RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000679-MR

WEST KENTUCKY MACHINE SHOP, INC. APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 99-CI-00194

VALIANT INSURANCE COMPANY; and
WESTERN RIVERS CORPORATION APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

VANMETER, JUDGE: This appeal arises from a judgment entered by the McCracken Circuit Court dismissing the claim of appellant, West Kentucky Machine Shop, Inc. (WKMS), against appellees Western Rivers Corporation and Valiant Insurance Company (Valiant). WKMS contends that the trial court erred by granting

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

partial summary judgment in favor of Valiant as to liability coverage for a damaged gear, and that the court abused its discretion by denying WKMS's motion to file a second amended complaint. We affirm.

WKMS was insured by Valiant under a commercial general liability policy obtained through agent Western Rivers. In March 1997 WKMS was installing a 36,000 lb. gear in an Iowa cement plant owned by Holnam Inc. The gear fell from a crane onto the floor of the cement plant, destroying the gear, causing structural damage to the plant, and interrupting business. In the exchange of correspondence following the accident, Holnam claimed damages from WKMS for business interruption, damage to the plant, and loss of the gear. In turn, WKMS sought liability coverage from Valiant. On April 3, 1997, Valiant issued its first reservation of rights letter which denied coverage for loss of the gear based on exclusions in WKMS's policy.[2] On June 19, 1997, Valiant issued a second reservation of rights letter advising WKMS that it was covered for its liability to Holnam

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[2] 2. Exclusions. This insurance does not apply to:

. . .

j. Damage to Property
"Property damage" to :

. . .

(4) Personal property in the care, custody or control of the insured;
(5) 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; or
(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

for the business interruption and the structural damage to the plant itself, but that it was not covered for damages to the gear. Valiant thereafter defended the claim under these parameters.

In December 1998, after Valiant and Holnam were unable to agree on the amount of the business interruption damages, Holnam filed a lawsuit in Iowa claiming damages in the amount of $988,250. In September 2000 a jury rendered a verdict for Holnam against WKMS in the amount of $335,768 "for property damage and repair with interest and costs." Based on Holnam's damage exhibit, the jury awarded damages of $307,870 for damaged/scrapped parts (i.e, the gear), and a net $27,898 for structural property damage, but it awarded no damages for business interruption. WKMS paid the entire judgment plus interest, and Valiant in turn reimbursed WKMS for the undisputed portion of the verdict, i.e., the structural damage, plus interest.

Meanwhile, in March 1999 WKMS filed a complaint against Valiant and Western Rivers in the McCracken Circuit Court alleging Valiant's breach of contract, bad faith, and unfair claim settlement practices, as well as Western Rivers' negligence as insurance agent. On October 22, 2003, the trial court granted Valiant partial summary judgment, ruling that Valiant did not provide liability coverage for the gear itself.

In January 2004 WKMS sought leave to file a second amended complaint to add a claim that Valiant violated KRS 304.12-235.[3] On February 4, the court denied the motion and granted summary judgment in favor of Valiant on WKMS's bad faith claim. On March 1, 2004, the court made its October 22 and February 4 orders final and appealable. This appeal followed.

WKMS makes two arguments on appeal: (1) the doctrines of equitable estoppel and/or waiver barred Valiant from asserting that its policy did not cover the gear; and (2) the trial court abused its discretion in not permitting WKMS to file its second amended complaint.

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[3] KRS 304.12-235 provides:

> (1) All claims arising under the terms of any contract of insurance shall be paid to the named insured person or health care provider not more than thirty (30) days from the date upon which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished the insurer.
>
> (2) If an insurer fails to make a good faith attempt to settle a claim within the time prescribed in subsection (1) of this section, the value of the final settlement shall bear interest at the rate of twelve percent (12%) per annum from and after the expiration of the thirty (30) day period.
>
> (3) If an insurer fails to settle a claim within the time prescribed in subsection (1) of this section and the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney's fees incurred. No part of the fee for representing the claimant in connection with this claim shall be charged against benefits otherwise due the claimant.

WKMS's equitable estoppel argument is based on the fact that Valiant's initial reservation of rights letter stated that the "care, custody, and control" exclusion[4] of WKMS's policy applied to the damage done to Holnam's gear, but the subsequent letter did not repeat this language as a specific basis for exclusion. WKMS asserts that Valiant presented inconsistent positions and is thereby estopped from presenting the exclusion as a defense at trial. We disagree.

As applied to insurance coverage, the Kentucky Supreme Court has held:

> [E]stoppel "offsets misleading conduct, acts, or representations which have induced a person to rely thereon to change his position to his detriment." . . . *Gray v. Jackson Purchase Credit Ass'n,* Ky.App., 691 S.W.2d 904 (1985), sets forth the elements of estoppel:
>
> > (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied upon this conduct to his detriment.[5]

The record indicates that both reservation of rights letters sent to WKMS by Valiant stated:

> Please be advised that nothing contained within this document or any act of this

[4] Exclusion 2j(4) of Valiant's policy with WKMS. *See* n. 1, *supra*.

[5] *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525, 527 (Ky. 1997).

> Company or its representatives is to be construed as a waiver of any known or unknown defense we may have under the policy. Nor does this letter waive or change any provisions or conditions of the policy.

In the second reservation of rights letter, this paragraph was followed by a statement that "[a]dditionally, the foregoing in no way restricts or limits this company from relying upon and asserting other facts and grounds that are, or may become, available." This letter also contained language that "[a]s stated previously, your policy will not cover the gear expenses." Thus, following the initial correspondence from Valiant, WKMS knew at all times throughout this controversy that Valiant was asserting that damage to the gear was not covered. As WKMS failed to demonstrate how it detrimentally acted in reliance on Valiant's statement in the second reservation of rights letter, it follows that Valiant was not estopped from asserting the policy exclusion.

In a related argument, WKMS asserts that Valiant waived the policy exclusion relating to the gear. While the concepts of waiver and estoppel are often used interchangeably, they are separate and distinct concepts. Waiver is the "voluntary and intentional relinquishment of a known, existing

right or power under the terms of an insurance contract."[6] As previously noted, Valiant's reservation of rights letters both stated that nothing in the documents or in the actions of the company or its representatives would be "construed as a waiver of any known or unknown defense" under the policy, and that the letters did not "waive or change any provisions or conditions of the policy." Clearly, Valiant did not waive its policy exclusion relating to the "care, custody and control" of the gear.

Next, WKMS contends that the trial court abused its discretion by denying WKMS's motion to file a second amended complaint to add a claim that KRS 304.12-235 was violated, thereby cutting short WKMS's ability to litigate pending issues. We disagree.

CR 15.01 provides that a plaintiff may file one amended complaint prior to the filing of a responsive pleading, but that "[o]therwise a party may amend his pleading only by leave of court or by written consent of the adverse Party. . . ." In 1972 Kentucky's highest court addressed a situation similar to the one at hand. In *Laneve v. Standard Oil Co.*,[7] the plaintiff filed suit for injuries caused by an

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[6] *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525, 526 (Ky. 1997) (citing *Edmondson v. Pennsylvania Nat'l Mut. Cas. Ins. Co.,* 781 S.W.2d 753, 755 (Ky. 1989)).

[7] 479 S.W.2d 6 (Ky. 1972).

allegedly defective tire. After seven years of litigation, and on the eve of summary judgment, the plaintiff sought to amend his complaint in order to add a new claim of failure to warn. The trial court's denial of the motion was affirmed on appeal as,

> [i]n view of the extensive passage of time before the plaintiff undertook to completely alter the basic issue in this case, we conclude that the trial judge acted well within his discretion when he denied leave to file the amended pleadings. Cf. *Bensinger v. West*, Ky., 255 S.W.2d 29 (1953).
>
> "Though CR 15.01 provides that leave to amend 'shall be freely given when justice so requires,' it is still discretionary with the trial court, whose ruling will not be disturbed unless it is clearly an abuse." *Graves v. Winer*, Ky., 351 S.W.2d 193 (1961).[8]

In the instant case, by comparison, WKMS filed its initial complaint in 1999 and an amended complaint in 2001. It did not seek to file its second amended complaint until after the trial court granted Valiant partial summary judgment in 2003 on the issue of liability coverage for the gear. The trial court found that the second amended complaint, filed some five years after the commencement of the suit and some seven years after the incident, would raise a new claim that could have been brought either in the initial filing or in the first amended complaint, and it "would require extending this litigation to

[8] *Id.* at 8.

take discovery that could have been taken in concert with the other claims." Given these circumstances, including the extensive passage of time, the trial court did not abuse its discretion in denying the motion to file a second amended complaint.

Finally, there is no merit to any claim on appeal that the trial court erred by granting summary judgment dismissing WKMS's common law and statutory bad faith claims. As stated in *Wittmer v. Jones*,[9] three elements must be proven to establish a cause of action for bad faith: (1) the insurer was obligated to pay the claim under the terms of the policy; (2) the insurer lacked a reasonable basis in law or fact for denying the claim; and (3) the insurer either knew that no reasonable basis existed for denying the claim or acted with reckless disregard for whether any such basis existed.

As previously noted, Valiant did not provide coverage for Holnam's gear, and it neither waived nor was estopped from asserting the policy's exclusion of coverage for items under its insured's "care, custody and control." The record demonstrates that the main issue of contention necessitating Holnam's Iowa lawsuit was its claim for business interruption. The eventual damage award assessed by the Iowa jury was for property damage to Holnam's plant and for damage to the gear. The jury awarded

[9] 864 S.W.2d 885, 890 (Ky. 1993).

no damages for business interruption. Once liability was assessed with respect to the plant damage, Valiant promptly reimbursed WKMS. As noted by the court in *Wittmer*, as an insurer, Valiant was "entitled to challenge" the amount claimed as damages and to "litigate it if the claim is debatable on the law or the facts."[10] The trial court correctly granted summary judgment to Valiant on WKMS's bad faith claim.

For the foregoing reasons the trial court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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[10] *Id.*