



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWES
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÉ L. BUGG

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIAREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

July 14, 2020

Henry C. Spalding, III
Michael G. Matheson
ThompsonMcMullan, P.C.
100 Shockoe Slip, Third Floor
Richmond, Virginia 23219
Counsel for Plaintiff

C. Thomas Brown
Erik B. Lawson
Silver & Brown, P.C.
10621 Jones Street, Suite 101
Fairfax, Virginia 22030
Counsel for Defendants

Re: *Erie Insurance Exchange v. Spalding Enterprises, Inc. et al.*
Case No. CL-2020-4535

Dear Counsel:

This matter is before the Court on cross motions for summary judgment as filed by Plaintiff Erie Insurance Exchange (hereinafter “Plaintiff” or “Erie”) and Defendants Spalding Enterprises, Inc. (hereinafter “Spalding Enterprises”), Gregory Spalding and Dennis Spalding (hereinafter “Defendants” or collectively “Spalding”). The Court is called upon to determine a singular issue in resolving both motions:

Whether Spalding Enterprises’ commercial general liability policy obligates Erie to provide coverage for the acts Hsin Yen alleges against Spalding in CL-2019-15681?

The Court has considered the briefs in support and in opposition of each motion, the stipulated facts agreed to by the parties for the purposes of resolving these motions, and the

OPINION LETTER

arguments made by counsel at the hearing on June 26, 2020. Having reviewed the foregoing, the Court determines that the acts alleged in Hsin Yen's complaint fall beyond the scope of the insurance policy at issue. The facts as alleged do not implicate an occurrence as contemplated by the policy. Therefore, the Court grants summary judgment in favor of Erie.

BACKGROUND

The events culminating in today's Opinion Letter begin with Hsin Yen's (hereinafter "Mr. Yen") filing of CL-2019-15681 in this Court, styled *Hsin Yen v. Spalding Enterprises, Inc., et al.* Filed on November 15, 2019, Mr. Yen alleged that his home suffered damage during a structural fire. Having insured the home through Erie Insurance Group, the insurance company put Mr. Yen in contact with Gregory Spalding of Spalding Enterprises in February of 2019 to facilitate repair of the home. Spalding Enterprises had previously been designated a vendor by the insurance company representative.

Gregory Spalding represented to Mr. Yen that his company could complete the project and could do so by the end of October 2019. Yen Compl. ¶ 14. The parties had continuing dialogue, during which time Dennis Spalding of Spalding Enterprises also introduced himself to Mr. Yen. Due in part to the representations as to competence and timeliness, Mr. Yen hired Spalding Enterprises to repair his home. Yen Compl. ¶¶ 18-19. Repairs began in March of 2019. Yen Compl. ¶ 28.

Gregory Spalding continually represented to Mr. Yen that the project would be complete no later than October of 2019. After hiring, Mr. Yen paid a \$300,000 deposit to Spalding Enterprises on August 18, 2019, based upon representations of project progress. In September of 2019, however, Gregory Spalding told Mr. Yen that the project would not be completed until November of 2019. Mr. Yen thereafter terminated Spalding Enterprises on September 8, 2019, due to the deadline change, and because of alleged misrepresentations associated with an allegedly fraudulent plumbing quote Gregory Spalding gave to Mr. Yen. Yen Compl. ¶¶ 18-27. Mr. Yen alleged that "Defendants engaged in a fraudulent scheme to induce Mr. Yen into hiring Spalding Enterprises as general contractor and to obtain and retain the \$300,000 Deposit from Mr. Yen." Yen Compl. ¶ 42. Mr. Yen brought five counts seeking compensatory and punitive damages: Count I (Breach of Contract), Count II (Actual Fraud), Count III (Constructive Fraud), Count IV (Violation of the Virginia Consumer Protection Act), and Count V (Unjust Enrichment).

Faced with a lawsuit, Spalding Enterprises turned to its own insurance carrier, Erie, and filed a claim for coverage under its CGL policy. Erie denied coverage, stating that the claims Mr. Yen brought were not an "occurrence" as contemplated under the policy. Moreover, if an occurrence had been alleged, exclusions based upon Expected or Intended Injury and Contractual Liability excluded coverage. At an impasse, Erie filed this case seeking declaratory judgment that Erie has no duty to defend or indemnify Spalding Enterprises with respect to Mr. Yen's

lawsuit, and for a determination that the CGL policy does not provide coverage for the claims asserted.

These motions for summary judgment followed.

STANDARD OF REVIEW

Arising under the Rules of the Supreme Court of Virginia, Rule 3:20, “[s]ummary judgment upon all or any part of a claim may be granted to a party entitled to such judgment when no genuine issue of material fact remains in dispute, and the moving party is entitled to judgment as a matter of law. A grant of summary judgment must be based upon undisputed facts established by pleadings, admissions in pleadings, and admissions made in answers to requests for admissions. Additionally, the trial court must consider inferences from the facts in the light most favorable to the non-moving party” *Andrews v. Ring*, 266 Va. 311, 318 (2003) (citations omitted).

