

Cincinnati Insur. v. Fab Tech, et al. 03-CV-410-SM 06/24/05
UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

The Cincinnati Insurance
Company,
Plaintiff

v.

Civil No. 03-cv-410-SM
Opinion No. 2005 DNH 096

Fab Tech, Inc., d/b/a Corle
Building Systems; Seacoast
Crane Company, Inc.; Peerless
Insurance Company a/s/o
Crowning Holdings, Inc.;
Federal Insurance Company
a/s/o Lason Systems, Inc.;
and North American Specialty
Insurance Company,
Defendants

O R D E R

The Cincinnati Insurance Company ("Cincinnati") seeks judgment declaring that it is not obligated to defend or indemnify its insured, Fab Tech, Inc. ("Fab Tech"), in a subrogation action brought by Peerless Insurance Company ("Peerless") and Federal Insurance Company ("Federal").¹ It also seeks a declaration that North American Specialty Insurance

¹ The underlying subrogation action will be referred to as "the Peerless action."

Company ("North American")² is obligated to provide Fab Tech a defense against claims arising from the collapse of a building that Fab Tech designed and fabricated for Crowning Holdings, Inc. ("Crowning") while acting as a subcontractor to Seacoast Crane Company ("Seacoast"). Before the court are motions for summary judgment filed by Cincinnati, North American, Peerless, Fab Tech, and Federal.

Summary Judgment Standard

Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "The role of summary judgment is to pierce the boilerplate of the pleadings and provide a means for prompt disposition of cases in which no trial-worthy issue exists." Quinn v. City of Boston, 325 F.3d 18, 28 (1st Cir. 2003) (citing Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000)). When ruling on a party's motion for summary judgment, the court

² North American is the successor in interest to Underwriters Insurance Company, which issued an insurance policy to Fab Tech which is a subject of this litigation. For convenience, that policy is referred to as "the North American policy."

must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. See Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 37 (1st Cir. 2003) (citing Rivera v. P.R. Aqueduct & Sewers Auth., 331 F.3d 183, 185 (1st Cir. 2003)).

Background

On August 14, 1996, Seacoast entered into an agreement with Crowning under which Seacoast constructed an 80-foot by 180-foot pre-engineered building addition for Crowning. The work was to be completed "within 14 weeks of Site Plan Approval by town or issuance of a building permit by Town." (Peerless Mot. Summ. J., Ex. 2 at 1.) The agreement called for the building to be designed, fabricated, and constructed in conformity with the 1990 BOCA Code. (Id. at 7.) The roof was to be capable of bearing a snow load of 42 PSF. (Id.) The total cost was agreed to be \$284,270. (Id. at 2.) The "Bid Price Sheet" completed by Seacoast included the following items and prices: Pre-engineered steel building/All sitework, foundation, excavation and roof, \$224,000; Demolition, \$6,250; Sprinkler System, \$14,150;

Electrical, \$8,835; Heating, \$12,800; Alarms, \$1,035; Paving, \$16,000; and Miscellaneous, \$1,200. (Id. at 14.)

Seacoast subcontracted with Corle Building Systems, Inc.³ for the design and fabrication of the building's component parts by means of a purchase order dated September 6, 1996. (Peerless Mot. Summ. J., Ex. 1.) That purchase order reflected a cost of \$58,365.50 (id. at 3), and included the following special condition: "John Corle [of Fab Tech] has agreed to a six week turnaround on this project. Please deliver no later than Oct. 18, 1996." (Id. at 5.) "The work performed in connection with the addition in question was completed during the time period September of 1996 through February of 1997." (North American Mot. Summ. J., Ex. 1 (First Set of Interrogs. to Seacoast) at 8.)⁴ Under its agreement with Seacoast, Fab Tech designed and

³ Fab Tech is the successor in interest to Corle Building Systems. For convenience, the name "Fab Tech" is used throughout to refer to both entities.

⁴ On this point, Seacoast concedes that "[a]ll work performed by Fab Tech pursuant to the [purchase order] was completed prior to November 8, 1999" and that "[a]ll of [its] work performed in connection with the building and addition was completed prior to November 8, 1999." (North American Mot. Summ. J., Ex. 4 (Seacoast's Resp. to North American's First Set of Reqs. for Admis.) at 2.) Fab Tech has also conceded that its "design and fabrication of the addition, and any additional work

fabricated the component parts of the building addition in Pennsylvania and shipped them to New Hampshire, where the building was assembled by another Seacoast subcontractor, Cyr Construction.

For purposes of resolving the pending questions, it is assumed, but not found, that the building addition Fab Tech designed, and for which it fabricated the component parts, collapsed on March 14, 2001, under a snow load lighter than that specified in both the agreement between Crowning and Seacoast, and the agreement between Seacoast and Fab Tech. At the time of the collapse, Fab Tech was covered under three insurance policies at issue here: (1) an Architects and Engineers Professional Liability Insurance Policy issued by North American (Cincinnati's Mot. Summ. J., Ex. J); (2) a Commercial General Liability policy issued by Cincinnati (Cincinnati's Mot. Summ. J., Ex. E); and (3) a Commercial Umbrella Liability Policy also issued by Cincinnati (Cincinnati's Mot. Summ. J., Ex. F).

performed in connection with said addition, was completed prior to November 8, 1999." (North American Mot. Summ. J., Ex. 5 (Fab Tech's Resp. to North American's First Set of Reqs. for Admis.) at 4.)

On March 20, 2001, Fab Tech filed a notice of occurrence/claim with North American stating, as the occurrence, "[b]uilding manufactured by insured collapsed." (North American's Mot. Summ. J., Ex. 7.) By letter dated November 23, 2001, Target Professional Associates, acting on behalf of North American, denied coverage, explaining:

"[T]he work performed by your company was performed on or about September 16, 1996. The retroactive date of this policy is November 9, 1999. Because the work performed was prior to the policy's retroactive date, there is no coverage for this matter.

We hereby disclaim coverage for this claim. We will provide neither a defense nor indemnity for this matter. You are urged to immediately retain your own private counsel to protect your interests at your own expense.

(North American Mot. Summ. J., Ex. 8.)

Peerless and Federal, however, both paid claims arising out of the roof collapse. The building's owner, Crowning, claimed reconstruction costs of \$366,375.71. (Cincinnati's Mot. Summ. J., Ex. C (Peerless's Answers to Cincinnati's Interrogs.) at 2.) Peerless paid \$346,847.88 on that claim (id.), and paid "additional expenses in the amount of \$66,162.80 for demolition,

\$16,612.13 for stabilization of the building after the collapse, and \$4,519.84 for snow removal and consulting service relating to stabilization after the loss." (Id.) Crowning's tenant, Lason Systems, Inc. ("Lason"), a document storage company, claimed damages related to document drying of \$388,132.46 and "extra expenses resulting from the collapse in the amount of \$777,381.66 for moving the boxes [of documents] to the new warehouse, temporary manpower at the new warehouse, temporary warehouse leasing, moving back to the reconstructed building, and miscellaneous personal property and supplies." (Cincinnati Mot. Summ. J., Ex. D (Federal's Answers to Cincinnati's Interrogs.) at 2.) Federal paid both those claims. (Id.)

By writ of summons dated December 5, 2002, Peerless, as subrogee of Crowning, and Federal, as subrogee of Lason, sued Seacoast and Fab Tech in the New Hampshire Superior Court to recover payments they made to their respective insureds.

The state court writ in the Peerless action alleged:

On or about July 26, 1996, the defendant Seacoast Crane submitted to Crowning Holdings a proposal to construct a prefabricated building as an addition to

the existing masonry and frame building located at 527 Mammoth Road, Londonderry, New Hampshire.

In this proposal, the defendant Seacoast Crane expressly represented that the new addition would be designed, fabricated and constructed with a roof live load of 42 PSF, and further that it would be designed, fabricated and constructed in compliance with the BOCA 1990 Code.

On or about October 5, 1996, plaintiff Crowning Holdings and defendant Seacoast Crane entered into an agreement for the construction of the addition specified in Seacoast Crane's original proposal. A copy of said proposal is attached as Exhibit A.

Defendant Seacoast Crane subsequently subcontracted with defendant Fab Tech, Inc., Corle Building Systems and/or Corle Information Services, Inc. (collectively referred to as the Corle defendants hereinafter) for the design and fabrication of the building's component parts.

Fab Tech and/or the Corle defendants prepared design plans for the building in which they affirmatively represented that the building, as designed, fabricated and constructed would comply with the 1990 BOCA Code, and that it would have a 42 PSF roof snow load.

(Cincinnati Mot. Summ. J., Ex. A at 3-4.) Based upon those factual allegations, Peerless and Federal asserted the following claims against Fab Tech: strict liability, negligence, negligent misrepresentation, violation of N.H. REV. STAT. ANN. § 358-A, breach of express warranties, and breach of implied warranties.

Fab Tech did not provide written notice of the Peerless/ Federal suit to North American, but did provide notice to Cincinnati, which is defending under a reservation of rights. (North American Mot. Summ. J., Ex. 5 at 5-6.)

Cincinnati filed a two-count declaratory judgment action in this court seeking a determination that it has no duty to defend or indemnify Fab Tech in the Peerless action, and a declaration that North American has a duty to defend Fab Tech and is liable to Cincinnati for all or some of the defense costs Cincinnati has already expended.

