2014 IL App (5th) 130353-U

NO. 5-13-0353

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DESIGN CONCRETE FOUNDATIONS, INC., f/k/a Design Concrete of Madison County, Inc.,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellant,	)	
v.	)	No. 09-L-669
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, a/k/a Erie Insurance Group,	)	Honorable Dennis R. Ruth,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in entering a summary judgment in favor of the insurer where the facts alleged in the underlying complaint did not fall within or potentially fall within the policy coverage.

¶ 2 The plaintiff, Design Concrete Foundations, Inc., f/k/a Design Concrete of Madison County, Inc. (Design), filed a complaint against the defendant, Erie Insurance Property and Casualty Company, a/k/a Erie Insurance Group (Erie), and alleged that Erie breached its contract by refusing to defend its insured in an underlying lawsuit involving

the construction of a residence. The complaint also contained a count for breach of fiduciary duty and a count seeking statutory penalties for vexatious conduct pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)). Erie filed a motion for summary judgment and claimed that it had no duty to defend Design because the underlying complaint did not allege an "occurrence" or "property damage" within the meaning of the policy. The trial court found that the factual allegations in the underlying complaint did not fall within, or potentially within, the policy coverage and granted Erie's motion for summary judgment. On appeal, Design challenges the trial court's finding that the alleged construction defect was not an "occurrence" within the policy coverage. It further challenges the entry of summary judgment where the insurer admitted that it refused to take into consideration matters outside the four corners of the complaint in denying coverage. We affirm.

¶ 3 In June 2005, Janet and Walter Waligorski entered into a contract with Leander J. Mathews to build a residential home on a lot in Pocahontas, Illinois. Mathews contracted the foundation work to Design. Design performed its work in August 2005. Sometime after completion of the work, cracks formed in the foundation, allowing water to enter the basement and an inward shifting of the foundation.

¶ 4 In August 2006, the Waligorskis filed a lawsuit against Mathews, Design, and Madison County Title Company, Inc., seeking to recover the sums they paid to repair the faulty foundation. The claims against Mathews and Madison County Title Company are not at issue in this appeal and will not be referenced further in this decision. In the initial complaint, the Waligorskis alleged that Design breached its contract by failing to lay the

concrete foundation and to perform the associated construction in a workmanlike manner. During the litigation, the Waligorskis changed their theory of liability a few times, and finally settled on a breach of implied warranty of habitability. Although the theory of liability changed, the basic allegations did not. The Waligorskis consistently alleged that Design constructed the foundation for their home, and that its failure to perform the construction in a workmanlike manner resulted in the development of cracks in the foundation, which allowed water to enter the basement and an inward shift of the foundation walls. They consistently sought to recover the amount they paid to repair and reinforce the concrete foundation as damages.

¶ 5 Design hired an attorney to review the Waligorski complaint. During the investigation, the attorney learned that Design had purchased a commercial general liability policy (CGL policy) and a commercial liability umbrella policy (umbrella policy) from Erie for this project. On August 2, 2007, Design's attorney sent a letter to Erie to advise that Design was tendering the defense of the Waligorskis' lawsuit to Erie. Design's attorney informed Erie of the status of the litigation and attached copies of the first amended complaint and the first and second amendments to the first amended complaint. He also suggested that the cracks in the foundation were most likely caused by the contractor who performed the backfill operations, and alternatively suggested that it was possible that there was a problem with the concrete supplied by Design's subcontractor.

¶ 6 Design's attorney sent a follow-up letter to Erie on August 29, 2007. In that letter, he stated that Design's role in the construction project was limited to the footings,

basement walls and preparing the basement floor area with rock, and that it was not responsible for pouring the basement floor, garage floor or sidewalks. He advised that A&L Construction had performed backfill operations prior to the installation of the basement floor and the application of the subfloor. He stated that performing the backfill before the basement floor was installed was a mistake and could account for the cracks in the foundation and the shifting of the foundation wall. Counsel noted that A&L was not a subcontractor of Design. He asked Erie to consider that Design's work may have been damaged as a result of the negligence of A&L, as it reviewed policy coverage.

