

Wisconsin Court of Appeals Finds No Duty to Defend in Breach of Construction Contract Case

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In *General Casualty Co. of Wisconsin v. Rainbow Insulators, Inc.*, KBS Construction, Inc. ("KBS"), the general contractor of a condominium building, hired E&A Enterprises, Inc. ("E&A") to handle framing and drywall for the project. *Id.* ¶ 3. After construction was complete the residents experienced noise problems and KBS sued E&A alleging breach of contract resulting from faulty workmanship. *Id.* Acuity, E&A's insurer, moved for summary judgment on the basis that it had no duty to defend or indemnify E&A under the terms of its policies. *Id.* ¶ 5. The circuit court granted summary judgment in favor of Acuity and E&A appealed. *Id.* The court of appeals affirmed, concluding that while both of Acuity's policies provided initial grants of coverage, both contained exclusions that ultimately precluded coverage.

First, the court considered E&A's Bis-Pak Policy. This policy provided coverage for "property damage" caused by an "occurrence." "Property damage" was defined as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." *Id.* ¶ 11. The court found that KBS' demolition of the condominium ceilings to remedy the noise problem constituted an allegation of "physical injury to tangible property." Additionally, the court found that the condominium owners' loss of use of the property satisfied the definition of "property damage" as the definition of "property damage" did not identify who had to suffer the loss of use. After finding an initial grant of coverage, the court then found that the policy's "your work" exclusion precluded coverage because (1) E&A's allegedly negligent workmanship caused the property damage at issue; (2) E&A's allegedly negligent workmanship did not occur on E&A's property; and (3) E&A's work was completed at the time the damages arose. *Id.* ¶ 31.

Next, the court considered E&A's Errors and Omissions Policy ("E&O Policy"). The E&O Policy provided coverage for "damages because of...property damage to your work...that arises out of...your work." The E&O Policy contained the same definition of "property damage" as the Bis-Pak Policy, therefore the court likewise found an initial grant of coverage. *Id.* ¶ 34. The court then considered whether the E&O Policy's "contract" exclusion applied. The "contract" exclusion excluded coverage for "damages arising out of any...[d]elay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms." *Id.* The court concluded that the exclusion applied because KBS' allegations were based on E&A's failure to perform according to the terms of its contract with KBS. *Id.* ¶ 36.

E&A, citing *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 2006 WI 94, argued that despite the E&O Policy's "contract" exclusion, the alleged property damage was covered because it arose out of E&A's negligent acts, errors or omissions. E&A further argued that the circuit court erred when it accepted KBS' designation of the claim as one for breach of contract rather than negligence. The court of appeals distinguished E&A's case from the *1325 North Van Buren* case, finding that while an allegation of negligence may support an initial grant of coverage, where a policy contains a "contract" exclusion, a breach of contract claim is, in fact, excluded. *Id.* ¶ 39. Finally, the court of appeals found that the circuit court properly determined that the conduct alleged in the complaint, if proven, would constitute a breach of contract. *Id.* ¶ 40.

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