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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

NAVIGATORS SPECIALTY INSURANCE COMPANY, Plaintiff, vs. MOOREFIELD CONSTRUCTION, INC., Defendants.	Case No. 30-2011-00492111 ~~[PROPOSED]~~ **STATEMENT OF DECISION** Action Filed: July 19, 2011 Trial Date: March 17, 2014

This action came on regularly for trial on March 17, 2014, in Department C20 of the Superior Court of Orange County, the Honorable David Chaffee presiding; plaintiff Navigators Specialty Insurance Company ("Navigators") appearing by attorneys Robert L. Sallander, Jr. and Robin L. Thornton of Greenan, Peffer, Sallander & Lally LLP; defendant Moorefield Construction, Inc. ("Moorefield") appearing by attorneys Richard A. Soll of Mahoney & Soll, LLP and Dennis N. Jones of Myers, Widders, Gibson, Jones & Feingold, LLP.

The Court issued its tentative decision by minute order dated May 27, 2014. Thereafter, Defendant made a formal request for statement of decision. Many questions raised in the statement of decision were addressed previously in the Court's tentative decision. Therefore, the Court incorporates much of that language in the following Statement of Decision in response to Defendant's request:

The Court, having taken the above-entitled matter under submission on March 27, 2014 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented and submitted, rules as follows:

Navigators filed this action seeking reimbursement of amounts paid on behalf of its insured, Moorefield, to defend and settle an underlying action, titled *JSL Properties, LLC v. D.B.O. Development No. 28*, Tulare County Superior Court, Visalia District Case No. 10-235780. JSL Properties, LLC ("JSL") filed the underlying action against the predecessor owner of a Best Buy building, DBO Development No. 28 ("DBO"), and Moorefield, as the building's builder ~~developer~~, after JSL's tenant, Best Buy, withheld rents to repair floor covering failures at its store. Moorefield tendered the action to its insurer, Navigators, who agreed to defend Moorefield under a reservation of rights. *See* Exhs. 56 and 62. The underlying action ultimately settled, with Navigators contributing $1,000,000 toward the settlement on Moorefield's behalf. Exh. 64.

At bottom, this is a relatively simple and straightforward insurance coverage case. The issue to be decided is whether the failure of certain floor coverings installed in a large retail building constructed by Defendant was an event covered by the policy of insurance issued by Plaintiff under the specific and unique facts presented. *See Blue Ridge Ins. Co. v. Jacobsen*

(2001) 25 Cal. 4th 489. (Issues relating to the duty to pay defense costs for the litigation of *potentially* covered claims under *Buss v. Superior Court* (1997) 16 Cal. 4th 35 are rendered moot as later discussed herein). Ultimately, the Court concludes that no such coverage exists under the facts elicited during trial.

The evidence reveals that carpet tiles and vinyl flooring were installed over a recently poured concrete slab at the direction of Defendant. The sub-contractor for these floor coverings, Solo Flooring, conditioned its installation upon the execution of a waiver indicating that "Moorefield and Best Buy understand that, due to the high moisture of the above-mentioned job that there is no warranty for materials and that Solo Flooring, Inc. will not be held responsible for any moisture related problem." Exh. 114. The "waiver" was executed on or about 8-22-2003.

The construction project, to build a Best Buy "big box" store, came with a Project Manual (Exh. 6) that included specifications for the installation of floor coverings. In particular, the Project Manual specified: "Ensure concrete floors are dry (maximum 5 lbs. Per 1000 s.f. moisture content), free of curing compounds and hardeners, and exhibit negative alkalinity, carbonization, or dusting." Exh. 6-506. See also Exh. 6-510.

Construction of this project commenced in February, 2003, and was completed October 22, 2003. Tests conducted by Krazan & Associates, Inc. a geotechnical engineering and environmental engineering company, between 7-30-2003 and 8-2-2003, showed moisture content of the concrete slab to range between 7.42 and 9.48 lbs. Exh. 11.

Some five to six years later the floor coverings, both carpet and vinyl began to fail as the adhesives released sufficient for pealing and separation of individual tiles and large areas of tiles. Prior to the underlying litigation, Best Buy hired Dr. Rene Luft, P.E., to investigate the source of the flooring issues. Navigators subsequently hired Dr. Luft as its expert in this action. Testing in or about 2009 by Dr. Luft showed moisture content in the concrete ranging from 5.4 to 10.6 lbs. Exh. 18. Dr. Luft concluded, based upon his testing and his direct observation of the conditions on site that the failure of the floor coverings was directly caused by excessive concrete slab moisture from original construction. Opposing testimony from Geoffrey Hichborn, the

Defendant's expert engineer was to the effect that the failure of the floor coverings could be attributed to roof leaks resulting in water accumulating on the floor and migrating under the floor coverings. Mr. Hichborn did not directly observe or inspect the failed flooring at the Best Buy building and based his opinions largely on criticisms of Dr. Luft's analysis and testing methodologies. In this instance, the Court finds the testimony of Dr. Luft to be entirely credible and reliable; indeed convincing and worthy of great weight. The Court finds Mr. Hichborn's testimony falls generally under the heading of mere speculation, and no weight was given to his opinions as to the cause of the flooring failure.