¶ 7 The CGL policy that was issued to Design contains a section addressing the coverage and the exclusions from coverage for bodily injury and property damage. The general coverage provisions state in pertinent part:

> "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. We may, at our discretion, investigate any 'occurrence' and settle any 'claim' or 'suit' that may result.
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> b. This insurance applies to 'bodily injury' and 'property damage' only if:
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> 1. The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory[.]"

¶ 8 The policy identifies several exclusions from the bodily injury and property damage coverage. The policy states that "this insurance does not apply to 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured." It also states that "this insurance does not apply to 'property damage' to 'your work' arising out of it or any part of it and included in the 'products completed operations hazard,' " and that "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."

¶ 9 The policy also contains a section defining terms. "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as: (a) "[p]hysical injury to tangible property, including all resulting loss of use of that property"; or (b) "[l]oss of use of tangible property that is not physically injured." "Your work" is defined as: "[w]ork or operations performed by you or on your behalf; and *** [m]aterials, parts or equipment furnished in connection with such work or operations"; and it includes "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work.' "

¶ 10 The umbrella policy states that it will pay the ultimate net loss in excess of the retained limit because of "bodily injury" and "property damage" to which this insurance applies. It further states that "this insurance applies to 'bodily injury' or 'property damage' only if the 'bodily injury' or 'property damage' " is caused by an "occurrence" that takes place in the coverage territory during the policy period. The definitions of "occurrence"

and "property damage" set forth in the umbrella policy are the same as those in the CGL policy.

¶ 11 On October 18, 2007, Erie notified Design that there was no coverage under either the CGL policy or the umbrella policy because the allegations in the Waligorskis' complaint did not allege an "occurrence" or "property damage," as those terms are defined in the policies. Design then filed this action seeking damages for breach of the insurance contract and breach of fiduciary duty, and statutory penalties for vexatious conduct. Erie filed a motion for summary judgment and argued that there was no insurance coverage and no duty to defend because the underlying complaint did not allege an "occurrence" or "property damage" as those terms are defined in the policy coverage. After considering the oral arguments and the written submissions of the parties, the trial court entered a summary judgment in favor of Erie on all counts. This appeal followed.

¶ 12 Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, when taken in a light most favorable to the nonmoving party, 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(c) (West 2010). The trial court's decision to enter a summary judgment is reviewed *de novo*. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390, 620 N.E.2d 1073, 1077 (1993).

¶ 13 The construction of an insurance policy and the determination of the rights and duties under the policy are questions of law that may be properly considered in a motion

for summary judgment. *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391, 620 N.E.2d at 1077. To determine whether a liability insurer has a duty to defend its insured against a complaint, the court compares the factual allegations in the underlying complaint with the relevant provisions in the insurance policy. *Crum & Forster Managers Corp.*, 156 Ill. 2d at 393, 620 N.E.2d at 1079. If the factual allegations in the complaint, when construed liberally in favor of the insured, fall within, or potentially within, the policy's coverage provisions, the insurer has a duty to defend. *Crum & Forster Managers Corp.*, 156 Ill. 2d at 393, 620 N.E.2d at 1079.

¶ 14 To determine whether Erie had a duty to defend Design in the underlying action, we first consider whether the factual allegations allege an "occurrence" within the meaning of the policy coverage.

