

***Global Modular Inc., v Kadena Pacific, Inc., et al (2017) DJDAR 8880***

Improper offset of jury's award by amount paid in settlement agreement results in partial reversal in insurance coverage dispute.

**FACTS**

This case arises from an insurance dispute between a general contractor, its subcontractor, and the subcontractor's general liability carrier over water damage to a construction site caused by heavy rain. In October 2009, the department of the U.S. VA hired Kadena Pacific, Inc. (Kadena) as a general contractor to oversee construction of the Center for Blind Rehabilitation in Menlo Park. Kadena hired Global Modular, Inc. (Global) to build, deliver, and install the 53 modular units. Kadena hired an independent company to install roofing on the units. As a result, Global agreed to deliver the units covered only by a three-fourths inch base sheet of plywood. Delivery of the units were originally scheduled for summer months of 2010, but there was a delay and they were delivered in October and November. Despite Global's effort to protect the units with tarp, the units suffered water damage. In February, Global and Kadena mutually agreed to terminate their contract and Kadena oversaw the remediation of the damaged units.

**PROCEDURAL HISTORY**

Global sued Kadena for failure to pay and Kadena countersued alleging Global breached the contract in various ways, including failing to repair the damaged units. Before trial, the parties entered into a partial settlement agreement where Global paid Kadena \$321,975 to release all of Kadena's claims except for claims covered by Global's insurance policy with North American Capacity Insurance Company (NAC). Global in return received \$153,025 to dismiss its failure to pay claims. At trial, Kadena introduced evidence that Global was contractually responsible for the water damaged units and the jury agreed, awarding \$1 million.

NAC bought a separate suit. In this second suit NAC and Kadena filed motion for summary judgement against each other on the issue of whether NAC's policy required it to indemnify Global for the jury's damage award. The court ruled in favor of Kadena and stated the award was covered under NAC's policy. The court also ruled the award must be offset by the \$321,975 Global paid in settlement and that Kadena was entitled to its attorney fees (\$360,000).

**ISSUES**

1. NAC contends the trial court erred in finding the water damages are covered under its policy;
2. Kadena argues the court erred in offsetting those damages with Global's settlement payment; and
3. Global and NAC argue the court erred in awarding attorney fees.

**HOLDINGS**

The court concluded the trial court properly determined NAC's policy covers the water damages and Kadena is entitled to attorney fees. However, the court reversed the offset order because Global's settlement payment did not compensate Kadena for the costs of its water remediation; the parties agreed to reserve that issue for litigation.

## DISCUSSION

### **I. Repair/Replacement Costs-NACS Policy<sup>1</sup>**

NAC contended exclusion j(5) of Global's policy applied and excluded coverage. Exclusion j(5) excludes coverage for "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf *are performing operations*, if the 'property damage' arises out of those operations. The dispute concerned the meaning of "*are performing operations*." NAC argued it applied to works in progress and applies to property damage before construction is complete. Kadena argued the exclusion meant "physically working on at the time of the property damage" and because the damage occurred during heavy rains when Global was not working, the exclusion did not apply. The court adopted Kadena's meaning and stated the use of the active, present tense construction "are performing operations" indicates the exclusion applies only to damage caused during physical construction activities. The court noted even if it were to adopt NAC's interpretation, they would be required to resolve the ambiguity of the meaning in favor of Kadena.

NAC contended exclusion j(6) of Global's policy applied and excluded coverage. Exclusion j(6) applies to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it. The dispute concerned the meaning of "*that particular part*" and "*work*." NAC argued Global's waterproofing of the units (the process) was incorrectly performed. Kadena argues the phrase refers to a product and not a process. Moreover, the incorrect work (which Kadena does not think was done incorrectly) was performed on the plywood and not the interior units and therefore the exclusion does not apply. The court adopted Kadena's interpretation.

### **II. Attorney Fees**

The Kadena-Global contract stated Global "expressly agrees" to pay the reasonable attorney fees Kadena incurs in "enforcing any provision or obligation arising under" the contract. Additionally, Civil Code section 1717, Code of Civil Procedure sections 1033 and 1033.5 allow the prevailing party to seek attorney fees as part of their claim. Accordingly, Kadena was entitled to its attorney's fees.

### **III. Motion for Offset**

The court reviewed ruling on the motion for offset under an abuse of discretion standard. The court held it was error to offset because the jury award and the settlement award were not for the same harm. The settlement agreement covered all Kadena's uninsured claims, excluding the failing to repair the units water damaged drywall, insulation, framing and ducting. At trial, Kadena limited the evidence to just the water damaged units' repairs, and the judge issued limiting instructions to that effect. Moreover, Global's own motion in limine sought to exclude all evidence not related to claims covered under the policy. In essence Global knew what the settlement agreement covered and did not cover.

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<sup>1</sup> This was a case of first impression.