The evidence shows that Defendant was under a contractual obligation to deliver the completed structure to Best Buy by a date certain or face severe financial penalties for each day of delay. *See* Ex. 9. Testimony indicated the deadline for completion of construction may have been extended from August to October. In any case, the deadline loomed. Presented with this "Hobson's choice," Defendant elected to take the risk of having the floor coverings installed immediately to allow for store opening in October rather than wait an extended period for the concrete to eliminate more of its moisture content. Indeed, Michael Moorefield, a principal of the Defendant Company, testified that in his experience it is "safe" to install these types of floor coverings despite the high moisture content as failures are rarely experienced.

In this case, however, Best Buy having experienced the floor coverings failure, Moorefield tendered the claim to its insurer, Plaintiff Navigators, for the lawsuit filed by Best Buy against Moorefield. Under a reservation of rights Navigators provided a defense and ultimately paid the policy limit of $1,000,000 in settlement of Best Buy's lawsuit. In its investigation Navigators learned for the first time of the waiver and order to install the floor coverings over the moist concrete slab. Based in large part on this information, Navigators concluded that the floor coverings failure was no "accident" within the terms or meaning of the policy of insurance it had issued to Moorefield. The Court agrees.

The Navigators' policies limit coverage to "bodily injury" or "property damage" caused by an "occurrence". Exhs. 1-4. The policies define "occurrence" to mean "...an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Id. Defendant seeks to create coverage where none exists by emphasizing its lack of intent to cause the sustained harm, i.e, the failure of the floor coverings, or its expectation that such harm would not occur. As made clear in *State Farm General Insurance Co. v. Frake* (2011) 197 Cal. App. 4th 568, the insured's intent and expectations is not the test.

In *Frake,* several friends engaged in "a game of consensual 'horseplay' that involved 'hitting each other in the groin and other areas of the body.'" *State Farm General Insurance Co., supra,* 197 Cal. App. 4th at 571. This was a game that the friends had engaged in "countless times in the past." *Id.* at p. 578. After the incident in question involving the insured, the friends continued to walk around and interact for several days without mention that any had sustained injury or discomfort. The insured was later notified that his friend had sustained serious injury as a result of the insured having struck him in the groin. The friend requested reimbursement of his medical expenses and ultimately filed suit against the insured alleging negligence, assault and battery and intentional infliction of emotional distress. The insured tendered the claim to his insurer.

The insured stated in the investigation of his claim that he did not intend to cause harm or pain to his friend. The insurer agreed to defend pursuant to a reservation of rights, stating its position that it did not believe the incident fell within the policy coverage because the act of its insured was "purposeful, deliberate conduct which does not qualify as an accident under the policy." *State Farm General Insurance Co., supra,* 197 Cal. App. 4th at 574.

The *Frake* court restated California law that "'the term 'accident' does not apply to an act's consequences, but instead applies to the act itself.'" *State Farm General Insurance Co., supra,* 197 Cal. App. 4th at 579 (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal. App. 4th 715, 750; *see also Fire Ins. Exchange v. Superior Court* (2010) 181 Cal. App. 4th 388, 395. The court continued:

> [t]hese cases make clear that "[a]n accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent and unforeseen happening occurs that produces the damage." [Citations.] As recently explained by the Fourth District, "[w]here the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury. [Citations]. The insured's subjective intent is irrelevant. [Citations.] Indeed, it is well established in

> California that the term 'accident' refers to the nature of the act giving rise to liability; not the insured's intent to cause the harm. [Citations.]
>
> *Id.*

The language of the policy in *Frake* is substantially the same as in the instance case. Like the defendant in *Frake*, Defendant here deliberately performed an act, which later resulted in injury. The causal relationship between Defendant's conduct here and the harm alleged by Best Buy was not interrupted by any additional, unexpected, independent, or unforeseen happening. Regardless of whether the Defendant intended to cause harm, an accident and, by extension, coverage under the policies does not exist under those circumstances.

Put simply, had Navigators been in a position to know about the problematic installation of the floor coverings, it likely would have specifically excluded the coverings, or the failure thereof, from its policy. Instead, Defendant elected to proceed with installation knowing that the moisture content exceeded design specifications and knowing that the installer required a waiver to do the installation. Under such circumstances, Defendant cannot simply pass its liability on to an insurer whose policy contemplates compliance with product and construction design specifications.

Navigators is entitled to reimbursement of the entire $1,000,000 sum it contributed toward settlement on Moorefield's behalf. Defendants argue, but have not proven that a portion of this sum may have been intended to compensate JSL, DBO and/or Best Buy for their attorneys' fees. Even if Defendants had proved their contention, this does not reduce Navigators' entitlement to reimbursement. Therefore, Defendant's emphasis on the supplementary payments provision and an allocation of the settlement amount to further parse its liability to Navigators in this action is misplaced.

As relevant here, the supplementary payments provision obligates an insurer to pay costs taxed against its insured. The underlying case was settled and no costs were taxed against Defendant. For purposes of this analysis, however, the Court will assume, without ruling on the legal issue, that costs included within a settlement are synonymous with "costs taxed against the insured."

The obligation under the supplementary payments provision extends only to costs, and then only where the requirement to pay such costs arises from potentially covered claims. *State Farm General Ins. Co. v.Mintarsih* (2009) 175 Cal. App. 4th 274. While not dispositive on the legal question of whether the attorney's fees exposure in the underlying action was a damages or costs exposure, the Court notes that Defendant's attorney in the underlying case analyzed it as an issue of damages, not costs:

> ...the provisions of the Owner-Contractor Agreement clearly establish that MOOREFIELD is exposed to the probability of those damages because this litigation includes claims that MOOREFIELD's construction of the project failed to comply with the plans and specifications of the project thereby rendering the construction work "defective". (See §§ 12, 12.1 and 14.7.) In fact, both JSL and DBO are directly alleging, and will likely prove, that MOOREFIELD was negligent in its construction by allowing (or requiring) the installation of the flooring materials atop the concrete slab floor at a time when the moisture levels excessed the allowed level under the specifications and industry standards.
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> Exh. 63.

This underscores a key element in Defendant's argument under the supplementary payments clause on which Defendant offered no evidence and which Defendant did not address in its briefing. Moreover, Defendant has not proven by a preponderance of the evidence what portion, if any, of Navigators' settlement payment was attributable to costs.

Regardless, the obligation to pay the costs, if any, included within the settlement only arises where the obligation to pay costs arises from a potentially covered claim, which is not the case here. Rather, Moorefield's potential liability arose from a non-covered claim.

Navigators also seeks reimbursement of its costs in defending in the underlying action by paying for attorneys who defended Moorefield. However, the evidence provided during the instant trial on the costs expended by Navigators to defend Moorefield in the underlying action, or rather the lack of such evidence, prevents an award of defense expenses to Navigators and makes moot any issue relating to the duty to pay such expenses.

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Judgment shall be for Plaintiff Navigators in the amount of $1,000,000 plus costs and interest at the legal rate from the date of payment in settlement of the underlying claim by Best Buy.

JUL 22 2014

Dated: _____, 2014

Hon. David Chaffee
Judge of the Superior Court

PROOF OF SERVICE

I, the undersigned, hereby declare:

I am employed in the County of Contra Costa, State of California in the office of a member of the bar of this court, at whose direction the following service was made. I am over the age of 18 and not a party to this legal action. My business address is: Greenan, Peffer, Sallander & Lally, 6111 Bollinger Canyon Road, Suite 500, San Ramon, California 94583.

On the date given below, from the business address indicated above, I served a true and correct copy of:

[PROPOSED] STATEMENT OF DECISION

on the interested parties in this matter by enclosing said document(s) in a sealed envelope, addressed as follows:

(SEE ATTACHED SERVICE LIST)

[X] **[BY MAIL]** I am readily familiar with the business practice of Greenan, Peffer, Sallander & Lally for collection and processing of correspondence for mailing with the United States Postal Service, wherein the correspondence would be deposited with the United States Postal Service that same day, in the ordinary course of business. I served such envelope(s) in accordance with said business practice. [CCP §1013(a)]

[ ] **[BY FACSIMILE]** I placed said document(s) to be transmitted via facsimile to the party (ies) at the facsimile number(s) indicated. Said transmission was reported as complete and without error by the transmitting machine. A copy of the transmission report is attached hereto. [CRC 2.300 et seq., CCP §1013(e)(f)]

[ ] **[BY OVERNIGHT DELIVERY]** I caused such envelope(s) to be deposited with or in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier of said carrier, delivery fees paid or provided for, to be delivered the next business day. [CCP §1013(c)]

[X] **[BY ELECTRONIC SERVICE]** I caused such document(s) to be transmitted electronically to the party (ies), at the electronic mailing address(es) indicated. Said transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **June 26, 2014** at San Ramon, California.

Patricia Voight

SERVICE LIST

NAVIGATORS SPECIALTY INS. CO. v. MOOREFIELD CONSTRUCTION, INC.
(Orange County Superior Court Case No. 30-2011-00492111)

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