Discussion

I. Count I: Cincinnati's Obligation to Fab Tech

In Count I of its petition for declaratory judgment, Cincinnati asserts that insurance coverage is not available under either the Commercial General Liability ("CGL") policy or the Commercial Umbrella Policy because: (1) the March 14, 2001, roof collapse was not an "occurrence" as that term is defined by the policies at issue; and (2) coverage is precluded by various policy exclusions including those for damage to: (a) real

property on which Fab Tech worked (exclusion (j)(5) in the CGL policy); (b) property that must be restored because Fab Tech's work was incorrectly performed on it (exclusion (j)(6) in the CGL policy); (c) Fab Tech's product (exclusion (k) in the CGL policy; exclusion 5 in the Umbrella policy); (d) Fab Tech's work (exclusion (l) in the CGL policy; exclusion 6 in the Umbrella policy); and (e) impaired property or property not physically injured (exclusion (m) in the CGL policy).

In its motion for summary judgment, Cincinnati refines its claims somewhat, arguing that: (1) "it does not owe a duty to indemnify Fab Tech against Peerless's entire subrogation claim as this claim is excluded from coverage under both the CGL and Umbrella policies by operation of the 'Damage To Your Product' and/or 'Damage To Your Work' exclusions . . . and does not owe a duty to indemnify Fab Tech against Federal's subrogation claim for expenses incurred in moving boxes into a new warehouse, temporary warehouse manpower, temporary warehouse leasing, and the cost to move boxes back into the building once it was reconstructed." Cincinnati's second argument, that it is not liable for the moving and storage expenses paid by Federal to

Lason, is based upon an assertion that those expenses fall outside the definition of "property damage."

A. Occurrence

Both the CGL policy and the Umbrella policy provide coverage for property damage resulting from occurrences. Both policies define the term "occurrence" to mean "an accident." (Cincinnati Mot. Summ. J., Ex. E at 11; Ex. F. at 12.)

The word "accident" is not defined in the policy, and the term must therefore be interpreted in its usual, ordinary and popular sense. "Webster has defined it as 'an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance, contingency.' Many courts have quoted this definition, and some have added to or embellished it, but in reality few have improved upon it." Lacey v. Washburn & Williams Co., 164 A. 724, 725 [(Pa. 1932)]. This definition is substantially repeated in United States Mutual Accident Ass'n v. Barry, 131 U.S. 100 [(1889)], where it was said that an "accident" within the meaning of an insurance policy is an event "happening by chance; unexpectedly taking place; not according to the usual course of things;" or "not as expected". It seems clear that an accident is the antithesis of something likely to occur, foreseeable in due course. If an occurrence is the ordinary and expected result of the performance of an operation, then it cannot be termed an accident. To constitute an accident, the occurrence must be "an unusual or unexpected result attending the operation or performance of a usual or necessary act or event"; Hey v. Guarantors' Liability Indemnity Co., 37 A. 402 [(Pa.

1897)]. And see Hamilton v. American Indemnity Co., 82 Pa.Super. 191 [(1923)].

M. Schnoll & Son, Inc. v. Std. Accident Ins. Co., 154 A.2d 431, 432 (Pa. Super. Ct. 1959) (parallel citations omitted). Based upon that definition, there can be little doubt that, under Pennsylvania law, the March 14, 2001, roof collapse as described in the Peerless action was an "occurrence" for purposes of determining coverage under the Cincinnati CGL and Umbrella policies.

B. Exclusion (j) (5)

The CGL policy contains an exclusion for "[p]roperty damage" to "[t]hat particular part of real property on which [the insured] or any contractors or subcontractors working directly or indirectly on [the insured's] behalf are performing operations, if the 'property damage' arises out of those operations."

(Cincinnati Mot. Summ. J., Ex. E. at 3.) Here, it is undisputed that neither Fab Tech nor any contractors or subcontractors working for Fab Tech performed any operations on any real property that suffered property damage for which claims have been

made against the CGL policy. Thus, exclusion (j)(5) does not bar coverage.

C. Exclusion (j)(6)

The CGL policy contains another exclusion for “[p]roperty damage” to “[t]hat particular part of any property that must be restored, repaired or replaced because ‘[the insured’s] work’ was incorrectly performed on it.” (Cincinnati Mot. Summ. J., Ex. E at 3.) However, that “exclusion does not apply to ‘property damage’ included in the ‘products-completed operations hazard.’” (Id.) In turn the

“[p]roducts-completed operations hazard” includes all . . . “property damage” occurring away from premises [the insured] own[s] or rent[s] and arising out of “[the insured’s] product” or “[the insured’s] work” except:

- (1) Products that are still in [the insured’s] possession; or
- (2) Work that has not yet been completed or abandoned.

(Id. at 11.) Because the property damage alleged in this case arose out of the failure of work that had been completed by Fab Tech and/or products that had left Fab Tech’s possession, and arose away from any premises owned or rented by Fab Tech, Fab

Tech is seeking coverage for property damage included in the "products-completed operations hazard," which takes its claim outside the limits of exclusion (j)(6).

D. The "Your Product" exclusion

Both the CGL policy and the Umbrella policy contain exclusions for "'property damage' to 'your product' arising out of it or any part of it." (Cincinnati Mot. Summ. J., Ex. E at 3, Ex. F. at 2.) The term "your product" is defined as follows:

"Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) [the insured];
 - (2) Others trading under [the insured's] name; or
 - (3) A person or organization whose business or assets [the insured has] acquired; and
- b. Containers (other than vehicles), materials, parts, or equipment furnished in connection with such goods or products.

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

(Id., Ex. E at 11-12; Ex. F at 13-14.)

Cincinnati asserts that Peerless's subrogation claim is precluded by the "your product" exclusion, because Fab Tech is seeking coverage for a claim arising out of property damage to its product, i.e., the building components it designed and fabricated for Crowning, under contract to Seacoast. Peerless contends that the "your product" exclusion is inapplicable, because once Fab Tech's components were assembled and the building was complete, the components became real property and, thus, fell outside the definition of "your product." Cincinnati does not contest that argument.

Pennsylvania law describes the relationship between personalty and real property as follows:

Chattels used in connection with real estate can fall into one of three categories. Clayton v. Lienhard, 167 A. [321,] 322 [(Pa. 1933)]. First,

chattels that are not physically attached to realty are always personalty. Id. Second, chattels which are annexed to realty in such a manner that they cannot be removed without materially damaging either the realty or the chattels are always fixtures. Id. at 322. The third category consists of those chattels that are physically connected to the real estate but can be removed without material injury to either the land or the chattels. Id. at 322. When a chattel falls into the third category, its status as a fixture or as personalty depends upon the "objective intent of the [owner] to permanently incorporate [the] chattel into real property, as evidenced by the proven facts and surrounding circumstances entered into evidence." Noll v. Harrisburg Area YMCA, 643 A.2d 81, 88 (1994).

Lehmann v. Keller, 684 A.2d 618, 621 (Pa. Super. Ct. 1996)

(parallel citations omitted).

Here, it is undisputed that the product Fab Tech provided to Seacoast was a building, or more properly, the design and fabrication of the component parts thereof. It is similarly undisputed that the component parts provided by Fab Tech were, in fact, assembled, resulting in a finished building. Cincinnati does not argue, nor could it reasonably argue, that the Fab Tech components constituted chattels rather than fixtures at the time of the roof collapse. Because Fab Tech's product had become a fixture, that is, "an article . . . of personal property which has been so annexed to the realty that it is regarded as part and

parcel of the land," id. (quoting Smith v. Weaver, 665 A.2d 1215, 1218 (Pa. Super. Ct. 1995)), it is not subject to the "your product" exclusion. See Nat'l Union Fire Ins. Co. v. Structural Sys. Tech., Inc., 756 F. Supp. 1232, 1239 (E.D. Mo. 1991) (holding that a radio tower, once constructed, became "a fixture of the real property onto which it [was] attached" and, therefore, not subject to CGL policy "your product" exclusion).

E. The "Your Work" Exclusion

Both the CGL policy and the Umbrella policy contain exclusions for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" (Cincinnati Mot. Summ. J., Ex. E at 3-4; Ex. F. at 2.) The term "your work" is defined as follows:

"Your work" means:

- a. Work or operations performed by [the insured] or on [the insured's] behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

- b. The providing of or failure to provide warnings or instructions.

(Cincinnati's Mot. Summ. J., Ex. E at 12; Ex. F at 14.)

In its petition and in its motion for summary judgment, Cincinnati argues that Peerless's subrogation claim is entirely precluded by the "your work" exclusion, because Fab Tech is seeking coverage for a claim arising out of property damage to its work, i.e., the building components it designed and fabricated for Crowning, under contract to Seacoast. Peerless concedes that "[t]he cost of the unassembled structural steel building components supplied by [Fab Tech] is included in the Your Work exclusions set forth in the Cincinnati primary and excess policies and, therefore, Cincinnati has no duty to indemnify Fab Tech . . . for the cost of the structural steel used in the replacement building . . ." Thus, Peerless seeks a declaration that, should it prevail in the underlying action, Cincinnati must indemnify Fab Tech for \$308,010.21. That figure is derived by subtracting the cost of the Fab Tech components (\$58,365.50) from the total cost of rebuilding Crowning's

building (\$366,375.71).⁵ In its objection to defendants' motions for summary judgment, Cincinnati appears to concede that some of the property damage caused by the roof collapse falls outside the "your work" exclusion, and suggests that its liability to pay a judgment against Fab Tech should not include the cost of the components provided by Fab Tech or the costs of stabilizing and demolishing the building after the collapse.

