Rel: May 24, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170588

Nationwide Mutual Fire Insurance Company

v.

The David Group, Inc.

Appeal from Jefferson Circuit Court, Bessemer Division (CV-08-902856)

SHAW, Justice.

Nationwide Mutual Fire Insurance Company ("Nationwide"), the defendant in a declaratory-judgment action below, appeals from a judgment entered in favor of the plaintiff below, The David Group, Inc. ("TDG"), holding that TDG was entitled to

coverage and indemnification under a commercial general-liability ("CGL") insurance policy issued by Nationwide. We reverse and remand.

Facts and Procedural History

In January 2004, TDG, a construction company that specializes in custom-built houses, remodeling, and construction services, purchased a CGL policy from Nationwide. Under the terms of that CGL policy, Nationwide agreed to "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." According to the policy, its coverage applied to "bodily injury" and "property damage" only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence.'"

In October 2006, while TDG's CGL policy with Nationwide was in effect, Saurin and Valerie Shah purchased a newly built house from TDG. After they moved in, the Shahs began experiencing problems with their new house. Despite TDG's efforts at correcting the problems, however, in February 2008, the Shahs sued TDG.

In their complaint, the Shahs alleged that the house had "severe structural issues" and that they had discovered "numerous and substantial construction defects in the residence including, but not limited to, serious defects resulting in health and safety issues, building code violations, poor workmanship, misuse of construction materials, and disregard of proper installation methods." They also asserted claims of rescission, breach of contract, breach of express and implied warranties, negligence and wantonness, negligent supervision and training, misrepresentation and fraud, suppression, and "gross negligence" and "incompetence." As a result of the purported defects in the house, the Shahs alleged that they "suffered and/or are continuing to suffer damages including, but without limitation[,] repair, and/or replacement costs, loss of the use and enjoyment of areas of their home, loss of market value in their home, mental anguish and emotional distress damages."

Although Nationwide initially defended TDG against the Shahs' action, Nationwide withdrew its defense after conducting its own investigation into the Shahs' allegations. Nationwide explained in a letter to TDG that, based on its

investigation, it concluded that it had no duty either to defend or to indemnify TDG because, according to Nationwide, the damage the Shahs complained of did not constitute an "occurrence" so as to trigger coverage under the CGL policy.

In September 2008, TDG initiated an action against Nationwide seeking a judgment declaring that Nationwide was obligated to defend TDG in the Shahs' action and to indemnify TDG for any judgment entered against it. TDG also requested that all fees and expenses it incurred in defending against the Shahs' action be paid by Nationwide. Finally, TDG sought a preliminary injunction to prevent the Shahs' action from going forward until TDG's case against Nationwide had been resolved.

Despite that request, however, the Shahs' case against TDG proceeded to arbitration, and TDG's case against Nationwide was stayed pending the results of the arbitration proceeding. On October 20, 2009, the arbitrator issued an award in favor of the Shahs in the amount of $12,725.

In July 2011, Nationwide filed a motion for a summary judgment on TDG's claims. In its motion, Nationwide argued, among other things, that TDG's alleged faulty workmanship in

constructing the Shahs' house did not constitute an "occurrence" so as to trigger coverage under the CGL policy. In December 2011, Nationwide filed a renewed motion for a summary judgment, to which TDG responded, and later filed supplemental evidence in support of that motion.

On January 29, 2015, the Jefferson Circuit Court ("the trial court") issued an order denying Nationwide's motion for a summary judgment. In that same order, the trial court also entered a partial summary judgment in favor of TDG on the issue of coverage. Based on the allegations in the Shahs' complaint and the findings in the arbitrator's award, the trial court, applying the reasoning found in this Court's decision in Owners Insurance Co. v. Jim Carr Homebuilder, LLC, 157 So. 3d 148 (Ala. 2014), held that the complaint alleged, and the arbitration award indicated, that there was damage to the Shahs' house that resulted from or was caused by TDG's faulty work. The trial court thus concluded that TDG was entitled to coverage and indemnification under the CGL policy not only for the damages awarded against it in the Shahs' action but also for its attorney fees and expenses incurred in

defending the Shahs' action. The specific amount of damages to which TDG was entitled was not covered in that order.

Between February 2015 and April 2017, the parties filed various motions with the trial court related to damages. On April 19, 2017, the trial court entered a judgment in favor of TDG and assessed damages. Nationwide filed a motion to alter, amend, or vacate that judgment, arguing several grounds. On August 17, 2017, the trial court granted Nationwide's motion and withdrew its April 2017 order after finding, among other things, that it had miscalculated the prejudgment interest it had awarded to TDG. On February 15, 2018, the trial court entered a new final judgment awarding damages. Thereafter, Nationwide appealed.

