GIBBS CONSTRUCTION, L.L.C.	*	**NO. 2017-CA-0113**
	*	
VERSUS		**COURT OF APPEAL**
	*	
NATIONAL RICE MILL, L.L.C.		**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-12018, DIVISION "M"
Honorable Paulette R. Irons, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

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REVERSED AND REMANDED

FEBRUARY 21, 2018

This is an insurance coverage dispute arising from a claim for breach of construction contract and damages. Defendant/Appellant, National Rice Mill, L.L.C. ("Rice Mill"), appeals the district court's October 10, 2016 and October 20, 2016 judgments granting two motions for partial summary judgment. The October 10, 2016 judgment ruled that the water intrusion events that took place on September 4, 2011 and August 28, 2012 constitute two occurrences within the meaning of the applicable Westchester Surplus Lines Insurance Company ("Westchester") policies. The October 20, 2016 judgment dismissed Rice Mill's claims for delay damages/liquidation damages, loss of income/business reputation, and rent concessions. For the reasons that follow, we reverse both judgments and remand this matter for further proceedings.

The following facts are pertinent to this appeal. Gibbs Construction, L.L.C. ("Gibbs") was the general contractor for an extensive renovation of the Rice Mill's luxury apartment complex, the Rice Mill Lofts (the "apartments"). Gibbs selected Rush Masonry, Inc. ("Rush") as the masonry restoration subcontractor for the renovation of the apartments. Westchester issued a policy of commercial general liability ("CGL") insurance to Rush, which was the primary layer of insurance during the policy periods of February 1, 2011 to February 1, 2012 and February 1, 2012 to February 1, 2013. Third Party Defendant/Appellee, Fireman's Fund Insurance Company ("Fireman's Fund") provided a policy of excess liability insurance to Rush during each of the aforementioned Westchester policy periods.

Third Party Defendant/Appellee, Zurich American Insurance Company ("Zurich"), issued a CGL insurance policy to Gibbs for the policy periods of January 1, 2011 to January 1, 2012 and January 1, 2012 to January 1, 2013.

The apartments experienced multiple instances of water intrusion, including a thunderstorm in July 2011, on September 4, 2011 during Tropical Storm Lee, and on August 28, 2012 during Named Storm Isaac. Subsequently, Gibbs filed suit against Rice Mill for failure to make payments under the general construction contract. Rice Mill filed a reconventional demand against Gibbs and third party demands against Rush, Zurich, and other parties.

Thereafter, Fireman's Fund filed a motion for partial summary judgment, arguing that two separate weather events on September 4, 2011 and August 28, 2012 resulted in two occurrences of property damage, each during a separate Westchester policy period.

Fireman's Fund and Zurich also each filed a motion for partial summary judgment, arguing that Rice Mill's claims for management fees, damage to "your work," delay damages or reduction in contract price by liquidated damages, rent concessions, loss of business reputation, and mold remediation are not "property damage" as required for coverage under the respective Fireman's Fund and Zurich policies.[1]

On June 16, 2016, the district court held a hearing, at which the court ruled from the bench on the respective motions for partial summary judgment. The

[1] The district court's rulings regarding coverage for management fees, damage to "your work," and mold remediation are not a part of this appeal.

district court granted partial summary judgment in favor of Fireman's Fund, finding that the water intrusion events on September 4, 2011 and August 28, 2012 constitute two occurrences. As to the motions for partial summary judgment filed by Fireman's Fund and Zurich, the district court granted the motions in part and dismissed Rice Mill's claims for "delay damages or liquidation damages," "loss of income/business reputation," and "rent concessions."

On September 9, 2016, Rice Mill filed a motion to have the district court's judgments designated as final. On October 10, 2016, the district court signed and rendered judgment as to Fireman's Fund's and Zurich's motions for partial summary judgment on the dismissed categories of damages. On October 20, 2016, the district court signed and rendered judgment as to Fireman's Fund's motion for partial summary judgment on number of occurrences.

