

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MILL TECH, INC.,	:	NO. 06 – 00,834
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
HARLEYSVILLE MUTUAL INSURANCE CO. and	:	
RONALD R. ENDERS AND SONS, INC.,	:	
Defendants	:	Motion for Summary Judgment

**OPINION AND ORDER**

Before the Court is the Motion for Summary Judgment filed by Defendant Harleysville Mutual Insurance Company ( hereinafter “Harleysville”) on March 7, 2008. Argument on the motion was heard May 2, 2008.

Plaintiff, Mill Tech, Inc., (hereinafter “Mill Tech”) was brought into a personal injury suit in New York based on its role in designing a feed mill system for Agway Feed Mill (hereinafter “Agway”) in Guilderland, New York. When Mill Tech requested of Harleysville, the company which provided its liability insurance, that Harleysville provide a defense, Harleysville determined that the alleged basis for Mill Tech’s liability fell within the policy exclusions and denied coverage. Mill Tech then brought the instant action against Harleysville and Defendant Enders, the agent from whom Mill Tech obtained the Harleysville policy, contending first that Harleysville should not have denied coverage and second, that if indeed the policy does not cover the alleged liability, Enders is at fault for having sold the wrong type of policy to Mill Tech. In the instant motion for summary judgment, Harleysville contends the policy clearly does not provide coverage and that it is thus entitled to judgment as a matter of law.<sup>1</sup> After reviewing the terms of the policy and the evidence of what role Mill Tech played in designing the Agway feed mill system, the Court agrees with Harleysville.

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<sup>1</sup> All of Plaintiff’s claims are based on Harleysville’s denial of coverage and thus if that denial was correct, all of Plaintiff’s claims fail.

The third-party complaint filed against Mill Tech in the New York litigation alleged that Mill Tech negligently designed and planned certain aspects of the Agway feed mill system. In denying coverage, Harleysville concluded that these acts of designing and planning were “engineering services” performed in the rendering of “professional services” and were therefore excluded from coverage under the General Liability Policy’s “Contractor’s – Professional Liability” exclusion, as well as the Umbrella Policy’s “Engineers, Architects or Surveyors Professional Liability” exclusion and the “Contractor’s Limitation Endorsement.” The General Liability Policy’s “Contractor’s – Professional Liability” exclusion reads as follows:

1. This insurance does not apply to “bodily injury”, “property damage” or “personal injury” or “advertising injury” arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
  - a) Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
  - b) Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.
2. Subject to Paragraph 3. below, professional services include:
  - a) The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
  - b) Supervisory or inspection activities performed as part of any related architectural or engineering activities.
3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

The Umbrella Policy’s “Engineers, Architects or Surveyors Professional Liability” exclusion reads as follows:

This insurance does not apply to any liability arising out of the rendering or failure to render any professional services by or for you including but not limited to:

1. The preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; and
2. Supervisory, inspection or engineering services.

The “Contractor’s Limitation Endorsement” reads in pertinent part as follows:

A. This insurance does not apply to any liability arising out of:

...

2. The rendering or failure to render any professional services by or for you including the preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and any supervisory, inspection or engineering services.

According to the deposition testimony of Mill Tech’s president, John Merrifield, Mill Tech did provide engineering services in the Agway project, as its role was to design part of the feed mill system and to provide drawings which contained specifications to manufacturers and mechanical contractors. While Mr. Merrifield distinguishes his company’s services from “professional” engineering services on the basis that neither he nor any of his employees is a licensed engineer, he could not disagree that Mill Tech provided engineering services in the Agway project:

Q. But is it your understanding that Mill Technology did not perform engineering services, as you understand that term, on the Agway project?

A. We have never performed professional engineering services.

Q. I didn’t ask professional. I said just engineering services.

A. Yes, we do every day.

Q. And did you perform engineering services on the Agway project?

A. As I understand them, yes.

Q. And how did Mill Technology perform engineering services on the Agway project?

A. When I meet with a customer they tell me what they want to do.

Q. Let me ask a better question because I just realized it’s the same question.

A. The same questions over and over, man. I’m sorry.

Q. What specifically did Mill Technology do in performing engineering services for the Agway project?

A. We made a drawing of a horse feed manufacturing tower and the equipment that’s set inside of it.

Q. Anything else?

A. There was a set of storage bins. We also did – engineered drawings of what those bins would look like, again, so we could send these drawings out to the manufacturers to size steel and size equipment.

....

Q. Now, would you consider preparing this drawing for Agway to be providing engineering services?

A. You could call it that. I wasn't paid for it, but you could call it that.

Q. What would you call it then?

A. I'm not an engineer, so no.

Q. Based on your understanding of engineering services that you testified to before and your testimony the Mill Technology did perform engineering services, are you saying that this is not an example of engineering services?

A. You can call it an engineering service. We've been dancing around for three hours about the word engineering. I'm sorry.

Q. I'm going to assume the answer is yes, this is providing engineering services?

A. Yes.

...

Q. Is this a drawing that you prepared?

A. Yes.

Q. And this was for the Agway project?

A. Yes.

Q. What does this drawing depict?

A. It's a planned view of the bends and a plan view of the bagging towers. It's a drawing that would be built by Millwrights, the mechanical contractors, so that they could, in turn, give us a price for the installation. They would have to have the whole series of eight or ten drawings to do that.

Q. Are there other drawings behind that?

A. Yes. They all domino and support each other. It will be elevations, plan views. The same drawings are also given to the bin manufacturers and the steel manufacturers so they can take the information, size it appropriately and give us a price.

Q. Would you consider preparing this drawing for Agway to be providing engineering services?

A. It was not prepared for Agway, but it could be considered an engineering service.

Q. What do you mean –

A. That was not paid by Agway. These are not the property of Agway. These are the property of Mill Technology.

Q. Okay. When I said prepared for Agway, I should have said prepared for the Agway project.

A. Yes.

Q. So that this document was prepared for the Agway project, you considered this to be performing engineering services.

A. Yes. You could call it engineering services. You could call it design services. You could call it drafting services, whatever you choose.

...

Q. Okay. Now we have 9404-04. Is this also a drawing that Mill Technology prepared?

A. Yes.

Q. And it has your initials, so I assume you prepared it?

A. Yes.

Q. What does this drawing depict?

A. The same as before, a depiction of the horse feed processing tower. The bins that we were talking earlier will show up on another drawing.

Q. Would you consider preparing this drawing to be performing engineering services?

A. As I understand it, yes.

...

Q. This is drawing 9404-05, also prepared by Mill Technology. Correct?

A. Yes.

Q. What does this depict?

A. The horse feed manufacturing tower from a different side and also the bins, storage bins.

Q. Would you consider preparing this drawing to be performing engineering services?

A. As I understand it, yes.

...

Q. This does not appear to have a drawing number.

A. It's going to be 06 or 07.

Q. We can refer to this as the fines return layout, as it says on the drawing. Did you prepare this drawing?

A. Yes.

Q. Did you prepare this for the Agway project?

A. Yes.

Q. And what does this drawing depict?

A. Fines return layout.

Q. Is that part of the horse feed tower?

A. Yes. The horse feed tower removes fine particles from the feed. You then have to do something with it. This is what we did with it.

Q. And do you consider preparing this drawing to be performing engineering services?

A. Yes, as I understand it.

...

Q. The next drawing is 9404-08, called the relocated respond bagger. Did you prepare this drawing?  
A. Yes.  
Q. And you prepared it for the Agway project?  
A. Yes.  
Q. And what does this drawing depict?  
A. Relocating an existing piece of equipment, a bagger that they already had at the mill.  
Q. And in preparing this – do you consider this drawing to be providing engineering services?  
A. Yes, as I understand it.

Deposition testimony of John Merrifield, at pp. 138-147. Mr. Merrifield’s testimony is quoted, however, not so much to show his agreement that what Mill Tech did for the Agway project could be called engineering services, as to show what Mill Tech did: prepared drawings of various components of the feed mill system, or, to quote Mr. Merrifield, “engineered drawings of what those bins would look like, again, so we could send these drawings out to the manufacturers to size steel and size equipment.”

Webster’s New Collegiate Dictionary defines “engineering” as “the application of science and mathematics by which the properties of matter and the sources of energy in nature are made useful to man in structures, machines, products, systems and processes.” Webster’s New Collegiate Dictionary, G. & C. Merriam Co., 1974, p. 378. Mill Tech’s preparation of the drawings and specifications as part of its design of certain components of the feed mill system in the Agway project clearly constituted “engineering” and “professional services” and thus clearly fell within the exclusions of the insurance policies at issue. Further, as the policies do not restrict the exclusions to “licensed” engineering services, Mill Tech’s argument that the exclusion should not apply because none of its employees are licensed engineers, is without merit.

Accordingly, as Harleysville correctly interpreted its policies, it was within its rights to deny coverage on Mill Tech’s claim, and is therefore entitled to judgment on all claims against it as a matter of law.

**ORDER**

AND NOW, this 14<sup>th</sup> day of May 2008, for the foregoing reasons, the motion for summary judgment filed by Defendant Harleysville Mutual Insurance Company is hereby GRANTED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Scott T. Williams, Esq.  
C. Edward S. Mitchell, Esq.  
Louis H. Kozloff, Esq.  
Blank Rome, LLP  
One Logan Square, Philadelphia, PA 19103  
Grant W. Schonour, Esq.  
Dickie McCamey & Chilcote, P.C.  
1200 Camp Hill Bypass, Suite 205, Camp Hill, PA 17011  
Gary Weber, Esq.  
Hon. Dudley Anderson