STATE OF MICHIGAN

COURT OF APPEALS

TRIZEC PROPERTIES, INC., and TRAVELERS INSURANCE COMPANY,

Plaintiffs-Appellees,

v

MILLAR ELEVATOR SERVICE COMPANY, a/k/a MILLAR ELEVATOR SERVICE COMPANY OF DELAWARE and ZURICH-AMERICAN INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
March 26, 1999

No. 203144
Wayne Circuit Court
LC No. 96-617880 CK

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendants appeal from an order granting summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10), in this breach-of-contract/declaratory-judgment action. We reverse and remand.

Plaintiff Trizec Properties, Inc. (Trizec), and defendant Millar Elevator Service (Millar) entered into a service agreement for the Fisher Building in 1991, the provisions including that Millar would obtain various insurance policies for the benefit of Trizec. In 1992, one Susan Diaz allegedly suffered injury at the Fisher Building resulting from an elevator's failure to level itself with the lobby floor. Diaz sued for damages, naming both Trizec and Millar as defendants. Plaintiffs settled that action, and, seeking to recover attorney fees and costs from defendant Zurich-American Insurance Co., filed the present action for declaratory judgment. At issue is whether defendant Zurich-American's "Owners and Contractors Protective Liability Policy" naming Trizec as the insured covered Diaz' alleged accident. On cross-motions for summary disposition the trial court ruled in favor of plaintiffs, adopting their position in its entirety.

"This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997). When considering an appeal of an order granting summary disposition under MCR 2.116(C)(10), a reviewing court must examine all relevant documentary evidence in the

light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

The insurance policy lists Millar as the designated contractor, and specifies elevator maintenance at the Fisher Building as the covered operation. The policy provides for coverage for "damages because of 'bodily injury'" arising from "[o]perations performed for you by the 'contractor' at the location specified" or "[y]our acts or omissions in connection with the general supervision of such operations." However, the policy announces an exclusion from coverage for bodily injury occurring after "all 'work' on the project (other than service, maintenance or repairs) to be performed for you by the 'contractor' at the site of the covered operations has been completed" or "that portion of the 'contractor's' 'work', out of which the injury . . . arises, has been put to its intended use by any person or organization." Defendants contend that the trial court erred in accepting plaintiffs' argument that Diaz' accident did not come under this exclusion. We agree.

"[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). However, exclusionary clauses in insurance contracts should be strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). Ambiguities must likewise be strictly construed against the drafter. *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996).

Plaintiffs characterize the "work" covered by the policy as elevator maintenance that is continuously in progress and therefore never "completed" for purposes of the exclusion. However, because the exclusion plainly distinguishes "work" from "service, maintenance, or repairs," plaintiffs' attempt to fold the latter into the general concept of the former is inappropriate. "An insured is obligated to read his insurance policy and raise questions concerning coverage within a reasonable time after the issuance of the policy." *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 324; 575 NW2d 324 (1998). Subsequent servicing of an otherwise completed system does not render the operation incomplete for purposes of an unambiguous exclusion for completed work. *St Paul Ins Co v Bischoff*, 150 Mich App 609, 616; 389 NW2d 443 (1986). Instead, the policy treats each act of service or maintenance as a discreet insurable event. Thus, injury occurring at a time when Millar was not specifically engaged in servicing the elevator remains excluded by the policy. See *James v Hyatt Corp of Delaware*, 981 F2d 810, 813-814 (CA 5, 1993) (exclusion for completed work or work put to its intended use applied where the policy treated each act of servicing or maintenance as a discreet insurable event, and the contractor was not actively servicing the equipment involved at the time of a patron's injury).

Plaintiffs assert that because this construction of the contract recognizes coverage only when Millar was actually on the premises performing service, this effectively vitiates the policy in contravention of public policy because the elevator would not be in operation at those times. Although we recognize that exclusions for work completed or put to its intended use may severely limit coverage, this Court has afforded such unambiguous exclusions their full effect. *St Paul Ins Co, supra* at 614-616 (insurer's completed-operations exclusion excluded coverage for loss allegedly caused by the insured's negligent

installation of a security system, where that system had been put to its intended use). See also *James, supra* at 813-814 (escalator maintenance contractor's policy exclusion for bodily injury occurring after the work had been put to its intended use precluded coverage for the insured hotel in an action by a patron allegedly injured by the hotel's failure to inspect and maintain the escalator).

Although plaintiffs protest that it is unfair that coverage is excluded under these circumstances, plaintiffs offer no evidence that they negotiated for coverage other than that indicated by the plain terms of the insurance policy. Accordingly, the contract must be construed according to its plain terms. See *Vanguard Ins Co v Racine*, 224 Mich App 229, 232; 568 NW2d 156 (1997).

Plaintiffs argue alternatively that if the exclusion for work completed or put to its intended use does apply under these facts, this exclusion conflicts with general provisions elsewhere in the policy covering elevator maintenance, creating an ambiguity that should be resolved against the insurer. This argument is without merit. To observe that an exclusionary provision in some way runs counter to a general provision is only to observe that an exclusionary provision is doing its job—carving out an exception to a contractual obligation that would otherwise exist. "Clear and specific exclusions must be given effect." *Auto-Owners Ins Co*, *supra* at 567.

For these reasons, we hold that the trial court erred in granting plaintiffs' motion for summary disposition, and in declining to grant defendants' motion for summary disposition on this issue.

Plaintiffs posited as an alternative issue, in the event that the trial court ruled that the exclusion discussed above was applicable to this case, that Millar had breached its service agreement with Trizec. The trial court, having held that the exclusion did not apply, did not reach this alternative issue. In light of our reversal of the trial court in that particular, Trizec's contract claim against Millar becomes germane. We therefore remand this case to the trial court for consideration of that issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell