

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001874-MR

JAMES M. DEARINGER, a/k/a MATT DEARINGER;
THERESA DEARINGER, f/d/a M & T PLUMBING APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 98-CI-00575

KENTUCKY NATIONAL INSURANCE COMPANY APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellants, James M. Dearinger a/k/a Matt Dearinger, and Theresa Dearinger, f/d/a M & T Plumbing, appeal from a summary judgment entered by the Fayette Circuit Court in favor of appellee, Kentucky National Insurance Company ("Kentucky National"). After reviewing the record and the applicable case law, we reverse and remand for a ruling on the issue of coverage.

Appellants installed a hot water supply line into a residence located in Nicholasville, Kentucky on December 1, 1990. At the time of the installation, appellants were insured with a commercial liability coverage policy by original co-defendant,

American States Insurance Company ("American States"). On November 29, 1992, the owner of the residence discovered that the hot water supply line had come loose, leaked water, and damaged the home. At the time of the leak, appellants were insured with a commercial liability insurance policy from Kentucky National Insurance Company. The damages to the home, in the amount of \$37,908.69, were paid by the homeowner's insurance carrier, Fireman's Fund Insurance Company ("Fireman's Fund").

Having determined that appellants were insured by Kentucky National at the time the damage to the home occurred, Fireman's Fund sent a letter to Kentucky National on April 14, 1993, making a subrogation claim for damages paid to the homeowner. On August 16, 1993, Kentucky National sent a letter to appellants requesting a statement and record of work pertaining to the claim. On September 14, 1993, Kentucky National sent another letter to appellants stating that appellants' policy was an "occurrence" type policy, and that the alleged negligence (installation of the hot water line) occurred prior to the policy period with Kentucky National. The letter then suggested that appellants contact their previous insurance carrier. The record indicates no further correspondence between appellants and Kentucky National.

On September 8, 1995, Fireman's Fund filed a subrogation lawsuit against appellants to recover amounts paid for the damages to the home (Fireman's Fund Insurance Company v. Dearinger's Plumbing Company, Fayette Circuit Court, Civil Action No. 95-CI-2914). A bench trial was held on February 17, 1998. On February 17, 1998, appellants filed a complaint for

declaratory relief against American States and Kentucky National in Fayette Circuit Court seeking payment of any judgment against appellants rendered in Civil Action No. 95-CI-2194, plus all court costs, attorney fees, and out-of-pocket expenses. On February 24, 1998, the court entered a judgment against appellants for \$39,329.69.

A review of the relevant dates is as follows. Appellants were insured by American States from May 9, 1990 to December 10, 1990. Appellants installed the water line on December 1, 1990. Appellants were insured by Kentucky National from July 12, 1992 to January 12, 1993. The leak from the water line which damaged the home occurred on November 29, 1992. Appellants' complaint requested the court to determine which of the two carriers was liable for the judgment against them.

On March 10, 1998, American States filed a motion to dismiss on the basis that appellants' policy with American States was an "occurrence" policy. American States argued that the "occurrence" that triggered coverage was the leak and not the installation, and therefore there was no "occurrence" during its coverage period. The court granted American States's motion to dismiss on April 1, 1998.

On March 16, 1998, Kentucky National filed an answer to appellants' complaint, stating that Kentucky National denied coverage based, among other reasons, upon its policy with appellants being an "occurrence" policy. Kentucky National argued, as American States did, that the "occurrence" occurred outside their coverage period as well.

The American States and Kentucky National policies use similar language to describe when there is coverage. Both policies state:

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;" and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

On May 14, 1998, appellants moved the court for summary judgment against Kentucky National for damages incurred by appellants as a result of the Fireman's Fund lawsuit. Appellants argued that the American States and Kentucky National policies used the same language to denote when there is coverage. Appellants reasoned that, in dismissing American States, the court agreed that the "occurrence" triggering coverage was the leak, not the installation; therefore, it follows that if the "occurrence" was the leak, it must be covered by the Kentucky National policy.

On June 5, 1998, Kentucky National filed an amended answer to appellants' complaint, denying that Kentucky National had denied coverage. On June 5, 1998, Kentucky National also filed a cross-motion for summary judgment, in which it argued that appellants' claim was barred because appellants breached the contractual duties required by the insurance policy by failing to ever notify Kentucky National of the lawsuit by Fireman's Fund, and failing to immediately send Kentucky National copies of any demands, notices, summons or legal papers received in connection with the lawsuit.

