

2018 Mass.App.Div. 1

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Massachusetts Appellate Division,
DISTRICT COURT DEPARTMENT.
NORTHERN DISTRICT.

Frank FODERA, Sr.
v.

ARBELLA PROTECTION INSURANCE
COMPANY

NO. 17-ADCV-126NO

Heard December 1, 2017

Opinion Certified January 25, 2018

In the WOBURN DIVISION: Justice: Curran, J., Docket No. 1453CV0758, Date of Decision Appealed: March 20, 2017, Date of Entry in the Appellate Division: August 11, 2017.

Attorneys and Law Firms

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Coven, P.J., Crane & Flynn, JJ.

OPINION

COVEN, P.J.

*1 In this appeal, we consider whether Arbella Protection Insurance Company (“Arbella”) had a duty to defendant Frank Fodera, Sr. (“Fodera”) in an action brought by the current trustees of a **condominium** development against Fodera in his capacity as a former trustee of that development, under the Directors & Officers Coverage Form Policy (“D & O Form”) issued by Arbella. We conclude that a duty to defend existed under the

allegations of the complaint and prayers for relief.

In April of 2014, the current trustees filed a 173-paragraph complaint in Superior Court against several defendants, including Fodera, in which it was alleged, generally, that the developing and building entities of the **condominium** development, in which Fodera held an interest, defectively constructed and designed the development and mismanaged the development.

In September of 2014, Fodera filed this action in District Court alleging that Arbella breached its duty to him to provide defense coverage and indemnity. The complaint sought a declaratory judgment, monetary damages, and injunctive relief for specific performance under the policy. Upon cross motions for summary judgment, judgment was entered in favor of Arbella. In a written memorandum, the motion judge, focusing upon the breach of fiduciary count (paragraphs 158–165) in the Superior Court complaint, concluded that acts alleged in that count, asserted to be undertaken “willfully and/or in bad faith” or with a “motive of ... personal gain,” were excluded from coverage.

We begin with recognition of a few general principles. First, “the duty to defend is broader than an insurer’s duty to indemnify.” J.F. Comerford & M.S. Coven, *Insurance Law* § 9.1 (2013). “An insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms.” *Billings v. Commerce Ins. Co.*, 458 Mass. 194, 200 (2010). Second, in examining whether a duty exists, a court considers not only the factual allegations, but also the whole complaint, including the relief requested, to determine whether a policy provides a basis for coverage. Comerford & Coven, *supra* at § 9.3. And third, Massachusetts recognizes the so-called “‘in for one, in for all’ or ‘complete defense’ rule.” *Id.* at § 9.4, quoting *GMAC Mtge., LLC v. First Am. Title Ins. Co.*, 464 Mass. 733, 738 (2013).¹

The Superior Court complaint alleges that Fodera, as “developer/trustee” of the development, is liable in negligence for the “acts of [the development],” including the “misrepresentations” in the sale of **condominium** units on the **condominium** Web site that the development “offered ‘superior construction’” and was, then, “the newest luxury **condominium** development in the city of Cambridge.”

*2 It is also alleged that Fodera, in his capacity as a

trustee of the development, breached his fiduciary duty to the development and unit owners. Specifically, the complaint asserts that Fodera breached his fiduciary duty (along with other trustees) by:

“[1] failing to take action to repair the defective design and construction of the **Condominium** despite being on notice of such; [2] failing to produce, maintain and keep financial and other documents, information and records as required by statute and the By-Laws; [3] knowingly and intentionally funneling **Condominium** funds to ... Fodera[] for improper, unnecessary, and duplicative services for the purpose of enriching ... Fodera[] at the expense of the **Condominium**; [4] failing to fund a reserve account for the **Condominium**, as required by statute and the By-Laws, and converting funds intended for the reserve account for [his] own use[]; [5] failing to fund a capital account for the **Condominium**, as required by the By-Laws, and converting funds intended for the capital account for [his] own use[]; and [6] by diverting the **Condominium’s** operating reserves for improper uses not benefitting the **Condominium**.”

The complaint further alleges that these fiduciary breaches “were committed with a motive of, and in *sic*] did result in, personal gain,” and were “committed willfully and/or in bad faith.”

The complaint for relief sought monetary damages, an order for a “complete accounting of the financial records and financial condition” of the development, and reformation of the master deed and by-laws.