Given the parties' positions, there appears to be no dispute. They agree that Cincinnati is not liable for the value of the Fab Tech building components, and they agree on a value of \$58,365.50. And Peerless does not appear to press a claim for the costs of stabilization or demolition. Thus, all agree that Cincinnati must indemnify Fab Tech against Peerless's subrogation claims to the extent those claims arise from property damage to elements of the building other than the components that

⁵ Peerless argues, in the alternative, that "Cincinnati must provide indemnity to Fab Tech . . . for the fair and reasonable cost of the replacement building, including but not limited to: a) the cost of concrete, demolition, electrical, heating, ventilation and air conditioning, plumbing, as well as the cost of managing, supervising and erecting the steel building metal components."

constitute Fab Tech's work. In other words, the portion of Count I pertaining to the "your work" exclusion is moot.

F. Exclusion (m)

The CGL policy contains an exclusion for damage to impaired property or property not physically injured. Cincinnati cites that exclusion in its petition for declaratory judgment, but does not do so in its motion for summary judgment. More importantly, in its objection to the summary judgment motions filed by Peerless, Federal, and Fab Tech, Cincinnati does not mention Exclusion (m), leading the court to conclude that Cincinnati no longer intends to rely upon that policy provision.

G. Property Damage

As noted above, Cincinnati seeks to avoid liability for the moving and storage expenses incurred by Lason as a result of the roof collapse, arguing that those "extra expenses" do not qualify as "property damage" under the policies at issue.

In both the CGL policy and the Umbrella policy, the term "property damage" is defined as follows:

"Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Cincinnati Mot. Summ. J., Ex. E at 11; Ex. F at 13.)

Cincinnati appears to concede that it is obligated to cover the costs Lason incurred in drying documents that were damaged as a result of the roof collapse, but contends, without citation to any relevant authority, that the costs of moving Lason's property to and from an alternate storage facility, and the costs of alternate storage during the reconstruction of the damaged building, are not associated with "property damage" under the policy. Federal, naturally, disagrees.

While the precise issue raised by Cincinnati, i.e., its obligation to cover economic damages resulting from property damage, has not been addressed by the Pennsylvania Supreme Court,

it has been addressed in a decision by the Pennsylvania Court of Common Pleas. Mattiola Construction Corp. v. Commercial Union Insurance Co., 60 Pa. D. & C.4th 412 (Pa. Ct. Com. Pl. 2002), involved a CGL policy worded identically to the CGL policy in this case. The court held in Mattiola Construction that liquidated damages Mattiola was obligated to pay on account of delays created by damage it did to a bridge were covered by its CGL policy, because that policy, like the CGL policy at issue here, provided coverage for "sums that the insured becomes obligated to pay as damages because of . . . 'property damage' to which this insurance applies." (Cincinnati Mot. Summ. J., Ex. E at 1 (emphasis added).) Liquidated damages were covered by the policy in Mattiola Construction because the construction company was obligated to pay damages arising from the property damage it inflicted on the bridge. So too here. If Fab Tech is obligated, as a result of the Peerless action, to pay the costs Lason incurred in moving and storing documents because of the damage inflicted on those documents (and the building in which they were stored) then those costs are damages Fab Tech is legally obligated to pay because of property damage to which the Cincinnati CGL policy applies.

The conclusion that Cincinnati is obligated, under Pennsylvania law, to cover economic damages resulting from covered property damage follows directly from the resolution in Mattiola Construction, and it is consistent with holdings in several other jurisdictions. See, e.g., Jacob v. Russo Builders, 592 N.W.2d 271, 277 (Wis. Ct. App. 1999) (explaining, in suit by homeowner against builders for faulty construction that “damages such as relocation costs . . . represent . . . costs associated with addressing and correcting that situation . . . which can be recovered in tort, and . . . are covered by West Bend’s CGL policy”); Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 306 (Colo. 2003) (“We find no authority showing that liability cannot include a mix of property damages and other kinds of damages.”); Amerisure Ins. Co. v. ML & Assocs., Inc. (In re ML & Assocs., Inc.), 302 B.R. 857, 861 (Bankr. N.D. Tex. 2003) (granting insured’s motion for summary judgment on theory that loss of use of building due to damage to the building was covered “property damage”).