This appeal followed. Rice Mill sets forth two assignments of error on appeal, arguing that the district court erred in (1) granting partial summary judgment dismissing claims for particular categories of damages, and (2) granting partial summary judgment finding that the water intrusion constituted two occurrences.

Before discussing the merits of this appeal, we first address whether this Court has appellate jurisdiction to review the October 20, 2016 judgment rendered by the district court. On October 13, 2016, Rice Mill filed a motion for appeal relative to two judgments, both purportedly rendered on October 10, 2016, in particular:

a) That certain judgment dated October 10, 2016 granting a Motion for Partial Summary Judgment on the number of occurrences and coverage triggers filed by Fireman's Fund; and

b) That certain judgment dated October 10, 2016 granting in part Motions for Partial Summary Judgment filed by Fireman's Fund and Zurich.

The district court signed the order of appeal on October 17, 2016. The record before us, however, contains only one judgment dated October 10, 2016, which was the judgment granting Fireman's Fund's motion for partial summary judgment relative to the number of occurrences. The record lacks a second judgment dated October 10, 2016. Rather, the record reflects that the judgment granting in part the motions for partial summary judgment filed by Fireman's Fund and Zurich, dismissing claims for certain categories of damages, was not signed until October 20, 2016.

This Court ordered the parties to submit briefs addressing whether Rice Mill's appeal of the October 20, 2016 judgment should be dismissed as premature and/or as the order of appeal does not reference the October 20, 2016 judgment. Responding to this Court's order, Rice Mill argues that its appeal should not be dismissed and urges this Court to follow its holding in *Law Office of Paul C. Miniclier, PLC v. Louisiana State Bar Ass'n*, 2014-1162, p. 4 (La. App. 4 Cir. 5/27/15), 171 So.3d 1013, 1015. In *Miniclier*, the district court signed an order of appeal referencing a judgment not in the record, and only after the order of appeal was signed did the district court sign and render the judgment that Miniclier had intended to appeal. *Id.*, 2014-1162 at p. 3, 171 So.3d at 1014. This Court, following the Supreme Court's ruling in *Overmier v. Traylor*, 475 So.2d 1094 (La.

1985), held that "[e]ven though the appeal order was initially premature because it was filed and signed after the trial court rendered oral judgment, but before the judgment was reduced to writing and signed, once the judgment was signed the defect was cured." *Id.*, 2014-1162 at p. 4, 171 So.3d at 1015.

We agree with Rice Mill's argument that *Miniclier* applies. We find that both the October 10, 2016 and October 20, 2016 judgments are properly before this Court on appeal, and we next address the merits of the appeal.

Appellate courts review a grant of a motion for summary judgment *de novo* using the same criteria district courts consider when determining if summary judgment is proper. *Kennedy v. Sheriff of E. Baton Rouge*, 2005-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686 (citations omitted).

Fireman's Fund and Zurich filed their respective motions for partial summary judgment after January 1, 2016. As a result, the version of La. C.C.P. art. 966, which became effective on January 1, 2016 applies to this motion. Summary judgment procedure is favored in Louisiana. La. C.C.P. art. 966(A)(2). "After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3).

Regarding the burden of proof on summary judgment, La. C.C.P. art. 966(D)(1) states:

> The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the

> court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

We first turn to the partial summary judgment finding that the water intrusion events on September 4, 2011 and August 28, 2012 constituted two occurrences. All parties submit that the Westchester policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." Rice Mill contends that the district court erred in considering evidence attached to Fireman's Fund's reply memorandum in violation of La. C.C.P. art. 966(B)(3). Rice Mill also argues that, even if the reply memorandum evidence is considered, genuine issues of material fact remain that preclude summary judgment.

