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BENDER SHIPBUILDING & REPAIR CO., INC. v. BRASILEIRO
United States Court of Appeals, Eleventh Circuit, 13 June 1989
874 F.2d 1551

A marine insurance Builder's Risk policy including protection and indemnity is not intended to incorporate insured's contractual liability to a co-insured for liquidated damages.

FACTS: Bender Shipbuilding & Repair Co., Inc. ("Bender") contracted to build a floating drydock for Todd Shipyards Corporation ("Todd"). Bender agreed to construct and deliver the drydock on or before May 27, 1982. The contract provided for a liquidated damages payment of \$5,300.00 per day beyond the delivery date for a maximum period of 90 days.

Bender purchased a Builder's Risk insurance policy from The Hartford Insurance Company of Alabama ("Hartford"). The purpose of the policy was to cover the floating drydock during construction and delivery. Under this policy, Bender and Todd were listed as co-insured and co-loss payees.

On July 6, 1982, a severe storm caused three sections of the drydock at Bender's yard to break their moorings and be blown west across the Mobile River. On the western bank of the river the floating drydock collided with the M/V Itapura, a moored vessel. The floating drydock and the M/V Itapura were damaged. Repairs of the drydock delayed delivery to Todd.

Todd instituted a claim for liquidated damages for delay of delivery of the drydock pursuant to the contract with Bender. Bender sought coverage for the liquidated damages claim under the Hartford policy. Hartford denied coverage. Bender paid Todd \$353,797.26 in February of 1983 under a joint agreement and mutual release of claims.

Bender instituted suit against Hartford on November 22, 1985 in the United States District Court for the Southern District of Alabama. As it was agreed by the parties that no genuine issues of material fact existed, the suit was brought before the district court on Hartford's motion for summary judgment and Bender's cross-motion for summary judgment. The district court denied Hartford's summary judgment motion on the basis that its burden to demonstrate "clearly and unambiguously" that no coverage was intended was not met. Bender's cross-motion for summary judgment was granted as the court concluded that "no clear language in the policy demonstrated an intent... to exclude from the coverage liquidated damages resulting from a collision..." Hartford made an interlocutory appeal of the order granting summary judgment under 28 U.S.C. §1292(a)(3).

ISSUES: (1) Whether a marine insurance Builder's Risk policy is intended to incorporate insured's contractual liability to a co-insured for liquidated damages under its Collision Liability clause?

(2) Did the district court err by adjudicating pendant state law issues between a shipbuilder and insurer when jurisdiction was based upon Admiralty?

ANALYSIS: In its reversal of the lower court, the Eleventh Circuit rendered judgment for Hartford because the policy was unambiguous and indicated no intention to cover liquidated damages owed by Bender to Todd pursuant to their contract. The Eleventh Circuit agreed with the district court that an insurance policy should be construed against the insurer which is in a better position to limit its exposure to liability. However, the court pointed out that this construction does not include every risk that is not specifically excluded.

The provisions of the policy purchased by Bender were threefold, including hull, liability (protection and indemnity) and general conditions. Excluded from coverage under general conditions was "delay or disruption of any type whatsoever,

including, but not limited to, loss of earnings or use of the Vessel, howsoever caused, except to the extent, if any, covered by the Collision Liability or the Protection and Indemnity clauses of this Policy.'" Bender argued for coverage under the Collision Liability or "Running Down" clause which provided: "[i]f the Vessel shall come into collision with any other ship or vessel, and the Assured ... in consequence of the Vessel being at fault shall become liable to pay and shall pay by way of damages to any other person ... the Underwriters will pay the Assured..." The protection of the Collision Liability clause must be determined by looking at the reasonable understanding of the parties. *Harbor Towing Corp. v. Atlantic Mut. Ins. Co.*, 189 F.2d 409 (4th Cir. 1951). Hartford did not undertake contractual risks of which it apparently had no knowledge. The court determined that such an expansion of Hartford's own risk overextends the "reasonable expectations of both insurer and insured." The court expressed that an extension of the coverage of the Collision Liability clause to the risks created by the Bender-Todd contract would cause higher premiums, generally undesirable in the maritime industry.

Historically, the Collision Liability clause limited underwriter liability to indemnification of shipowners for damages done to other vessels by the insured vessel. *General Mut Ins Co. v. Sherwood (The Emily)*, 55 U.S. (14 How.) 351 (1853). Bender argues that the Collision Liability clause has been held to cover contractual liabilities which arise out of a collision. *Marine Transit Corp. v. Northwestern Fire & Marine Ins. Co.*, 67 F.2d 544 (2d Cir. 1933). Bender's effort to avoid exclusion under the "delay and disruption damages" clause, as provided for under the general policy conditions, fails here. The court illustrated that the cargo under contract in *Marine Transit* was on a vessel other than the insured's, whereas Bender's liability arose from a contract involving the insured vessel itself.

The status of Todd and Bender as co-insureds and co-loss payees caused the district court to find liquidated damages payable to Todd as damages from loss of use of the drydock. The district court erroneously relied on the Collision Liability clause in allowing an insured to collect for damage on its own vessel. Further, Todd's status precluded its qualification as "any other person" within the meaning of the Collision Liability clause.

The collision between the floating drydock and the M/V Itapura was on navigable waters. The nexus between the alleged wrongful conduct and some maritime activity established admiralty jurisdiction in tort. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation Inc. v. Cleveland*, 409 U.S. 249 (1972). Maritime jurisdiction over the collision gave the district court discretion to hear pendant state law claims arising out of the same transaction and occurrence. *Hagens v. Lavine*, 415 U.S. 528 (1974). The resolution of the admiralty claim did not bar the district court from retaining pendant jurisdiction over the issue of insurance coverage, a related state claim. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The court of appeals reversed the district court's summary judgment for Bender finding that the Bender-Todd contract was not incorporated into the Builder's Risk policy and that the liquidated damages paid by Bender to Todd were not intended to be covered under the policy.

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