STATE OF MISSOURI
CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT
City of Saint Louis

CERTAIN UNDERWRITERS AT LLOYDS, LONDON,
a/k/a
LLOYDS OF LONDON,
Plaintiff,

v.

DR. LEON SCOTT, *et al*.,
Defendants;

and

BRIAN SMITH,
Plaintiff,

v.

FLAMINGO BOWL LLC.
Defendant.

Cause No. 0922-CC00302 consolidated with 0822-CC08282	Division 31	December 31, 2009

ORDER AND JUDGMENT
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING CROSS-PLAINTIFF/DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND SETTING DATE FOR STATUS CONFERENCE

Summary

Defendant Certain Underwriters (Lloyd's) issued to Flamingo Bowl LLC an insurance policy. The terms of the insurance policy provide coverage for the type of claims made against the insured. When there is coverage, there is also a duty to defend the insured against any lawsuit seeking damages for such claims. Therefore, the insured, Flamingo Bowl, has the right to be defended against said claims by Defendant Lloyd's, and Lloyd's has a duty to defend the Flamingo Bowl against such claims.

Here, the insured and the insurance company have each filed motions for summary judgment, and the facts relevant to the nature of the claims and the terms of the policy are not in dispute. Therefore, the cross-motion for summary judgment of the insured party, cross-plaintiff/defendant Flamingo Bowl, is hereby granted, and a judgment is entered declaring that the policy obligates the insurance company, Certain Underwriters at Lloyds, London, also known as Lloyds of London, to defend Flamingo Bowl against these suits. The insurance company's motion for summary judgment is denied.

Missouri courts have construed language of insurance policies, such as is used in the insurance policy issued by Lloyds here, to include coverage for claims for injuries caused by the negligence of the insured. The question is whether the claimed injury is of a kind that the insured party under the policy has a "reasonable expectation" that such claimed injury would be covered by the policy. When the insured has such a reasonable expectation, the insurance company has a duty to defend its insured against such claims.

Factual Background

The Court now has considered the pleadings, the record, the arguments of the parties, and the applicable law. The following facts are not in dispute.

On September 2, 2008, defendants Leon Scott and Marie Scott filed a petition in the Circuit Court of the City of Saint Louis in which they alleged that defendant Flamingo Bowl, LLC owned and operated a bowling alley at 1117 Washington Avenue that allegedly caused excessive noise and vibration such as to unreasonably interfere with their residence.[1] The Scotts have asserted a nuisance claim and seek injunctive relief as well as monetary damages. Defendant Brian Smith also filed a petition in the Circuit Court of the City of St. Louis against Flamingo Bowl, also asserting a nuisance claim and seeking money damages and injunctive relief,[2] as a result of alleged excessive noise and vibration, unreasonably interfering with the use of his residence.

On November 17, 2008, Flamingo Bowl demanded that Lloyds provide coverage under its policy (No. 326823), issued to Blueberry Hill, et al., d/b/a Pegasus, Inc., owner of Flamingo Bowl, and that Lloyds tender a defense with respect to the suits brought by the Scotts and Smith. The policy went into effect July 25, 2007, and includes bodily injury and property damage liability coverages. Lloyds initially defended the claim under a reservation of rights. In December 2008, Flamingo Bowl, by counsel, made a written demand that Lloyds acknowledge coverage for the claims asserted in both suits.

Lloyds's policy provides:

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 "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

[1] Cause No. 0822-CC08337.
[2] Cause No. 0822-CC08282.

against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....

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";
(2) The "bodily injury" or "property damage" occurs during the policy period; and
(3) Prior to the policy period, no insured listed ... knew that the "bodily injury" or "property damage" had occurred, in whole or in part....

* * *

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" 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 "personal and advertising injury" to which this insurance does not apply....

* * *

SECTION V -- DEFINITIONS

* * *

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death sustained by a person, including death resulting from any of these at any time.

* * *

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

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
f. The use of another's advertising idea in your "advertisement"; or
g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

* * *

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

* * *

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.

Nature of the Dispute

Lloyds has filed the present declaratory judgment action seeking the Court's determination that there is no coverage under policy No. 326823 for the claims made by the Scotts and Smith against Flamingo Bowl. Lloyds argues such claims are not included within the policy's coverage. Flamingo Bowl has also filed a declaratory judgment action in which it seeks the Court's determination that the policy affords coverage for the claims asserted in the underlying lawsuits, and that Lloyds has a duty to defend Flamingo Bowl.

Issue

The issue presented by the parties' cross-motions for summary judgment is whether the alleged nuisance in the underlying actions is covered as property damage caused by an "occurrence"; that is, caused by "an accident, including continuous or repeated exposure to substantially the same harmful conditions."

