SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-004950 12/20/2002

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 12/24/2002

J D STEEL-GREAT WESTERN ERECTORS JOINT

MICHAEL S RUBIN

v.

ARGONAUT INSURANCE COMPANY, et al.

ANGILA L GALLENSTEIN

TERRENCE P WOODS

MINUTE ENTRY

After oral argument this Court took under advisement Defendant Argonaut Insurance Company's Motion for Summary Judgment, Defendant Travelers Insurance Company's Joinder in Argonaut's Motion, and Plaintiff J.D. Steel/Great Western Erectors Joint Venture's Cross-Motion for Summary for Partial Summary Judgment. The basis for Defendant Argonaut's Motion for Summary Judgment (and Travelers' joinder therein) is that there is no coverage under the applicable insurance policy for the damages caused by Plaintiff to the work product of others in the course of Plaintiff remedying its faulty workmanship. On the other hand, Plaintiff's Cross-Motion for Partial Summary Judgment requests that the Court determine, as a matter of law, that Defendants Argonaut and Travelers insurance policies provide coverage for the expenses incurred by Plaintiff for repair and replacement of work and products of others on the Intel project with the amount of such expenses to be determined at trial.

The material facts are not in dispute. Plaintiff entered into a subcontract with non-party Consolidated Rebar, Inc. to install reinforcing steel on a project for the construction of certain offices for the Intel Corporation in Chandler, Arizona. During the actual construction of the project Plaintiff incorrectly installed certain reinforcing steel. The incorrect installation apparently was not discovered until after other subcontractors and trades performed work on the project. In order to remedy the incorrect installation of the reinforcing steel Plaintiff had to remove work of other subcontractors and trades that had been installed in the office project after Plaintiff installed the reinforcing steel. At all relevant times there was in effect an owner controlled commercial general liability policy issued by Defendant Argonaut. The Argonaut

policy provided general liability coverage to various entities, including subcontractors such as Plaintiff. Defendant Travelers Insurance Company also issued a commercial general liability insurance policy that provided general liability coverage to Plaintiff during the relevant period.

The commercial general liability insurance policies in this case provide coverage for "property damage" caused by an "occurrence". The policies define "property damage" as either "physical damage to tangible property, including all resulting loss of use of that property," or "loss of use of tangible property that is not physically injured." The policies also define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Both policies contain nearly identical exclusions providing that the insurance does not apply to "property damage to that particular part of any property (1) on which "you or any contractor or subcontractor working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or (2) that must be restored, repaired or replace because "your work" was incorrectly performed on it…."." The Travelers policy specifically excludes "property damage" expected or intended by the insured.

The threshold question is whether or not under the undisputed facts there has been "property damage" resulting from an "occurrence" as those terms are defined under the policy. Both policies require that the "property damage" be caused by an "accident" but the policies do not define "accident". Webster's defines "accident" as an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result." Webster's Third New International Dictionary 11 (1993). In the context of insurance policies, the event does not have to be a sudden one. But even in its broadest definition "accident" refers to circumstances that were unexpected or unintended from the standpoint of the insured. *High Country Associates v. New Hampshire Insurance Company,* 139 N. H. 39, 44, 648a. 2d 474, 477. In this case the property damage itself was not the result of an unexpected event. The property damage was itself the unintended event. Thus, the property damage was not caused by an accident but rather by the subcontractor's intentional act. Under the plain language of the policies there is no "accident" to constitute an "occurrence" under the policies.

Despite the plain language of the policies, Plaintiff contends that Arizona case law and cases applying Washington and California law support their position that the damages they seek are covered by the policies. But an examination of the case law does not support Plaintiff's contention.