¶ 15 By their terms, the CGL and umbrella policies provide insurance for property damage only if it is caused by an "occurrence." Under these policies, an "occurrence" is defined as an "accident," but "accident" is not further defined. In cases involving the construction of CGL policies, courts have defined "accident" as "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character." *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill. App. 3d 404, 409, 777 N.E.2d 986, 990 (2002); *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 703, 661 N.E.2d 451, 455 (1996). The natural and ordinary consequences of an act do not constitute an accident. *Tillerson*, 334 Ill. App. 3d at 409, 777 N.E.2d at 991; *Wil-Freds Construction*, 277 Ill. App. 3d at 703, 661 N.E.2d at 455. Here, the underlying complaint alleged that

Design failed to construct the foundation for the Waligorskis' home in a workmanlike manner, and that the foundation developed cracks as a result of the defective workmanship. Damages were sought to cover the costs to repair and reinforce the foundation. The alleged defects in the concrete foundation are the natural and ordinary consequence of the alleged faulty workmanship. When the work of the contractor is defective and necessitates repairing that work, there is no "accident" and no "occurrence." The underlying complaint does not allege facts constituting an "occurrence" within the meaning of either the CGL policy or umbrella policy that would trigger coverage and a duty to defend.

¶ 16 Next, we consider whether the underlying complaint alleged "property damage" within the meaning of the policy coverage. The policies define "property damage" as physical injury to or loss of use of tangible property. The underlying complaint sought damages for the costs of repair and reinforcement of the foundation which was allegedly caused by Design's faulty construction work. It alleged damage to the foundation itself. It did not allege that defective workmanship resulted in damage to other property. In Illinois, repair and replacement damages are considered economic losses, not property damage. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 312, 757 N.E.2d 481, 502 (2001); *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 54-56, 831 N.E.2d 1, 16-18 (2005); *Tillerson*, 334 Ill. App. 3d at 410, 777 N.E.2d at 991. CGL policies are intended to protect the insured from liability for injury or damage to the person or property of others; they are not intended to pay the costs associated with repairing and replacing the insured's defective work, which

constitute purely economic losses. See *Eljer Manufacturing*, 197 Ill. 2d at 314, 757 N.E.2d at 503 (quoting *Qualls v. Country Mutual Insurance Co.*, 123 Ill. App. 3d 831, 833-34, 462 N.E.2d 1288, 1291 (1984)). After reviewing the underlying complaint and the relevant provisions in the CGL and umbrella policies, we conclude that the underlying complaint did not allege "property damage" caused by an "occurrence" within the meaning of the policy coverage.

¶ 17 Design next claims that it was error to grant summary judgment in favor of Erie because Erie refused to consider unpleaded facts in determining whether there was coverage for the claim. Design contends that Erie should not have been permitted to ignore the true, but unpleaded fact that a different subcontractor damaged Design's foundation work. Under the "true, but unpleaded facts" principle, an insurer has a duty to defend if it possesses knowledge of unpleaded facts which it knows to be correct and which, when taken together with the allegations in the underlying complaint, indicate that the claim is within or potentially within the policy coverage. *Shriver Insurance Agency v. Utica Mutual Insurance Co.*, 323 Ill. App. 3d 243, 247, 750 N.E.2d 1253, 1256 (2001). In this case, the record shows that Design's attorney presented Erie with an unsupported theory that another contractor, who was not a subcontractor of Design, "most likely" caused the damage to the foundation. Neither Design's insurance broker nor Erie's claims' adjustor testified to any facts that would support Design's theory that another contractor's work damaged the foundation. Design did not provide any evidentiary material that would create a factual issue about whether Erie possessed, but ignored, true but unpleaded facts which would have triggered its duty to defend.

¶ 18 Finally, following oral argument, Design filed a motion to supplement the record with material obtained during the discovery process that revealed facts showing that someone other than Design caused damage to the concrete. Erie objected. After reviewing the supplemental material, we do not find that it contains any facts that would support Design's theory that another contractor's work damaged the foundation. Additionally, the material was not before the trial court at the time it ruled on Erie's motion for summary judgment. Therefore, Design's motion to supplement the record is denied.

¶ 19 After reviewing the relevant provisions in the insurance policies and the allegations of the underlying complaint, we conclude that the facts alleged in the underlying complaint did not fall within or potentially fall within the scope of the coverage under the CGL policy or the umbrella policy, and that Erie, consequently, had no duty to defend. In absence of a duty to defend, the trial court did not err in granting summary judgment in favor of Erie on all three counts of the complaint.

¶ 20 Accordingly, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.