

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
March 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN STATES INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois,
)	County Department,
v.)	Chancery Division.
)	
CHICAGO IMPORT, INC.,)	No. 08 CH 38885
)	
Defendant-Appellee.)	
)	Honorable
GOLD REALTY GROUP CORPORATION and)	Mary Ann Mason,
MICHAEL GOLDSTEIN,)	Judge Presiding.
)	
Defendants.)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices JOSEPH GORDON and HOWSE concurred in the judgment.

ORDER

HELD: The circuit court properly granted summary judgment in favor of an insured tenant and against its insurer, finding that the insurer owed a duty to defend the tenant in an underlying counterclaim filed by the landlord against the tenant after the leased premises burned to the ground. The circuit court properly found that (1) the landlord's underlying counterclaim "potentially" alleged "property damage" caused by an "occurrence," so as to be covered by the insurance policy and (2) the contractual liability exclusion in the insurance policy failed to preclude coverage.

No. 1-10-0138

This cause arises out of a declaratory judgment action (735 ILCS 5/2-701 (West 2002)) filed by plaintiff-appellant, American States Insurance Co. (ASI), against the defendant-appellee, Chicago Import Inc. (Chicago Import), wherein ASI sought a declaration that it was not obligated to defend or indemnify Chicago Import in an underlying counterclaim brought by Gold Realty Corp. (Gold Realty) and its president, Michael Goldstein, against Chicago Import. The underlying counterclaim arose from a commercial warehouse lease agreement entered into by Gold Realty and Chicago Import. After a fire destroyed the subject warehouse, Gold Realty filed the underlying counterclaim alleging, *inter alia*, that Chicago Import had breached the lease agreement by failing to “take due care of the [leased warehouse]” that contributed to the destruction of the warehouse in the fire. Since Chicago Import had a general commercial liability insurance policy with ASI, it tendered the defense of the underlying counterclaim to ASI, but ASI denied coverage, refusing to defend and indemnify Chicago Import against any action by Gold Realty.

After discovery, ASI and Chicago Import filed cross-motions for summary judgment seeking a declaration regarding ASI’s duty to defend Chicago Import. The circuit court held that ASI had a duty to defend Chicago Import and therefore granted Chicago Import’s motion for summary judgment. The circuit court also held that pursuant to Illinois Supreme Court Rule 304(a) (210 Ill. R. 2d 304(a)) there was no just reason to delay enforcement or appeal.

ASI now appeals the circuit court’s ruling, contending that summary judgment should have been granted in its favor, rather than in favor of Chicago Import. Specifically, ASI argues that the circuit court erred when it found that: (1) Gold Realty’s counterclaim against Chicago

No. 1-10-0138

Import sufficiently alleged “property damage” caused by an “occurrence” so as to be covered by ASI’s policy; (2) the contractual liability exclusion in ASI’s policy failed to preclude coverage; and (3) the issue of indemnity was premature pending the outcome of the underlying action. For the reasons that follow, we affirm.

I. BACKGROUND

The undisputed facts in this case show that on July 8, 1999, Gold Realty, as landlord, and Chicago Import, as tenant, entered into an “Industrial Space Lease” (lease) for the rental of a warehouse located at 4150 North Knox Avenue in Chicago. The lease commenced on July 8, 1999, and was to expire on September 30, 2009. According to section 17. 2 of the lease agreement the tenant was “responsible for all maintenance and repair to the Premises of whatsoever kind or nature,” except for those specifically set forth in the lease as the obligation of the landlord. In addition, the tenant had the duty to “take good care of the premises and fixtures, and keep them in good repair and free from filth, overloading, danger of fire or any pest or nuisance ***.”

In addition, pursuant to section 9.2 of the lease, which set forth the terms for terminating the lease agreement in case of “a fire or other casualty, cause or condition whatsoever that would make the premises partially or wholly untenable,” the tenant was responsible for “the removal, or restoration *** of all its damaged property and debris from the premises, upon request by the landlord,” or, alternatively, for reimbursement of the landlord “for the cost of [any such] removal.”

Furthermore, section 20.3 of the lease, entitled “Indemnification of the Landlord,”

No. 1-10-0138

provided that:

“Tenant shall indemnify and defend landlord and save it harmless from and against any and all loss (including loss of rents payable to tenant) and against all claims, actions, damages, liability and expenses in connection with loss of life, bodily injury or damage to the Building arising from any occurrence in, upon, or at the premises or any part thereof, occasioned wholly or in part by any act or omission of tenant.”

This section further required the tenant to hold the landlord harmless and defend and indemnify “against all actions, claims, demands, costs, damages, or expenses of any kind which may be brought or made against the landlord or which landlord may pay or incur by reason fo tenant’s occupancy of the premises or its negligent performance of or failure to preform any of its obligations under the lease.”

During the pendency of the lease agreement, and about two years prior to its expiration, on May 12, 2007, a fire consumed and destroyed the warehouse. Subsequently, on April 10, 2008, Chicago Import filed a two-count complaint against Gold Realty, alleging that Gold Realty had: (1) breached the lease agreement by failing to return Chicago Import’s security deposit and failing to reimburse Chicago Import for the 19 remaining days on the lease, during which the building became untenable due to the fire and (2) engaged in fraud when it promised Chicago Import that it would construct an enclosed two bay dock knowing that it would not do so and relying upon these statements to induce Chicago Import to enter into the lease agreement in the first place.

In response, on August 7, 2008, Gold Realty filed the instant underlying one count counterclaim alleging that Chicago Import had breached its lease agreement with Gold Realty by

No. 1-10-0138

failing to “take due care” of the warehouse premises, thereby contributing to the destruction of the entire warehouse in the fire. In its counterclaim, Gold Realty specifically alleged that under the lease agreement Chicago Import was responsible to “take good care of the premises and fixtures, and keep them in good repair and free from filth, overloading, danger of fire or any pest or nuisance.” Gold Realty alleged that Chicago Import failed to take such good care of the warehouse or its fixtures, and instead overloaded the interior spaces with excessive amounts of inventory, including combustible items (*i.e.*, pornographic materials). Gold Realty further alleged that on numerous occasions, its representatives viewed the interior of the warehouse with representatives of Chicago Import and identified situations where Chicago Import’s inventory was stacked to excessive heights, “often above the sprinkler system.” According to Gold Realty, on at least one such occasion, Chicago Import was told by a city inspector that its inventory was stacked too high and that it created a hazard. Despite these warnings, however, Chicago Import ignored Gold Realty’s requests to rectify the overloading of the inventory on the premises. According to Gold Realty, Chicago Import’s refusal to do so constituted a “material factor leading to the destruction of the building caused by the subsequent fire.” Gold Realty further alleged that as a direct and proximate result of the fire, it incurred “substantial financial damages.”

Gold Realty then alleged the following specific damages: (1) in excess of \$47,000 in demolition costs, in excess of \$122,000 in security costs, in excess of \$8,000 for permits, water department charges, inspections and related items required by the city in the clean-up of the site; (2) in excess of \$9,000 in attorneys’ fees in defending a lawsuit against the city of Chicago arising from the fire at the premises, as well as a \$3,761 in fines arising from that action; (3) at least

No. 1-10-0138

\$8,000 in attorney's fees and costs pursuant to the lease; (4) at least \$190,000 in compensatory damages; (5) an unspecified amount of "lost revenue and income taxes owed for the remainder of the lease;" and (5) "all other relief that [the circuit] court deems just and fair."

At the time of the fire, Chicago Import was covered by a commercial general liability insurance policy with ASI. The policy was issued by ASI to Chicago Import for the period of December 30, 2006, to December 30, 2007. The policy contained general liability coverage with liability limits of \$1 million per occurrence and \$2 million in the aggregate, and with a \$200,000 sublimit for damages to premises rented to the insured.

Accordingly, after Gold Realty filed its counterclaim against Chicago Import, Chicago Import attempted to tender the defense of its case to its insured, ASI. However, ASI refused, and instead on October 16, 2008,¹ filed a declaratory judgment action in the circuit court, seeking that the circuit court declare that it owed no duty to defend or indemnify Chicago Import with respect to Gold Realty's underlying counterclaim. In the complaint for declaratory judgment, ASI alleged that its policy to Chicago Import did not extend coverage to the damages alleged in Gold Realty's underlying counterclaim. Specifically, ASI asserted that Gold Realty's counterclaim nowhere alleged "property damage" or "bodily injury" caused by "an occurrence" as those terms are defined by ASI's policy, so as to extend the policy to the damages sought by Gold Realty. In

¹We note that although the record reveals that on June 3, 2009, ASI filed an amended complaint for declaratory judgment against Chicago Import, in all relevant respects the substance of that amended complaint is identical to the original complaint. We will therefore treat the two complaints together.

No. 1-10-0138

support of this contention, ASI attached a copy of the insurance policy issued to Chicago Import.

The ASI policy contains the following relevant coverage grant:

“Section I-COVERAGES

COVERAGE A- BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

* * *

- b. This insurance applies to ‘bodily injury’ and property damage’ only if:
 - (1) The ‘bodily injury’ or ‘property damages’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory;’
 - (2) the ‘bodily injury’ or ‘property damage’ occurs during the policy period.

***.”

Furthermore, section V of ASI’s policy contains definitions of “occurrence,” and “property damage.” An “occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” “Property damage” is defined as “physical injury to tangible property, including all resulting loss of use of that property. All such loss of use

No. 1-10-0138

shall be deemed to occur at the time of the physical injury that caused it.”

In the alternative, in its complaint for declaratory judgment, ASI argued that even if Gold Realty had alleged “property damage” or “bodily injury” caused by “an occurrence,” as those terms are defined by ASI’s policy, coverage would nevertheless be precluded because of the contractual liability exclusion provision in ASI’s policy. That exclusion provision provides:

“b. Contractual Liability

‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an ‘insured contract,’ provided that the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an ‘insured contract,’ reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of ‘bodily injury’ or ‘property damage,’ provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same ‘insured contract;’ and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.”

No. 1-10-0138

In addition, ASI's policy defines an "insured contract" in the following manner:

"A contract for lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owners is not an 'insured contract.' "

Chicago Import answered ASI's declaratory judgment action by way of a counter claim seeking a declaration that ASI was obliged to defend and indemnify Chicago Import against Gold Realty's underlying counterclaim. Chicago Import argued that the meaning of "property damage" as used by section V of ASI's policy in defining a "suit," and an "insured contract," makes clear that Gold Realty's underlying claim sufficiently alleged "property damage" caused by "an occurrence," so as to require ASI to defend that claim. According to Chicago Import, "occurrence" was defined by the ASI policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Chicago Import argued that the fire was an accident, and that the stacking of the inventory as alleged by Gold Realty, would constituted a "continuous or repeated exposure to substantially the same general harmful conditions."

After discovery, ASI and Chicago Import filed cross-motions for summary judgment. The circuit court granted summary judgement in favor of Chicago Import.² ASI now appeals.

²In its one-page handwritten order, the circuit court stated that it granted summary judgment in favor of Chicago Import, and denied summary judgment in favor of ASI, "for the reasons stated in the record." Neither party, however, has attached a transcript of those

II. ANALYSIS

1. Standard of Review

We initially begin by setting forth the appropriate standard of review. It is well-established that “the construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment.” *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002). Summary judgment, however, is a drastic measure [of disposing litigation] and should be granted when the movant’s right to judgment is clear and free from doubt.” *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is appropriate “if the pleadings, depositions, 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.” 735 ILCS 5/2-1005 (West 2004); see also, *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); see also *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). Where cross-motions for summary judgment are filed in an insurance coverage case, the parties acknowledge that no material questions of fact exist and only the issue of law regarding the construction of an insurance policy is present. *American Family Mut. Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 525 (2009), citing *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App.3d 335, 338-39 (2005).

proceedings, nor attempted to explain its absence in the record in the briefs.

No. 1-10-0138

We review the circuit court's decision to grant or deny such a motion for summary judgment *de novo*. *Virginia Surety Co.*, 224 Ill. 2d at 556.