The record reflects that Fireman's Fund, in support of its motion for partial summary judgment, attached the following exhibits: (1) Rice Mill's opposition to Gibbs' motion for summary judgment on consequential damages and delay damages without exhibits; (2) partial copy of Gibbs' original petition for breach of contract; (3) Rice Mill's answer to Gibbs' original petition and third party demand; (4) Rice Mill's amended reconventional demand and third party demand; (5) Westchester policy issued to Rush for the period February 1, 2011 to February 1, 2012; and (6) Westchester policy issued to Rush for the February 1, 2012 to February 1, 2013. No affidavits, deposition testimony, or discovery responses were

introduced into evidence at that time. However, in filing its reply memorandum, Fireman's Fund attached as an exhibit the entirety of its previously filed opposition to Westchester's motion for summary judgment regarding number of occurrences, along with the attachments to the opposition.

Rice Mill responded by filing a motion to strike the additional evidence, arguing that no additional documents could be filed with a reply memorandum and that the late filing of Fireman's Fund's exhibits did not allow Rice Mill time to respond to the additional documents. Fireman's Fund argued that the district court could consider the exhibits to Fireman's Fund's reply because the evidence was already placed into the record when Fireman's Fund filed its opposition to Westchester's motion for partial summary judgment regarding number of occurrences.[2] The district court granted Rice Mill's motion to strike, but also ultimately granted partial summary judgment in Fireman's Fund's favor.

Under La. C.C.P. art. 966(D)(2), "[t]he court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made." Comment (k) of La. C.C.P. art. 966 explains that "[s]ubparagraph (D)(2) makes clear that the court can consider only those documents filed in support of or in opposition to the motion. This rule differs from Federal Rules of Civil Procedure, Rule 56(c)(3),

[2] Westchester filed a motion for partial summary judgment taking the opposite position from Fireman's Fund, arguing, as does Rice Mill, that the damages claimed herein arise from one occurrence implicating one Westchester policy. Nothing in the record indicates that Rice Mill, which was aligned with Westchester on this issue, filed any memorandum in support of or in opposition to Westchester's motion. The record does not reflect that the district court ever heard or considered Westchester's motion, evidently because Westchester reached a settlement with Rice Mill.

which allows the court to consider other materials in the record." Subparagraph (B)(3) explicitly provides that "[n]o additional documents may be filed with the reply memorandum." La. C.C.P. art. 966(B)(3). Comment (d) of La. C.C.P. art. 966 notes, "[t]his Article continues the rule that no new documents may be filed with a reply memorandum."

The hearing transcript reveals that the district court found that Fireman's Fund was not permitted to attach exhibits to its reply memorandum. Nevertheless, the district court also stated on the hearing transcript that Fireman's Fund could "reference" the exhibits to its previously filed opposition to Westchester's motion, regardless of whether the exhibits were attached to Fireman's Fund's reply, because those exhibits were in the district court's record. Thus, the district court correctly found that no additional documents may be filed with the reply memorandum; however, the district court erred in determining that it could consider documents in the record, other than those documents filed in support of or in opposition to the particular motion before the district court. Fireman's Fund correctly points out that the documents it attempted to file in support of its reply were already properly placed into the record as part of its exhibits to a different opposition. Nevertheless, we find no support for Fireman's Fund's argument which would allow the court to consider materials in the record beyond those filed in support of or in opposition to the motion for summary judgment before the court. *See Diversified Marine Servs., Inc. v. Jewel Marine, Inc.*, 2016-0617, p. 9, n. 5 (La. App. 1 Cir. 6/2/17), 222 So.3d 1008, 1015 (citing *Price v. Chain Elec. Co.*, 2016-

597, p. 6 (La. App. 5 Cir. 4/12/17), 216 So.3d 388, 392-93)("because the exhibits attached to [the] reply memorandum are not deemed admitted pursuant to La. C.C.P. art. 966, the trial court should not have considered them and this court cannot consider these documents in its *de novo* review"). As the documents attached to Fireman's Fund's reply were properly stricken, the district court erred in considering them on the basis that the documents could be found elsewhere in the record.

Based on our *de novo* review of the motion for summary judgment, opposition, and the exhibits attached to and properly admitted with the motion and opposition, there is not sufficient evidence before this Court "to show that the other party lacks factual support for their position." *Randazzo v. St. Bernard Parish Gov't*, 2016-0902, p. 6 (La. App. 4 Cir. 5/17/17), 219 So.3d 1128, 1132, *reh'g denied* (5/31/17), *writ denied*, 2017-1209 (La. 10/27/17), 228 So.3d 1236 (quoting *Gooding v. Merrigan*, 2015-200, p. 9 (La. App. 5 Cir. 11/19/15), 180 So.3d 578, 584). *See also Wynder v. Royal Ford Lincoln Mercury, Inc.*, 98-616 (La. App. 3 Cir. 10/28/98), 721 So.2d 1001, 1005 (refusing to consider evidence that was not properly admitted on summary judgment when reviewing a grant of summary judgment, and reversing the grant of summary judgment). We find that Fireman's Fund did not meet its burden of proving two occurrences under the relevant insurance policies, or that it was entitled to judgment as a matter of law. Accordingly, we reverse the district court's October 10, 2016 judgment granting

Fireman's Fund's motion for partial summary judgment, and remand the case for proceedings consistent with this opinion.

We next turn to the partial summary judgments rendered in favor of Fireman's Fund and Zurich dismissing Rice Mill's claims for delay damages/liquidated damages, loss of income/business reputation, and rent concessions. Rice Mill has identified certain categories of damages it has allegedly incurred in connection with water intrusion events in litigation, as follows:

Interior Repair	$1,025,403.03
Exterior Masonry Restoration	$793,708.99
Rent Concessions	$145,722.50
Loss of Income/Business Reputation (Past & Future)	$2,790,394.00
Delay Damages	$2,557,604.80
Total	**$7,312,833.32**

Fireman's Fund's and Zurich's motions arise from these alleged damages. The interior repair and exterior masonry restoration damages are not at issue in this appeal. Fireman's Fund and Zurich contend that delay damages/liquidated damages, loss of income/business reputation, and rent concessions are economic damages, not "property damage," and are thus not afforded coverage under the applicable policies. Rice Mill argues on appeal that the economic damages it sustained occurred "because of" "property damage" such that coverage is triggered.

As this Court explained in *Stewart Interior Contractors, L.L.C. v. Metalpro Indus., L.L.C.*, 2007-0251, pp. 5-7 (La. App. 4 Cir. 10/10/07), 969 So.2d 653, 658-59:

> A summary judgment may be rendered on the issue of insurance coverage alone, although a genuine issue as to liability or the amount

of damages exists. *See* La. C.C.P. art. 966 E; *Leflore v. Coburn*, 95-0690 (La. App. 4 Cir. 12/28/95), 665 So.2d 1323. A summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, exists under which coverage could be afforded. *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180, 1183. An insurer seeking to avoid coverage through summary judgment must prove that some exclusion applies to preclude coverage. *McMath Const. Co., Inc. v. Dupuy*, 03-1413, p. 4 (La. App. 1 Cir. 11/17/04), 897 So.2d 677, 681.