In *USF&G. Corp. v. Advanced Roofing Supply,* 163 Ariz. 476, 786 P.2d 1227 (App. 1990) the Arizona Court of Appeals held that a contractor's faulty workmanship cannot constitute an "occurrence" and that the cost of repairing the faulty workmanship cannot constitute "property damage". *Id. at* 1233-34. In reaching this conclusion the Court examined the nature of a comprehensive general liability policy and concluded that if the policy were construed to cover faulty workmanship the insurer would become the guarantor of the insured's

performance under the contract and the policy would take on the attributes of a performance bond. *Id.* at 1233. The Court stated:

> "The better reasoned authorities hold that mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages."

Plaintiff acknowledges the holding of *USF&G* and concedes that it cannot be reimbursed for the amounts it had to spend to remedy its faulty workmanship. But Plaintiff urges that the language in *USF&G* that faulty workmanship "standing alone" does not constitute an "occurrence" under a commercial general liability policy means that there are situations in which coverage for damage to other subcontractors' work is available for the insured.

To determine what the Court of Appeals in *USF&G* referred to when it concluded that the faulty workmanship "standing alone" does not constitute an occurrence requires an examination of the cases discussed by the court. The Court of Appeals in *USF&G* recognized the split of authority on the issue of whether faulty workmanship, standing alone, can constitute an "occurrence" as defined in a comprehensive general liability policy. In reaching its decision that it cannot, the court specifically rejected a line of cases which hold to the contrary, including *Yakima Cement Products Co. v. Great American Insurance Co.,* 22 Wash. App. 536, 590 P. 2d 371 (1979), rev'd on damages grounds, 93 Wash. 2d. 210, 608 P. 2d 254. *Yakima* formed the basis for the decisions in *DeWitt Const. Inc.v. Charter Oak Fire Ins. Co,* 307 F. 3d 1127, (9th Cir. 2002) and *Baugh Construction Co v. Mission Insurance Company,* 836 F. 2d 1164 (9th Cir. 1988). Because our courts have specifically rejected this line of cases they do not support Plaintiff's position.

Moreover, in rejecting the reasoning of *Yakima* and other similarly decided cases, the Arizona Court of Appeals in *USF&G* embraced as better reasoned the holding in *McAllister v. Peerless Insurance Co.,* 124 N.H. 676, 474 A. 2d 1033 (1984). An examination of that case and a subsequent decision of that same court, *High Country Associates v. New Hampshire Insurance Company,* 139 N. H. 39, 648 A. 2d 474 (1994), clarifies that the faulty workmanship itself must be the cause of the damage to other property in order for the damage to be constitute an "occurrence" for purposes of coverage. Other cases construing similar policy provisions have stated it more succinctly as" faulty workmanship, standing alone, does not constitute an "accident" but "faulty workmanship that causes an accident is covered." *Weedo v. Stone-E.Brick, Inc.,* 81 N. J. 233,239-40, 405 A. 2d 788,796 (1979). Thus, there are circumstances where faulty workmanship that causes physical damage to property can constitute an occurrence for purposes of coverage under a commercial general liability policy. *See e.g. Kalchthaler v Keller Construction Company,* 224 Wis. 2d 387, 395,591 N. W. 2d 169 (App. 1999) (water damage to interior of building cause by faulty construction was physical injury to tangible property within the definition of "property damage" in commercial general liability policy); *L-J, Inc. v. Bituminous Fire and Marine Insurance Company,* 350 S. C. 549, 567 S. E. 2d 489 (App. 2002).(deterioration and failure of roads from repeated water runoff was an "accident" and,

therefore, an "occurrence" within the meaning of a commercial general liability policy). But the physical injury must indeed be the result of an accident caused by faulty workmanship.