In the present case, ASI makes three contentions on appeal. First, ASI argues that the circuit court erred when it found that Gold Realty's counterclaim against Chicago Import sufficiently alleged "property damage" caused by an "occurrence" so as to trigger ASI's duty to defend Chicago Import under its commercial general liability policy. Next, ASI argues that even if the counterclaim had sufficiently alleged "property damage" caused by an "occurrence," the ASI policy would nevertheless be inapplicable because of the contractual liability exclusion provision in that policy. Finally, ASI argues that the circuit court erred when it found that the issue of indemnity was premature pending the outcome of the underlying action. We will address each of ASI's contentions in turn.

2. Coverage Under the Policy—Duty to Defend

We begin with ASI's duty to defend. It is well-settled that in order to determine whether an insurer has a duty to defend an action against the insured, a reviewing court must compare the allegations of the underlying complaint to the relevant portions of the insurance policy. *Outboard Marine Corp.*, 154 Ill. 2d at 108; see also, *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 438 (1994); *Viking Construction Management v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 41 (2005) ("The duty of an insurer to defend an insured is determined by the allegations of the underlying complaint."), citing *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 406 (2004). If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if

No. 1-10-0138

the allegations are “groundless, false, or fraudulent.” (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991); see also, *Lyons*, 349 Ill. App. 3d at 406 (“A duty to defend arises if the complaint’s allegations fall within or potentially within the coverage provisions of the policy.”) In other words, an insurer may not justifiably refuse to defend an action against the insured “unless it is *clear* from the face of the underlying complaint[] that the allegations fail to state facts which bring the case within, or potentially within the policy’s coverage.” (Emphasis in original.) *Wilkin Insulation Co.*, 144 Ill. 2d at 73; see also, *Aetna Casualty & Surety Co. v. Prestige Casualty Co.*, 195 Ill. App. 3d 660, 664 (1990) (“Unless the complaint, on its face, clearly alleges facts which, if true, would exclude coverage, the potentiality of coverage is present and the insurer has a duty to defend.”).

Moreover, if the underlying complaint alleges several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy.

Wilkin Insulation Co., 144 Ill. 2d at 73; see also, *American Country Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960, 975 (2003) (“ ‘the insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy.

[Citations.] The insurer may simply refuse to defend only if the allegations of the underlying complaint preclude any possibility of coverage.’ [Citation.]”). Accordingly, the threshold that an underlying complaint must satisfy to present a claim of potential coverage is low, and for coverage to exist, the complaint need only present a possibility of recovery, not a probability of

No. 1-10-0138

one. See *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991); see also *Lyons*, 349 Ill. App. 3d at 407.

In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy must be liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 73; see also, *Lyons*, 349 Ill. App. 3d at 407. Where the words in the policy are clear and unambiguous, “a court must afford them their *plain, ordinary, and popular meaning*.” (Emphasis in original.) *Outboard Marine Corp.*, 154 Ill. 2d at 108; see also, *Traveler’s Insurance Co., v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292-93 (2001). However, if the words in the policy are susceptible to more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer who drafted the policy. *Outboard Marine Corp.*, 154 Ill. 2d at 108; see also, *Traveler’s Insurance Co.*, 197 Ill. 2d at 293; see also, *Wilkin Insulation Co.*, 144 Ill. 2d at 73 (“All doubts and ambiguities must be resolved in favor of the insured.”).

On appeal, ASI contends that it has no duty to defend Chicago Import against Gold Realty’s counterclaim, because under its policy to Chicago Import it is obligated to defend only those “suits” “seeking” “property damage” arising out of an “occurrence.” ASI’s commercial general liability policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful condition.” Although the policy does not define “accident,” courts have generally defined it as “an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character.” See *e.g., Westfield National Insurance Co. v. Continental Community*

No. 1-10-0138

Bank & Trust Co., 346 Ill. App. 3d 113, 117 (2003), citing *Aetna Casualty & Surety Co. v. Freyer*, 89 Ill. App. 3d 617, 619(1980); *but see Country Mutual Insurance Co. v. Carr*, 372 Ill. App. 3d 335, 340 (2007) (noting that “[t]he Supreme Court of Illinois has stated a court should not determine whether something is an accident by looking at whether the actions leading to the damage were intentionally done. According to the court, the real question is whether the person performing the acts leading to the result intended or expected the result. If the person did not intend or expect the result, then the result was the product of an accident.”), citing *Wilkin Insulation Co.*, 144 Ill. 2d at 77-78; see also, *Stoneridge Development Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731 (2008) (“we believe that, even if the person performing the act did not intend or expect the result, if the result is the ‘rational and probable’ consequence of the act [citation] or, stated differently, the ‘natural and ordinary’ consequence of the act [citation], it is not an ‘accident.’ ”).

