

**SIXTH DIVISION
October 30, 2009**

No. 1-08-1155

CMK DEVELOPMENT CORPORATION, an Illinois Corporation,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellee and Cross-Appellant,)	
)	
v.)	No. 04 L 361
)	
WEST BEND MUTUAL INSURANCE COMPANY,)	Honorable
)	Allen S. Goldberg,
Defendant-Appellant and Cross-Appellee.)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the opinion of the court:

This appeal concerns whether an insurance company had a duty to defend its insured, a residential developer.

The facts are undisputed, and can be summarized in a paragraph. After the developer built a home for a couple, the couple presented a long list of alleged defects with the home. The developer then contacted its insurance company which refused to obtain counsel to represent the developer, in a subsequent arbitration proceeding against the developer. After entering arbitration, the purchasers and the developer agreed to settle for \$47,500. The developer then sued the insurance company, in the case at bar, for its refusal to obtain counsel to represent the

No. 1-08-1155

developer in the arbitration proceeding and to pay for the damages.

Like the facts, the point of dispute between the two parties is also easy to summarize. The developer admits that, normally, damage caused by defective workmanship is not covered by the type of policy involved here, which is a “Commercial General Liability Coverage” (CGL) policy. However, the developer argues that Illinois courts have held that this type of policy does cover damage caused by defective workmanship, if the damage is to the property of others. In response, the insurance company agrees with this principle of law, but argues that the damage alleged by the purchasers did not qualify as damage to the property of others.

The trial court found coverage, and the developer received a judgment of \$85,906.60. The insurance company now appeals. For the reasons stated below, we reverse.

BACKGROUND

1. The Parties

The developer is plaintiff CMK Development Corporation, a residential real estate developer and an Illinois corporation. The insurance company is defendant West Bend Mutual Insurance Company, an insurance carrier licensed to issue

No. 1-08-1155

policies in the State of Illinois. The purchasers are Bruce and Suzanne Beatus, who are not parties to this action.

2. The Events at Issue

In March 1999, the purchasers entered a contract with the developer for the construction of a new residence in Chicago, Illinois. The closing occurred on April 19, 2000. The day before the closing, on April 18, the purchasers submitted their first list of alleged defects in workmanship to the developer. After two years of trying to resolve their differences, the purchasers served a demand for arbitration on June 5, 2002. On April 26, 2002, approximately six weeks before the arbitration demand, the developer notified the insurance company of the purchasers' claims and requested the insurance company to defend and indemnify it against these claims. On June 12, 2002, the insurance company denied coverage. During arbitration, the developer negotiated a settlement of the purchasers' claims for \$47,500. On June 12, 2004, the developer filed this suit against the insurance company.

3. The Insurance Contract

The insurance contract was entered by the parties on April 23, 1999, and it initially covered the period from April 18, 1999, to April 18, 2000. The

No. 1-08-1155

developer, in its complaint, alleged that this contract “was renewed from time to time and was in effect at all times relevant to this litigation.” The insurance company, in its answer, admitted this allegation. The insurance contract included business automobile coverage, commercial property coverage and commercial general liability coverage.

On this appeal, the issues concern the part of the policy that covers commercial general liability. This part of the policy is a 13-page standardized form, entitled “Commercial General Liability Coverage Form.” The first page of the CGL form states that it covers the insured for “property damage,” (1) only if the property damage was caused by an “occurrence” during the policy period and (2) only if the property damage was not “expected or intended from the standpoint of the insured.” The first page of the CGL form states in relevant part:

“SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY

DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of

No. 1-08-1155

'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty 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;' and
- (2) The 'bodily injury' or 'property damage' occurs during the policy period.

* * *

No. 1-08-1155

2. Exclusions

This insurance does not apply to:

a. Expected or intended injury

'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property." (Emphasis added.)

The last few pages of the 13-page CGL form contain a section entitled "Definitions." This section provides a definition for the word "occurrence," which is used to define the term "property damage," above. In essence, the CGL form equates the word "occurrence" with the word "accident":

"'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The definitions section of the CGL form does not provide a definition for the word "accident."

The CGL form also states that it does not cover damage either to "real

No. 1-08-1155

property” or “any property” caused by the contractor’s work:

“2. Exclusions

This insurance does not apply to:

* * *

j. Property damage to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the ‘property damage’ arises out of those operations; or

(6) That particular part of any property must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.”

The above-quoted exclusion uses the term “your work,” which is defined in the definitions section of the CGL form, as follows:

“19. ‘Your work’ means:

a. Work or operations performed by you or on

No. 1-08-1155

your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.”

The various sections, quoted above, are the sections concerned in this appeal.

4. The Defects Alleged by the Purchasers

The purchasers filed a “Statement of Claim” in the arbitration proceeding that alleged, in essence, that they did not receive the home that they had “bargained for”:

“Given the price demanded by Respondents, and given the representations made by the Respondents *** to the [purchasers] before closing regarding the quality, luxury and elegance of the homes built by [them], plus the representations made *** to the [purchasers] after closing that CMK Development would promptly and professionally remedy the defects, and given the Respondents’ failure to complete the punch-list or remedy the defects, Respondents did not build the residence bargained for by [the purchasers].”