If Federal obtains a judgment against Fab Tech in the Peerless action, Cincinnati will be obligated to indemnify Fab

Tech for expenses arising from Lason's efforts to repair damage to documents it stored, as well as expenses involved in dealing with the loss of use of the damaged building during its reconstruction, including reasonable costs associated with moving documents to and from a temporary storage facility and of leasing any such facility. The latter expenses were incurred because of property damage to which the insurance applies, and qualify as property damage in their own right, because they arose from loss of use occasioned by physical injury to tangible property. In other words, Lason's "extra expenses" are covered by the plain language of the CGL policy.

To summarize, regarding Count I, Cincinnati is obligated to indemnify Fab Tech for any damages it must pay Peerless for property damage to those portions of Crowning's building that fall outside the "your work" exclusion, i.e., all the building components not fabricated by Fab Tech, and Cincinnati is also obligated to indemnify Fab Tech for the full ranges of damages it must pay Lason for drying documents, moving documents to and from a temporary storage facility, and operating that temporary facility.

II. Count II: North American's Duty to Fab Tech

In Count II, Cincinnati asserts that it has no obligation to defend and indemnify Fab Tech in the Peerless action, but North American does have such an obligation. As a result, Cincinnati says North American is liable for defense costs Cincinnati has already incurred in defending the Peerless action in state court.

All agree that the North American policy issued to Fab Tech was a "claims made" policy - one that required North American to defend claims made against Fab Tech for "wrongful acts" committed during the policy period, or "prior to the **policy period** but on or after the **retroactive date**, if any" (Cincinnati's Mot. Summ. J., Ex. J at 10.) The policy included a retroactive date of November 8, 1999. (Id. at 1.) Cincinnati argues that because the Peerless complaint did not specify precisely when Fab Tech allegedly committed the wrongful act(s) for which it was being sued, North American was obligated to defend Fab Tech until a court determined that Fab Tech's wrongful act(s) occurred before the retroactive date. North American counters that it was relieved of any obligation to defend Fab Tech as soon as it determined that the wrongful act for which Fab Tech sought

coverage - its design and fabrication of the building that collapsed - took place before the retroactive date stated in the policy. North American is correct.

Under Pennsylvania law, an "insurer's obligation to defend is fixed solely by the allegations in the underlying complaint," Erie Ins. Exch. v. Muff, 851 A.2d 919, 926 (quoting Aetna Cas. & Sur. Co. v. Roe, 650 A.2d 94, 98 (Pa. Super Ct. 1994)), and "the insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true." Id. (citation omitted). However, "[n]ot all claims asserted against an insured . . . activate the insurer's duty to defend." Id. "The duty to defend is limited to only those claims covered by the policy." Aetna, 650 A.2d at 98 (citing D'Auria v. Zurich Ins. Co., 507 A.2d 857, 859 (Pa. Super. Ct. 1986)) (emphasis in the original). Finally, "the duty to defend remains with the insurer [only] until it is clear the claim has been narrowed to one beyond the terms of the policy." Bd. of Pub. Educ. v. Nat'l Union Fire Ins. Co., 709 A.2d 910, 913 (Pa. Super. Ct. 1998) (citing Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 652 (Pa. Super. Ct.

1994); Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 953-54 (Pa. Super. Ct. 1992)).

Here, the writ of summons in the Peerless action alleges no conduct of any kind by Fab Tech that took place on or after November 8, 1999, the retroactive date established in the policy North American issued to Fab Tech. To the contrary, the writ incorporated by reference a copy of the agreement between Crowning and Seacoast, the general contractor, which called for Seacoast's work - which necessarily included Fab Tech's work - to be completed within fourteen weeks of site plan approval or issuance of a building permit. The complaint alleges no facts that would support a finding that the municipal approval process delayed the construction process such that any of Fab Tech's work (as Seacoast's subcontractor) took place on or after November 8, 1999. Thus, the allegations in the underlying complaint, even if proven true, are insufficient to bring the Peerless claim within the coverage of North American's policy.

In Cincinnati's view, the failure of the Peerless complaint to "set forth any allegations that conclusively establish when

Fab Tech completed its duties relative to the design, fabrication and construction of the building at issue . . . [creates] the potential that Peerless and/or Federal can obtain recovery against Fab Tech based upon a 'wrongful act' after November 8, 1999, thereby triggering [North American]'s duty to defend." Cincinnati bases its argument on both the well-established proposition that "[a]n insurer's duty to defend is a distinct obligation, different from and broader than its duty to indemnify," Erie, 851 A.2d at 925 (citation omitted), and the novel proposition that North American may only be relieved of its duty to defend by a judicial determination that the Peerless claims are outside the scope of coverage.