In the present case, there can be no doubt that the damages sought arose out of an “occurrence.” The entire premise of Gold Realty’s underlying complaint is the total loss of the subject warehouse as a result of an unexpected fire, which destroyed the building on May 12, 2007. “Certainly an unexpected fire would seem to meet the definition of an accident” (*Minergy Neenah LLC v. Rotary Dryer Parts, Inc.*, No. 05-C-1181 (E.D. Wisconsin, Sept 21, 2006)).

Although ASI does not appear, at least overtly, to argue that the fire was not a result of an “accident,” and that therefore the damages sought did not arise out of an “occurrence,” it nevertheless contends that Gold Realty’s one-count counterclaim fails to allege any “property damage” because it only states a breach of contract claim, *i.e.*, Chicago Import’s breach of its

No. 1-10-0138

lease agreement with Gold Realty. In support of this notion, ASI points out that the damages sought by Gold Realty, namely attorney's fees, city fines, security costs, and lost revenue stream, are purely "economic losses" resulting from the breach of the lease agreement, and not damages arising from tort liability. For the reasons that follow, we disagree.

We initially note that ASI's argument is faultily premised on the fact that Gold Realty labeled its counterclaim as one for "breach of lease," rather than one sounding in tort. Our courts have been clear that in the context of determining whether the allegations in the counterclaim trigger the application of the insurance policy such a label is meaningless, and the proper inquiry is whether the factual allegations of the counterclaim in the very least *potentially* allege negligent conduct that falls within the coverage of the policy. *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill. App. 3d 128, 13536 (2001) ("We give little weight to the legal label that characterizes the underlying allegations. Instead, we determine whether the alleged conduct arguably falls within at least one of the categories of wrongdoing listed in the policy."); *American Family Mutual Insurance Co. v. Roth*, 381 Ill. App. 3d 760, 765 (2008) ("Little weight is given to the legal label that characterizes the allegations of the underlying complaint; rather, the determination focuses on whether the alleged conduct arguably falls within at least one of the categories of wrongdoing listed in the policy."); see also, *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000) ("the duty to defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy. The question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underling action."), citing *Western Casualty & Surety Co. v. Adams Co.*, 179 Ill.

No. 1-10-0138

App. 3d 752, 757 (1989).

In the present case, liberally construing the allegations in the underlying counterclaim, as we must, it is apparent that Gold Realty's counterclaim at least *potentially* sounds in negligence. In that respect, we first note that in Illinois to state a cause of action for negligence, a plaintiff must allege (1) the existence of a duty of care; (2) a breach of that duty; and (3) an injury proximately caused by that breach. See *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007). Gold Realty's underlying counterclaim makes the following specific allegations. First, the counterclaim alleges that Chicago Import "was responsible," *i.e.*, had a duty to "take good care of the [warehouse]." The counterclaim next alleges that Chicago Import "did not take good care of the [warehouse]" but instead "overloaded the interior space with excessive amounts of inventory including combustible novelty items and pornographic materials" and "stacked [inventory] to excessive heights, often above the level of the sprinkler system." The counterclaim further alleges that despite being warned of the dangers of this practice and after being asked to remedy it, Chicago Import did not rectify the overloading of the inventory on its premises. The counterclaim specifically alleges that Chicago Import's refusal to remedy the overloading "was a material factor leading to the destruction of the building caused by the subsequent fire." The counterclaim finally alleges that as a direct and proximate result of this fire, Gold Realty incurred "substantial financial damages."

While we acknowledge that Gold Realty makes the aforementioned allegations within the confines of a breach of contract claim, contending that Chicago Import's duty to "take good care of [the property]" arose from provisions in the parties' lease agreement, which imposed such a

No. 1-10-0138

duty of care on Chicago Import, and which Gold Realty alleges Chicago Import breached by its actions, the question is not whether the underlying counterclaim alleges a breach of contract, but rather, whether it also could *potentially* allege a claim of negligence. See *Wilkin Insulation Co.*, 144 Ill. 2d at 73 (“If the underlying complaint[] allege[s] several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy”). Under the record before us, we are unable to state that the allegations in the counterclaim do not potentially state such a claim.

