STATE OF MICHIGAN

COURT OF APPEALS

KATIKUTI E. DUTT, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 231188 Genesee Circuit Court
FARM BUREAU MUTUAL INSURANCE CO., Defendant-Appellant.	LC No. 97-054838-CK

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff $112,000 under the loss of business income provision of defendant's insurance policy. On appeal, defendant challenges the trial court's order granting, in part, summary disposition for plaintiff. We affirm.

I. Basic Facts and Procedure

This case arises from a fire that occurred on October 30, 1995 in an office building on South Road in Goodrich, where plaintiff practices internal medicine. The issue on appeal concerns whether plaintiff is entitled to benefits under a business insurance policy issued by defendant based on loss of business income resulting from the fire.

Plaintiff entered an employment contract with a group of physicians known as Genesys Integrated Group Practice (GIGP), which became effective January 1, 1995. There was also evidence suggesting plaintiff merged his business with GIGP pursuant to GIGP's Agreement and Plan of Reorganization that same date.[1] Plaintiff leased the South Road office suite on February

[1] Plaintiff testified at deposition that the business merger took place on January 1, 1995. Statements of operations showing plaintiff's involvement with GIGP extend back to January 1995. GIGP President Michael James testified that the GIGP reorganization did not take effect until October 24, 1995 when the group's certificate of merger was accepted by the Michigan Department of Commerce. Regardless of whether the actual date of merger occurred on January 1, 1995 or October 24, 1995, it is clear that the merger occurred prior to the October 30, 1995 fire.

17, 1995. Plaintiff signed the lease: "Dr. K.E. Dutt, M.D., Genesys Integrated Group and Practice, P.C."

The insurance policy in question was renewed May 1, 1995 for a one-year term. The policy lists the named insured as: "Katikuti Dutt MD." There is no dispute the policy was in effect on October 30, 1995 when a fire occurred in the office above plaintiff's suite. That fire caused damage to plaintiff's office and prevented him from conducting business at the building for several months. According to plaintiff, he attempted to operate his business from his son's medical office, but suffered a twenty-to thirty-percent loss of revenue due to lost clientele during the months he was unable to use the South Road office.

Soon after the fire, plaintiff submitted claims to defendant for loss of business personal property and loss of business income. Defendant denied those claims on the basis that plaintiff lacked an insurable interest in the property subject to the policy. Plaintiff filed suit for breach of contract. Defendant brought a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff cannot be said to have an insurable interest in the property covered by the policy because he transferred his business and became employed by GIGP. Thus, defendant claimed, plaintiff cannot be entitled to benefits in connection with lost business personal property or lost business income.

Plaintiff admitted in his response to defendant's motion for summary disposition that all business property had, in fact, been transferred to GIGP. Therefore, plaintiff did not oppose dismissal of the portion of his complaint seeking benefits related to business personal property.

The trial court determined that despite the fact plaintiff no longer owned business personal property related to the practice, plaintiff is entitled to lost business income under the plain language of the policy. Thus, the court granted summary disposition for plaintiff under MCR 2.116(I)(2) on plaintiff's claim for loss of business income.[2] Pursuant to the terms of the policy, the determination of the amount of lost income and expenses incurred as the result of the fire was submitted to appraisers representing both parties. The appraisers agreed on the amount of $112,000. Thereafter, the trial court entered a final judgment awarding plaintiff $112,000. It is from that judgment that defendant now appeals.

II. Analysis

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The interpretation of contractual language is also a question of law that is reviewed de novo on appeal. *Bandit Industries, Inc v Hobbs International Inc*, 463 Mich 504; 511; 620 NW2d 531 (2001). A motion based on the lack of a material factual dispute tests the factual support for a claim. In reviewing a motion under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461

[2] The trial court granted summary disposition for defendant on the portion of plaintiff's claim that sought benefits based on business personal property.

Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). If it appears that the opposing party, rather than the moving party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Marx v Dep't of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996).

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The contractual language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Bianchi v Auto Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991); *Wilkie v Auto-Owners Ins Co*, 245 Mich App 521, 524; 629 NW2d 86 (2001). The terms of an insurance policy are given their commonly used meanings, in context, unless clearly defined in the policy. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

With respect to loss of business income, the policy at issue provides, in pertinent part:

> [T]his policy is extended to insure against the actual loss of business income [3] sustained and extra expense incurred by you caused by the perils insured against [4] damaging or destroying, during the policy period, building(s) or business personal property … at the premises described in the Declarations.

Defendant argues that because GIGP, not plaintiff, owned the business personal property originally subject to the policy, plaintiff cannot be entitled to lost business income. Defendant contends that plaintiff could claim lost business income only to the extent it related to loss of business personal property that he owned. Because it is undisputed plaintiff did not own the business personal property at the time of the fire, defendant claims the trial court erred in determining that plaintiff is entitled to lost business income. We disagree with defendant's analysis of the policy's plain language.

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[3] "[L]oss of business income" is defined in the policy as:

> the reduction in earnings, including the reduction in rents, if any, which result from the interruption of business or the untenantability of the premises, less charges and expenses which do not necessarily continue during the time it takes to resume normal business operations or during the period of untenantability, and less any extra expense paid under this policy. Due consideration will be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of your business and the tenantability of your premises with the same quality of service which existed immediately preceding the date of damage or destruction.

[4] "[P]erils insured against" is defined in the policy as "the perils defined and limited in the policy, for each premises scheduled in the Declarations and also subject to the provisions of this coverage."

It is clear that plaintiff is not entitled to benefits in connection with the business personal property subject to the policy because all such property was transferred to GIGP prior to the fire. Neither party disputes that fact. However, that fact is not dispositive of whether plaintiff is entitled to loss of business income under the policy.

As noted, the policy provides that coverage extends to loss of business income caused by perils insured against damaging or destroying "building(s) *or* business personal property … at the premises described in the Declarations." (Emphasis added).[5] Plaintiff contends that while he is not entitled to benefits for lost income in connection with damage of business personal property, he is entitled to such benefits on the alternative basis that the loss was caused by damage to the building described in the policy declarations. We agree.

The plain language of the policy does not require plaintiff to hold an ownership or leasehold interest in the building in order to recover lost income based on damage to the building. The policy's declarations indicate the insured business property was located at two office locations. One of the locations listed and described in the declarations is the South Road building. The policy does not specifically define the term "building" or otherwise indicate that recovery of lost business income is contingent on the insured owning the building(s) referenced. We therefore conclude that the plain language of the policy allows plaintiff to recover benefits for loss of business income resulting from damage to the building in which he based his practice. The fact that plaintiff did not hold an ownership interest in the building does not preclude plaintiff's recovery of such benefits. Had defendant intended a different meaning, as drafter of the contract, it could have provided for such.

Furthermore, we reject defendant's argument that plaintiff's claim fails for the fundamental reason that plaintiff did not have an insurable interest in the property subject to the policy. It is well established that a party need not hold an ownership interest in the insured property to have an insurable interest. *Crossman v American Ins Co of Newark*, 198 Mich 304, 308; 164 NW 428 (1917); *Secura Ins Co v Pioneer State Mut Ins Co*, 188 Mich App 413, 415; 470 NW2d 415 (1991); see *Clevenger v Allstate Ins Co*, 443 Mich 646, 661-662; 505 NW2d 553 (1993). Whether an individual has an insurable interest is not determined by the label attached to the insured's property right, but rather, by whether the individual will suffer a direct pecuniary

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[5] Defendant argues that plaintiff was only covered for loss of business income if such losses were caused by a fire that damaged or destroyed the building described in the policy's declarations "*and on which a limit of liability is shown.*" By requiring the damages to arise from damage or destruction to a building on which the policy shows a limit of liability, loss of business income insurance would only be available if plaintiff possessed an insurable interest in the building and the structure was insured by defendant. The Property Coverage section of the policy issued to plaintiff describes the insurance coverage provided by defendant. While the "buildings" and "business personal property" coverage described in this section of the policy limit the coverage to damages arising at the "premises described in the Declarations, for which a limit of liability is shown," the loss of business income coverage contains no such limitation, referring only to the "premises described in the Declarations." If defendant intended such a limitation to apply to the loss of business income coverage, it should have expressly stated it in its description of the coverage. The absence of this limitation leads us to the conclusion that defendant did not intend such a limitation to apply to the loss of business income coverage.

loss as a result of the destruction of the property. *Crossman, supra*; *Secura, supra*; see *Clevenger, supra*.

Here, the parties dispute whether plaintiff could suffer pecuniary loss as the result of damage to the South Road building. Defendant cites plaintiff's employment agreement with GIGP, which obligated GIGP to provide plaintiff with the necessary facilities to continue his practice. Given that obligation, defendant claims, plaintiff could not suffer pecuniary loss as the result of damage to the South Road office because GIGP had essentially agreed to insure against such loss. Upon inspection of the agreements between plaintiff and GIGP and the undisputed testimony of plaintiff and GIGP President Michael James regarding compensation of GIGP employees, it is evident that plaintiff was compensated by GIGP based on his personal productivity. The employment agreement states, in part:

> Employee's draw shall be adjusted prospectively on a quarterly basis in a manner determined by the Board to reflect Employee's Productivity (defined below) during the previous quarter …. For all purposes herein, the term "Productivity" shall mean the cash collections for professional medical services personally performed or directly supervised by or on behalf of Employee.

Thus, despite GIGP's obligation to provide office space, the interruption in plaintiff's ability to provide professional medical services resulted in a direct pecuniary loss to plaintiff.

Defendant does not dispute plaintiff's testimony that he lost twenty to thirty percent of his revenue and incurred additional expenses in relocating during the months he was unable to conduct business at his South Road address. Under these circumstances, we conclude that the undisputed facts establish that plaintiff, in fact, suffered pecuniary loss as a result of the fire. Accordingly, while plaintiff had no direct ownership interest in the insured property, plaintiff had an insurable interest in the property. *Crossman, supra*; *Secura Ins Co, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White