On July 22, 1998, the Fayette Circuit Court entered an order denying appellants' motion for summary judgment, and sustaining Kentucky National's motion for summary judgment. The trial court did not address the issue of coverage. Rather, the court held that summary judgment was appropriate based on appellants' failure to provide notice of the lawsuit to Kentucky National, failure to comply with the other conditions of the policy requiring it to send copies of any demands, notices, summons or legal papers to Kentucky National, and failure to cooperate with the insurer in the investigation, settlement and defense of the lawsuit.

The trial court held that, as appellants failed to comply with the notice of lawsuit and related terms in the policy, appellants were now barred by the terms of that policy from proceeding against Kentucky National. However, in Jones v. Bituminous Casualty Corporation, Ky., 821 S.W.2d 798, (1991), the Kentucky Supreme Court reconsidered whether failure to provide prompt notice should automatically defeat liability insurance coverage regardless of circumstances. Jones dealt with notification of an occurrence. The Court held that an **insured's failure to provide prompt notice of an occurrence does not automatically defeat liability insurance coverage**; to escape liability, the insurer must prove probable prejudice from delay in notification. (Emphasis added.) Jones, Ky., 821 S.W.2d at 803, overruling Reserve Ins. Co. v. Richards, Ky., 577 S.W.2d 417 (1978); Aetna Casualty and Surety Co. of Hartford, Conn. v.

Martin, Ky., 377 S.W.2d 583 (1964), and Shipley v. Kentucky Farm Bureau Ins., Ky., 747 S.W.2d 596 (1988).

Furthermore, if appellants were denied coverage by Kentucky National, case law indicates that appellants may proceed independently, with the insurance coverage question determined in a subsequent action. In Cincinnati Insurance Company v. Vance, Ky., 730 S.W.2d 521, 522 (1987) (concerning an insurance company's duty to defend where the insurance company believed no coverage existed), the Kentucky Supreme Court held:

. . . the insurance company, at its own peril, may elect not to defend the original action against a putative insured, although thereafter it may be liable for the judgment if it is judicially determined that the policy did in fact provide coverage in the circumstances.

The Court further stated:

. . . If the insurance company timely denies coverage, both sides then have the right to act independently of the other, subject only to then having to bear responsibility for the loss occasioned in the underlying tort action if wrong in their judgment about the policy coverage question. (Emphasis added.)

Vance, 730 S.W.2d at 524.

It appears that Kentucky National denied coverage to appellants. On September 14, 1993, Kentucky National sent the following letter to appellants:

Dear Mr. Dearing:

As you know, the investigation conducted on behalf of Fireman's Fund Insurance Company indicates that an improperly installed water supply line caused extensive water damage to the property of James Borden, 61 Avenue of Champions, Nicholasville, Ky. This work was completed in 1990.

A review of your policy reflects that it is an "occurrence" type policy and did not go into effect with Kentucky National Insurance Company until 7-12-91. Since this alleged negligence occurred prior to the policy period with Kentucky National Insurance Company, we urge you to contact your previous carrier.

Sincerely,

Kentucky National Insurance Co.
Vicky L. Pierce
Claims Representative

Kentucky National argues that this correspondence was not a denial of coverage. We believe that this letter can be reasonably interpreted as a denial of coverage. Kentucky National further argues that even if Kentucky National had denied coverage, that would not have waived Kentucky National's provision which required the appellants to notify and tender the lawsuit to Kentucky National. However, applying the Kentucky Supreme Court's statement in Vance, a denial of coverage should allow appellants the opportunity to act independently of the provision in Kentucky National's policy.

Furthermore, the Kentucky Supreme Court has stated:

An insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. . . .

Eskridge v. Educator and Executive Insurers, Inc., Ky., 677 S.W.2d 887 (1984), quoting Comunale v. Traders & General Insurance Company, 50 Cal.2d 654, 328 P.2d 198, 202 (1958).

We opine, therefore, that the trial court erred in granting summary judgment to Kentucky National based solely on appellants' failure to comply with the notice of lawsuit and related provisions in the policy. Applying the principles from Vance and Eskridge, the appellants' failure to provide notice to Kentucky National of the lawsuit should not now preclude them from proceeding against Kentucky National on the issue of coverage.

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). The facts of this case show issues of material fact exist with regard to whether the Kentucky National policy covered the "occurrence" in question. Accordingly, the case must be reversed and remanded to the circuit court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Julius Rather
Lexington, Kentucky

BRIEF FOR APPELLEE:

Guy R. Colson
Michael E. Liska
Lexington, Kentucky