In that respect, and for the same reasons, we are similarly unpersuaded by ASI’s contention that Gold Realty’s counterclaim is purely seeking recovery for “economic losses” based upon its disappointed commercial expectations with respect to Chicago Import’s alleged breach of lease agreement. We recognize that our courts have previously held that intangible damage to property, such as diminished value, or costs of repair and cleanup will constitute “economic losses,” and thereby fall outside of the purview of “property damage” caused by an “occurrence.” See, e.g., *Traveler’s Insurance Co.*, 197 Ill. 2d at 312 (“under its plain and ordinary meaning, the phrase ‘physical injury’ does not include intangible damage to property, such as economic loss”); *Stoneridge Development Co.*, 382 Ill. App. 3d at 753 (claims for cost of repair to home and diminished value of home are economic losses, not property damage); *Bituminous Casualty*, 218 Ill. App. 3d at 963-64; *Viking Construction Management*, 358 Ill. App. 3d at 42 (“The standard policy definition of property damage *** differentiates between physical damage to property and intangible property losses, such as economic interests. Courts do not consider the latter types of losses to be ‘property damage.’ ”); see also, *Whitman Corp v. Commercial Union*

No. 1-10-0138

Ins. Co., 335 Ill. App. 3d 859 (2002). Nevertheless, after liberally construing Gold Realty’s allegations in the instant matter, we are unable to find that the relief sought is purely for “economic loss.” In that respect, we note that aside from the specified damages (*i.e.*, attorney’s fees, city fines, security costs, and lost revenue stream), which would undeniably fall into the category of “economic losses,” Gold Realty’s counterclaim also seeks “compensatory damages,” as well as “all other relief [the trial] court deems just and fair.” These two provisions, when liberally construed together with the remaining allegations in the underlying complaint, namely, Gold Realty’s assertion that as a “proximate result” of the fire it incurred “substantial financial damages,” in the very least *potentially* resound in tort. This is especially true of the catch-all provision, which could be read as seeking punitive damages.

For all of the aforementioned reasons, we find that Gold Realty’s counterclaim sufficiently, *i.e.*, in the very least, potentially, alleges a claim for negligence, so as to trigger the application of ASI’s policy and bestow upon ASI the duty to defend Chicago Import.

3. Application of the Exclusionary Provision

ASI nevertheless contends that even if it has a duty to defend Chicago Import, the Contractual Liability Exclusion in ASI’s policy precludes any coverage. That exclusionary provision precludes coverage for “property damage” “for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” ASI contends that because by the terms of the lease agreement,³ Chicago Import agreed to indemnify Gold Realty

³Section 20.3 of the lease agreement, the indemnification clause provides the following:

“Tenant shall indemnify and defend landlord and save it harmless from and against any and all

No. 1-10-0138

against damages arising from any occurrence, the exclusionary provision applies precluding any coverage. We disagree.

In Illinois, it is the insurer's burden to affirmatively demonstrate the applicability of an exclusion. *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App.3d 795, 799 (2009); see also *Pekin Insurance Co. v. Miller*, 367 Ill. App. 3d 263, 267 (2006). "Exclusion provisions that limit or exclude coverage must be construed liberally in favor of the insured and against the insurer." *Pekin*, 367 Ill. App. 3d at 267. In construing an insurance policy, the primary function of the court is to "ascertain and enforce the intentions of the parties as expressed in the agreement." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). "To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract." *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391. Where

loss (including loss of rents payable to tenant) and against all claims, actions, damages, liability and expenses in connection with *** damage to the Building arising from any occurrence in, upon, or at the premises or any part thereof, occasioned wholly or in part by any act or omission of tenant." This section further requires the tenant to hold the landlord harmless and defend and indemnify "against all action, claims, demands, costs, damages, or expenses of any kind which may be brought or made against the landlord or which landlord may pay or incur by reason of tenant's occupancy of the premises or its negligent performance of or failure to perform any of its obligations under the lease."