An insurance policy is a conventional obligation that constitutes the law between the insured and the insurer, and the agreement governs the nature of their relationship. *See* La. C.C. art. 1983. Moreover, an insurance policy is a contract, which must be construed employing the general rules of interpretation of contracts. *Supreme Services* [*and Specialty Company, Inc. v. Sonny Greer, Inc.*, 06-1827, p. 5 (La. 5/22/07), 958 So.2d 634, 638]; *Reynolds*, 634 So.2d at 1183; La. C.C. arts. 2045-2057. If the insurance policy's language clearly expresses the parties' intent and does not violate a statute or public policy, the policy must be enforced as written. *See* La. C.C. art. 2046; *Rando v. Top Notch Properties, L.L.C.*, 03-1800 (La. App. 4 Cir. 6/2/04), 879 So.2d 821. Courts are not at liberty to alter the terms of insurance policies that are unambiguous. *Edwards v. Daugherty*, 03-2103 (La. 10/1/04), 883 So.2d 932. However, if any doubt or ambiguity exists as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer. *See* La. C.C. art. 2056. When the ambiguity relates to an exclusionary clause, the law requires that the contract be interpreted liberally in favor of coverage. *Borden, Inc. v. Howard Trucking Co., Inc.*, 454 So.2d 1081, 1090 (La. 1983); *Williamson v. Historic Hurstville Ass'n*, 556 So.2d 103, 107 (La. App. 4 Cir. 1990).

Liability insurance policies should be interpreted to effect, rather than to deny coverage. *Yount v. Maisano*, 627 So.2d 148, 151 (La. 1993). However, it is well-settled that, absent a conflict with statutory provisions or public policy, insurers are entitled to limit their liability and to impose reasonable conditions upon the obligations they contractually assume. *Supreme Services*, *supra* at p. 6, 958 So.2d at 638-639; *Reynolds*, 634 So.2d at 1183; *Marcus v. Hanover Insurance Co., Inc.*, 98-2040, p. 4 (La. 6/4/99), 740 So.2d 603, 606. In these circumstances, unambiguous provisions limiting liability must be given effect. *Supreme Services*, *supra* at p. 6, 958 So.2d at 639. Only if the language can reasonably be read to have more than one reasonable meaning can the language be said to be ambiguous. *Rando*, *supra* at p. 3, 879 So.2d at 825. Whether a contract provision is ambiguous is a question of law. *Pope v. Khalaileh*, 05-0027, p. 5 (La. App. 4 Cir. 6/1/05), 905 So.2d 1149, 1152. Moreover, [the insurer]

> bears the burden of proving that a loss falls within a policy exclusion. *Blackburn v. National Union Fire Ins. Co.*, 00-2668, p. 6 (La. 4/3/01), 784 So.2d 637, 641; *Rando*, *supra* at p. 3, 879 So.2d at 825.

To resolve the particular issue before us, we must consider the language of the applicable policies to determine whether Rice Mill has alleged "property damage" so as to trigger the initial grant of coverage for Gibbs' and Rush's alleged liability under the Zurich and Fireman's Fund policies. *See id.*

Rice Mill alleges that, as a result of incomplete and defective masonry and waterproofing work by Rush and Gibbs, Rice Mill suffered damage to the interior and exterior of the apartments from multiple instances of water intrusion. Rice Mill further argues that it incurred delay damages, the cost of rent concession payments to the apartments' renters, and loss of income and business reputation "because of property damage" to the apartments.

In general, a commercial general liability ("CGL") policy is a broad statement of coverage, and insurers limit their exposure to risk or liability for damages through a series of specific exclusions. *Stewart*, 2007-0251 at p. 8, 969 So. 2d at 659. We first determine whether the losses claimed by Rice Mill are covered by the language of the policies' initial grant of coverage.

As stated, Fireman's Fund issued, for each of the two relevant time periods, a policy of excess insurance to Rush for liability above the limits of the first layer of primary insurance provided by Westchester to Rush.

Coverage A of the Fireman's Fund's policies' states that it "will pay on behalf of any Insured those sums in excess of Primary Insurance that any Insured becomes legally obligated to pay as damages ... provided that such damages ... (a)

are covered by Primary Insurance; (b) arise from injury or damage that occurs, or from an offense that is committed, during our Policy Period; and (c) take place anywhere in the world." The "terms and conditions of Primary Insurance apply to Coverage A…."

