IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

BLOOMER PLASTICS, INC.,

Plaintiff,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.

MEMORANDUM AND ORDER

06-C-124-S

Plaintiff Bloomer Plastics, Inc. commenced this action against defendant Fireman's Fund Insurance Company in Chippewa County Circuit Court seeking monetary relief. Plaintiff seeks relief pursuant to two theories of liability: (1) breach of contract; and (2) bad faith. Defendant removed the action pursuant to 28 U.S.C. §§ 1441 and 1446 citing 28 U.S.C. § 1332 as grounds for removal. Jurisdiction is based on 28 U.S.C. § 1332. The matter is presently before the Court on the parties' cross-motions for summary judgment. The parties agree the material facts of this action are not in dispute. Accordingly, the following facts are undisputed.

BACKGROUND

Plaintiff Bloomer Plastics, Inc. is a Wisconsin corporation with its principal place of business in Bloomer, Wisconsin. Plaintiff is engaged (at least in part) in the business of manufacturing and selling polyethylene film. Defendant Fireman's Fund Insurance Company is a California corporation with its principal place of business in Novato, California. Defendant is engaged in the insurance business.

Defendant issued a series of annual commercial general liability insurance policies (hereinafter CGL policies) to plaintiff as follows: (1) policy number MZX 80746926 covering the period from November 1, 1999 through November 1, 2000, (2) policy number MZX 80770934 covering the period from November 1, 2000 through November 1, 2001; and (3) policy number MZX 80792362 covering the period from November 1, 2001 through November 1, 2002. Plaintiff was insured by defendant at all times relevant to this action.

In October of 2003 Microtek Medical, Inc. (hereinafter Microtek) commenced an action against plaintiff in the United States District Court for the Northern District of Mississippi, Eastern Division alleging: (1) breach of contract, (2) breach of express warranty, (3) breach of implied warranty of merchantability, (4) breach of implied warranty of fitness for a particular purpose; and (5) negligent misrepresentation in connection with polyethylene film plaintiff manufactured and sold to Microtek.

Microtek alleged that in the year 2000 it was contacted by one of its customers concerning a need for fluid collection pouches which were to be used during caesarean-section procedures and made from polyethylene film. Microtek supplied its customer with a sample of twenty-seven inch width polyethylene film that it was already purchasing from plaintiff. Microtek's customer approved plaintiff's film for use and issued specifications for the fluid

collection pouches approving the use of said film. Accordingly, beginning on or about July 28, 2000 Microtek issued a series of purchase orders to plaintiff for various quantities of the approved polyethylene film. While plaintiff never disclosed the chemical composition or formula that it utilized in manufacturing the approved film it understood and agreed that said chemical composition or formula could not be altered or varied without Microtek's permission. Microtek alleged plaintiff never sought permission to change either the chemical composition or the formula of its polyethylene film.

In or about April of 2001 plaintiff began providing Microtek with signed Certificates of Conformance for each shipment of the polyethylene film in which plaintiff expressly certified that it used materials and manufactured said film per Microtek's specifications and purchase orders. Additionally, the certificates expressly certified that plaintiff tested the film and it met Microtek's product specifications. However, Microtek alleged that in or about September of 2002 its customer began receiving complaints about the fluid collection pouches including complaints that the pouches were leaking due to cracks and pinholes in the product. Microtek alleged that it notified plaintiff of such defects shortly thereafter. Additionally, Microtek alleged that it began manufacturing and delivering replacement pouches to its customer at Microtek's own expense.

Microtek alleged in its complaint that at some point prior to September of 2002 plaintiff changed the chemical composition or formula it utilized in manufacturing the approved polyethylene film and/or it changed the manufacturing process utilized to produce said film. Microtek alleged that as a result of such changes the polyethylene film sold by plaintiff failed to meet product specifications and as such the film developed cracks and pinholes which rendered it unsuitable for use.

On or about December 11, 2002 Microtek notified plaintiff by letter of efforts it expended in an attempt to mitigate damages and maintain its customer. Microtek detailed its efforts as follows: (1) it worked extensive overtime and set up special production lines to meet its customer's requirements, (2) it air-freighted product to its customer on a daily basis, (3) it accepted an initial return of product from its customer which incorporated the non-conforming material[1]; and (4) it placed all existing inventory of plaintiff's film, as well as works-in-progress and finished goods, in quarantine as it was no longer marketable. Additionally, Microtek itemized the costs it "incurred [through November 30, 2002] as a direct result of [plaintiff's] failure to provide product that met[] the agreed specifications." Such costs were as follows:

1. Overtime to produce replacement product including QA, Packout, and Shipping departments $9,006

[1]As of December 11, 2002 the total amount of product return was in excess of 46,000 pouches.

2.	Truck transfer fees to airport	$850
3.	Daily air shipments	$219,696
4.	Rejected film and WIP in inventory	$26,374
5.	Finished goods at Jacksonville on hold	$120,610
6.	KC return of pouches (46730) pouches)	$168,303
7.	Inspection hours at Jacksonville on finished goods on hold	$3,600
8.	Trailers (storage at Jacksonville) 2x150x1 month (October and November)	$600
9.	R & D time developing new alternatives	$2,063
		$551,102

On or about February 5, 2003 Microtek notified plaintiff by letter of additional costs it alleged were incurred as of December 31, 2002 "due to the unauthorized substitution of the formula." Microtek detailed such additional costs as follows:

1.	Overtime to produce replacement product including QA, Packout, and Shipping departments.	$[276]
[2].	Daily air shipments from the Dominican Republic to Tucson, AZ and necessary air freight of replacement raw materials to the Dominican Republic.	$[94,366]

Accordingly, in its February 5, 2003 letter Microtek requested that plaintiff reimburse it for all costs that it allegedly incurred in the matter which totaled an amount of $645,744.00. Additionally, Microtek notified plaintiff that it would seek reimbursement for any claims asserted by its customer. In its complaint Microtek alleged its customer demanded $585,400.00 as compensation for "losses caused by the defective Microtek product."

On or about February 14, 2003 plaintiff notified Microtek by letter that it rejected Microtek's demand for reimbursement because it asserted the polyethylene film supplied met Microtek's specifications. On or about October 10, 2003 Microtek commenced its action against plaintiff in the United States District Court for the Northern District of Mississippi, Eastern Division. Plaintiff tendered its defense of the Microtek action to defendant. On or about November 3, 2003 defendant responded to plaintiff's tender by letter which stated in relevant part as follows:

> We have received the Complaint filed by Microtek Medical, Inc. in the United States District Court for the Northern District of Mississippi and served on Bloomer Plastics, Inc. ("Bloomer") on October 23, 2003. We currently have insufficient information to make a decision regarding your tender of defense. We will be gathering this information as soon as possible and will advise you of our coverage decision shortly. Meanwhile, our further investigation is being conducted under a full and complete Reservation of all Rights available under the policy and the law.
>
> Bloomer's potential liability in this suit may not fall within the coverage provided by the policy for the following reasons. The policy covers claims for "bodily injury" and or "property damage" which is caused by an occurrence and which occurs during the policy period. There is no claim for either "bodily injury" or "property damage["] alleged in the Complaint.
>
> ...Because an appearance in this lawsuit is due by October 11, 2003[2] you must obtain counsel, at your own expense, to file an answer to this suit to protect the interest of Bloomer. Should we determine that there is a duty to defend Bloomer under the policy, we will reimburse Bloomer for...costs associated in this defense.

[2]Defendant's citation to this date appears to be a typographical error. Microtek commenced its action on October 10, 2003. Accordingly, plaintiff was required to make an appearance in the Mississippi action by November 11, 2003 rather than the October 11, 2003 date stated in defendant's letter.

On or about April 30, 2004 defendant by letter formally disclaimed: (1) any duty to defend plaintiff in the Mississippi action, (2) any obligation to indemnify plaintiff; and (3) any other coverage obligation involving plaintiff's policies. Plaintiff ultimately settled the Microtek action for $450,000.00 and on or about January 27, 2006 it commenced this action against defendant in Chippewa County Circuit Court alleging: (1) breach of contract; and (2) bad faith.

MEMORANDUM

Plaintiff asserts defendant had a duty to defend it in the underlying Mississippi action because Microtek's complaint adequately stated claims which "arguably invoked" coverage under defendant's CGL policies. Additionally, plaintiff asserts defendant is liable for all of its damages including: (1) the cost of settling the Microtek litigation, (2) attorneys' fees and costs incurred in defending the Microtek action; and (3) attorneys' fees and costs incurred in pursuing coverage in this action. Plaintiff asserts defendant is liable for such damages because it breached its duty to defend and as such it is not entitled to raise coverage defenses in this action. Finally, plaintiff asserts defendant acted in bad faith when it denied coverage because the coverage issue was "fairly debatable." Accordingly, plaintiff argues it is entitled to summary judgment as a matter of law.

Defendant asserts Microtek's action was a classic commercial dispute concerning contractual liability for economic loss because plaintiff's product was not that for which Microtek bargained.

Accordingly, defendant asserts Microtek's complaint failed to allege "property damage caused by an occurrence" which was required for Microtek's allegations to fall within the scope of coverage under defendant's CGL policies. Additionally, defendant asserts had Microtek's complaint alleged a claim that fell within the scope of the insuring agreement, application of the business risk exclusions clearly precluded coverage for the claims Microtek asserted. Accordingly, defendant argues it rightfully declined to defend plaintiff in the underlying Mississippi action and as such it is not liable for any of plaintiff's damages. Finally, defendant asserts plaintiff cannot sustain its bad faith claim under the undisputed facts of this action. Accordingly, defendant argues it is entitled to summary judgment as a matter of law.

I. Summary Judgment Standard

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When the material facts are not in dispute as is the case in this action the "sole question is whether the moving party is entitled to judgment as a matter of law." Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 461 (7th Cir. 1997)(citations omitted).

II. Duty to Defend Governing Principles

An insurer's duty to defend its insured is triggered by

comparing the allegations contained within the four corners of the complaint to the terms of the insurance policy. Radke v. Fireman's Fund Ins. Co., 217 Wis.2d 39, 43, 577 N.W.2d 366, 369 (Wis. Ct. App. 1998)(*citing* Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis.2d 824, 835, 501 N.W.2d 1, 5 (1993)). Extrinsic facts will not be considered. Benjamin v. Dohm, 189 Wis.2d 352, 359, 525 N.W.2d 371, 374 (Wis. Ct. App. 1994)(*citing* Prof'l. Office Bldgs., Inc. v. Royal Indem. Co., 145 Wis.2d 573, 581-582, 427 N.W.2d 427, 430 (Wis. Ct. App. 1988)). The insurer has a duty to defend whenever the allegations in the complaint, if proven, "create a possibility of recovery that falls under the terms and conditions of the insurance policy." Employers Mut. Cas. Co. v. Horace Mann Ins. Co., 2005 WI App 237, ¶ 6, 287 Wis.2d 418, 707 N.W.2d 280, 283 (*citing* State Farm Fire & Cas. Co. v. Acuity, 2005 WI App 77, ¶ 7, 280 Wis.2d 624, 695 N.W.2d 883).

In determining whether an insurer has a duty to defend, the underlying complaint must be liberally construed and all reasonable inferences must be drawn in favor of the insured. *See* Doyle v. Engelke, 219 Wis.2d 277, 284, 580 N.W.2d 245, 248 (1998)(citations omitted). Additionally, any doubt concerning whether the complaint triggers such a duty must be resolved in favor of the insured. Wausau Tile, Inc. v. County Concrete Corp., 226 Wis.2d 235, 266, 593 N.W.2d 445, 459 (1999)(citations omitted). In other words an insurer has a duty to defend its insured when the complaint at least arguably asserts liability covered by the policy. *See* Radke,

at 44, 577 N.W.2d at 369 (citation omitted). However, a court cannot rewrite an insurance policy so as to provide coverage for a risk that "the insurer did not contemplate and for which it has not been paid." Qualman v. Bruckmoser, 163 Wis.2d 361, 365, 471 N.W.2d 282, 284 (Wis. Ct. App. 1991)(citation omitted). Accordingly, the primary goal in interpreting an insurance contract is to determine and give effect to the parties' intention. Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co., 2000 WI 26, ¶ 23, 233 Wis.2d 314, 328, 607 N.W.2d 276, 282 (citations omitted).

A. Fireman's Fund's Policy

To determine whether Microtek's allegations against plaintiff were covered by defendant's insurance policy, the Court must apply the language of said policy to the facts presented in Microtek's complaint. The Court construes said policy "as it would be understood by a reasonable person in the position of the insured." Midway Motor Lodge of Brookfield v. Hartford Ins. Group, 226 Wis.2d 23, 30, 593 N.W.2d 852, 855 (Wis. Ct. App. 1999)(citation omitted).

The relevant portions of defendant's insurance policy detail its liability as follows:

> We 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. 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 **bodily injury** or **property damage** to which this insurance does not apply....But:...
>
> b. This insurance applies to **bodily injury** and **property damage** only if:

(1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and

(2) The **bodily injury** or **property damage** occurs during the policy period...[3]

(emphasis in original). Neither party argues the bodily injury provision is applicable to this action. Accordingly, defendant was obligated to defend plaintiff in the Mississippi action if allegations contained within Microtek's complaint described property damage caused by an occurrence. As such the policy's key definitions for determining coverage in this action are as follows:

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

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.

(emphasis in original). The Court must first address whether Microtek's complaint alleged an occurrence as such term is defined under defendant's CGL policy. The parties' arguments concerning whether Microtek's complaint alleged an occurrence under

[3]As previously indicated, defendant issued three separate annual CGL policies to plaintiff. However, the contractual language relevant to the Court's analysis is identical in each policy. Accordingly, any citation of policy language will be to language included in policy number MZX 80792362 which covered the period from November 1, 2001 through November 1, 2002.

defendant's CGL policy center around paragraph twenty-one of said complaint which states in relevant part as follows:

> Upon information and belief, at some point at or prior to September 2002, [plaintiff] changed the chemical composition or formula utilized in manufacturing the Approved Film, and/or otherwise changed its manufacturing processes utilized in manufacturing the Approved Film. As a result of these changes, the film sold to Microtek...did not meet the product specifications...and developed cracks and pinholes that made it unsuitable for use...

Plaintiff asserts Microtek's complaint does not allege that the change in chemical composition was volitional. In other words, plaintiff asserts Microtek's complaint fails to describe such change in formula as "deliberate." Accordingly, plaintiff argues Microtek's complaint does not eliminate the possibility that the change in chemical composition was the result of an accident at plaintiff's plant which would render Microtek's allegation an occurrence under defendant's policy.

Defendant asserts Microtek's allegation that plaintiff changed the chemical composition or formula utilized in manufacturing the approved film and/or otherwise changed its manufacturing process indicates plaintiff's acts were volitional and not ones resulting from an event or condition occurring by chance. Accordingly, defendant argues Microtek's complaint does not allege an occurrence under its policy. The Court finds Microtek's complaint failed to allege an occurrence as such term is defined by defendant's CGL policy. Accordingly, coverage for Microtek's claims did not exist under said policy and as such defendant did not have a duty to defend plaintiff in Microtek's Mississippi action.

Defendant's CGL policy fails to define the term accident. However, Wisconsin courts have been called upon to define the term accident (as such term has been used in connection with identical occurrence language in other CGL policies) on a number of occasions. Wisconsin courts have defined said term as follows: (1) "'[a]n unexpected, undesirable event' or 'an unforeseen incident' which is characterized by a 'lack of intention," Doyle, at 289, 580 N.W.2d at 250 (*quoting* The American Heritage Dictionary of the English Language 11 (3rd ed. 1992)); and (2) "'[a]n unintended and unforseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.'" Everson v. Lorenz, 2005 WI 51 ¶ 15, 280 Wis.2d 1, 12, 695 N.W.2d 298, 303 (*quoting* Black's Law Dictionary 15 (7th ed. 1999)).

Plaintiff argues Microtek's complaint "does not eliminate the possibility that the change in the chemical composition was a result of an accident at [plaintiff's] plant, or other circumstances beyond the control of [plaintiff]." However, defendant was only required to consider Microtek's allegations which were contained within the four corners of its complaint. Radke, at 43, 577 N.W.2d at 369 (citation omitted). When defendant assessed its duty to defend it was not required to speculate beyond the written words of said complaint to determine all potential claims Microtek could have alleged against plaintiff. Microtek's complaint alleged that plaintiff:

> changed the chemical composition or formula utilized in manufacturing the Approved Film, and/or otherwise changed its manufacturing processes utilized in manufacturing the

> Approved Film. As a result of these changes, the film sold to Microtek...did not meet the product specifications..and developed cracks and pinholes that made it unsuitable for use...

While plaintiff presumably did not expect, desire or anticipate that its film would develop cracks and pinholes the term "changed" as such term was used in Microtek's complaint would be understood by a reasonable person in the position of the insured to require some intentional act on the part of plaintiff inconsistent with the term accident. *See* Everson, at ¶ 19, 280 Wis.2d at 14, 695 N.W.2d at 304 (citation omitted). In other words, plaintiff intended to commit some act which changed the chemical composition, formula, or manufacturing process that it utilized in manufacturing the polyethylene film. Such an intentional act removes Microtek's allegations from coverage as an occurrence under defendant's CGL policy. Id. at ¶ 20, 280 Wis.2d at 15, 695 N.W.2d at 305.

Additionally, plaintiff intentionally issued Certificates of Conformance which expressly certified that: (1) it used materials and manufactured the film per Microtek's specifications and purchase orders; and (2) it tested the film and it met Microtek's product specifications. Under the four corners of the complaint these intentional assertions were false. Such misrepresentations cannot be considered accidents for the purpose of finding coverage existed under defendant's CGL policy. Id. at ¶¶ 18-19, 280 Wis.2d at 14, 695 N.W.2d at 304. Accordingly, defendant did not have a duty to defend plaintiff in the Mississippi action because Microtek's complaint failed to allege an occurrence as such term is defined under defendant's CGL policy. Having decided Microtek's

complaint failed to allege an occurrence as such term is defined under defendant's CGL policy, the Court need not decide whether its complaint alleged property damage as that term is defined by the policy.

Finally, while an insurance company that "declines to defend [its insured] does so at its peril it is not liable to its insured unless there is, in fact, coverage under the policy or coverage is determined to be fairly debatable." Radke, at 44, 577 N.W.2d at 369 (citation and internal quotation marks omitted). Defendant is not liable for any of plaintiff's damages because coverage for Microtek's claims did not in fact exist under defendant's CGL policy. Additionally, coverage under said policy was not fairly debatable. Accordingly, defendant was in no peril when it declined to defend plaintiff because within the four corners of Microtek's complaint there was nothing to alert defendant that its contractual obligation to defend plaintiff had been triggered. Midway Motor Lodge of Brookfield, at 38, 593 N.W.2d at 858.

III. Plaintiff's bad faith claim

The Court determined defendant did not have a duty to defend plaintiff in the Mississippi action because Microtek's complaint failed to allege an occurrence as such term is defined under defendant's CGL policy. Accordingly, because coverage for Microtek's claims did not exist under the policy plaintiff's claim for bad faith cannot be sustained. *See* Mowry v. Badger State Mut. Cas. Co., 129 Wis.2d 496, 516-517, 385 N.W.2d 171, 181 (1986).

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ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff dismissing the action and all claims contained therein with prejudice and costs.

Entered this 13th day of June, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ

District Judge