Filed 5/31/18 Masson v. Mid-Century Insurance Co. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JACQUELINE MASSON, Plaintiff and Appellant, v. MID-CENTURY INSURANCE COMPANY, Defendant and Appellant.	B278895 (Los Angeles County Super. Ct. No. BC544184)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel S. Murphy, Judge. Affirmed.

Abir Cohen Treyzon Salo, Boris Treyzon, Cynthia Goodman, and Meagan Melanson for Plaintiff and Appellant.

Parker Ibrahim & Berg, Andrew S. Hollins, and Kathleen Mary Kushi Carter for Defendant and Appellant.

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Plaintiff Jacqueline Masson appeals from the judgment in favor of defendant Mid-Century Insurance Company. Plaintiff sued defendant after defendant denied her claim for damages to her home caused by sewer repair work done by a third party on the public street nearby. Finding that plaintiff's claim for insurance coverage is not a covered loss and is excluded under the policy, we affirm the judgment below.

BACKGROUND

Plaintiff sued defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). The trial court granted defendant's motion to bifurcate the trial to determine in a first phase of trial whether there was insurance coverage for plaintiff's loss. Judgment was entered for defendant after the first phase of the trial.

1. Facts Adduced at Court Trial

The parties stipulated to the following undisputed facts: Plaintiff owns a single family home on Lafayette Park Place in Los Angeles. The property was insured by an "all risk" policy issued by defendant.

The City of Los Angeles awarded a sewer replacement project in plaintiff's neighborhood to Colich & Sons. As part of the project, Colich & Sons dug a deep trench on plaintiff's street to access the sewer lines. After installing a new sewer pipe, Colich & Sons backfilled the trench, and used a Hydra-Hammer to compact the soil. A Hydra-Hammer is a large machine that uses a multi-ton metal weight to strike the ground to compact soil.

Colich & Sons used the Hydra-Hammer to compact the soil in the trench three houses down from plaintiff's home. Plaintiff

felt strong vibrations in her home, and noticed cracking and damage. Plaintiff went outside and told Colich & Sons that the use of the Hydra-Hammer was damaging her home. Colich & Sons inspected plaintiff's home for evidence of damage, moved the Hydra-Hammer to the middle of the street directly in front of plaintiff's property, and conducted a test to show plaintiff that it was harmless. According to plaintiff, the test caused more damage to her property.

The Hydra-Hammer was on the street at all times, and never touched plaintiff's property. Plaintiff believes the Hydra-Hammer caused soil movement which damaged her property.

Plaintiff made a timely claim for damages under her insurance policy. According to defendant, there was no coverage for the claimed damages, and therefore defendant denied her claim in its entirety.

With its trial briefs, defendant also presented evidence that plaintiff sued the City and Colich & Sons for the damage to her home in a separate action, alleging causes of action for negligence, trespass, and nuisance based on use of the Hydra-Hammer. Defendant also included as evidence plaintiff's brief in opposition to defendant's motion for summary judgment in this action, where plaintiff repeatedly represented that the damage to her home was caused by the negligence of Colich & Sons and the City. In her trial brief, plaintiff also contended that the use of the Hydra-Hammer by Colich & Sons caused the damage to her home.

2. The Insurance Policy

Plaintiff's property was insured by an all-risk policy. The insuring clause of Section I of plaintiff's policy states: "We insure accidental direct physical loss or damage to [the] property. . . .

Loss or damage to property consists of certain types of loss or damage. [¶] The policy does not insure all types of loss or damage to covered property. This policy does not insure against all causes of loss or damage to covered property. We do not insure covered property for the types of loss or damage described in Section I – Uninsured [Types of] Loss or Damage [(subsection A.)] and Excluded Causes of Loss or Damage [(subsection B.)]. We do not insure loss or damage to covered property directly or indirectly caused by, arising out of or resulting from the excluded causes of loss or damage set forth in Section I – Uninsured [Types of] Loss or Damage and Excluded Causes of Loss or Damage, whether the excluded cause of loss or damage occurs on or away from the residence premises." (Boldface omitted.)

One type of uninsured loss or damage listed in subsection A. of Section I is for "movement, settling, cracking, bulging, shrinking, heaving or expanding of any part of covered property," except that this type of loss or damage is covered if it is directly caused by "direct, actual physical contact by an aircraft . . . or a vehicle."

One type of exclusion from coverage listed in subsection B. of Section I is for "earth movement." Another exclusion listed in subsection B. is for "faulty, inadequate or defective planning, zoning, development, surveying, siting, engineering, design, specifications, workmanship, maintenance, repairs, manufacture, construction, grading, compaction, or materials."

3. Defendant's Denial of Plaintiff's Claim

Defendant denied plaintiff's claim on the basis that "the cosmetic damage to the structure was due to construction vibrations caused by the street work being performed in fro[nt] of your house. The structural damage to the home is due to

expansive soil shrink and swell coupled with ground movements. . . . [¶] Please note that earth movement [is] uninsured and excluded from your policy's coverage. Construction vibrations are considered earth movement; therefore, unfortunately, we are unable to consider the costs associated with the repairs to your home."

4. Trial and Judgment

Defendant argued in its trial brief that both the earth movement and the faulty construction exclusions applied to plaintiff's claim. Defendant also argued that losses for movement, settling, cracking, bulging, shrinking, heaving or expanding were uninsured under the policy.

Plaintiff argued that the earth movement exclusion applies only to natural events and not man-made occurrences. Plaintiff also argued that the faulty construction exclusion does not apply to third parties who are not under the control of the insured. She also argued that the damages caused by movement, settling, cracking, bulging, shrinking, heaving or expanding were insured losses.

The trial court issued a statement of decision, finding that the earth movement exclusion did not apply, reasoning that this exclusion applies only to natural events and not man-made events.[1] The court found that the faulty construction exclusion applied, reasoning that plaintiff had asserted throughout the proceeding, and in her other lawsuit against the City and Colich & Sons, that the negligent use of the Hydra-Hammer caused the

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[1] Defendant filed a "protective" cross-appeal of this finding, asking us to review it in the event we find the other bases of the trial court's judgment to be erroneous.

damage to her home. The trial court also found the loss was not covered by the vehicle exception to damage caused by movement and settling, because the Hydra-Hammer did not have "direct, actual physical contact" with plaintiff's property.

DISCUSSION

This case turns on the interpretation of the policy. The issue is one of law and our review is de novo. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18; *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-780.) In interpreting an insurance policy, we follow the general rules of contract interpretation. We give effect to the mutual intention of the parties, determined, if possible, from the written provisions of the contract. The clear and explicit meaning of those provisions, interpreted in their ordinary and popular sense, controls. (*Topanga and Victory Partners*, at pp. 779-780.) Under an all-risk policy, the limits of coverage are defined by the exclusions. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.) "[E]xclusionary clauses are interpreted narrowly, whereas clauses identifying coverage are interpreted broadly." (*Ibid.*)

1. Faulty Construction Exclusion

Defendant contends the faulty construction exclusion bars plaintiff's claim. Plaintiff contends the faulty construction exclusion does not apply to damages *caused exclusively by* a third party. She contends it only applies when a third party *aggravates* or *contributes to* an excluded loss. She also contends it does not apply here because there was no evidence the work performed for the City was faulty.

The faulty construction exclusion provides that "[w]e do not insure loss or damage directly or indirectly caused by, arising out of or resulting from faulty, inadequate or defective planning,

zoning, development, surveying, siting, engineering, design, specifications, workmanship, maintenance, repairs, manufacture, construction, grading, compaction, or materials. The foregoing activities are excluded whether performed for, as part of the process of, or used in construction, remodeling, maintenance or repair of part or all of any property (including land, structures or improvements)."

This exclusion for loss or damage caused by faulty or defective compaction plainly excludes plaintiff's claim from coverage.

Plaintiff contends that the exclusion does not apply when third party negligence is the exclusive cause of the loss, but applies only when third parties aggravate or contribute to the loss. This interpretation ignores the plain language of the policy. The introductory paragraph to subsection B. of Section I provides that "[a]cts or omissions of persons can *cause*, contribute to, combine with or aggravate any of the excluded causes of loss or damage" and that "[s]uch loss or damage is not covered regardless of any acts, omissions or decisions of any persons . . . or *any other causes* or other events which aggravate or contribute concurrently or in any combination or sequence with the excluded cause of loss or damage." (Italics added.) Manifestly, the policy here excludes from coverage third parties' conduct that causes *or* contributes to an excluded peril. (See, e.g., *Freedman v. State Farm Ins. Co.* (2009) 173 Cal.App.4th 957, 962-963.)

Plaintiff also contends that the policy cannot be interpreted to exclude losses caused by third parties offsite of the insured property. Again, plaintiff ignores the introductory language of subsection B. of Section I, Excluded Causes of Loss or Damage, which states that the policy does not cover excluded causes of loss

or damage "whether occurring on or away from the residence premises." Plaintiff also ignores the insuring clause that provides the policy does not cover excluded loss or damage, "whether the excluded cause of loss or damage occurs on or away from the residence premises." (Boldface omitted.)

Plaintiff relies on a New York case for the proposition that the faulty construction exclusion only applies to work contracted for by the insured on the insured's premises. (*242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.* (2006) 815 N.Y.S.2d 507.) This New York case is not binding on this court, and more to the point, the policy language at issue in the New York case apparently did not include the language, quoted above, which states that the policy does not cover excluded causes of loss or damage "whether occurring on or away from the residence premises." (*Id*. at p. 509.)

The New York opinion acknowledged that there were no other reported cases in New York interpreting the faulty construction exclusion, and that decisions from other jurisdictions addressing that exclusion "reached differing results." (*242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, *supra*, 815 N.Y.S.2d at p. 512.) In California, the faulty construction exclusion was found to exclude coverage for damage caused by the rupture of a city-maintained water main adjacent to the plaintiff's property. (*Waldsmith v. State Farm Fire & Casualty Co.* (1991) 232 Cal.App.3d 693, 695-696.) We find this California authority supports our conclusion that the faulty construction exclusion of this policy excludes coverage for the loss in this case.

Next, plaintiff contends there was no evidence that the sewer/street work performed by Colich & Sons was faulty, inadequate or defective. However, the parties stipulated that

plaintiff believes the Hydra-Hammer caused soil movement that damaged her property. Plaintiff's pleadings and filings were replete with references to Colich & Sons' negligence, and these admissions may be considered as evidence. (*Fireman's Fund Ins. Co. v. Davis* (1995) 37 Cal.App.4th 1432, 1441.) We find plaintiff's admissions provide substantial evidence that the compaction of soil with such force as to damage adjacent property is "faulty, inadequate or defective" within the meaning of the policy.

2. Uninsured Loss for Movement and Cracking of Property

The policy does not insure losses for "movement, settling, cracking, bulging, shrinking, heaving or expanding of any part of covered property." Plaintiff apparently concedes that the types of damage caused to her property are uncovered losses under the policy. Nevertheless, she contends the damage caused by the Hydra-Hammer falls within the vehicle exception to the policy.

The policy provides an exception for this type of uninsured loss if it is caused by aircraft or vehicles. However, the policy does not "insure loss or damage directly or indirectly caused by, arising out of or resulting from aircraft or vehicles unless such loss or damage is caused by or results from *direct, actual physical contact* by an aircraft, or any refuse from an aircraft, or a vehicle with covered property or with a building or other structure containing covered property." (Italics added, boldface omitted.)

Defendant did not dispute that the Hydra-Hammer is a vehicle for purposes of this exception. Defendant contends, however, that the Hydra-Hammer did not have "direct, actual

physical contact" with plaintiff's property, as required by the exception.

Plaintiff contends that the vibrations caused by the Hydra-Hammer constitute physical contact within the meaning of the exception. She relies on a case construing California's uninsured motorist statute, which requires "physical contact" between a hit-and-run vehicle and an insured vehicle. (*Inter-Insurance Exchange of Auto. Club v. Lopez* (1965) 238 Cal.App.2d 441, 443-444.) She also relies on a case construing a battery exclusion in a liability policy, and the requirement that battery involve "physical contact." (*Mount Vernon Fire Ins. Co. v. Busby* (2013) 219 Cal.App.4th 876, 883.)

Neither the case interpreting the uninsured motorist statute nor the case interpreting the battery exclusion in a liability policy aids in our analysis of the policy at issue here. The provisions of the uninsured motorist statute requiring physical contact "were designed to curb fraud, collusion, and other abuses arising from claims that phantom cars had caused accidents which, in fact, had resulted solely from the carelessness of the insured. For example, a driver who fell asleep and hit a telephone pole might claim he had swerved off the road to avoid being hit by an unidentified vehicle. The provision requiring physical contact with the unknown vehicle was added to the statute in order to eliminate such fictitious claims." (*Inter-Insurance Exchange of Auto. Club v. Lopez*, *supra*, 238 Cal.App.2d at p. 443.) No such concerns apply here.

The court interpreting the battery exclusion in a liability policy observed the tort of battery does not require direct body-to-body contact, and common sense informs that an attack with a glass filled with a flammable liquid to set someone on fire

constitutes a battery. (*Mount Vernon Fire Ins. Co. v. Busby*, *supra*, 219 Cal.App.4th at pp. 881-883.) Nothing in the reasoning of that case applies here either.

Moreover, the policy at issue here does not only require "physical contact" for application of the vehicle exception. The exception requires "direct, actual physical contact by . . . a vehicle with covered property or with a building or other structure containing the covered property." The inclusion of "direct" and "actual" in the policy indicates that the vehicle must actually and directly touch plaintiff's property.

Because we have concluded that plaintiff's loss was not covered, and falls within the faulty construction exclusion of the policy, we need not consider the arguments made in defendant's cross-appeal of the trial court's findings regarding the "earth movement" exclusion.

DISPOSITION

The judgment is affirmed. Mid-Century Insurance Company is awarded its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.