Zurich, likewise, issued a policy of CGL insurance to Gibbs for each of the relevant time periods in litigation. Both the Zurich and Westchester[3] CGL policies provide, in pertinent part:

[3] We recognize that the record lodged with this Court contains, within Fireman's Fund's exhibits to its motion, incomplete copies of the Westchester policies. Specifically, those policies are missing the page that provides the definition of "occurrence." No party objected to the introduction of the Westchester policies into evidence. All parties represent to this Court that the Westchester definition of "occurrence" is the same definition of "occurrence" provided in the Zurich policies, and no party raises the verbiage of that definition as an issue on appeal. We thus find that there is no genuine issue of material fact that the definition of "occurrence" is the same in both the Zurich and Westchester policies.

SECTION I-COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies….

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

…

SECTION V - DEFINITIONS

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

…

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it…

In *Stewart*, this Court found that, in addition to a subcontractor's economic loss claims for breach of contract and redhibition against a steel stud manufacturer and manufacturer's insurer, the subcontractor sufficiently alleged damage to property other than to the steel studs themselves, or incident to their removal and repair; thereby, such allegations constituted "property damage," which triggered the initial grant of coverage under the CGL policy issued to the steel stud manufacturer. 2007-0251 at p. 12, 969 So.2d at 661-62. *Stewart* noted that "claims solely for economic losses, are generally not covered by CGL policies because of

policy exclusions restricting coverage for damages, such as the 'work product' exclusion, and not on any inherent limitation in the general grant of coverage for 'property damage' as required by the insuring agreement." *Id.*, 2007-0251 at p. 11, 969 So.2d at 661. This Court explained that if the policy "never confers coverage for this type of liability as an original definitional matter," there would be no need for a policy exclusion to specifically eliminate coverage. *Id.*, 2007-0251 at p. 10, 969 So.2d at 660. Having found that the subcontractor's claims for "property damage" triggered the initial grant of coverage under the policy, this Court found that coverage for certain property damage claims was nevertheless precluded by other policy exclusions.

On appeal, Rice Mill argues, as to the contested categories of damages as a whole, that the initial grant of coverage under the policies is triggered when there is "physical injury to tangible property" caused by an "occurrence" and that the economic damages it sustained occurred "because of … property damage." Rice Mill contends that the district court improperly found as a matter of law that these categories of damages were purely economic damages and not property damage. We find, as this Court did in *Stewart*, that to the extent that summary judgment was granted on the basis that Rice Mill failed to allege "property damage" triggering the initial grant of coverage under the Fireman's Fund and Zurich policies, the district court erred. 2007-0251 at pp. 9-10, 969 So.2d at 660.

With respect to the delay damage claims, Fireman's Fund and Zurich rely on *Fed. Ins. Co. v. New Hampshire Ins. Co.*, 439 F. App'x 287 (5th Cir. 2011)(citing

Data Specialties, Inc. v. Trans. Ins. Co., 125 F.3d 909 (5th Cir. 1997)) and *First Horizon Ins. Co. v. Int'l Surplus Lines Ins. Co.*, No. 87-3616, 1989 WL 132856 (E.D. La. Oct. 31, 1989) for the proposition that the policy language "legally obligated to pay as damages" applies only to tort-based obligations, not obligations arising from breach of contract such as contract price or delay damages. We are not persuaded by the reasoning in either case. *First Horizon* is distinguishable because there were no allegations of physical damage to property in that litigation. *Fed. Ins. Co.* relies on a federal appellate case applying Texas law and merely makes an "*Erie* guess" as to Louisiana law; we have identified no reported Louisiana cases adopting Zurich's and Fireman's Fund's interpretation of *Fed. Ins. Co.* on this issue.[4]