Pennsylvania courts have repeatedly held that the duty to defend is broader than the duty to indemnify. See, e.g., Erie, 851 A.2d at 925; Board of Public Education, 709 A.2d at 913; Aetna, 650 A.2d at 98; Britamco, 636 A.2d at 651; D'Auria, 507 A.2d at 859. But, as Aetna explains, the duty to defend is broader than the duty to indemnify in the following specific way: "An insured has purchased not only the insurer's duty to indemnify successful claims which fall within the policy's

coverage, but also protection against those groundless, false, or fraudulent claims regardless of the insurer's ultimate liability to pay." 650 A.2d at 98 (citation omitted). But while an insurer has a duty to defend against both meritorious and meritless claims, its duty to defend is not so broad that it is obligated to defend against claims alleging injuries that fall outside the policy's coverage.

Rather, the insurer has a "duty to defend . . . [only] until it is clear the claim has been narrowed to one beyond the terms of the policy." Board of Public Education, 709 A.2d at 913 (citation omitted). Here, it was clear to North American over a year before the Peerless action was filed that Fab Tech had committed no potentially actionable wrongful acts on or after the retroactive date. And, indeed, the Peerless writ contained no factual allegations concerning any relevant acts by Fab Tech occurring on or after November 8, 1999.⁶ If the Peerless writ had alleged acts by Fab Tech after the retroactive date, then,

⁶ The correctness of North American's determination that no possible claim against Feb Tech could be within the terms of the policy was confirmed by the uncontradicted admissions of both Seacoast and Fab Tech that their work on the building that collapsed was fully completed prior to November 9, 1999.

perhaps, North American would have been obligated to provide a defense up to the point when the Peerless action no longer contained any claims based upon acts by Fab Tech occurring on or after the retroactive date. But that is not this case.

There is no suggestion in any of the cases applying the rule stated in Board of Public Education that an insurer is obligated to provide a defense until a court determines that a claim lies beyond the terms of the relevant insurance policy. In an opinion cited by the Pennsylvania Superior Court, Judge Learned Hand once explained that “[i]n most cases . . . it will not be difficult for the insurer to compel the injured party to disclose whether the injury is within the policy; and, if it transpires that it is not, the insurer need go on no longer.” Lee v. Aetna Cas. & Sur. Co., 178 F.2d 750, 752 (2d Cir. 1949) (cited in Stidham, 618 A.2d at 954); see also, Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994) (applying Pennsylvania law) (“[The] duty to defend remains with the insurer until facts sufficient to confine the claims to liability not within the scope of the policy become known to the insurer.”) (emphasis added, citations omitted); Charter Oak Fire Ins. Co. v. Sumitomo Marine & Fire Ins. Co., 750

F.2d 267, 272 (3d Cir. 1984) (applying Pennsylvania law) (explaining that insurer is relieved of its duty to defend "until it can confine the claim to a recovery excluded from the scope of the policy") (emphasis added, citations omitted).

Finally, the theory on which North American relies - that the Peerless writ's silence regarding when Fab Tech's alleged wrongful acts occurred creates the possibility that they occurred on or after the retroactive date, thereby imposing upon North American a duty to defend - has been rejected by at least one Pennsylvania court. In Aetna, a teacher, her husband, and a fellow teacher were sued by a set of parents, on behalf of their children, for committing, "inter alia . . . [various] specific acts of sexual, physical and mental abuse." 650 A.2d at 96. Two of the underlying defendants, a teacher and her husband, made a claim for defense and indemnification on their comprehensive homeowners insurance policy. Id. at 97. The insurer, in turn, sought a declaratory judgment and argued, on summary judgment, that it was relieved from its duty to provide a defense by the policy's exclusions of coverage for bodily injuries that are expected or intended by the insured, and personal injuries

resulting from criminal acts. Id. In ruling against the insureds, the Pennsylvania Superior Court rejected their argument that even though the underlying complaint enumerated only intentional criminal acts, its use of the phrase "inter alia" created the possibility that the underlying plaintiffs might also be attempting to recover damages for other unenumerated unintentional non-criminal acts which would be outside the scope of the policy exclusion. Id. at 98 ("Aetna was bound, appellants submit, to remain in the action until any ambiguity which arose from the use of the proviso "inter alia" was resolved. . . . We disagree.").

Because the facts alleged in the Peerless writ did not implicate the coverage provided by the policy North American issued to Fab Tech, and because it is undisputed that Fab Tech's design and fabrication of the building was completed before November 8, 1999, North American is not obligated to defend Fab Tech against the Peerless action. Accordingly, North American is entitled to Summary Judgment on Count II.

III. Attorneys' Fees

Relying upon N.H. REV. STAT. ANN. ("RSA") § 491:22-b, Fab Tech requests attorneys' fees, while Federal, without citation to authority, seeks reasonable costs and attorney's fees.

