[Cite as *Schluter Sys., L.P. v. Cent. Mut. Ins. Co.*, 2009-Ohio-4375.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92637

SCHLUTER SYSTEMS, LP, ET AL.

PLAINTIFFS-APPELLEES

vs.

CENTRAL MUTUAL INSURANCE CO., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-641653, CV-647731, and CV-664551

BEFORE: Blackmon, J., Gallagher, P.J., and Kilbane, J.

RELEASED: August 27, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANTS

Patrick M. Roche
Beverly A. Adams
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, East
Cleveland, Ohio 44114

Joseph K. Poe
Rivkin Radler, LLP
926 RXR Plaza
Uniondale, NY 11556-0926

ATTORNEYS FOR APPELLEES

Jean Kerr Korman
Barry J. Miller
Benesch, Friedlander, Coplan & Arnoff
2300 BP Tower, 200 Public Square
Cleveland, Ohio 44114-2378

For Joseph & Pamela Carollo:
Roger J. Weiss
147 Bell Street, Suite 300
Chagrin Falls, Ohio 44022

For Larry A. Guthrie, et al.:
Harry T. Sigmier
Weston, Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862

For Westfield Insurance Co.:
Mark F. Fischer
Fischer, Evans & Robbins, LTD.
4505 Stephen Circle, N.W., Suite 100
Canton, Ohio 44718

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} In this consolidated appeal, appellant Central Mutual Insurance Company ("Central Mutual") appeals the trial court's decision granting summary judgment in favor of Schluter Systems, LP ("Schluter"). Central Mutual assigns the following error for our review:

> **"I. The trial court erred when it denied Defendant Central Mutual Insurance Company's motion for summary judgment and granted Plaintiff Schluter Systems, LP's motion for summary judgment holding and declaring that, in applying New York law, Plaintiff Schluter System, LP complied with the notice provisions in the commercial general liability policy issued to it by Defendant Central Mutual Insurance Company and that Defendant Central Mutual Insurance Company has a duty to defend and indemnify it for the underlying claims."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} In July 2003, Joseph and Pamela Carollo ("the Carollos") entered into a contract with Larry A. Guthrie ("Guthrie"), the sole proprietor of Absolute Flooring ("Absolute"), for the installation of approximately 1,400 square feet of limestone tile in their home in Brecksville, Ohio. As part of the installation, Absolute used an underlayment called Ditra, which is manufactured by Schluter. Absolute completed the installation in August 2003 and provided a warranty to the Carollos.

{¶ 4} In December 2003, approximately four months after the installation, the Carollos began to notice separating and cracking tiles. The Carollos reported this development to Absolute, who indicated that it typically takes a full year for all

settlement cracks to appear. Absolute also indicated that it would complete the repairs during the Summer of 2004.

{¶ 5} In August 2004, Guthrie inspected the installation and was perplexed by the manner in which the tiles had separated and cracked. Following the inspection, Guthrie informed the Carollos that he would contact Eric Williamson ("Williamson"), a Schluter sales representative, to determine the possible causes of the separation and cracks.

{¶ 6} On October 21, 2004, Williamson inspected the installation and observed hairline cracks in the limestone tiles. At the time of the inspection, the Carollos requested that Schluter provide a one year warranty if the cracks could be repaired. Following his inspection, Williamson consulted with Peter Nielsen ("Nielsen"), Schluter's technical director, to determine the cause of the cracked tiles.

{¶ 7} In December 2004, Nielsen determined that Schluter's Ditra underlayment was not defective and was not the cause of the cracked tiles. Nielsen concluded that the cracks were present because the Carollos selected a fragile limestone tile that Absolute installed over a single layer of 3/4 inch plywood; Absolute installed the tile in a butt-jointed fashion, with no surface movement joints; and Absolute failed to install the functional perimeter expansion joints.

{¶ 8} Thereafter, in December 2004, Williamson issued the findings to Absolute and provided a proposed repair specification. The repair specifications required the installation of expansion and control joints around the perimeter walls of

the first floor and at every 20-26 feet with the field of installation. On January 24, 2005, Absolute confirmed that the Carollos would accept the warrantied repairs to resolve the cracks in the tile. Absolute also confirmed that they would follow all of Schluter's repair specifications.

{¶ 9} On February 17, 2005, Absolute began repairing the floor. On March 10, 2005, while Williamson, Guthrie, and the Carollos were reviewing the repairs being done, Mr. Carollo indicated that he did not want his natural tile floor to look like a jigsaw puzzle due to the required expansion and control joints.

{¶ 10} At that time, Guthrie informed Williamson and the Carollos that the tongues from the tongue and groove plywood had been cut prior to installing Schluter's Ditra underlayment in the original installation. Guthrie opined that this was the cause of the cracked tiles. Guthrie also indicated that on a previous unrelated job, Williamson had suggested cutting the tongues from the tongue and groove plywood.

{¶ 11} In subsequent discussions with the Carollos, Nielsen advised them that at the time he prepared the repair specifications, he was not aware that Absolute had cut the tongues from the tongue and groove plywood. Nielsen inquired if the Carollos would consider other options such as taking off the entire floor and replacing the sub-flooring, or laying a second layer of tile over the first installation. Nielsen further indicated that Schluter needed to file a claim with their insurance carrier.

{¶ 12} On May 26, 2005, Schluter notified Central Mutual of a potential claim from the Carollos. On July 12, 2005, Central Mutual denied coverage citing late notice. Central Mutual then retained an engineer to investigate the installation. In September 2005, the engineer issued a report opining that the removal of the tongues from the plywood sub-floor was the primary cause of the cracked tiles.

{¶ 13} On February 8, 2007, the Carollos filed suit against Schluter, Absolute, and Guthrie to repair the cracks in the limestone tile installed by Absolute. Schluter tendered the complaint to Central Mutual, who, on June 26, 2007, denied coverage. Absolute filed a cross-claim against Schluter. On September 19, 2007, the Carollos dismissed the suit without prejudice.

{¶ 14} On November 14, 2007, Schluter filed suit against Central Mutual alleging breach of contract, and bad faith. In addition, Schluter also sought a declaration that Central Mutual had a duty to defend them in the Carollos litigation. Central Mutual filed its answer and asserted late notice. On January 17, 2008, the Carollos re-filed the lawsuit, which Schluter tendered to Central Mutual, who again denied coverage based on late notice. Absolute re-filed their cross-claim against Schluter.

{¶ 15} On July 23, 2008, Central Mutual filed a motion for summary judgment based on the affirmative defense of late notice. Schulter filed its motion in opposition and a cross-motion for summary judgment. On December 9, 2008, the trial court denied Central Mutual's motion, and on December 11, 2008, granted Schluter's motion for summary judgment.

Summary Judgment

{¶ 16} In its sole assigned error, Central Mutual argues the trial court erred in granting summary judgment in Schulter's favor. We disagree.

{¶ 17} We review an appeal from summary judgment under a de novo standard of review.[1] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.[2] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion which is adverse to the non-moving party.[3]

{¶ 18} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment.[4] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if

---

[1]*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

[2]Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

[3]*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

[4]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

the non-movant fails to establish the existence of a genuine issue of material fact.[5]

{¶ 19} In the instant case, Central Mutual contends that under New York law, Schluter did not comply with the notice provision of the commercial general liability policy because Schluter failed to give notice "as soon as practicable."

{¶ 20} At the outset, we draw attention to the provisions of the Central Mutual policy about which the controversy revolves. Section IV of the commercial general liability policy states in pertinent part as follows:

> **"2. Duties In The Event Of Occurrence, Offense, Claim or Suit**
>
> **a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. * * ***
>
> **b. If a claim is made or 'suit' is brought against any insured, you must"**
>
> **1. Immediately record the specifics of the claim or 'suit' and the date received; and**
>
> **2. Notify us as soon as practicable. You must see to it that we receive written notice of the claim or 'suit' as soon as practicable."**[6]

{¶ 21} Central Mutual contends that October 21, 2004, the date Williamson, Schluter's sales representative, first inspected the tile installation and observed the cracked tiles, is the date that triggered Schluter's obligation to notify them of a

---

[5]Id. 293.

[6]Central Mutual's Commercial General Liability Policy, Section IV.

potential claim. Instead, Central Mutual claims that Schluter waited approximately seven months to notify the company. We are not persuaded.

{¶ 22} Preliminarily, we note, notice provisions in insurance contracts are conditions precedent to coverage, so an insured's failure to give its insurer notice in a timely fashion bars coverage.[7] A provision in an insurance policy requiring notice to the insurer "as soon as practicable" requires notice within a reasonable time in light of all the surrounding facts and circumstances.[8]

{¶ 23} Under New York law, which neither party disputes applies to this action, an insured's failure to give timely notice to its insurer may be excused by proof that the insured had a reasonable belief of non-liability.[9] The test to be applied is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim.[10] An insured's reasonable belief in non-liability constitutes a valid excuse for failure of or delay in notification.[11]

---

[7]*Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, citing *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.* (Feb. 22, 1995), 6th Dist. No. CI90-2521.

[8]*Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St.3d 292.

[9]*Commercial Union Ins. Co. v. International Flavors & Fragrances, Inc.* (2d Cir.1987), 822 F.2d 267, 271.

[10]Id. at 272.

[11]*Sparacino v. Pautackit Mut. Ins. Co.* (2d Cir.1995), 50 F.3d 141, 144. See, also, *White v. City of New York* (N.Y.1993), 81 N.Y.2d 955, 598 N.Y.S.2d 759, 760, 615 N.E.2d 216; *Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.* (N.Y.1972), 31 N.Y.2d 436, 340 N.Y.S.2d 902, 906, 293 N.E.2d 76; *Beach Haven Apts. v. Allcity Ins. Co.* (2d

{¶ 24} Here, the record indicates that in October 2004, Schluter inspected the installation, observed the hairline cracks, and commenced an investigation to determine the cause of the cracks and whether the cracks could be repaired. The record also indicates that if the cracks could be repaired, the Carollos merely wanted a one-year warranty after the repairs were completed. At this juncture, given the unknown cause of the cracks, Schluter could not have reasonably foreseen the possibility of a claim, which would trigger their obligation to notify Central Mutual.

{¶ 25} The record also indicates that after their investigation, in December 2004, Schluter determined that it was not a failure of their product, which caused the tiles to crack, but the installation of fragile limestone tiles over a single layer of 3/4 inch plywood. Schluter also determined that Absolute had installed the tiles with no surface movement joints and had failed to install functional perimeter expansion joints.

{¶ 26} Consequently, at that point, Schluter could not have foreseen the possibility of a claim, because they had determined the cracks resulted from Absolute's improper installation and not from their product. Thus, after determining that they were not liable, it was unnecessary to notify Central Mutual.

{¶ 27} Further, the record indicates that in the latter part of December 2004, Schluter devised a repair specification plan and agreed to provide a one-year warranty after Absolute completed the repairs. The record indicates that in January

---

Dept. 1992), 182 A.D.2d 658, 581 N.Y.S.2d 689, 690.

2005, the Carollos consented to the proposed repairs and Absolute commenced the repairs around the middle of February 2005. We conclude that up to this point, no circumstances existed that would have created in the mind of a reasonable person that liability could attach and therefore notification was unnecessary.

{¶ 28} Our review of the records, leads us to conclude that the circumstances changed around the middle of March 2005. It was at this point that Schluter discovered that the tongues from the tongue and groove plywood had been cut prior to installation of the tiles. Schluter also discovered that it was their salesperson, Williamson, who had instructed Absolute, on a prior unrelated installation, to cut the tongues from the tongue and groove plywood. Thus, for the first time, Schluter had sufficient knowledge to conclude that liability could attach. Consequently, this period is the logical starting point from which Schluter's obligation to notify Central Mutual arises.

{¶ 29} The record indicates that after Schluter became aware that their agent had instructed Absolute to cut the tongues off the plywood prior to installation, Schluter attempted to resolve the issue. After proposing taking off the entire original installation, replacing the sub-flooring, and laying new tiles, Schluter notified Central Mutual on May 26, 2005 of the possibility of a claim. Consequently, we conclude, given the circumstances and the ongoing steps being taken to resolve the problem, Schluter gave Central Mutual timely notice.

{¶ 30} Nonetheless, Central Mutual maintains Schluter's notice was not given "as soon as practicable." In support of its argument, Central Mutual cites several

cases including *Paramount Insurance Company v. Rosedale Gardens, Inc.*[12] for the proposition that a seven month delay constitutes late notice. However, we find *Paramount* and the other cited cases distinguishable from the instant case, because they all involved accidents, which occurred on a specific date, and which resulted in bodily injury, and even death. Unlike here, the injury or damage was immediately ascertainable and the attendant liability was easily discoverable, therefore the analysis of timeliness of notice was more clear cut.

{¶ 31} Moreover, Central Mutual was not prejudiced. The record indicates that it was almost a year after Schluter notified Central Mutual about the possibility of a lawsuit threatened by the Carollos. The Carollos did not file suit until February 8, 2007, almost two years after Schluter notified Central Mutual of this possibility.

{¶ 32} We conclude, the record establishes that Central Mutual was put on notice of the possibility of a lawsuit within a reasonable time after Schluter determined that their actions directly contributed to the cracking of the tiles. As such, Central Mutual had a duty to defend Schluter in a lawsuit that was brought almost two years after notification. Consequently, the trial court properly denied Central Mutual's motion for summary judgment and did not err in granting Schluter's motion for summary judgment. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

[12](2000), 293 A.D.2d 235, 743 N.Y.S. 2d 59.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR