631 Fed.Appx. 452
United States Court of Appeals,
Ninth Circuit.

RTR BUILDERS INCORPORATED, An Arizona Corporation/ Judgment Debtor,
Plaintiff-counter-defendant,
Atain Specialty Insurance Company, A Michigan Corporation, FKA USF Insurance Company,
Garnishee–Appellee,
v.
Homer F. SAVARD, Husband/Judgment Creditor; et al., Defendants–counter–claimants–Appellants.

No. 13–16638.
|
Argued and Submitted Oct. 23, 2015.
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Filed Nov. 19, 2015.

Synopsis

Background: General contractor brought action against homeowners, seeking payment allegedly due for rebuilding their home. Homeowners counterclaimed, and contractor's insurer refused to defend and indemnify contractor under commercial general liability (CGL) policy. Contractor confessed judgment and assigned its claims against insurer to homeowners in *Damron* agreement. In homeowners' subsequent collection action, the United States District Court for the District of Arizona, Susan R. Bolton, J., granted summary judgment to insurer. Homeowners appealed.

Holding: The Court of Appeals held that homeowners did not sustain property damage caused by an "occurrence" under CGL policy, and thus insurer had no duty to defend or indemnify contractor.

Affirmed.

West Headnotes (1)

[1] **Insurance**
Accident, occurrence or event

Under Arizona law, homeowners did not sustain property damage caused by an "occurrence" under insured general contractor's commercial general liability (CGL) policy, and thus insurer had no duty to defend or indemnify contractor with respect to homeowners' claims against it in connection with contractor's rebuild of their home; contractor did not finish rebuilding home, but this was not result of an "occurrence," which policy defined as an accident, rather, it was result of contractor's affirmative decision to stop work because of payment dispute with homeowners.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Arizona, Susan R. Bolton, District Judge, Presiding. D.C. No. 2:12–cv–02007–SRB.

Before: HAWKINS, SILVERMAN, and CHRISTEN, Circuit Judges.

MEMORANDUM*

After rebuilding a substantial portion of the Savards' home, their general contractor, RTR Builders, stopped work because ***453** of a payment dispute. RTR filed a complaint against the Savards seeking payment and the Savards asserted various counterclaims. RTR repeatedly asked its insurer, Atain Specialty Insurance Company, to defend and indemnify it under RTR's Commercial General Liability Policy ("the Policy"). Atain declined. RTR eventually confessed judgment and assigned its claims against Atain to the Savards in a *Damron*

agreement. *See Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969). In the Savards' subsequent collection action, the district court granted summary judgment in favor of Atain. The Savards argue on appeal that Atain breached its duty to defend and indemnify RTR. We have jurisdiction over this diversity action under 28 U.S.C. § 1291 and we affirm.[1]

The Savards argue that Atain had a duty to defend RTR because the Savards alleged that RTR caused "property damage" resulting from an "occurrence" within the meaning of the Policy. An insurer has a duty to defend when a complaint alleges "facts that, if true, would give rise to coverage," *Lennar Corp. v. Auto–Owners Ins. Co.*, 214 Ariz. 255, 151 P.3d 538, 544 (App.2007), so long as "other facts which are not reflected in the complaint [do not] plainly take the case outside the policy coverage," *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 509 P.2d 222, 224 (1973) (en banc). An "occurrence" is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." RTR's affirmative decision to stop work was not an "occurrence." The Savards did not establish a triable issue of fact as to whether Atain had a duty to defend RTR.

The Savards also contend that Atain had a duty to indemnify RTR.[2] To determine a duty to indemnify we look to whether the facts "proven, stipulated or otherwise established" fall within policy coverage. *Colorado Cas. Ins. Co. v. Safety Control Co., Inc.*, 230 Ariz. 560, 288 P.3d 764, 772 (App.2012). The Savards did not establish a disputed issue of fact as to whether they suffered "property damage" caused by an "occurrence." They allege that their home sustained water damage, but nothing in the record shows that any water damage actually occurred. The record does show evidence of incomplete construction, but this alone cannot constitute property damage under the Policy. *U.S. Fidelity & Guar. Corp. v. Advance Roofing & Supply Co., Inc.*, 163 Ariz. 476, 788 P.2d 1227, 1230 (App.1989). As noted, the Savards did not raise a disputed issue of fact about whether there was an occurrence under the Policy, because incomplete construction cannot constitute an "occurrence."[3]

***454** Last, the Savards argue that failing all else, RTR had a reasonable expectation of coverage because Atain knew what kind of work RTR performed, it could infer RTR expected coverage for this work, and it subsequently created an impression of coverage by not informing RTR that its work was not covered. We can find no authority for the proposition that an insurer has an affirmative duty to alert its insured that the insured is operating outside of coverage, lest the insurer create a reasonable expectation of coverage. Even if an insurer had such a duty, the record does not reflect that RTR represented to Atain that it was operating outside of coverage. The Savards have not raised a triable issue of fact as to whether Atain had a duty to indemnify RTR.

AFFIRMED.

All Citations

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Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

1 Because the parties are familiar with the facts we do not recount them here.

2 The Savards argue that Atain had a duty to indemnify RTR for the full stipulated *Damron* judgment because Atain breached its duty to defend RTR. Because we find Atain did not have a duty to defend RTR this argument is moot. But even if Atain had a duty to defend RTR and breached that duty, the Savards would still have to show Atain had a duty to indemnify RTR; a *Damron* agreement establishes the amount of liability, but it does not establish coverage. *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 235 Ariz. 536, 334 P.3d 719, 727 (2014) (recognizing that an insurer in breach of its duty to defend is not bound by a *Damron* agreement unless the insured can separately establish a duty to indemnify).

3 The Savards rely on Arizona case law suggesting that damage resulting from *faulty* construction (as opposed to *incomplete* construction) can itself constitute an occurrence. *See Lennar Corp.*, 151 P.3d at 546. But the negligent construction in *Lennar* is unlike the intentional incomplete construction here; damage caused by the former can be considered an "accident," but damage caused by the latter cannot. Further, as noted, the Savards did not establish a triable issue of fact as to whether the incomplete construction actually resulted in any property damage.

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