Plaintiff also contends that the Arizona Court of Appeals decision in *Continental Ins. Co. v. Asarco, Inc.,* 153 Ariz. 497, 738 P. 2d 368 (App. 1987) supports coverage under the facts of this case. In *Continental* the insured entered into a contract with Asarco to assemble trusses and other parts of a conveyor belt at a mining installation. Asarco has purchased the trusses from a fabricator. Due to the insured's negligence in performing its work, the structure collapsed during the assembly process, damaging the trusses and another structure. The Court in *Continental* did not address whether there had been an "occurrence" for purposes of coverage but instead based its decision on the exclusions of the policy. The policy contained an exclusion for property damage to property " the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured." The Court found that the purpose of the exclusion was to "deny coverage for performance of the contract but to provide it for harm external to the contracted-for performance." What was excluded was the cost of reassembling the fallen structure, not the damage to Asarco's property. Thus, *Continental* dealt not with damages necessitated by the repair of faulty workmanship but rather with faulty workmanship that caused an accident to property other than the work product of the subcontractor. In contrast to the situation here, *Continental* indeed involved an accident that actually caused physical damage to property. There is no discussion by the court of property damage to another subcontractor's work product necessitated by the repairs of the insured's faulty workmanship. However, in reaching its decision the Court commented that "the repair or replacement of that property was necessitated not by faulty workmanship on it but by the collapse of a structure erected with faulty workmanship." Thus, the decision suggests that there would be no coverage for property damages necessitated by the repair of faulty workmanship.

Apparently recognizing that no reported Arizona case squarely addresses the issue presented in this case, both parties have cited Ninth Circuit Court of Appeals decisions in support of their positions. Plaintiff urges that this Court apply the holding in *St. Paul Fire and Marine Ins. Co. v. Sears, Roebuck, and Co.,* 603 F. 2d 780 (9th Cir.) (Cal.) (1979). On the other hand, Defendants urge that the Court apply the holding in *New Hampshire Insurance Company v. Viera,* 930 F. 2d 696 (9th Cir.) (Cal.) (1991). Interpreting similar provisions in a commercial general liability policy, the Court in *Viera* concluded that there was no coverage for subsequent damages to property of others where the damages were necessitated by the repair of the insured's faulty workmanship. In reaching this conclusion, the Court stated:

> "We hold that the nature of the repairs cannot create coverage where none exists. Diminution in value and cost of repair are not two separate harms--they are two different ways of measuring the same harm. If the harm-the [drywall subcontractor's] defective work-is not covered as measured by diminished value, it is not covered as measured by the cost of repair."

Viera, 930 F. 2d at 701-02.

In reaching its decision the court in *Viera* concluded that the decision in *St. Paul* was not applicable for at least two reasons. The court first pointed out that there had been a significant change in the definition of "property damage" contained in standard commercial general liability policies of insurance which took place after the *St. Paul* decision. Unlike the definition of "property damage" in the policy in *St. Paul,* the definition of "property damage" in the policy at issue in *Viera* required "physical injury to or destruction of tangible property…, or loss of use of tangible property which has not been physically injured or destroyed." *Viera* at 930 F.2d at 699. The Court in *Viera* also concluded that *St. Paul* was factually distinguishable because the repairs in *St. Paul* required removing the defective material instead of repairing the defective workmanship by adding drywall. *Viera,* 930 F.2d at 701.

Based upon the undisputed facts of this case, *Viera* rather than *St. Paul* is applicable here. Here, as in *Viera,* no removal of the defective material was necessitated. Additionally, like the policy in *Viera*, the policies at issue in this case both require physical injury to tangible personal property in order for the damage to constitute "property damage. That property damage must be the result of an accident. In this case no property damage occurred until the repairs of the faulty workmanship were undertaken. None of the cases cited by Plaintiff support coverage under the undisputed facts of this case. There is no coverage for damages to work product of other subcontractors on the project where the damages are necessitated by the repair of the insured's faulty workmanship. *Viera,* 930 F.2d at 701. Because there is no coverage under the policies the court need not address the exclusions. Accordingly,

IT IS ORDERED granting Defendant Argonaut Insurance Company's Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Plaintiff J.D. Steel/Great Western Erectors Joint Venture's Cross-Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED that Defendants may file an application for an award of attorneys' fees and costs within twenty days of the date this minute entry is filed by the Clerk of the Court.