UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Swa Painting, Inc. v. Golden Eagle Ins. Co.

268 F. App'x 521 (9th Cir. 2008) · Decided February 26, 2008

SUMMARY

The Ninth Circuit reversed a district court judgment holding that a commercial general liability policy covered losses arising from defective paint sold by the insured. The court held that the policy's impaired-property exclusion applied because the homes were restored to use by replacing the defective paint with sealant and new paint, and therefore the insurer was not liable for any part of the stipulated settlement.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
JURISDICTION	Federal
DECIDED	February 26, 2008
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Golden Eagle appealed the district court's order granting summary judgment to SWA in an insurance-coverage dispute arising from defective paint sold by Golden Eagle's insured.
STANDARD OF REVIEW	De novo review of the district court's summary-judgment ruling and interpretation of the insurance policy.
PRECEDENTIAL VALUE	Nonprecedential unpublished memorandum disposition
PARTIES	Golden Eagle Insurance Company v. SWA Painting

TOPICS

insurance coverage · insurance · contract interpretation · commercial litigation · appellate procedure

PRACTICE AREAS

insurance coverage · commercial litigation · contracts · appellate procedure

QUESTIONS PRESENTED

1. Whether the losses resulting from defective paint constituted property damage covered by CMS's commercial general liability policy.

2. Whether the policy's impaired-property exclusion applied because the homes were restored to use by replacement of the defective paint with sealant and new paint.
3. Whether Golden Eagle could challenge the reasonableness of the stipulated settlement.

HOLDINGS

1. The losses were covered under the policy's property-damage clause because the policy defined property damage to include loss of use of tangible property that was not physically injured, and the homeowners lost use of their homes while the walls were repainted.
2. The impaired-property exclusion barred coverage because the homes were restored to use by replacement of CMS's defective paint with sealant and new paint.
3. The court did not need to decide whether Golden Eagle could challenge the reasonableness of the stipulated settlement because Golden Eagle was not liable for any part of the settlement.

KEY QUOTATIONS

> *"Here, the homes were restored to use by replacement of the defective CMS paint with sealant and new paint, which "put something new in the place of" the defective paint."* (523)

> *"Replacement does not require that the defective paint be removed from the walls; nor does it preclude use of a sealant."* (523)

> *"If the insurer wins on the coverage issue, it is not liable for any part of the settlement."* (523)

FACTUAL BACKGROUND

Coating Management Systems manufactured and sold paint to SWA Painting, which applied the paint to homeowners' walls and homes. The paint was defective, and homeowners lost use of their homes while the walls were repainted using sealant and new paint. CMS and SWA entered into a stipulated settlement, and SWA sought recovery from CMS's commercial general liability insurer, Golden Eagle.

PROCEDURAL HISTORY

SWA obtained summary judgment against Golden Eagle on the grounds that the commercial general liability policy covered losses resulting from CMS's defective paint and that Golden Eagle could not challenge the reasonableness of a stipulated settlement between CMS and SWA. The Ninth Circuit reversed and remanded with instructions to enter judgment for Golden Eagle dismissing the complaint.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

Enter judgment for Golden Eagle dismissing the complaint.

CASES CITED

- Liristis v. American Family Mutual Insurance Co., 204 Ariz. 140, 61 P.3d 22, 25 (2002)
- United Services Automobile Association v. Morris, 154 Ariz. 113, 741 P.2d 246, 254 (1987) (en banc)

OPINION

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PER CURIAM.

MEMORANDUM **

Golden Eagle Insurance Company ("Golden Eagle") appeals from the district court's order granting summary judgment to SWA Painting ("SWA") on the grounds that: (1) the commercial general liability insurance policy (the "Policy") entered into between Golden Eagle and its insured, Coating Management Systems ("CMS"), a manufacturer and vendor of paint, covered and did not exclude losses resulting from CMS selling defective paint to SWA, a painting contractor; and (2) Golden Eagle was not entitled to challenge the reasonableness of a stipulated settlement entered into between CMS and SWA. We reverse and remand to the district court with the instruction to enter judgment for Golden Eagle dismissing the complaint. I We need not decide whether application of defective paint physically injures the walls and/or homes on which the paint was applied under Arizona law because the Policy defines "property damage" to include "Moss of use of tangible property that is not physically injured," Policy § V.15, and the parties do not dispute that homeowners lost use of their homes while the walls were repainted; thus, the losses incurred by CMS were covered under the "property damage" clause of the Policy. However, the Policy excludes " '[property damage' to 'impaired property' ... arising out of [a] defect, inadequacy or dangerous condition in 'your product' or 'your work.' " Policy § I.A.2.m. Under the Policy, " '[ijmpaired property' means tangible property ... that cannot be used or is less useful because [i]t incorporates 'your product' or 'your work' that is known or thought to be defective ... if such property can be restored to use by [t]he repair, replacement, adjustment or removal of 'your product' or 'your work'." Id. at § V.7. Clearly the homes are tangible property and, at a minimum, they were less useful because of CMS's defective paint; thus, the only issue is whether, as argued by Golden Eagle, the homes were restored to use by repair or replacement of CMS's product, namely the defective paint. In *523this regard, SWA argues that the defective paint has not been repaired or replaced because: (1) the defective paint still sits on the walls, (2) sealant had to be used prior to application of the new paint, and (3) the new paint was not supplied by CMS. We need not consider whether the defective paint was repaired because the plain and ordinary meaning of the term "replace" is dispositive. See Liristis v. Am. Family Mut. Ins. Co., 204 Ariz. 140, 61 P.3d 22, 25 (2002) ("We construe provisions of an insurance policy according to their plain and ordinary meaning."). The Merriamr-Webster Dictionary (the "Dictionary") defines the word "replace" as "1: to restore to good condition esp[.] by replacing parts or putting together something torn or broken[;] 2: to take the place of; supplant [;] 3: to put something new in the place of.” Dictionary at 593 (Henry Bosley Woolf ed., Simon & Schus-ter, Inc.1974) (emphasis added). Here, the homes were restored to use by replacement of the defective CMS paint with sealant and new paint, which “put something new in the place of’ the defective paint. Replacement does not require that the defective paint be removed from the walls; nor does it preclude use of a sealant. Furthermore, neither the Policy nor the ordinary meaning of “replace” requires the defective CMS paint to be replaced by new CMS paint, as opposed to another brand. II Consideration of Golden Eagle’s ability to challenge the reasonableness of the stipulated settlement is unnecessary because it is not liable for any part of the settlement between SWA and CMS. See United Servs. Auto. Ass’n v. Morris, 154 Ariz. 113, 741 P.2d 246, 254 (1987) (en banc) (“If the insurer wins on the coverage issue, it is not liable for any part of the settlement.”). REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT FOR GOLDEN EAGLE. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9 th Cir. R. 36-3.