Docket: **12-03503-BLS2**
Date: **January 22, 2018**
Parties: **THE HANOVER INSURANCE GROUP INC., Plaintiff VS. RAW SEAFOODS, INC., Defendant**
Judge: **Janet L. Sanders**

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This case concerns a dispute over coverage between an insured and its insurer. Defendant Raw Seafoods, Inc. (RSI) is a seafood processor. In 2012, an RSI customer, Atlantic Capes Fisheries, Inc. (Atlantic), filed an action in federal court alleging that RSI's negligent processing of its scallops resulted in their premature spoilage. RSI's insurer, plaintiff Hanover Insurance Group, Inc. (Hanover), agreed to defend RSI under a reservation of rights and then filed the present action, seeking a declaration that it had no duty to indemnify RSI for any judgment Atlantic obtained. After the federal court judge granted summary judgment in favor of Atlantic and entered judgment against RSI, the parties filed cross motions for partial summary judgment in the instant action. This Court (Roach, J.) granted summary judgment in favor of Hanover but the Appeals Court reversed. 91 Mass.App.Ct. 401 (2017). RSI now renews it Motion for Partial Summary Judgment. For the reasons that follow, the Motion is Allowed.

-1-

BACKGROUND

RSI is a seafood processing facility in Fall River. Atlantic, a seafood company that sells scallops and other seafood, regularly uses RSI to apportion, pack, and freeze the fresh scallops that it purchases from fishing vessels. Upon delivery of Atlantic's scallops, RSI staff inspects the scallops for quality, reports the results to Atlantic, and receives processing instructions. After processing, the scallops are transported to a third-party cold storage facility, Arctic Cold Storage (Arctic), from which Atlantic ships its customers' orders.

In July 2011, a batch of scallops that RSI had processed made their way through customs in Denmark where it was observed that the scallops were decomposed and emitting a strong smell of ammonia. They were deemed unacceptable for human consumption and sent back to the United States. Once in the United States, the Food and Drug Administration tested the batch and confirmed that it was spoiled. The batch of scallops was then returned to Arctic's facility, where representatives from Atlantic and RSI jointly inspected the shipment and again confirmed the damage. They also inspected another batch of scallops processed by RSI around the same time as the rejected batch, and discovered more damaged scallops.

At the time, Hanover insured RSI through a Commercial General Liability (CGL) Policy. The Policy provides in relevant part that Hanover "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The Policy applies to "property damage" that is caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Policy contains several exclusions as well as a "special broadening endorsement," which modifies the scope of certain exclusions.

-2-

In June 2012, Atlantic sued RSI in the United States District Court for the District of Massachusetts, alleging that the damage to the scallops was caused by RSI's negligence. Hanover agreed to defend RSI under a reservation of rights. Shortly thereafter, Hanover filed the present lawsuit, seeking a

declaratory judgment that either the damage to the scallops was not caused by an "occurrence" within the meaning of the Policy, or that certain Policy exclusions applied, such that it had no duty to indemnify RSI for any judgment Atlantic obtained. RSI asserted counterclaims for breach of contract and violations of G.L. cc. 93A and 176D, and further alleged that it was entitled to a declaration that the damage was covered. Upon motion by RSI, the Court stayed discovery pending resolution of the federal litigation.

While the stay was in place, discovery proceeded in the federal action. In deposition testimony, the president of RSI, Jason Hutchens, conceded that the scallops were delivered to RSI in good condition, but that "somewhere in [RSI's] system, the product got messed up." Hutchens testified: "[I]n almost the seventeen years we've been doing this, we've never seen anything like this before . . . we beat our heads against the wall for, it seemed like months, trying to figure this out. We have never seen anything like it and have not seen anything after this problem. But we can't put our hands around it, how it happened and why it happened . . . we don't know." Hutchens agreed, however, that the damage occurred while the scallops were in RSI's custody and was "the result of some, as yet, unknown failure on the part of [RSI's] processing people or handling people within [RSI's] plant." The precise cause of the damage remains unknown.

In June 2014, Atlantic moved for summary judgment in the federal action, relying on the doctrine of res ipsa loquitur. Atlantic argued that the undisputed facts showed that it had delivered the scallops to RSI in good condition, that RSI had exclusive control over the scallops

-3-

until they were delivered to Arctic in a frozen state, and that nothing occurred after that delivery that would have caused the damage. Agreeing with this reasoning, the federal court allowed Atlantic's motion.

After judgment entered against RSI, the parties in the instant case filed cross motions for partial summary judgment on the issue of coverage. Judge Roach granted summary judgment in favor of Hanover, concluding that RSI could not meet its burden of proving that the loss was caused by an "occurrence" because "there was no demonstrated accident distinct from [RSI's] performance of its work." In reaching that conclusion, Judge Roach relied on Pacific Indemnity Co. v. Lampro (Lampro), 86 Mass. App. Ct. 60, 65 (2014), reasoning that the possibility that raw seafood could be spoiled or damaged during handling is a "normal, foreseeable and expected incident" of the seafood processing business and is therefore not an accident.

RSI appealed and in April 2017, the Appeals Court set aside the judgment in Hanover's favor and remanded the case. In doing so, the Court made several observations relevant to the renewed motion presently before this Court. First, the Appeals Court noted that, in allowing Atlantic's motion for summary judgment in the federal action, the court had necessarily determined that the only explanation for the damage to the scallops was that RSI was negligent in handling the product. Hanover could not relitigate this factual issue. In other words, Hanover could not take the position in this litigation that the damage could have been the result of intentional conduct. 91 Mass.App.Ct. at 407. Second, the Appeals Court concluded that Lampro was distinguishable, and that the instant case was instead similar to Beacon Textiles Corp., v. Employers Mut.Liab. Ins. Co., 355 Mass. 643 (1969), which supported RSI's position. 91 Mass.App.Ct. at 409-410. The Court remanded the case "for further proceedings consistent with this opinion regarding (1) the applicability of the exclusions, (2) Hanover's duty

-4-

to defend and (3) RSI's counterclaims for breach of contract and violations

of G. L. cc. 93A and 176D." Id. at 411.

DISCUSSION

As the insured, RSI bears the initial burden of proving that its claim falls within the scope of coverage provided by the Policy. See Boazova v. Safety Ins. Co., 462 Mass. 346, 351 (2012). That means that RSI must demonstrate that the claimed loss (here the damage to Atlantic's scallops) was caused by an "occurrence." In moving for summary judgment, RSI argues that the undisputed facts and the legal principles set forth in the Appeals Court's decision in this case establish that RSI's liability to Atlantic arose out of an "occurrence" within the meaning of the Policy. This Court agrees, in large part based on the reasoning of the Appeals Court.

Hanover argues, however, that the Appeals Court did not hold that RSI was entitled to judgment as a matter of law and that there may be facts which would show this was not an accident. Because discovery has been stayed, Hanover has had little opportunity to determine if such facts exist. Hanover contends that it needs more information regarding the procedures that RSI followed in processing the scallops, the materials it used, the purpose of processing and any communications regarding this issue. But the Appeals Court made it quite clear that Hanover was bound by the federal court's decision that the damage to the scallops was due to RSI's negligence, not as part of the ordinary work process and not the result of any intentional conduct. Hanover cannot relitigate this factual determination. Accordingly, there is no basis to seek this additional discovery.

It is also clear from the Appeals Court's decision that that the damages for which RSI seeks coverage arose out of an "occurrence."[1] Hanover relied (and continues to rely) on Lampro in support of its position that this was not an occurrence, but the Appeals Court made it clear that Lampro was different. In that case, the insured was hired to cut down trees. The harm for which it sought coverage arose because it cut down too many trees, not because it cut down the trees in an improper manner. The harm thus did not arise because of a fortuitous or unexpected event but because of an intentional decision that occurred in the course of the insured's ordinary work process, which was cutting down trees. In contrast, damaging scallops was not part of RSI's ordinary work process; rather, it was an "unexpected happening without intention or design" and thus an "accident." See Liberty Mut. Ins. Co. v. Tabor, 407 Mass. 354, 358 (1990) (construing that term in an auto policy to find that there was coverage for an auto accident caused by the insured's negligence). The Appeals Court reasoned that the instant case was controlled not by Lampro but by Beacon Textiles, 355 Mass. at 646, where it was held that a loss sustained by the insured as a result of yarn changing color was an -accident" and therefore covered by the insurance policy. Although the precise cause for the change in color was never determined, it took place while in the insured's possession and therefore was an "accident." The same conclusion is compelled here.

In remanding the case, the Appeals Court did leave open the question of whether any exclusions to coverage apply.[2] On this issue, Hanover bears the burden of proof. Hanover relies on three exclusions: Exclusion (j) ("Damage to Property"), Exclusion (k) ("Your

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[1] Indeed, in remanding the case, the Appeals Court did not suggest that there continued to be an issue regarding whether this was an "occurrence," instead instructing this Court to determine whether any exclusions to the policy applied.

[2] In doing so, however, the Appeals Court acknowledged that this was a

question of law.

-6-

Product"), and Exclusion (n) ("Recall of Products, Work or Impaired Property"). This Court concludes that, as a matter of contract interpretation, these exclusions do not apply.

Exclusion (j) precludes coverage for certain types of property damage, including personal property in the care, custody or control of the insured. The Broadening Endorsement, however, alters the scope of the exclusion and expressly provides that the exclusion does "not apply to 'property damage' to 'customer goods' while on your premises . . . ." It defines "customer goods" as "property of your customer on your premises for purposes of being a) worked on; or b) used in your manufacturing process." Reading Exclusion (j) and the Broadening Endorsement together, this Court concludes that this exclusion cannot apply because the damaged scallops were the property of Atlantic and they were damaged while they were in RSI's facility "for the purpose of being . . . worked on."

Exclusion (k) precludes coverage for property damage to "Your Product arising out of it or any part of it." The Policy defines "Your Product" as "Any goods or products, other than real property, manufactured sold, handled, distributed or disposed of by . . . You." "The purpose of the exclusion is to prevent the insured from using its product liability coverage as a form of property insurance to cover the cost of repairing or replacing its own defective products or work." Commerce Ins. Co. v. Betty Caplette Builders, Inc., 420 Mass. 87, 92 (1995), quoting 2 R. Long, Liability Insurance Section 11.09(2) (1993). It does not apply when the insured's liability results from the provision of services. See Todd Shipyards Corp. v. Turbine Serv., Inc., 674 F.2d 401, 420 (5th Cir. 1982). Here, the exclusion does not apply because the undisputed facts demonstrate that RSI was hired to perform a service for Atlantic and the damage occurred when it processed the scallops as part of that service. The scallops themselves were not RSI's product.

-7-

Hanover contends that it would be unfair to draw that conclusion without knowing more about RSI"s processing procedures. This assumes that this processing necessarily turns the raw scallops that it received from Atlantic into something else entirely. Regardless of the processing procedures utilized by RSI, it is undisputed that Atlantic harvested and delivered the scallops to RSI and that after processing, those same scallops went to Arctic's facility. RSI did not turn the scallops into a fundamentally different product -- for example, by incorporating them into a scallop chowder. Contrast Holsum Food Div. of Harvest States Cooperatives v. Home Ins. Co., 162 Wis. 2d 563, 566-567 (1991) (insured hired to mix ingredients supplied by customer to make customer's barbeque sauce); Nu-Pak, Inc. v. Wine Specialties Intl, Ltd., 253 Wis. 2d 825, 828 (Wis. Ct. App. 2002) (insured hired to blend ingredients supplied by customer to make customer's alcoholic beverage).

Finally, Exclusion (n), commonly referred to as the "sistership 'exclusion," provides that the Policy does not apply to: "Damages claimed for any loss, cost, or expense incurred by you or others for the loss or use, withdrawal, recall, inspection, repair, replacement, adjustment or disposal of: (1) Your product; (2) Your work; or (3) Impaired Property; If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it. . ." The exclusion "only applies 'in cases where, because of the actual failure of the insured's product, similar products are withdrawn from use to prevent the failure of these other products, which have not yet failed but are

suspected of containing the same defect.' It does not apply when the product has already failed and caused property damage." Amtrol, Inc. v. Tudor Ins. Co., 2002 WL 31194863, at *10 (D. Mass. Sept. 10, 2002), quoting United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 144 I11.2d 64, 81-82 (1991). Here RSI is not seeking

-8-

coverage for costs associated with the removal of non-damaged products but rather for costs connected to the recall of products that were actually damaged. Accordingly, this exclusion does not apply.

Hanover asserts that there is a material dispute of fact as to whether all of the scallops were actually spoiled. In the federal action, however, the evidence presented to the court on the summary judgment motion was that the weight of the damaged scallops was 58,824 pounds and that the value of those scallops was $463,735.86. The federal court entered judgment in favor of Atlantic for that amount, thus implicitly determining that 58,824 pounds of scallops were actually damaged. Hanover is bound by those figures.

CONCLUSION AND ORDER

For the forgoing reasons, Raw Seafoods, Inc.'s Renewed Motion for Partial Summary Judgment is ALLOWED with regard to the question of coverage. This matter is scheduled for
a status conference on February , 2018 at 2:00 to set a schedule for resolution of what
remains of the case.

Janet L. Sanders
Justice of the Superior Court

-9-