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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D.R. HORTON LOS ANGELES HOLDING CO., INC.,

Plaintiff and Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 146/LDUSA0700832,

Defendant and Respondent.

G057467

(Super. Ct. No. 30-2014-00759575)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

McLeod Law Group, John J. McLeod; Law Offices of Mary A. Lehman and Mary A. Lehman for Plaintiff and Appellant.

Clyde & Co. U.S., Douglas J. Collodel, Ralph A. Guirgis and Curtis D. Parvin, for Defendant and Respondent.

* * *

Appellant D.R. Horton Los Angeles Holding Company, Inc. (D.R. Horton) builds and sells homes. Leighton and Associates, Inc. (Leighton) is a geotechnical or soils engineering firm. In April 2001, D.R. Horton hired Leighton as the geologist and soils engineer for the Canyon Gate Project, a residential housing development in Santa Clarita, California. In that capacity, Leighton prepared a preliminary soil grading plan for the entire project, and later submitted amended plans to accommodate conditions and problems encountered during grading. Leighton also supervised the grading work. During the relevant time, Leighton had claims-made professional liability insurance.

In 2003, homeowners who owned houses adjacent to the project sued D.R. Horton and Leighton for damages arising from slope movement allegedly caused by the project's grading activities (the 2003 claim). The homeowners filed three lawsuits, which were consolidated with the leading case being captioned *William Fessler, et al. v. Zephyr Newhall, L.P., et al.* (*Fessler* Lawsuit). Leighton's professional liability insurer defended and indemnified Leighton under the 2002/2003 policy. After the *Fessler* Lawsuit was settled in October 2007, $116,372 of the $1 million per claim limit of liability remained available to Leighton under the 2002/2003 policy.

Beginning in November 2007, homeowners in the project notified D.R. Horton of claims for damages arising from slope movement (the 2007 claim). These homeowners filed three lawsuits which were consolidated (the Consolidated Action). Leighton was not a named defendant, but made a party via D.R. Horton's cross-complaint. Leighton, its insurance broker and the 2002/2003 insurer agreed the 2007 claim was "related" to the 2003 claim. Eventually, the 2002/2003 insurer tendered to Leighton the remaining limits of the 2002/2003 policy.

Before trial on the cross-complaint, Leighton and D.R. Horton settled. As part of the settlement, Leighton assigned its rights under the 2007/2008 insurance policy to D.R. Horton. The trial proceedings continued and concluded with a judgment, which found Leighton liable to D.R. Horton for approximately $3.2 million in damages and

costs. In the associated statement of decision, the trial court determined the cause of the property damage at issue in the *Fessler* Lawsuit was different than the causes of the property damage at issue in the Consolidated Action.

D.R. Horton then filed the instant action against Leighton's 2007/2008 insurer, respondent Certain Underwriters at Lloyd's, London, Subscribing to Policy No. 146/LDUSA0700832 (the 2007/20008 Underwriters). D.R. alleged contractual causes of action for failure to pay the $3.2 million judgment, and for failure to defend or indemnify Leighton in the Consolidated Action. With the parties' agreement, the trial court bifurcated the trial, with the first phase addressing coverage. Following a four-day bench trial, the trial court concluded the 2007 claim was "related" to the 2003 claim. Accordingly, the 2007 claim was not covered under the 2007/2008 policy. The court entered a judgment in favor of the 2007/2008 Underwriters, and D.R Horton appealed.

D.R. Horton contends the 2007 claim is not "related" to the 2003 claim under the terms of the 2002/2003 policy or the 2007/2008 policy. After independently reviewing the insurance contract, we conclude the 2007 claim is "related" to the 2003 claim. As discussed below, the alleged wrongful acts that form the basis for the two claims arose from a single project performed by the insured for a single client. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Insurance Policies*

Leighton was insured for the period October 1, 2002 to October 1, 2003, by Professional Liability Policy No. 146/P11202 (the 2002/2003 policy). The limits of liability under the 2002/2003 policy were $1 million per claim, with a $3 million aggregate limit, subject to a $200,000 per claim deductible.

Leighton was insured for the period October 1, 2007 to October 1, 2008 by Professional Liability Policy No. 146/LDUSA0700832 (the 2007/2008 policy). The

limits of liability under the 2007/2008 policy were $1 million per claim, with a $2 million aggregate limit, subject to a $100,000 per claim deductible.

Both policies are "claims made" policies, covering claims "first made" against the insured during the policy period and reported to the respective Underwriters within 45 days.

Both Policies include the following definitions:

> "E. The term 'Related Claim' as used in this Policy shall mean all those Claims that arise out of the same or replicated Wrongful Act in the performance of the Insured's Professional Business activities.
>
> "F. The term 'Wrongful Act' as used in this Policy shall mean any actual or alleged negligent act, error, omission, misstatement, misleading statement, neglect or breach of duty by the Insured committed subsequent to the Retroactive Date(s) specified in Item No. 8 of the Schedule.
>
> "G. The term 'Professional Business' as used in this Policy shall mean testing, inspection, engineering and research services which are conducted by, through or under the direction of the Insured and which arise out of the services as listed in the application or supplemental application and are not excluded."

Both policies also contain language addressing related claims. Section IV, Subsection B, provides:

> "The Limit of Liability specified in Item No. 3 of the schedule as applicable to 'Each Claim' is the Limit of Liability for all Damages and Claims Expenses arising out of the same or related Wrongful Act without regard to the number of claims, demands, suits proceedings or claimants. If additional claims are subsequently made against the Insured which arise out of the same or related Wrongful Acts as a Claim already made during the

Period of Insurance, then all such Claims shall be subject to the Limit of Liability."

"The Deductible(s) . . . shall apply only once to each Wrongful Act regardless of the number of Related Claims that arise therefrom."

The parties agreed the above contractual language is unambiguous.

B. *Trial Testimony*

D.R. Horton's geotechnical engineering expert, Ronald Shmerling, testified his firm was retained to investigate the causes of the property damage in the *Fessler* Lawsuit and in the Consolidated Action. Shmerling testified the cause of the property damage in the *Fessler* Lawsuit resulted from "backcut failures" that occurred while using Leighton's proposed "sliding slot key method" to provide temporary stability while addressing stability problems due to an ancient landslide plain under Lot 90. Shmerling identified the two problems that caused property damage in the Consolidated Action. The first problem as Leighton's failure to confirm another contractor had completely removed a clay seam under Lot 90, despite Leighton's submitting reports stating it had been removed. The second problem resulted from Leighton's design proposal to use a steeper than normal ratio for a slope in Lot 88.

The 2017/2018 Underwriters' geotechnical expert, Stavros Chrysovergis, opined the problems that caused the property damage in both the *Fessler* Lawsuit and the Consolidated Action resulted from one single cause. "It's one design, one grading permit, one grading plan, one soil engineer, one civil engineer. It's just one project."

II

DISCUSSION

The sole issue on appeal is whether the 2007 claim is "related" to the 2003 claim under the express terms of the 2002/2003 policy. Because the relevant facts are undisputed, we review the contractual language de novo. (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.)

As noted, the insurance policy addresses related claims in Section IV, Subsection B. That subsection provides: "The Limit of Liability . . . applicable to 'Each Claim' is the Limit of Liability for all Damages and Claims Expenses arising out of the same or *related Wrongful Acts* without regard to the number of claims, demands, suits proceedings or claimants. If additional claims are subsequently made against the Insured which arise out of the same or *related Wrongful Acts* as a Claim already made during the Period of Insurance, then all such Claims shall be subject to the Limit of Liability." (Italics added.) Thus, to determine whether the 2007 claim is "related" to the 2003 claim requires us to construe the term "related" in connection with the defined term "Wrongful Act."

The insurance policy defines a "Wrongful Act" as "any actual or alleged negligent act, error, omission, misstatement, misleading statement, neglect or breach of duty." The trial court determined there was only a single Wrongful Act. D.R. Horton argues Leighton committed three separate and distinct Wrongful Acts: (1) proposing to use a sliding slot key method to provide temporary stability; (2) failing to supervise or confirm the complete removal of a clay bed; and (3) proposing a steeper than normal slope ratio. However, even if there are multiple different Wrongful Acts, all the Wrongful Acts are "related."

Although the insurance policy defines the term "Related Claim," it does not define the term "related" in the context of "Each Claim." Fortunately, in 1990, the California Supreme Court defined the term "related" in the context of a per-claim limitation in a professional liability insurance policy. In *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854 (*Bay Cities*), the high court determined "the term 'related' as it is commonly understood and used encompasses both logical and causal connections." (*Id.* at p. 873.) There, the high court found two attorney errors were "'related' in multiple respects. They arose out of the same specific transaction, the collection of a single debt. They arose as to the same client. They were

committed by the same attorney. They resulted in the same injury, loss of the debt." (*Id.* at p. 873.)

Here, even assuming there were three Wrongful Acts, the Wrongful Acts are related in multiple respects. They arose from the same contractual grading work on the Canyon Gate Project. They arose as to the same client, D.R. Horton. They were committed by the same firm, Leighton. They resulted in the same problem, property damage from underlying slope movement. Thus, the 2007 claim is "related" to the 2003 claim under the terms of the 2002/2003 policy.

D.R. Horton argues *Bay Cities* is inapposite because there the term "related" was not defined, whereas here, the term "Related Claim" is defined. The term "related," however, is not defined here either.

Moreover, the definition of "Related Claim" does not limit the term "related" as used in Section IV, Subsection B. In contrast to a "Related Claim," which is expressly defined as a Claim arising out of the "same or replicated" Wrongful Act, a Claim subject to the policy's limits on liability includes those Claims arising out of the "same or related" Wrongful Act. The latter is necessarily broader than the former because "related" is a broader term than "replicated." In addition, in Section IV, Subsection B, the policy limits deductibles to non-Related Claims. The use of the same term ("Related Claim") in the deductible-limitation context, but not in the liability-limitation context shows that the term "Related Claim" does not limit the term "related" when used to determine per-Claim limitations other than deductibles.

Having concluded the 2007 claim is "related" to the 2003 claim, we need not determine whether the 2007 claim is also a "Related Claim" under the 2002/2003 policy. Even if the 2007 claim is not a "Related Claim" because it is based on a different "Wrongful Act," it is a "related" claim under the 2002/2003 policy because it is logically related to the 2003 claim. Accordingly, we affirm the judgment in favor of the 2007/2008 Underwriters.

III

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.