Cincinnati objects to both requests, arguing that: (1) it is not liable for Fab Tech's fees because it never denied coverage to Fab Tech and because it will prevail in the declaratory judgment action; and (2) it is not liable for Federal's costs and fees because there is no legal basis for deviating from the general rule that each party is responsible for its own attorneys' fees and costs.

Turning first to Fab Tech's request, RSA 491:22-b provides that "[i]n any action to determine coverage of an insurance policy pursuant to RSA 491:22, if the insured prevails in such action, he shall receive court costs and reasonable attorneys' fees from the insurer." Cincinnati's declaratory judgment action founded on diversity jurisdiction, naming Fab Tech as a defendant, plainly qualifies as "action to determine coverage of an insurance policy pursuant to RSA 491:22," and Cincinnati does not contest the applicability of RSA 491:22-b to the facts of

this case. Rather, Cincinnati contends that Fab Tech is not entitled to attorneys' fees because Cincinnati never denied coverage and, in fact is currently defending Fab Tech in the Peerless action subject to a reservation of rights.

There is no requirement that an insured must suffer a denial of coverage before it is entitled to an award under RSA 491:22-b. Moreover, there can be no doubt Cincinnati, by defending Fab Tech under a reservation of rights and by claiming in this action that it has no duty to defend or indemnify Fab Tech, has disputed coverage. Fab Tech has been forced to litigate against Cincinnati in order to obtain the insurance coverage to which it is contractually entitled. In other words, the mere fact that Cincinnati has not formally denied coverage to Fab Tech is no bar to an award of attorneys' fees under RSA 491:22-b. Cf. Binda v. Royal Ins. Co., 144 N.H. 613, 616-17 (2000) (holding that RSA 491:22 "does not, as Binda suggests, require an actual denial of coverage by an insurer before an insured must seek a determination of coverage or risk being time-barred"). Because the absence of a formal denial of coverage is no bar to obtaining an award of attorneys' fees, and because Fab Tech has prevailed

in this action, Fab Tech is entitled to court costs, if any, and reasonable attorneys' fees from Cincinnati.

Federal, however, is not entitled to an award of costs and attorneys' fees from Cincinnati. While Federal has prevailed in this action, Federal stands in the shoes of its subrogor, Lason, and Lason is not an "insured" vis à vis Cincinnati. RSA 491:22-b limits shifting of costs and fees to insureds who prevail in suits seeking to obtain coverage from their insurers. Cf. Liberty Mut. Ins. Co. v. Home Ins. Indem. Co., 117 N.H. 269, 271-72 (1977) ("The purpose of RSA 491:22-b (Supp. 1975) is to protect consumers against wrongful refusal of insurance companies to provide coverage.") (citation omitted). Rather than being Cincinnati's insured, or subrogated to Cincinnati's insured, Federal a/s/o Lason is in effect bringing a tort claim against Cincinnati's insured (Fab Tech). Federal, therefore, is like the underlying tort claimant who was denied costs and attorney's fees from the tortfeasor's insurance company in Providence Mutual Fire Insurance Company v. Scanlon, 138 N.H. 301, 307 (1994) (citing Am. Home Assur. Co. v. Star Speedway, Inc., 119 N.H. 954, 955 (1979)). In other words, for purposes of its dispute with

Cincinnati, Federal is not a consumer of insurance, but a claimant against Cincinnati's insured, and, because it is not seeking to enforce coverage under a policy issued to it by Cincinnati, Federal is not entitled to costs or fees under RSA 491:22-b.

IV. Findings of Fact

In its motion for summary judgment, Peerless asks the court to issue an order finding that "[t]he roof of the building located at 527 Mammoth Road, Londonderry, New Hampshire failed on March 14, 2001" and that "[t]he roof failed due to inadequately sized purlin clips." Cincinnati objects on grounds that Peerless is asking this court to decide factual matters that are uncontested in this action, but disputed in the underlying Peerless action. The legal issues in this case have been resolved without the necessity of deciding the two factual issues identified by Peerless. Accordingly, the court declines to make the requested findings. See, Howard v. Hartford Ins. Co., 127 N.H. 727, 730 (1986) (quoting U.S. Fid. & Guar. Co. v. Johnson Shoes, Inc., 123 N.H. 148, 154 (1983)) (explaining that this

court's factual findings would have preclusive effect in the underlying action).

Conclusion

Cincinnati's motion for summary judgment (document no. 61) is denied. North American's motion for summary judgment (document no. 62) is granted. Peerless's motion for summary judgment (document no. 63) is granted. Fab Tech's motion for summary judgment (document no. 64) is granted. Federal's motion for summary judgment (document no. 66) is granted in part and denied in part. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

Steven J. McAuliffe
Chief Judge

June 24, 2005

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