STATE OF MICHIGAN

COURT OF APPEALS

JAKE and GINGER HELSEL, Plaintiffs-Appellees,	UNPUBLISHED June 10, 2008
v	No. 276749 Crawford Circuit Court
FARM BUREAU GENERAL INSURANCE COMPANY, Defendant-Appellant.	LC No. 03-006093-CK

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

In this case involving an insurance coverage dispute, defendant appeals as of right from a summary disposition order granting plaintiffs the replacement cost value of their home, as well as 12 percent penalty interest. We affirm in part and reverse in part.

Plaintiffs lost their home in an accidental fire in May 2002. They had insured the home through defendant. The insurance coverage included a provision for "guaranteed replacement cost." The policy stated as follows concerning this coverage:

> With respect to loss under COVERAGE A, covered property losses are settled at replacement cost for like construction and use, without deduction for depreciation, after application of the deductible, provided that:
>
> a. We are notified within 60 days after completion of any additions or improvements in excess of $5,000;
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> b. The dwelling is replaced on the original premises occupied at the time of loss; and
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> c. Premiums, calculated at each renewal, and based on the then current replacement cost of the dwelling, are paid. Payment of the renewal premium shall constitute acceptance of these conditions.

Defendant refused to pay plaintiffs the full replacement cost, arguing that plaintiffs had not satisfied the above provisions because they had installed tongue-and-groove paneling and a dropped ceiling in the basement of the home without notifying defendant of the projects.

Defendant contended that that the paneling and ceiling were each valued over $5,000 and constituted improvements that were completed before the fire, such that plaintiffs were required to notify defendant about them. Defendant also argued that plaintiffs were not entitled to the replacement cost of the dwelling because they had not actually replaced the dwelling as required by subsection (b) of the replacement cost endorsement.

The parties filed cross-motions for summary disposition, and the trial court ruled for plaintiffs, finding that they were not required to notify defendant about the paneling and ceiling because (1) the cost to plaintiffs (as opposed to the added value to the home) of the paneling and ceiling was below $5,000 for each and (2) the basement improvement as a whole was not completed at the time of the fire. The court also held that plaintiffs were not required to rebuild the home before obtaining the replacement cost because "defendant's failure to pay on the claim hindered and may possibly have prevented the plaintiff[s] from complying with their obligation . . . ." The court, without providing a substantial analysis, also granted an award of 12 percent penalty interest based on defendant's failure to pay the claim.

Defendant argues that the trial court erred in granting summary disposition to plaintiffs and should instead have granted summary disposition to it. It argues that the paneling and ceiling each constituted a separate, completed improvement valued over $5,000 and that plaintiffs failed to notify defendant about the improvements in accordance with the replacement cost endorsement in the insurance policy.

Although plaintiffs moved for summary disposition under MCR 2.116(C)(8) and (10), it appears to us that the trial court based its decision on MCR 2.116(C)(10), because the court considered information not contained in the pleadings as part of its analysis. A trial court's ruling with regard to a summary disposition motion under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

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). An insurance contract is clear and unambiguous if it fairly allows only one interpretation. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). "If an insurance contract's language is clear, its construction is a question of law for the court." *Taylor v Blue Cross & Blue Shield*, 205 Mich App 644, 649; 517 NW2d 864 (1994). "An insurance contract is ambiguous if, after reading the entire contract, its language reasonably can be understood in differing ways." *Id*. "Furthermore, ambiguities in an insurance policy drafted by an insurer are to be construed against the insurer and in favor of the insured." *Id*.

In ruling on plaintiffs' motion, the trial court stated, in part:

> And I . . . do adopt the language of the cases that were cited to me by the Plaintiff[s]. . . . [I]f there are two probable or . . . possible constructions that can

> be placed upon a policy, the construction favorable to the policyholder is the one to be adopted.
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> * * *
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> Farm Bureau has no proof . . . to the contrary of Mr. Helsel's sworn statement that [the basement] was a work in progress and it wasn't done. He hadn't put in the wiring he expected. He hadn't put in the floors. He hadn't hung the doors, even though the doors were made. He was working on it.
>
> And that's the problem, too, in part with the construction that counsel for Farm Bureau would urge on the Court, given the circumstances here where Mr. Helsel built this house himself. You know, at what board -- If we were to accept . . . Farm Bureau's construction of this provision of the policy, at what board or what nail would the homeowner be expected to say, "Oops. I just reached my limit and I now need to call the -- the agent, irrespective of the fact that I'm not done and there are lots of other things I'm gonna do, and [I] may have to call him several more times."?

We find the court's reasoning on this point persuasive. The replacement cost endorsement states that the insured must notify defendant "after completion of any additions or improvements . . . ." There was uncontroverted evidence that the basement, at the time of the fire, still had a cement floor and lacked some doors. The uncontroverted evidence was that plaintiffs were planning to finish the basement project in the future, by, among other things, installing flooring and doors.[1] Defendant argues on appeal that it would be absurd to hold that there were no completed improvements in the basement at the time of the fire, stating in its brief:

> This example can be taken further, as there would be no notification required until every lamp was plugged in, every picture hung, and every light bulb screwed in. Further, any insured could claim that they were **intending** to do more in connection with the project, so it would never be completed, and notification would never be required. This is clearly not the obvious intent of the endorsement. [Emphasis supplied by defendant.]

We cannot agree with defendant's argument. A missing picture or light bulb is not equivalent to the lack of flooring and doors, which are integral parts of a room. We hold that, as a matter of law, plaintiffs were in the *midst* of an improvement – a remodeling of their basement – at the time of the fire but that the improvement had not yet been completed. Accordingly, they were

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[1] Although Jake Helsel indicated in a recorded statement shortly after the fire that he had "finished the basement" in 2001, the later uncontroverted evidence was that the flooring and doors had yet to be completed. Defendant does not dispute this on appeal but instead argues that the completion of the paneling and ceiling were separate improvements that were required to be reported in order for plaintiffs to retain their replacement cost coverage.

not required to notify defendant about the improvement in order to retain their replacement cost coverage.

Given our resolution of the above issue, we need not decide whether the $5,000 threshold mentioned in the replacement cost endorsement refers to the out-of-pocket costs to the insured or instead refers to the value added to the home by way of an addition or improvement.

Defendant also argues on appeal that plaintiffs must actually replace the dwelling before being entitled to the replacement cost. As noted, the replacement cost endorsement states that the dwelling must be "replaced on the original premises occupied at the time of loss" in order for the replacement cost to be paid.

Defendant's claim is supported by MCL 500.2826, which states:

> An insurer may issue a fire insurance policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual value of the insured property at the time any loss or damages occurs, and the amount actually expended to repair, rebuild, or replace with new materials of like size, kind, and quality, but not to exceed the amount of liability covered by the fire policy. *A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site*. [Emphasis added.]

See also *Smith v Michigan Basic Prop Ins Assoc*, 441 Mich 181, 189; 490 NW2d 864 (1992).

The trial court, in refusing to require the actual replacement of the dwelling before ordering the payment of the replacement cost, cited *Pollock v Fire Ins Exchange*, 167 Mich App 415; 423 NW2d 234 (1988). In that case, the Court determined that the insurer could be ordered to pay the replacement cost of a dwelling before the actual replacement because of the insurer's actions in "imped[ing] any progress in [the] matter . . . ." *Id*. at 421. The Court stated:

> In short, defendant's failure to pay on the claim hindered, and quite possibly even prevented, plaintiff from complying with her obligation to repair or replace the building. Had defendant immediately paid in good faith the actual cash value of the loss, holding the additional amount due under the replacement cost provision in reserve until the replacement was made or contracted for, or had otherwise worked with plaintiff to insure her financial ability to immediately proceed with the replacement or repair, a different result might be called for. However, defendant did not work with plaintiff to promptly pay the claim and enable her to repair or replace the building; rather, it did as much as possible to hinder plaintiff and delay or prevent the payment of the claim. We will not now allow defendant to raise as a defense plaintiff's failure to perform an act which defendant itself greatly hindered plaintiff from performing. See *Woody v Tamer*, 158 Mich app 764, 772; 405 NW2d 213 (1987) (where a duty to perform has been rendered impossible, the failure to perform the duty is not a breach of contract). [*Pollock, supra* at 422.]

The situation from *Pollock* is simply not present here. Defendant did pay plaintiffs a substantial amount for the actual cash value of the loss, and its delay with regard to the replacement cost was based on a colorable interpretation of the policy language. In *Salesin v State Farm Fire & Casualty Company*, 229 Mich App 346, 363 n 8; 581 NW2d 781 (1998), the Court, in dicta, mentioned that if an insured must finance the cost of rebuilding a home, a lender might be hesitant to loan money on the basis of the mere possibility that the insured would obtain replacement cost money from his insurance company. The Court stated: "The solution to the dilemma is [a] . . . provision . . . that allows for payment of the actual cash value of the damage before repair and replacement." Here, plaintiffs did obtain, on March 31, 2003, some payment for the actual cash value of their dwelling - $234,000, representing the policy limit, according to defendant.[2] Under the circumstances, where plaintiffs did obtain a sizeable payment, we find that *Pollock* is inapplicable. We conclude that the trial court erred in holding that plaintiffs could obtain the replacement cost for the dwelling before the actual replacement. Plaintiffs must proceed with the replacement in order to obtain the replacement cost. They are entitled to be reimbursed for this replacement up to the appraisal amount of $435,602, in accordance with the terms of the policy.

Because defendant was not required to pay the replacement cost to plaintiffs before the actual replacement of the dwelling, there was no delay in payment, and therefore the 12 percent penalty interest associated with the replacement cost should not have been imposed by the trial court. The penalty-interest portion of the judgment is vacated.

Affirmed in part and reversed in part.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter

[2] Plaintiffs contended that the actual cash value of the home was higher. It appears the policy limit was later adjusted, based on inflation, to $248,500. A later appraisal set the actual cash value at $300,000.