No. 1-10-0138

the insurer relies on a provision that it contends excludes coverage to reject a tender of defense, we review the applicability of the provision to ensure it is “ ‘clear and free from doubt’ that the policy’s exclusion prevents coverage.” *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 560 (2000), quoting *Bituminous Casualty Corp. v. Fulkerson*, 212 Ill. App. 3d 556, 564 (1991).

In the present case, the contractual exclusionary provision in ASI’s policy contains an explicit exception stating that “this exclusion does not apply to liability for damages; (1) that [Chicago Import] would have in the absence of the contract of agreement.” As already discussed above, in the context of ASI’s duty to defend, the Gold Realty counterclaim is not based exclusively on any contractual obligations. Rather, Gold Realty can potentially recover from Chicago Import under a common-law negligence tort action, as alleged by the substantive allegations in its counterclaim. In that situation, Chicago Import’s liability would not stem exclusively from the lease, but rather would stem from the fire loss caused by Chicago Import’s alleged negligence. In other words, in the absence of a contractual provision in the lease specifically prohibiting Chicago Import from over-stacking its inventory, liability could nevertheless be found under a common law action for negligence. Accordingly, liberally construing the exclusionary provision in favor of the insured, as we must, we find that because Gold Realty could potentially prove Chicago Import liable for common-law negligence, it is not “clear and free from doubt” that the loss would necessarily fall within the contractual liability exclusion so as to preclude coverage, rather than the exception to that exclusion. *Bituminous Casualty Corp.*, 212 Ill. App. 3d at 564.

ASI nevertheless cites to *Fisher Development, Inc.*, 391 Ill. App. 3d 521, for the proposition that a party cannot avoid the contractual liability exclusion by arguing that liability arose independent of the lease. *Fisher Development*, however, is distinguishable because, unlike in the case at bar, neither property damage nor negligence was alleged therein. *Fisher Development*, 391 Ill. App. 3d at 523. Rather, that case involved a cause of action for moneys paid by Gap, Inc. to injured employees under the Workers' Compensation Act, (*i.e.*, "economic losses") that Gap alleged were covered under an indemnity provision in a construction contract it entered into with Fisher Development, which in turn required coverage by Fisher Development's insurer. *Fisher Development*, 391 Ill. App. 3d at 532. The *Fisher Development* court concluded that the exception to the policy exclusion that was at issue in that case was not founded on any tort liability, but rather that the claim was based exclusively on a contractual obligation, not on any liability that may be imposed by operation of law. *Fisher Development*, 391 Ill. App. 3d at 532. In the present case, as already elaborated in detail above, the liability does not stem exclusively from any contractual obligations under the lease agreement, but rather also potentially from a common-law tort.

4. Indemnification

Accordingly, since we have found that the circuit court properly concluded that under the commercial general liability policy ASI has a duty to defend Chicago Import against Gold Realty's underlying counterclaim, we find that the question of indemnification is not yet ripe for adjudication, and we therefore need not address it. See *Abrams v. State Farm Fire & Casualty Co.*, 306 Ill. App. 3d 545, 549 (1999) ("If the duty to defend exists, the insurer's duty to

No. 1-10-0138

indemnify cannot be determined until the underlying action has been adjudicated”); see also, *Outboard Marine*, 154 Ill. 2d at 127-28 (“[T]he question of whether the insurer has a duty to indemnify the insured for a particular liability is only ripe for consideration if the insured has already incurred liability in the underlying claim against it”); *Zurich Insurance Co. v. Raymark Industries, Inc.* 118 Ill. 2d 23, 52 (1987) (“ ‘The duty to indemnify arises only when the insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy.’”); *Traveler’s Insurance Co.*, 197 Ill. 2d at 293 (2001) (“Once the insured has incurred liability as a result of the underlying claim, an insurer’s duty to indemnify arises only if ‘the insured activity and the resulting loss or damage *actually* fall within the [commercial general liability] policy’s coverage.” (Emphasis in original). [Citation.]”).

III. CONCLUSION

For the aforementioned reasons, we find that the circuit court properly granted summary judgment in favor of Chicago Import and denied summary judgment in favor of ASI.

Affirmed.