemnify the general contractor only for damages caused by Aero-Crete.

In Reeder, the insureds were developers and a general contractor who were answerable for the damages caused by their subcontractors. (Reeder, supra, 221 Cal.App.3d at pp. 965, 971.) Aero-Crete had no subcontractors. The insurance industry publication relied on by the Reeder court would have discouraged Aero-Crete from purchasing the coverage at issue, because the industry considered that coverage to be valuable only for insureds who anticipated using subcontractors. (Id. at p. 972.) While the INA case provides an example of another circumstance in which the former broad form endorsement proved useful, it is not a circumstance in which Aero-Crete found itself.

DISPOSITION

The order is reversed. The parties shall bear their own costs on appeal.

We concur:

McGuiness, P. J.

Corrigan, J.

Insurance Commissioner of the State of California v. Golden Eagle Insurance Co.

2002 | Cited 0 times | California Court of Appeal | May 10, 2002

1. Insurance Code, section 1010 et seq. govern proceedings in cases of insolvent or delinquent insurers. Insurance Code, section 1032 provides that if the Commissioner rejects a claim against such an insurer, the claimant may seek relief by filing an application for an order to show cause in the court in which the liquidation is proceeding. We note that the filings below, the notice of appeal, and the briefs in this court reflect an appearance by "Golden Eagle Insurance Corporation," evidently the designated administration agent for "Golden Eagle Insurance Company." The Corporation, however, never seems to have been a party in this order to show cause proceeding. Counsel for the Corporation and the Company are the same. We will consider counsel to be acting on behalf of the Company.

2. Golden Eagle uses the term "work product exclusion." We will use "work- performed exclusion," the term adopted by the court in Insurance Co. of North America v. National American Ins. Co. (1995) 37 Cal.App.4th 195, 201.

3. The record on appeal does not include the settlement agreement itself, or even the underlying complaint in the construction defect litigation. We caution the parties that letters between counsel - which are plentiful in this record - are no substitute for such fundamental documentation.