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**STATE OF VERMONT
WASHINGTON COUNTY, SS.**

**SUPERIOR COURT
WASHINGTON COUNTY**

TRAVELERS INDEMNITY COMPANY,)
Plaintiff,)
)
v.)
)
J.A. MCDONALD, INC.; ACADIA)
INSURANCE COMPANY; and CITY)
OF BARRE, VERMONT,)
Defendants.)

**Washington Superior Court
Docket No. 419-8-01 Wncv**

Decision on Defendant Acadia's Motion for Summary Judgment

The City of Barre (City) contracted with J.A. McDonald, Inc. (McDonald), general contractor, in 1994 to make improvements on a dam in the Town of Orange which is part of the City's reservoir. This case concerns insurance issues arising out of problems from that project including, largely, the failure of a shotcrete coating applied over the exterior of the spillway wall of the dam.

The City eventually filed two lawsuits as a result, one in 1997 against McDonald and another in 1998 against others. McDonald sought a defense from Travelers Indemnity Company (Travelers) and Acadia Insurance Company (Acadia) under separate commercial general liability (CGL) policies. The Travelers CGL policy extended from December 10, 1994 to December 10, 1995 while the Acadia CGL policy extended from December 10, 1995 to the present. Travelers initiated a defense for McDonald under a reservation of rights and then filed this declaratory judgment action. The first count of this action essentially alleges that Travelers has neither a duty to defend nor a duty to indemnify McDonald. The second count essentially alleges that Acadia is liable to Travelers for a pro-rata share of defense and indemnity costs if those obligations do exist. Acadia has always disclaimed a duty to indemnify and has never provided McDonald with a defense.

Acadia has filed a motion for summary judgment arguing that as a matter of law under the terms of its policy it has neither a duty to defend nor a duty to indemnify. Since Acadia filed its motion, the underlying claims have settled. Both Travelers and Acadia contributed relatively small amounts to the total settlement. At this point, Travelers no longer seeks a pro-rata share of indemnity costs from Acadia, but does still seek a share of defense costs, which were substantially larger than the cost of settlement.

As between Travelers and Acadia in the current posture of this case, the overriding issue is whether the complaint against McDonald triggered Acadia's duty to defend. "We have often explained that an insurer's duty to defend is broader than its duty to indemnify." City of

Burlington v. National Union Fire Ins. Co., 163 Vt. 124, 127 (1994), citing Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 366 (1992). “Generally, the insurer’s duty to defend is determined by comparing the allegations in the complaint of the underlying suit to the terms of coverage in the policy. If any claims are potentially covered by the policy, the insurer has a duty to defend. Conversely, where there is no possibility that the insurer might be obligated to indemnify, there is no duty to defend.” City of Burlington, 163 Vt. at 127 (citations omitted).

Acadia argues that it has no duty to defend as a matter of law for three reasons: first, there was no “occurrence” triggering coverage during the period of the Acadia policy; second, no “property damage” (as defined in the policy) was sustained; and third, Exclusion M, the so-called “business risk” exclusion, bars coverage. These arguments are based on Acadia’s construction of the complaint in the underlying case of the City against McDonald.

The underlying complaint is dated December 23, 1997, well after the inception of the Acadia policy period, which started on December 10, 1995. The complaint alleges that the contract with McDonald was scheduled for completion on February 22, 1995, but was not completed on time and that the work, including items on a punch list, was still not fully performed. The complaint generally alleges the coating on the spillway “has failed and is crumbling away and otherwise deteriorating.” Count 1 asserts a negligence claim based on the design and application of the coating, and alleges that “the Plaintiff has suffered damages.” Count 2 asserts a breach of contract claim for failing to complete the project in a workmanlike fashion. Count 3 asserts that “the wall has failed to perform” and breach of warranty. Plaintiff sought all “provable damages” as well as other remedial relief.

Acadia’s arguments concerning the construction of the complaint are founded on two premises that are unsupportable based on the language and broad allegations of the complaint. First is the premise that any event triggering a duty to defend occurred before December 10, 1995. The complaint is not specific that the alleged damage occurred prior to December 10, 1995, and in fact suggests that damage was continuing to occur as of the date of the complaint. Looking only to the four corners of the complaint, the only reference to timing is that construction was not complete before February 22, 1995; the allegations are broad enough to encompass the possibility of damage to property after December 10, 1995. Second is the premise that the scope of the property damage resulting from the defective application of the shotcrete was limited to the deterioration of the shotcrete. This is not a conclusion that can be reached from reading the complaint. The complaint is vague as to whether alleged property damage is limited to the deterioration of the shotcrete, or whether other property was damaged, whether due to the shotcrete deterioration or from some other cause that falls within the broad allegations of the complaint.

Based on the allegations in the complaint, the court cannot conclude that there is or was no possibility that Acadia would be obligated to provide a defense at any time. Acadia therefore had a duty to defend, at least until such time as discovery of facts supported a determination that the duty no longer existed. If and when that occurred is a matter of proof at trial.

The fact that the insured did not file an action for declaratory relief on coverage does not absolve Acadia of all potential duty of defense. Acadia could have initiated a declaratory relief action of its own.


In making this ruling, the court is not indicating any position on Plaintiff's claim as to allocation of defense costs. This ruling is limited only to denying Acadia's motion for summary judgment.

Order

Acadia's motion for summary judgment is DENIED.

The attorneys shall submit a stipulated updated pretrial scheduling order by June 2, 2003.

Dated at Montpelier, Vermont this 14th day of May, 2003.



Mary Mills Teachout
Superior Court Judge