In this appeal, there exists no dispute that Fodera is a covered insured. The issue is whether Arbella is relieved of its duty to defend because the complaint alleges acts that fall within the exclusion provisions of the policy.

Section I(B)(1) of the D & O Form imposes upon Arbella the “duty to defend [Fodera] against any claim or ‘suit’ seeking damages.” A “suit” is defined in Section VI(F) as “a civil proceeding in which damages because of a

‘wrongful act’ to which this insurance applies are alleged.” A “wrongful act” is defined in Section VI(G) as “any factual or alleged breach of duty, neglect, error, misstatement or misleading statement, act or omission committed by ‘directors of officers’ while acting solely in their capacity as such.”

As to the exclusion from coverage, Section 1(C) provides that the director and officer insurance coverage “does not apply to claims made or ‘suits’ brought arising from” the following relevant exclusions: “2. Bodily Injury or Property Damage[.] ... b. Physical injury to tangible property, including all resulting loss of use of that property. 3. Expected or Intended Loss[.] Any ‘Loss’ expected or intended from the standpoint of the insured. 4. Criminal, Fraudulent or Dishonest Acts[.] Any ‘wrongful act’ that is in fact criminal, fraudulent, or deliberately dishonest. 5. Personal Profit[.] The gaining of any personal profit or remuneration or advantage to which ‘directors or officers’ were not legally entitled.” Section VI(C) defines “Loss” to “mean[] damages, judgements, awards and settlements. Loss does not include non-monetary relief, civil or criminal fines or penalties imposed by law, punitive or exemplary damages, the multiplied portion of multiple damages, or matters deemed uninsurable according to the law under which this policy is construed.”

*3 We may agree with the motion judge that, on a limited view of the complaint, most, if not all, of the acts underlying the breach of fiduciary count may lie outside of coverage. The fiduciary allegation of “[1] failing to take action to repair the defective design and construction of the **Condominium** despite being on notice of such” appears excluded under the expected loss exclusion. The personal profit exclusion appears controlling on the allegations that Fodera “[3] knowingly and intentionally funnel[led] **Condominium** funds to ... Fodera[] for improper, unnecessary, and duplicative services for the purpose of enriching ... Fodera[] at the expense of the **Condominium**; [4] fail [ed] to fund a reserve account for the **Condominium**, as required by statute and the By-Laws, and convert[ed] funds intended for the reserve account for [his] own use[]; [5] fail[ed] to fund a capital account for the **Condominium**, as required by the By-Laws, and convert[ed] funds intended for the capital account for [his] own use[].” The expected loss exclusion appears applicable to the allegation of “[6] diverting the **Condominium’s** operating reserves for improper uses not benefitting the **Condominium**.” And as to the allegation of failing to produce, maintain, and keep financial and other documents, information, and records as required by statute and the by-laws, the relief requested, an accounting, is nonmonetary relief and may be excluded

under the definition of loss.

But this narrow focus does not account for the theory of negligence asserted against Fodera. D & O Form defense coverage is available to former trustees for a negligent “wrongful act,” as described in the policy, if the trustees were “acting solely in their capacity as such.” We think the allegation in the negligence count places upon Arbella a duty to defend Fodera. Though drafted as an allegation that Fodera acted as a “developer/trustee,” the complaint is factually and “reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms.” *Billings, supra* at 200. And more importantly, because Massachusetts recognizes the so-called “ ‘in for one, in for all’ or ‘complete defense’

rule,” *Comerford & Coven, supra* at § 9.4, Arbella had a duty to defend Fodera against those claims that were perhaps otherwise excluded.

The order of summary judgment is reversed. The case is returned for further action consistent with this opinion.

All Citations

Not Reported in N.E.3d, 2018 Mass.App.Div. 1, 2018 WL 632125 ..

Footnotes

¹ We also observe that matters outside the complaint may be considered. For example, facts obtained during discovery may inform coverage obligation. *Comerford & Coven, supra* at § 9.3. In this case, the plaintiff in his brief states that the parties engaged in written discovery that included requests for document production, interrogatories, and requests for admissions. The discovery is not part of the record, and our review is therefore limited to the complaint and controlling principles.

Generally, if there exists no duty to defend, a duty to indemnify does not exist. *Id.* at § 9.1.