“[I]t is a well-established principle, consistently applied in this Commonwealth, that only the allegations in the complaint and the provisions of the insurance policy are to be considered in deciding whether there is a duty on the part of the insurer to defend and indemnify the insured.” *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 616-617 (2012). “This principle is commonly known as the ‘eight corners rule’ because the determination is made by comparing the ‘four corners’ of the underlying complaint with the ‘four corners’ of the policy, to determine whether the allegations in the underlying complaint come within the coverage provided by the policy.” *Id.* at 617.

“An insurer’s duty to defend . . . is broader than [the] obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.” *Id.* (quoting *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 252 Va. 265, 268-269 (1996)). “On the other hand, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend.” *Id.* at 617.

“[C]ourts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document.” *Seal v. Erie Ins. Exchange*, 277 Va. 558, 562 (2009) (quoting *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158 (1993)). “[C]ourts . . . have been consistent in construing the language of such policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it. Where two constructions are equally possible, that most favorable to the insured will be adopted. Language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Nusbaum & Company, Inc.*, 227 Va. 407, 411 (1984)).

ANALYSIS

Erie's first basis for denying coverage – that Mr. Yen's complaint does not allege facts falling within the risk of the CGL policy – is dispositive.

The policy provides as to coverage:

- a. "We will 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. We will have the right to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result. . . .
- b. This insurance applies to 'bodily injury' and property damage only if:
 1. The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'" Policy I.1.(a), (b)

The parties do not dispute whether the allegations implicate bodily injury or property damage; they spar solely on the issue of whether the complaint alleges facts constituting an "occurrence."

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Policy V.13.

Interpreting an almost identical occurrence definition, the Supreme Court of Virginia has said that "[t]he terms 'occurrence' and 'accident' are 'synonymous and . . . refer to an incident that was unexpected from the viewpoint of the insured.'" *AES Corp.*, 283 Va. at 618 (quoting *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 147 (1982)). An accident is "an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated." *Id.* at 617-618 (quoting *Lynchburg Foundry Co. v. Irvin*, 178 Va. 265, 271 (1941)).

An occurrence-based policy anticipates accidental conduct – accordingly, "[a]n intentional act is neither an 'occurrence' nor an 'accident' and therefore is not covered by the standard policy." *AES Corp.*, 283 Va. at 618 (quoting *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 147 (1982)). Succinctly put, "[i]f a result is the natural or probable consequence of an insured's intentional act, it is not an accident." *Id.* at 618.

Intentional acts, however, do not always bring an incident beyond the scope of an occurrence-based policy. "[E]ven though the insured's action starting the chain of events was intentionally performed, when the alleged injury results from an unforeseen cause that is out of the ordinary expectations of a reasonable person, the injury may be covered by an occurrence policy provision." *AES Corp.*, 283 Va. at 618. In such instances, "the dispositive issue in determining whether an accidental injury occurred is not whether *the action* undertaken by the insured was intended, but rather whether *the resulting harm* is alleged to have been reasonably

anticipated or the natural or probable consequence of the insured's intentional act." *Id.* Where an intentional act is at issue, the Court must focus its inquiry on the harm as it relates to the intentional act. "For coverage to be precluded under a CGL policy because there was no occurrence, it must be alleged that the result of an insured's intentional act was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that objectively, the result was a natural or probable consequence of the intentional act." *Id.*

The parties here focus most of their efforts on the question of whether Count III – alleging constructive fraud – falls within or beyond the scope of an occurrence-based policy. Both proffer substantial foreign authority in support of their respective positions as to this issue of first impression. This case is nevertheless resolved on the basis of settled maxims of Virginia law.

The Court's analysis begins with a review of constructive fraud's elements in the Commonwealth:

[T]he elements of a cause of action for constructive fraud are a showing by clear and convincing evidence that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of his reliance upon the misrepresentation. . . . Additionally, a finding of . . . constructive fraud requires clear and convincing evidence that one has represented as true what is really false, in such a way as to induce a reasonable person to believe it, with the intent that the person will act upon this representation.

Blair Const., Inc. v. Weatherford, 253 Va. 343, 346 (1997) (quoting *Mortarino v. Consultant Eng. Services*, 251 Va. 289, 295 (1996) (internal citations and quotation marks omitted)).

With these elements in mind, Mr. Yen pled the following with respect to constructive fraud:

64. In the alternative to Count II, the Defendants negligently and/or mistakenly misrepresented their competence and ability to perform the work required for the Project.

65. The Defendants' representations regarding their competence and ability to perform the work required for the project was false when made.

66. The Defendants *intended for Mr. Yen to rely on their misrepresentations as an inducement for their agreement to engage the Spalding Enterprises through the General Contractor Agreement, and to continue in the performance of such agreement so that they could obtain and retain the \$300,000 Deposit. They were made in conjunction with the solicitation of the agreement to commence work and were specifically made in order to induce Mr. Yen to utilize*

Defendants' services or the services of business entities which Defendants Greg Spalding and Dennis Spalding controlled, owned, or worked for.

67. The competence and ability of Defendants and their willingness and intention to perform under the agreement, as referenced above, was material to Mr. Yen's agreement to engage Defendants for the Project.

68. Mr. Yen reasonably relied upon the representations of the Defendants to his detriment.

69. As a direct and proximate result of the Defendants' actions, Mr. Yen has been damaged.

Yen Compl. ¶¶ 64-69 (emphasis added).

Constructive fraud, by definition, requires an intentional act – a misrepresentation must be made with intent to induce belief and reliance. Irrespective of whether the misrepresentation's content was arrived at intentionally or accidentally, intent to induce reliance upon and action on the objectively false statement are elements which must be proven. Accordingly, Mr. Yen pled requisite intentional acts, as emphasized above.

As previously stated, when an intentional act is at issue, “[f]or coverage to be precluded under a CGL policy because there was no occurrence, it must be alleged that the result of an insured's intentional act was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that *objectively, the result was a natural or probable consequence of the intentional act.*” *AES Corp.*, 283 Va. at 618 (emphasis added). Here, Mr. Yen's detrimental reliance is unquestionably a natural or probable consequence of the misrepresentations made upon which Mr. Yen was intended to rely. It follows that any alleged constructive fraud in the complaint is not an occurrence under Spalding Enterprises' CGL policy with Erie.¹

Given this determination, Defendants' arguments that either fraudulent inducement or non-willful violations of the Virginia Consumer Protection Act provide alternate occurrence allegations must fail. “[A] false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, is always ground for rescission . . . [and] is also ground for an action for damages.” *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 362 (2010). While fraud cannot be predicated on unfulfilled promises or statements as to future events generally, fraudulent inducement may be premised upon promises with a present intent not to perform them. *Id.* at 362-363. In the most favorable light to Spalding, fraudulent inducement requires pleading of making an objectively false statement which has the result of

¹ The Court need not determine whether all acts of constructive fraud fall beyond the definition of an occurrence. Rather, the Court need only focus on whether constructive fraud as pled in this case qualifies as an occurrence contemplated under the CGL policy. It does not.

inducing contract formation. Considering the allegations in Mr. Yen's complaint, even if the false statements were innocently made, they were made intentionally to induce a contract, and had the natural consequence of inducing contract formation and resultant damage. Thus, the acts complained of are not an occurrence, even if fraudulent inducement has been properly pled.

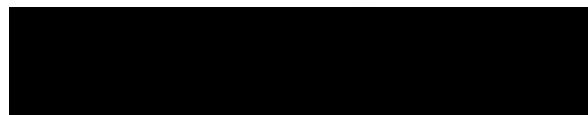
Turning to the Virginia Consumer Protection Act, Mr. Yen's complaint alleges that Spalding violated certain provisions of the Act in a "knowing and willful" manner. Yen Compl. ¶¶ 73-74. Contrary to Spalding's position, Count IV's allegations explicitly reject any inference that conduct violating the Act was unintentional. Considering these allegations in the context of the complaint as a whole, Count IV does not allege an occurrence. Even were the Court to consider the allegations contained in Count III under the lens of the Virginia Consumer Protection Act, the result remains the same. Assuming *arguendo* that the Act provides for non-willful recovery, the analysis remains bound to determining whether the facts alleged support an occurrence upon which judgment may result. There are no allegations of unintentional representations here, nor does Mr. Yen suggest that Defendants did not intend to induce reliance. Mr. Yen clearly asserts that while Defendants may have mistakenly or negligently arrived at the content of their representations, their making the representations was intentional with a single designed outcome: to induce reliance. That reliance and detriment resulted was not an accident. Count III does not factually plead the possibility of an occurrence, even if considered under the framework of the Virginia Consumer Protection Act.

Having reviewed Mr. Yen's complaint and the provisions of the applicable CGL policy under the "eight corners" rule, the Court determines that none of the allegations, if proved, fall within the risk of the policy's coverage for an occurrence. This finding is dispositive of the motions for summary judgment; therefore, Erie's arguments as to exclusion provisions within the policy are rendered moot.

CONCLUSION

For the reasons previously discussed, the Court grants Erie's Motion for Summary Judgment, and denies Spalding's Motion for Summary Judgment. An Order consistent with this Court's opinion is enclosed.

Sincerely,

A solid black rectangular redaction box covering the signature of Daniel E. Ortiz.

Daniel E. Ortiz
Circuit Court Judge

VIRGINIA



IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ERIE INSURANCE EXCHANGE,)
)
 PLAINTIFF,)
)
 V.)
)
 SPALDING ENTERPRISES, INC. ET AL.,)
)
 DEFENDANTS.)

CASE NO. CL- 2020-4535

ORDER

THIS CAUSE came to be heard on June 26, 2020, on Cross Motions for Summary Judgment.

IT APPEARING for the reasons set forth in the Court’s Opinion Letter issued contemporaneously with this Order that the allegations contained in Hsin Yen’s Complaint against Defendants are beyond the scope of coverage of the CGL policy at issue; it is therefore

ORDERED that Plaintiff’s Motion for Summary Judgment is GRANTED, and Defendants’ Motion for Summary Judgment is DENIED.

THIS CAUSE IS ENDED.

ENTERED this 14 day of July, 2020.

 Judge Daniel E. Ortiz /

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.