Discussion

Lloyds contends that the nature of the claims made in the lawsuits do not comport with the ordinarily understood meaning of the term "accident." Lloyds argues the alleged noise and vibration emanating from the bowling alley were not unforeseen or unplanned. Rather, Lloyds argues, ***the insured***, Flamingo Bowl, knew that a bowling alley would create noise and vibration and proceeded with their business anyway. Lloyds cites Wood v. Safeco Ins. Co., 980 S.W.2d 43 (Mo.App. E.D. 1998), in support.

Flamingo Bowl counters that the term "accident" is susceptible of different nuances of meaning, depending upon the circumstances, and that, notwithstanding exclusions for intentional conduct, an accident may arise from reckless as well as negligent conduct. In support of its position, Flamingo Bowl cites White v. Smith, 440 S.W.2d 497 (Mo.App. 1969); N.W. Elec. Power Coop., Inc. v. American Motorists Ins. Co., 451 S.W.2d 356 (Mo.App. 1970); and Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d .667 (Mo.App. 2007).

Standard for Motions for Summary Judgment

When ruling on a motion for summary judgment, the Court must determine whether the moving party has "the undisputed right to judgment as a matter of law," on the basis of the facts about which there is no genuine dispute. ITT Commercial Finance v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 380 (Mo.banc 1993). The party moving for summary judgment bears the burden of establishing a right to judgment as a matter of law. Any evidence in the record presenting a genuine dispute as to the material facts defeats the moving party's prima facie showing. Id. at 382; Friedman v. Marshall, 876 S.W.2d 745 (Mo.App. 1994).

Where the movant is a defending party, the movant may establish a right to judgment by negating any one or more of the essential elements of the claimant's cause of action, or by showing that the non-movant after an adequate period of discovery has not been able to produce or will not be able to produce evidence sufficient to allow the trier to find the existence of any one of these elements, or that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ITT at 381; Tresner v. State Farm Ins. Co., 913 S.W.2d 7, 9 (Mo.banc 1995); Thwing v. Reeder, 987 S.W.2d 347, 348 (Mo.App. E.D. 1998).

Where the movant is a claimant, the movant may establish a right to judgment by establishing that no genuine dispute exists as to those material facts upon which the claimant would have the burden of persuasion at trial. In addition, the movant must also establish that the defending party's affirmative defense fails as a matter of law, by showing that any one of the facts necessary to support the defense is absent. ITT at 381.

Once the moving party has met the burden imposed by Rule 74.04(c) by establishing the right to judgment, the non-movant's only recourse is to show by affidavit, depositions, answers to interrogatories, or admissions on file, that one or more of the material facts shown by movant is in fact genuinely disputed. Id. at 381.

Disputes arising from the interpretation and application of insurance contracts are matters of law for the court, where the underlying facts are not in dispute. Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 638 (Mo.App. 1998).

A duty to defend exists if the petition alleges facts which state a claim *potentially* within the policy's coverage. Standard Artificial Limb, Inc. v. Allianz Ins. Co., 895 S.W.2d 205, 210 (Mo.App. E.D. 1995). The petitions at issue allege Flamingo Bowl's operation of a bowling alley on the first floor of the building where the Scotts' and Smith's condominium units were located constituted a nuisance, in violation of City ordinances. Smith also alleges that the operation of the bowling alley "also causes, *inter alia*, sound reverberations through the structural support beams in the building, causing the vibrations to travel to Plaintiff's condominium...."

Lloyd's policy affords liability coverage for property damage caused by an "occurrence." The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Examining this definition, it is immediately apparent that the meaning of the word "accident" is intended to cover a broad range of circumstances, and it is further abundantly clear that, within the ambit of that broader range, one set of circumstances is specifically covered: when there is "**continuous and repeated exposure to substantially the same general harmful conditions**."

Here, the claimants against the Flamingo Bowl contend that the operations of the bowling alley cause sound reverberations to travel through the structural support beams in the building, thereby causing the vibrations to travel to each claimant's condominium. It is clear that the claimants against the Flamingo Bowl are basing their claims for damage to their properties (condominium residential units located in the same building as the bowling alley) on "continuous or repeated exposure to substantially the same general harmful conditions." Therefore, it is clear that these claims are covered by the policy.

The policy does not define the word "accident" except to specify that the word includes "continuous or repeated exposure to substantially the same general harmful conditions."

Even if that very specific inclusion had been omitted, the policy still is construed to cover the types of claims made here in the lawsuits brought against the Flamingo Bowl.

To interpret the meaning of a policy term such as the word "accident," the court refers to the policy itself. Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505, 512 (Mo. 1997). When the policy does not contain a technical definition, the court employs the ordinary

meaning of the term, and, if necessary, may look to a standard English-language dictionary for guidance. Id.

