

DISTRICT COURT

INSURANCE: Policy excluded contract/intentional tort claims, no duty to defend against house construction counterclaims despite asserted "negligence"... Tucker.

Murphy Homes sued Marilyn Mueller & Patrick Aberle in a dispute over construction of their home. Mueller/Aberle counterclaimed for slander of title and breach of contract. A Boulder jury awarded Murphy \$366,100 actual damages and \$366,000 punitives against Mueller/Aberle and rejected their counterclaims (MLW 3/19/05:4). Murphy held policies with Mountain West Farm Bureau and TIE. TIE defended Murphy. Mountain West did not defend Murphy. TIE now seeks contribution from Mountain West for TIE's defense of Murphy. Both insurers request summary judgment.

Allegations in a complaint against the insured determine whether there is coverage under the policy. If there is no coverage under terms of the policy based on the facts in the complaint, there is no duty to defend. Burns (Mont. 1988). Mueller/Aberle alleged 6 counts in their counterclaim against Murphy.

Count I, slander of title. Mueller/Aberle alleged that Murphy filed an improper, fraudulent, and baseless construction lien, which constituted malicious publishing of a false matter that brings in question or disparages the title to their property. Mountain West's policy provides coverage only for "bodily injury," "property damage," "advertising injury," and "personal injury." No "bodily injury" is alleged by Mueller/Aberle. Disparagement of their title does not constitute physical injury or loss of use of tangible property. Thus they did not suffer "property damage." Although "personal injury" and "advertising injury" include defined types of slander and libel, there is no doubt that there is no coverage for slander of title to a home. Therefore, Mueller/Aberle's slander of title claim alleges injuries that are not covered under Mountain West's policy. Accordingly, it had no duty to defend Murphy on their slander of title claim.

Count II, breach of contract. Mueller/Aberle alleged that Murphy breached the construction contract. They alleged that Murphy exceeded the agreed total price, did not achieve substantial completion, failed to limit labor costs to the agreed rate, improperly exercised discretion in discharging contractual obligations, and failed to furnish efficient business administration. Thus the gravamen of their breach of contract claim is that Murphy failed to perform its contractual obligations. Mountain West's policy clearly excludes coverage for "damages by reason of the assumption of liability in a contract or agreement." Accordingly, it had no duty to defend Murphy on the breach of contract claim.

Count III, breach of the implied covenant of good faith & fair dealing. "Every contract, regardless of type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract." Story (Mont 1990). The policy clearly excludes coverage for contract claims. Accordingly, Mountain West had no duty to defend Murphy on the claim for breach of the covenant of good faith & fair dealing.

Count IV, negligence. Mueller/Aberle alleged that "the negligence of Murphy Homes substantially increased the overall costs, including but not limited to roofing deficiencies; failure to monitor drywall installation (which resulted in deficiencies including but not limited to window frames and doors out of alignment with the drywall, and a lack of metal edging along exposed wooden beams); the main water line buried at an insufficient depth; gas and power lines improperly located where a retaining wall was to be placed; and faulty door installations (with thresholds lower than floor level)." The amount charged by Murphy for work on Mueller/Aberle's house is the cost. Contract theory is the jurisprudential method to determine liability for cost overruns, third-party performance, etc. It is inescapable that "overall costs" relates to the amount agreed to in the construction contract. All of the allegations in Mueller/Aberle's list refer to work Murphy was supposed to perform under the contract. The performance allegations combined with the phrase "increased the overall costs" alleges a breach of the contract. "Roofing deficiencies" is the only term that may involve some theory other than breach of contract. Upon first examination it might possibly refer to damage to the preexisting roof, in which case Mueller/Aberle may have asserted a negligence claim. However, Black's defines "deficiency" as "a lack, shortage, or insufficiency," and Webster's defines it as "lacking in some quality, faculty, or characteristic necessary for completeness; not up to a normal standard." Lack of quality and completeness are terms asserting lack of performance. Lack of performance is a breach of contract claim. Therefore "roofing deficiencies" must refer to Murphy's alleged inadequate performance or omission under terms of the contract. The assertion that Murphy omitted acts regarding a roof cannot at the same time mean it committed acts regarding a roof. Thus "roofing deficiencies" cannot refer to damage committed to an already existing roof. Therefore Mueller/Aberle did not allege that Murphy committed negligence. The fact that "roofing deficiencies" is included in a lengthy list of claims for contract remedies is further indication that it is likewise a contract claim. The policy that "if there is no coverage under the terms of the policy based on the facts contained in the complaint, there is no duty to defend" ensures that deft attorneys do not establish coverage for acts that a policy was never intended to cover simply by ambiguous or creative pleadings. The mere fact that negligence is recited in Mueller/Aberle's complaint does not necessarily mean that they have stated an action for negligence. The facts in their complaint clearly demonstrate that their counterclaim did not do so. Accordingly, Mountain West had no duty to defend where no negligence was asserted.

Count V, fraud. Mueller/Aberle alleged that Murphy fraudulently induced it to enter into the construction contract, that it intended them to act on a false & material representation, and that they suffered injury or damage as a result of reliance on its representations. The Mountain West policy clearly excludes coverage for intentional injuries. Accordingly, it had no duty to defend against Mueller/Aberle's fraud claim.

Count VI, tortious interference with contractual relations. Mueller/Aberle alleged that after John Murphy walked off the project he wrongfully & falsely ordered subcontractors to pull out and refused to let them return until he was paid for amounts he claimed. They contended that his actions were intentional and calculated to cause them damage. However, intentional or expected injury is excluded from coverage. Accordingly, Mountain West had no duty to defend against Mueller/Aberle's claim of tortious interference with contractual relations.

The Mountain West policy language clearly excludes coverage for Mueller/Aberle's claims. Liberal construction does not assist TIE. Summary judgment for Mountain West.

Truck Ins. Exchange v. Mountain West Farm Bureau Mutual Ins., Jefferson DV-04-10320, 3/9/06.

Marshal Mickelson (Corette, Pohlman & Kebe), Butte, for TIE, substituted following briefing by Rick Anderson (McKeon & Anderson), Butte; Randall Nelson (Nelson & Dahle), Billings, for Mountain West.