

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Indian Harbor Insurance Company,)
)
Plaintiff,)
)
vs.)
)
Byron Kriewaldt d/b/a Kriewaldt Roofing;)
Oak Bluff Homeowners Association, Inc.;)
John F. Kelly, on behalf of himself and all)
others similarly situated,)
)
Defendants.)
_____)

COMPLAINT

C.A. No. 2:17-cv-00732-DCN

Plaintiff, Indian Harbor Insurance Company, complaining of Defendants herein, would allege and show as follows:

THE PARTIES

1. Indian Harbor Insurance Company (hereinafter referred to as “Indian Harbor”) is an insurance company organized and existing under the laws of State of Connecticut, with its principal place of business in the State of Connecticut, which issues insurance policies across the country, including in South Carolina.

2. Indian Harbor is informed and believes that Defendant Byron Kriewaldt d/b/a Kriewaldt Roofing (hereinafter referred to as “Kriewaldt”) is a citizen and resident of the State of South Carolina.

3. Indian Harbor is informed and believes that Defendant Oak Bluff Homeowners Association (hereinafter referred to as “the HOA”) is a nonprofit corporation organized and

existing under the laws of the State of South Carolina with its principal place of business in the State of South Carolina.

4. Indian Harbor is informed and believes that Defendants John F. Kelly, on behalf of himself and all others similarly situated (hereinafter referred to as “the Owners”), are citizens and residents of the State of South Carolina, and are owners of condominiums in the Oak Bluff townhome development.

FACTUAL ALLEGATIONS

5. Indian Harbor issued a commercial general liability (“CGL”) policy of insurance, policy number AIL087000006, with effective dates of March 13, 2002 to March 13, 2003, to Bryon Kriewaldt d/b/a Kriewaldt Roofing (“the Policy”). The Policy was cancelled effective August 10, 2002. A copy of the Policy is attached hereto as Exhibit A and incorporated herein by reference.

6. This declaratory judgment action arises out of certain alleged construction defects involving the Oak Bluff townhome development (“the Development”) located in Charleston County, South Carolina.

7. Upon information and belief, the Development consists of 48 buildings. The first certificate of occupancy was issued in May 2002, and the last was issued on or about December 2005.

8. Upon information and belief, Portrait Homes-South Carolina, LLC (“Portrait”) acted as the general contractor for the Development.

9. Upon information and belief, Kriewaldt contracted with Portrait to perform certain construction services at the Development. Upon information and belief, those services

included the installation of vinyl siding on approximately 20 of the 48 buildings in the Development.

10. Two lawsuits have been filed seeking damages resulting from alleged defects associated with the construction of the Development. First, in an action filed in the Charleston County Court of Common Pleas captioned “*Oak Bluff Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al.*,” C.A. No. 2013-CP-10-7067, the HOA seeks damages from alleged defects which allegedly result in water intrusion and deterioration of the common elements in the Development (hereinafter referred to as “the HOA Action”). A copy of the Third Amended Complaint in the HOA Action is attached hereto as Exhibit B and incorporated herein by reference.

11. Second, in an action filed in the Charleston County Court of Common Pleas captioned “*John F. Kelly, on behalf of himself and all others similarly situated v. Portrait Homes-South Carolina, LLC, et al.*,” C.A. No. 2013-CP-10-7066, the Owners seek damages from the alleged defects which allegedly result in water intrusion and deterioration of the individual townhomes in the Development (hereinafter referred to as “the Owners Action”)¹. A copy of the Third Amended Complaint in the Owners Action is attached hereto as Exhibit C and incorporated herein by reference.

12. The Complaints in the Underlying Actions assert three causes of action against Kriewaldt: (1) negligence/gross negligence, (2) breach of express and implied warranties, and (3) unfair trade practices. The negligence claim asserts, *inter alia*, that Kriewaldt negligently performed construction services, causing water intrusions into the buildings and/or common areas of the Development.

¹ The HOA Action and the Owners Action may be collectively referred to as “the Underlying Actions.”

13. The breach of warranties cause of action alleges that Kriewaldt expressly and/or impliedly warranted that the work performed by it would be of workmanlike quality, merchantable, and fit for the particular purpose for which it was built.

14. The unfair trade practices cause of action alleges that Kriewaldt engaged in unfair and deceptive practices which resulted in defects in the Development.

15. The HOA has claimed as damages the cost of repairing the construction performed by Kriewaldt as well as punitive damages.

16. The Owners have claimed as damages not only the cost of repairing the construction performed by Kriewaldt, but also future loss of use arising out of those repairs as well as punitive damages.

17. Indian Harbor is currently providing a defense for Kriewaldt in the Underlying Actions under a full reservation of rights.

DECLARATORY JUDGMENT

18. The allegations contained in paragraphs 1 through 17 of the Complaint are re-alleged and incorporated herein by reference as if fully set forth herein.

19. Indian Harbor seeks a determination from this Court of its defense and coverage obligations, if any, to Kriewaldt under the Policy for the claims alleged against it in the Underlying Actions.

20. Defendants have a significant interest in the outcome of this litigation and any decision rendered herein should be binding upon them, their successors, and assigns.

21. This is a declaratory judgment action brought pursuant to Rule 57 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201-2202.

22. The jurisdiction of this District Court is based upon the diversity of the parties pursuant to 28 U.S.C. § 1332(a).

23. The amount in controversy herein exceeds the sum of \$75,000.00 exclusive of interest and costs.

24. All matters and allegations contained herein are within the subject matter and personal jurisdiction of this District Court and venue is proper in this District Court and in the particular division selected.

CGL Insuring Agreement and Other Provisions

25. The Policy contains the following provisions that are pertinent to the determination of this matter:

**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 . . . "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 . . . "property damage" to which this insurance does not apply.

- b. This insurance applies to . . . "property damage" only if:

- (1) The . . . "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The . . . "property damage" occurs during the policy period.

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

... “property damage” expected or intended from the standpoint of the insured...

j. Damage to Property

“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 that must be restored, repaired, or replaced because “your work” was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

SECTION V – DEFINITIONS

7. “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:

- a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of “your product” or “your work”; or
- b. Your fulfilling the terms of the contract or agreement.

8. “Insured contract” means:

- f. That part of any other contract or agreement pertaining to your business... under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

12. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. “Products-complete operations hazard”:

a. Includes all . . . “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

15. “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.

18. “Your product” means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You;

“Your product” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
- b. The providing of or failure to provide warnings or instructions.

19. “Your work” means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
- b. The providing of or failure to provide warnings or instructions.

26. The Policy also contains the Combination Endorsement – Exclusions/Limitations Form (IGHL-C-2) which modifies coverage provided under Section I. The endorsement contains the following relevant provisions:

EXCLUSION – PUNITIVE DAMAGES

We do not cover any claim of or indemnification for punitive or exemplary damages. If a “suit” seeking both compensatory and punitive damages has been brought against you for a claim covered by this policy, we will provide defense for such action. We will not have any obligation to pay for any costs, interest or damages attributable to punitive or exemplary damages.

EXCLUSION – INDEPENDENT CONTRACTORS/SUBCONTRACTORS

You are not covered for claims, loss, costs or expense arising out of the actions of independent contractors/subcontractors for or on behalf of any insured.

* * * *

27. Pursuant to the insuring agreement, the Policy only provides coverage for “property damage” caused by an “occurrence.”

28. Most, if not all, of the HOA’s and the Owners’ allegations in the Underlying Actions do not qualify as an “occurrence” resulting in “property damage” and, therefore, no coverage is afforded to Kriewaldt for those claims.

29. Moreover, claims for breach of warranty and unfair trade practices do not constitute an “occurrence” resulting in “property damage” and, therefore, no coverage is afforded to Kriewaldt for those claims.

30. Pursuant to the insuring agreement, the Policy only provides coverage for “property damage” that occurs during the policy period. Thus, in order to be potentially covered by the Policy, a building in the Development must have been completed prior to the cancellation date of the Policy, August 10, 2002. There is no coverage for any building in the Development that was completed after the Policy was cancelled on August 10, 2002.

31. For those buildings, if any, that were completed prior to August 10, 2002, if coverage under the Policy is triggered, coverage is limited to Indian Harbor’s pro rata time on risk.

32. As set forth above, the Policies also contain certain limitations and exclusions which are applicable to the claims made against Kriewaldt in the Underlying Actions.

33. Under the “Expected or Intended Injury” exclusion in the Policy, coverage for any “property damage” expected or intended from the standpoint of Kriewaldt is excluded.