When a liability policy defines an occurrence as meaning an accident, Missouri courts construe this to mean "injury caused by the negligence of the insured." Stark Liquidation Co. v. Florists' Mut. Ins. Co., 243 S.W.3d 385, 393 (Mo.App. E.D. 2007), *citing*, Wood, 980 S.W.2d at 49; N.W. Elec. Power Coop., 451 S.W.2d 356 (Mo.App. W.D. 1969).

In White, *supra*, in addressing the meaning of the term "accident," the court distinguished between intended acts and intended results. The Court stated that intentional acts giving rise to ***unintended*** results or injury do ***not exclude*** from coverage a claim arising from that result. White at 507. The court held this is so, even for "damage which might be, for other purposes, regarded as *constructively* intentional or damage resulting from wanton and reckless conduct." Id.

In Wood, the court explained its rationale in terms of the reasonable expectations of the insured:

> A "liability policy is designed to protect the insured from fortuitous injury caused by his actions. If the injury occurs because of the carelessness of the insured, he reasonably expects the injury to be covered."
> 980 S.W.2d at 50.

In Scottsdale Ins. Co. v. Ratliff, 927 S.W.2d 531, 534 (Mo.App. 1996), the court stated that liability coverage existed with respect to a claim involving a negligently performed termite inspection, resulting in diminution of the value of the underlying plaintiff's property. The court, suggesting that the insured reasonably expected the damage to be covered, and resolving the disputed terms in favor of the insured, stated as follows:

> The definitions of "occurrence" and "property damage" are ambiguous, in that they cannot be readily applied to a business such as the insured's without considering the surrounding circumstances. The insurer knew that the insured was engaged in the business of pest control, including inspection and extermination. The damage claims are of a kind that both the insurer and the insured might readily anticipate from the nature of that business.... If insurance companies do not intend to cover such claims when insuring termite inspectors, they might consider using language directed to the particular hazards and risks of that business rather than boiler plate.
> 927 S.W.2d at 534.

This Court recognizes that the nature of Flamingo Bowl's business, specifically, the operation of a bowling alley is one that involves a certain amount of noise. The better the bowlers, the more pins are struck with the ball, the more noise is generated by the pins striking each other and the surrounding area of the pin deck. But even the least accomplished bowler

causes a certain amount of noise by the rumble of the ball as it proceeds down the lane, even if it falls into the gutter before striking any pins.

Here, the claims made against the bowling alley are for damages as a result of "sound reverbrations" and "vibrations." The claimants do not allege that the Flamingo Bowl intended to cause the claimants alleged injuries. Rather, the injuries alleged to have been suffered are alleged to have been caused by the negligence of the Flamingo Bowl.

When all these circumstances are considered, this Court reaches a conclusion similar to those reached in the White, Wood, and Scottsdale cases. Here, both the insured and the insurer could reasonably expect noise and vibration would be a risk of the business of the operation of a bowling alley, regardless of safeguards that may or may not have been employed to mitigate these conditions for the residential occupants of the building. Therefore, the damages alleged to have been suffered as a result of such noise and vibration are covered by the policy.

This Court has reviewed both the underlying petitions and the policy language, and has construed the language of the policy in accordance with Missouri precedents. This Court finds that the underlying nuisance claims are within the scope of coverage of the policy for property damage. Nuisance does not depend on the degree of care used, and may be based on either negligent or intentional conduct; the word is descriptive of an effect rather than a cause. White, 440 S.W.2d at 502-3; Schwartz v. Mills, 685 S.W.2d 956, 958 (Mo.App. 1980).

Accordingly, the Court concludes that the motion for summary judgment of cross-plaintiff/defendant Flamingo Bowl must be granted; and the motion of plaintiff Lloyds's motion for summary judgment must be denied.

ORDER AND JUDGMENT

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Lloyds of London's, Motion for Summary Judgment is hereby denied, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Cross-Plaintiff/Defendant Flamingo Bowl's Motion for Summary Judgment is hereby granted.

The Court enters its judgment declaring that Lloyds has a duty to provide a defense, pursuant to policy No. 326823, in Cause Nos. 0822-CC08337 and 0822-CC08282. Costs assessed against Lloyds.

The Court sets this case for status conference on February 2, 2010, at 3:00 p.m.

Note: It is anticipated that due to changes in judges' assignments for calendar year 2010, this case will be transferred to Div. 5, the Hon. Mark Neill presiding. However, a separate order of transfer should be sent to counsel upon order of the presiding judge. Counsel are advised to contact Judge Neill prior to the date of the status conference to verify the setting will take place in Div. 5.

The Clerk shall mail or deliver copies of this Order to:

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SO ORDERED:

_____
Edward Sweeney, MBE #24064
Circuit Judge