Standard of Review

"An 'appeal from a pretrial final judgment disposing of all claims in the case ... entitles [the appellant], for purposes of our review, to raise issues based upon the trial court's adverse rulings, including the denial of [the appellant's] summary-judgment motions.'" Barney v. Bell, 172 So. 3d 849, 856 (Ala. Civ. App. 2014) (quoting Lloyd Noland Found., Inc. v. City of Fairfield Healthcare Auth., 837 So. 2d

253, 263 (Ala. 2002)). "[W]hen no oral testimony is presented to the circuit court and the '"'judgment is based entirely upon documentary evidence,'"' the Court reviews the matter de novo." Swindle v. Remington, [Ms. 1161044, March 8, 2019] ___ So. 3d ___, ___ (Ala. 2019) (quoting Weeks v. Wolf Creek Indus., Inc., 941 So. 2d 263, 268-69 (Ala. 2006), quoting in turn Padgett v. Conecuh Cty. Comm'n, 901 So. 2d 678, 683 (Ala. 2004), quoting in turn Alfa Mut. Ins. Co. v. Small, 829 So. 2d 743, 745 (Ala. 2002)).

Discussion

On appeal, Nationwide argues that the trial court erred in finding that TDG was entitled to coverage under the CGL policy and thus entering a judgment in favor of TDG. According to Nationwide, because the "defects" alleged by the Shahs and identified by the arbitrator referred to nothing more than faulty work performed by TDG, those defects were not "occurrences" that would trigger coverage under the CGL policy and, thus, Nationwide was not required to indemnify TDG for the damages awarded against it in the Shahs' action.

As noted above, under the terms of the CGL policy, Nationwide agreed to "pay those sums that [TDG] becomes

legally obligated to pay as damages because of 'bodily injury' and 'property damage' ... only if ... [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory ... [and] occurs during the policy period.'"[1] An "occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although the Nationwide policy does not define the term "accident," this Court has previously stated that, in this context, an "accident" is "'[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could [not] be reasonably anticipated.'" Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006, 1011 (Ala. 2005) (quoting Black's Law Dictionary 15 (7th ed. 1999)).

The Shahs alleged that TDG breached the parties' contract and express and implied warranties by failing to properly

[1]The policy specifically defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of that property" or "loss of use of tangible property that is not physically injured." Additionally, "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

construct their house in a "good workmanlike" manner. Alabama law recognizes an implied warranty of workmanship, i.e., a duty that a contractor will "'use reasonable skill in fulfilling [his] contractual obligations.'" Blackmon v. Powell, 132 So. 3d 1, 5 (Ala. 2013) (quoting Turner v. Westhampton Court, L.L.C., 903 So. 2d 82, 93 (Ala. 2004)). Even when a contractor has completed the work contracted for, the contractor can be held liable for breaching the parties' contract and the implied warranty of workmanship if it failed to use reasonable skill in performing its work. See id.

This Court has repeatedly held, however, that "faulty workmanship itself is not an occurrence" under a CGL policy like the one here. See Town & Country Prop., LLC v. Amerisure Ins. Co., 111 So. 3d 699, 706 (Ala. 2011). Phrased more precisely, "faulty workmanship itself is not 'property damage' 'caused by' or 'arising out of' an 'occurrence.'" Owners Ins., 157 So. 3d at 155. This Court has recognized, however, that faulty work may lead to an occurrence and thus trigger coverage under a CGL policy, "if it subjects personal property or other parts of the [damaged] structure to 'continuous or repeated exposure' to some other 'general harmful condition'

... and, as a result of that exposure, personal property or other parts of the structure are damaged." Town & Country, 111 So. 3d at 706. This concept is consistent with the idea that the purpose of a CGL policy is to protect the insured contractor from tort liability, not to insulate it from its own faulty work.[2] See Town & Country, 111 So. 3d at 707. This means that, although there is no coverage for replacing poor work, there may be coverage for repairing resulting damage caused by the poor work. This necessarily depends on the "nature of the damage" that results from that faulty work. Owners Ins., 157 So. 3d at 153.

For example, when a contractor hired to repair a roof performs the work so poorly that it results in leaks but those leaks cause no damage, there is no "accident" constituting an "occurrence." See Berry v. South Carolina Ins. Co., 495 So. 2d 511, 513 (Ala. 1985). In contrast, when a contractor is hired to repair a roof and his work causes a leak that results

[2]In contrast, a performance bond "'"is intended to insure the contractor against claims for the cost of repair or replacement of faulty work."'" Town & Country, 111 So. 3d at 707 (quoting Essex Ins. Co. v. Holder, 261 S.W.3d 456, 459 (Ark. 2007), quoting in turn Nabholz Constr. Co. v. St. Paul Fire & Marine Ins. Co., 354 F. Supp. 2d 917, 923 (E.D. Ark. 2005)).

in damage to the ceilings, walls, or floors of the building, the resulting damage is an "accident" that is covered. See United States Fid. & Guar. Co. v. Bonitz Insulation Co. of Alabama, 424 So. 2d 569, 573 (Ala. 1982).

A case illustrating this concept is Owners Insurance, supra. In Owners Insurance, the Johnson family hired a contractor to build a new house. After construction was completed and the Johnsons moved in, they began to notice a number of problems with the house relating to water leaking through the roof, walls, and floors that resulted in water damage to several areas of the house. As a result, the Johnsons sued the contractor, alleging breach of contract, fraud, and negligence and wantonness. 157 So. 3d at 150. The action proceeded to arbitration, and the arbitrator issued an award in favor of the Johnsons after finding that several parts of the house were faulty and that damage had resulted from leaks, moisture, and water invasion. 157 So. 3d at 151-52.