Similarly, Zurich and Fireman's Fund rely on a line of cases decided by the United States Fifth Circuit Court of Appeals to suggest that that rent concessions, lost income, and damage to Rice Mill's business reputation are not "property damage." *See Selective Ins. Co. of Southeast v. J.B. Mouton & Sons*, 954 F.2d 1075, 1079-80 (5th Cir. 1992)(equating policy language of "tangible property" to the Louisiana concept of "corporeal property" and rejecting the argument that, under Louisiana law, the loss of possible future income or profits, or the loss of use of that income, constitutes a loss of tangible property); *Lamar Advert. Co. v. Cont'l Cas. Co.*, 396 F.3d 654, 662 (5th Cir. 2005)(loss of anticipated or possible income was not loss of tangible property); *DeLoach v. HGI Catastrophe Servs., L.L.C.*,

[4] We are likewise not persuaded by the cases relied by the parties applying out-of-state law to determine whether certain consequential economic damages are excluded under the policies at issue.

460 F. App'x 314, 317 (5th Cir. 2012)("reputation is not tangible property, and the purely economic losses resulting from damage thereto are not 'property damage' within the meaning of the [CGL] policy"). We find each of these federal appellate cases distinguishable, however, because, in each case, the party seeking coverage did not allege a physical injury to or destruction of any tangible property.

By depicting Rice Mill's claims as solely involving incorporeal, economic losses, Fireman's Fund and Zurich ignore that Rice Mill has alleged that defective construction resulted in, not only economic losses to its income, reputation, and from delays in construction, but also physical injury to tangible property – the apartments.[5] "As our case law presupposes that '[a] [] complaint against the insured is examined with the assumption that all the allegations are true,'" we disagree with Fireman's Fund and Zurich and find that, in addition to economic losses, Rice Mill has sufficiently alleged property damage to the apartments, thereby triggering the initial grant of coverage under the applicable Fireman's Fund and Zurich policies. *See Stewart*, 2007-0251 at p. 12, 969 So.2d at 661-62 (internal citations omitted).

Ordinarily, having reached this conclusion as to the initial grant of coverage would not end our inquiry; we would next consider whether coverage is precluded by one or more of the policy exclusions. Thus, in the alternative, Fireman's Fund and Zurich seek this Court's determination of whether coverage for Rice Mill's

[5] "Under La. C.C.P. art. 852, the pleadings allowed in civil actions include "petitions, exceptions, written motions and answers." *Stewart*, 2007-0251 at p. 12, n. 8, 969 So.2d at 662 (citing *Grimaldi Mechanical, L.L.C. v. The Gray Insurance Company*, 2005-0695, p. 9 (La. App. 4 Cir. 6/2/06), 933 So.2d 887, 892. "Also, La. C.C.P. art. 1154 provides that amendments to the pleadings in order to conform to the evidence are proper." *Id.*

claims for delay damages, loss of income/reputation, and rent concessions are precluded by the "impaired property" exclusion.[6]

It is evident from the record, however, that the district court did not reach the issue of whether the "impaired property" exclusion applied. The transcript of the June 16, 2016 hearing reflects that, after the district court found that the delay damages, loss of income/reputation, and rent concessions did not fall within the initial grant of the applicable policies' coverage, the district court made no finding as to whether the "impaired property" exclusion applied and stated on the record that the issue was moot. Having found that the district court erred in its conclusion as to the initial grant of coverage, the applicability of the "impaired property" exclusion warrants consideration and is not moot. We therefore reverse the district court's grant of partial summary judgment and remand this matter to the district court for further proceedings and for determination of whether the "impaired property" exclusion applies.

For these reasons, we reverse the October 10, 2016 judgment granting summary judgment as to the number of occurrences within the meaning of the applicable Westchester policies, as we find that Fireman's Fund did not meet its burden of proving two occurrences and was not entitled to judgment as a matter of law. We also reverse the October 20, 2016 judgment dismissing Rice Mill's claims for delay damages/liquidation damages, loss of income/business reputation, and

[6] We recognize that pursuant to La. C.C.P. art. 2133(B), Fireman's Fund and Zurich were not required to file an answer to the appeal in order to assert, in support of affirmation of the judgment, "any argument supported by the record."

rent concessions. We thus remand this case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED