

THIS IS NOT A
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION
CERTIFIED COPY

MELISSA A. WALKER and WILLIAM C. WALKER,

Plaintiffs,

Case No.: 09-17303

vs

Division: B

TEACHERS INSURANCE COMPANY, a foreign corporation,

Defendant.

_____ /

FILED
MAR 10 2011
CLERK OF CIRCUIT COURT
HILLSBOROUGH COUNTY
FLORIDA
WIN

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGEMENT
AS TO COVERAGE**

THIS CAUSE having come before this Court upon Plaintiffs' Motion to Strike Defendant's Affirmative Defenses or Alternatively Motion for Summary Judgment on Coverage and Defendant's Motion for Summary Judgment concluded on December 21, 2010, and the Court having heard argument of counsel, considered the filings of the parties, the record, and the applicable insurance policy in full force and effect and being further advised on the premises, FINDS the following:

1. The subject policy was in full force and effect and insured the plaintiff's home (premises and contents), as alleged in the complaint.
2. The subject policy in question is an all-risk policy as to the premises, and a specified risk policy as to the personalty insured therein.
3. That the parties candidly admitted that this claim is based upon damages caused by what has been described as 'Chinese drywall'. The drywall is off-gasing significant amounts of sulfur-type particles, which when they combine with vapors in the air of the home, creates an

THIS IS NOT A

acid which then causes damage to the furnishings, fixtures and appliances in the home, together with the wiring and any metal with which it has contact, and is so irritating to the occupants, that the home is uninhabitable.

CERTIFIED COPY

4. The insured's residence and its contents suffered a "direct physical loss" within the meaning of the policy.

5. The court finds that this off-gasing, at this level, by the drywall was an unforeseen and unanticipated event which caused a sudden and accidental chemical reaction which produced sulfuris and sulfuric acids. These are then circulated throughout the house causing an odor, damage to the components within the home and creating an irritant and hazard to human beings.

6. Defendant claims that two exclusions apply: the "wear and tear" exclusion and the "errors, omissions, and defects" exclusion. The court notes that the terms in these exclusions are not defined in the policy. The court has applied an ordinary and plain meaning of the terms.

7. The court finds that damages caused by Chinese drywall are not excluded as "wear and tear" under the policy. The court finds that the ordinary meaning of the wear and tear exclusion would apply to an ordinary or expected degenerative processes occurring naturally over time.

8. Likewise, the categories included under the "wear and tear" exclusion and identified by the defense – "corrosion" and "latent defect" – do not change this analysis. This event was both sudden and accidental. By its terms, the exclusion applies when the cause of the damage is corrosion, not when the result is corrosion. The "latent defect" part of the exclusion does not apply because there is no inherent structural deficiency in the drywall itself. It serves its purpose and functions as drywall. The damage in this case is not the result of a latent defect.

THIS IS NOT A

9. This court further finds that the damages caused in this case, other than the replacement of the drywall itself, amounts to an “ensuing loss” that is specifically expected from the wear and tear exclusion.

10. The court further finds that the ‘errors, omissions, and defects exclusion’ does not apply because there is no inherent structural deficiency in the drywall nor does it break down. This drywall meets its purpose as it is still in use, is still doing its job of holding paint and providing insulation and sound proofing. The court also notes that the same drywall can apparently be used in areas of lower humidity without the same adverse effects.

11. Since this is an all-risk policy and neither of the defenses apply to the premises claim, there exists coverage for the premises, which is defined in the policy to include the building and its fixtures under coverage A of the policy.

12. There are no remote structures, so Coverage B is not at issue at this time.

13. Coverage C of the policy (personalty coverage) sets forth named peril coverage which insures against losses caused by “smoke”. The term “smoke” is undefined under the policy. The court has been presented with different reasonable definitions of the term "smoke." The court finds that the ordinary meaning as found in a Merriam-Webster dictionary, defines “smoke” as “a suspension of particles in a gas”. The court has applied the definition that allows coverage, which is at least as reasonable as the definition that might exclude coverage. The court further finds that the sulfur particles and off-gasing described above is a smoke emitted from the drywall, and is the cause of the damage to the personalty in the home, and as such is a listed peril, which is specifically insured under the policy.

14. The court thus finds that the policy at issue provides coverage under parts A and C for damages caused by the off-gasing of the drywall in the home.

15. Plaintiffs’ motion for partial Summary Judgment as to insurance coverage is **GRANTED**. Defendant’s Motion is hereby **DENIED**.

THIS IS NOT A

16. This matter will proceed to trial on the issue of damages caused by the off-gasing described above.

CERTIFIED COPY 2

DONE AND ORDERED in Chambers, Tampa, Hillsborough County, this 2
March
day of ~~February~~ 2011.



Honorable Robert A. Foster, Jr.
Circuit Court Judge

Conformed Copies To:

Anthony D. Martino, Esquire
Clark & Martino, P.A.
3407 W. Kennedy Blvd.
Tampa, Fl. 33609

Scott Frank, Esquire
Butler, Pappas, Weihmuller, Katz, Craig, LLP
777 S. Harbour Island Blvd., Suite 500
Tampa, Fl. 33602