34. The “Expected or Intended Injury” exclusion bars coverage for claims including but not limited to, for any “property damage” caused by Kriewaldt to its own work and any “property damage” resulting from Kriewaldt’s alleged breach of warranties.

35. Under the “Damage to Property” exclusion in the Policy, coverage for any “property damage” to “any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed” is excluded. This exclusion applies only to “property damage” not included in the “products-completed operations hazard.”

36. “Property damage” included in the Policy’s “products-completed operations hazard” includes all “property damage” arising out of Kriewaldt’s operations that are complete. As such, any “property damage” to work not yet completed by Kriewaldt is excluded.

37. Under the “Your Product” exclusion in the Policy, coverage for any “property damage” to Kriewaldt’s “products,” including any warranties relating to those products, is excluded. As such, any “property damage” to Kriewaldt’s products, including warranties, is excluded.

38. Under the “Your Work” exclusion in the Policy, coverage for any “property damage” to Kriewaldt’s “work,” including any warranties relating to its work, is excluded. As such, any “property damage” to Kriewaldt’s “work,” including warranties, is excluded.

39. Under the “Damage to Impaired Property or Property Not Physically Injured” exclusion in the Policy, coverage for any “property damage” to “impaired property,” as that term is defined by the Policy, or property that has not been physically injured, arising out of (1) a defect, deficiency, inadequacy or dangerous condition in Kriewaldt’s “product” or “work,” or (2) a delay or failure by Kriewaldt or anyone acting on its behalf to perform a contract in accordance with its terms is excluded.

40. As such, any “property damage” to “impaired property” or property not physically injured arising out of Kriewaldt’s defective, deficient, inadequate or dangerous “product” or “work” is excluded. Further, any “property damage” to “impaired property” or property not physically injured arising out of Kriewaldt’s or its agents’ delay or failure to perform a contract in accordance with its terms is excluded.

41. Under the “Independent Contractors” exclusion in the Policy, coverage for any claims, loss, costs or expense arising out of the actions of any subcontractors retained by Kriewaldt is excluded. As such, to the extent Kriewaldt’s work on the Development was performed by subcontractors, coverage is excluded.

42. Under the “Punitive Damages” exclusion in the Policy, coverage for any punitive or exemplary damages is excluded. As such, to the extent any punitive or exemplary damages are awarded against Kriewaldt, coverage for those damages is excluded.

PRAYER FOR RELIEF

43. Indian Harbor is entitled to a declaration by this Court that it owes no duty of defense or indemnity with regard to any faulty work performed by Kriewaldt which caused “property damage” to Kriewaldt’s work product.

44. Indian Harbor is entitled to a declaration by this Court that it owes no duty of defense or indemnity with regard to the breach of warranty and unfair trade practices claims because such claims do not constitute an “occurrence” under the Policy

45. Indian Harbor is entitled to a declaration by this Court that it owes no duty to indemnify Kriewaldt with regard to damage to any building in the Development on which Kriewaldt did not perform work or to which work was not completed until after the Policy had cancelled on August 10, 2002.

46. Indian Harbor is entitled to a declaration by this Court that its duty to indemnify, if any, is limited to its pro rata time on risk.

47. Indian Harbor is entitled to a declaration by this Court that it owes no duty of defense or indemnity to Kriewaldt with regard to “property damage” excluded by certain exclusions contained in the Policy, including:

- a. the “Expected or Intended Injury” exclusion;
- b. the “Damage to Property” exclusion;
- c. the “Your Product” exclusion;
- d. the “Your Work” exclusion;
- e. the “Damage to Impaired Property or Property Not Physically Injured” exclusion; and
- f. the “Subcontractor” exclusion.

48. Indian Harbor is entitled to a declaration by this Court that it owes no duty to indemnify Kriewaldt with respect to any punitive damage awarded against it.

WHEREFORE, Indian Harbor respectfully prays the Court for the following relief:

1. That the Court declare the rights and obligations of Indian Harbor under the Policy and determine that Indian Harbor does not owe a duty of indemnification to Kriewaldt for the claims made in the Underlying Actions;

2. That the Court declare the rights and obligations of Indian Harbor under the Policy and determine that Indian Harbor should not have to pay any alleged or potential judgment creditor of Kriewaldt for any claims in the Underlying Actions;

3. That the costs of this action be taxed against the Defendants; and

4. For such other and further relief as the Court deems just and proper.

/s/ Nicholas A. Farr 28 U.S.

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