

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000612-MR

DONALD OLSON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-001733

ALLSTATE INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Donald Olson appeals from the March 25, 2010,

summary judgment of the Jefferson Circuit Court. That judgment dismissed

Olson's complaint against Allstate Insurance Company ("Allstate") for its denial of

Olson's claim of damage caused when his above-ground swimming pool ruptured.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

We find no error with the trial court's grant of summary judgment and therefore affirm.

On the morning of June 6, 2008, Olson commenced the act of preparing his above-ground swimming pool for summer use by removing the cover and adding water and chemicals. Later that evening, the pool, which was located three feet from Olson's home and four feet from his attached carport, collapsed and released 21,000 gallons of water. The force of the water broke a basement window and destroyed a brick retaining wall connecting the carport to the home. Olson's basement was filled with approximately six inches of water. Olson indicated that, as a result of the released water, he suffered damage to his carport; the attached brick wall; the basement window; and personal property which had been located in the basement.

At the time of the accident, Olson carried a "deluxe homeowner's policy" with Allstate. Mr. Olson called to report his claim to Allstate the next morning. Two days later, on June 9, 2008, Olson was contacted by Allstate representative Amy Jeffries. Olson and Jeffries discussed the cause of the pool's collapse and Olson informed Jeffries that there was rust present on the pool's frame which, due to its location on the interior of the frame, was imperceptible until after the accident. Jeffries then informed Olson that the incident, which was attributable to wear and tear, would not be covered by his homeowner's policy. According to Olson, Jeffries also informed Olson that the claim would have been fully covered if a tree had fallen on the pool and caused the collapse. Olson

requested that a claim adjuster visit his home and view the pool. Jeffries denied his request and informed Olson that adjusters are not sent when a claim has been denied. Olson made several more requests for an adjuster from Jeffries and her supervisor, Stacie Nemiec. All requests were denied. Nemiec also confirmed that she had reviewed the claim and also concluded that it was to be denied. After receiving letters confirming that his claim had been denied, and writing an unanswered letter to the market claims manager for Allstate, Olson filed a complaint with the Jefferson Circuit Court.

Both Olson and Allstate filed motions for declaratory judgment. On March 25, 2010, summary judgment was entered in favor of Allstate, and Olson's complaint was dismissed. In support of its judgment in favor of Allstate, the trial court found that Olson's claimed losses were excluded from coverage under his policy specifications. In support of this conclusion, the court cited to the sections of Olson's policy which excluded claimed losses, on either the dwelling or personal property, caused by:

water or any other surface on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps, or leaks through any part of the **residence premises**. (emphasis in original).

The trial court rejected Olson's argument that the exclusion was only for natural occurrences of water and instead found:

[t]he phrase 'regardless of its source' is patently unambiguous, and is necessarily intended to void coverage from wither natural or artificial occurrences of

water so long as it occurs ‘on or below the surface of the ground.’

The court also rejected Olson’s argument that the majority of the water was not surface water because it did not come into contact with the ground and instead was expelled from the pool by such force that it damaged his home instantaneously.

The court found that such an argument is speculation and instead relied on Olson’s testimony that the ground was wet between the pool and the house, as well as the pictures of the pool which had ripped from top to bottom.

The trial court also rejected Olson’s argument that the water-related damage was caused by an “explosion” of the swimming pool, which is a specific exception to the policy’s water exclusion. The trial court noted that Olson failed to provide evidence that an explosion occurred. It also rejected Olson’s argument that his loss was caused by “breakage of glass” and not water, citing again to the water exclusion which includes loss caused by the pressure of water on any part of the residence premises.

The trial court lastly addressed Olson’s argument that the loss of his swimming pool was covered by his policy as personal property. The trial court concluded that the swimming pool was an “other structure” as was specifically indicated by the policy’s personal property section, and was excluded by that section’s exclusion of losses caused by “weight of water.” This appeal followed.

Our standard of review on appeal of a 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. CR² 56.03.

“The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* “Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.” *Id.* at 482.

Olson’s overall argument on appeal is that his policy provided coverage for the structural damage of his home and personal property losses caused by the unexpected explosion of his pool. Olson rejects the trial court’s application of the “surface water” exclusion in his policy, and argues that the water expelled from his swimming pool does not meet the definition of “surface water.”

The policy’s exclusion applies to losses caused by:

[w]ater or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps or leaks through any part of the **residence premises**

(emphasis in original). In support of his argument, Olson provided language from a Fire Casualty & Surety Bulletin as well as various out-of-state cases which interpret “surface water” in various manners, but always define it by its source.

However, as the trial court noted, the phrase in Olson’s specific policy “regardless

² Kentucky Rules of Civil Procedure.

of its source,” make Olson’s supporting documents inapplicable to these facts. The policy is clear that it does not cover damage caused by water on the surface of the ground, *regardless of its source*. Further, and as the trial court stated, Olson failed to present evidence that the water shot directly from the pool into the home, without making contact with the ground. We therefore find no error with the trial court’s conclusion that damage caused by the pool water was subject to the exclusion.

Olson further argues that the damage to his property is not excluded because it is the result of an explosion, and his policy provides coverage for losses incurred by “fire, explosion or theft resulting from (the surface water damage exclusion).” As support, Olson provided cases which defined “explosion” to encompass such occurrences involving active force, steam pressure, compressed air, hydraulic shock, excessive pressure, and electrical compression. In response to Olson’s explosion argument, the trial court stated:

[w]hile Olson continually claims in his briefs that the pool “exploded” and that an “explosion” occurred, he does not provide any evidence of the phenomenon. Rather, the only evidence before the Court is that the pool was uncovered, that the metal wall that supported the vinyl lining of the pool separated, the lining split, and the water released, cascading in and around the house.

...

Olson has presented no evidence that the water in his pool constituted “an active internal force” in any way, that it was expanding or contracting or otherwise behaving differently than a passive mass of water.

We agree with the trial court's conclusion that Olson failed to provide evidence that an explosion occurred. He offered no evidence that the water in the pool suffered any form of excessive force, pressure, shock, or compression. "A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present 'some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky.App. 2007). Olson failed to offer any such affirmative evidence and his argument was therefore appropriately rejected by the trial court. Similarly, Olson's argument that he is entitled to compensation for personal property, as a loss resulting from an explosion, also fails.

Olson also argues that his home's damage was covered by his policy and not excluded by the "wear and tear" exclusion in his policy. In support of this argument, Olson cites to the wear and tear exclusions, which reads:

In addition, we do not cover loss consisting of or caused by any of the following:

15. (a) wear and tear, aging, marring, scratching, deterioration, inherent vice, or latent defect;

(b) rust or other corrosion, mold, wet or dry rot;

(emphasis in original). Olson argues that because the cause of the pool's rupture is unknown, a conclusion that it was caused by wear and tear or rust is pure speculation. Olson further argues that, even if the cause of the pool's collapse were due to wear and tear, or rust, the exclusion would not apply to his home,

because the wear and tear or rust was present on the pool and not on his home. Because we have already held that the trial court was correct to determine that the damage to Olson's home was exempt from coverage under the policy's water exclusion, we need not determine whether the wear and tear exclusion would additionally preclude coverage.

For the foregoing reasons, the March 25, 2010, summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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