At the time of the events underlying the Johnsons' lawsuit, the contractor held a CGL policy issued by Owners Insurance Company ("Owners"). Although Owners initially hired

counsel to defend its insured contractor, it later filed an action seeking a judgment declaring whether, under the CGL policy, it had a duty to defend and indemnify the contractor with regard to the Johnsons' claims. The trial court entered a judgment holding that the arbitrator's award was covered by the policy and that Owners was required to indemnify the contractor. 157 So. 3d at 152.

On appeal, this Court held, among other things, that, although CGL policies are not meant to cover the cost of repairing faulty workmanship, the definition of the term "occurrence" does not itself exclude from coverage additional damage resulting from faulty work. 157 So. 3d at 155-56. See also Moss v. Champion Ins. Co., 442 So. 2d 26 (Ala. 1983) (finding an occurrence when a contractor's poor work on a roof resulted in damage to the plaintiff's attic, interior ceilings, and some furnishings caused by rain entering into the structure), and Bonitz, 424 So. 2d at 573 (holding that negligence in installing a roof did not prevent there from being an "occurrence" when it rained and water leaked through the roof, causing damage to the interior).

In the present case, the Shahs' complaint alleged that there were "numerous and substantial construction defects" throughout their house. Although the Shahs did not specifically describe those "defects" in their complaint, they did allege that those defects were "prevalent throughout the [house]" and included, but were not limited to, "structural issues," "serious defects resulting in health and safety issues, building code violations, poor workmanship, misuse of construction materials, and disregard of proper installation methods." (Emphasis added.) The Shahs alleged that, as a result of those defects, they had incurred "damages," including "repair, and/or replacement costs, loss of the use and enjoyment of areas of their home, loss of market value in the home, mental anguish, and emotional distress damages."

During the arbitration proceedings, both the Shahs and TDG offered a variety of exhibits and witness testimony. The arbitrator made the following findings:

> "3) The [Shahs'] experts failed to prove specifically any defects in the home other than some minor damage;
>
> "....
>
> "6) The Arbitrator finds no mental anguish damages are available to the [Shahs]."

(Emphasis added.) In light of the above findings, the arbitrator awarded damages against TDG "for $10,225.00 which is the total estimate for repairs and $2,500 for the money owed on the 'pool.'"[3]

Applying the law from Owners Insurance, supra, the trial court held that, although the arbitrator's award was not "expressly clear" as to the basis for awarding damages, the Shahs' complaint "sufficiently allege[d] claims other than faulty workmanship and pray[ed] for damages on [those] claims" and that the arbitrator "had the opportunity to find [that] the Shahs suffered damages due to occurrences caused by faulty workmanship." We disagree.

Under Alabama law, the insured--here, TDG--normally bears the burden of establishing that a claim falls within the coverage of the policy. See, e.g., Chandler v. Alabama Mut. Ins. Co., 585 So. 2d 1365, 1367 (Ala. 1991). The Shahs' complaint clearly alleges faulty workmanship, but at no point do the Shahs allege additional or resulting damage to their

[3]Nothing in either the briefs or the record explains what "the money owed on the pool" is referring to. In any event, the phrase "money owed" does not indicate that any damage to the pool resulted from TDG's faulty workmanship.

house or to their personal property as a result of that faulty workmanship.

Additionally, unlike the significant damage resulting from the faulty work found by the arbitrator in Owners Insurance, the arbitrator here specifically determined that the Shahs failed to prove any "defects" in the home "other than" some "minor damage." Although TDG contends that the "minor damage" referred to in the arbitrator's award indicates that the arbitrator believed that there was some damage that resulted from TDG's faulty work, the Shahs' complaint alleged no such damage. The "minor damage" mentioned by the arbitrator appears to actually be a reference to minor construction defects the Shahs' experts did prove. Stated differently, the arbitrator held that the experts failed to prove faulty workmanship ("defects") except for ("other than") "minor damage." This is further evidenced by the fact that the arbitration award does not indicate that any kind of damage to the Shahs' property--personal or otherwise--resulted from "'continuous or repeated exposure' to some other 'general harmful condition.'" Town & Country, 111 So. 3d at 706. Moreover, if the damages awarded for "minor defects"

referenced an award to repair resulting damage, then that would mean that the arbitrator awarded nothing to repair the faulty work referenced in the Shahs' complaint that would have caused such damage.

The record before us does not support the conclusion that the arbitrator found the Shahs to have "suffered damages" because of an occurrence caused by faulty workmanship. Under these circumstances, there is nothing in this case demonstrating that there was property damage or personal injury resulting from an "occurrence" that triggered coverage under the CGL policy.

Conclusion

For the foregoing reasons, we conclude that the trial court erred in finding that TDG was entitled to coverage and indemnification under its CGL policy with Nationwide. Thus, we reverse the trial court's judgment and remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.