STATE OF MICHIGAN

COURT OF APPEALS

WEST AMERICAN INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee,

v

AMMAR SHELL INVESTORS II LLC a/k/a AMMAR SHELL INVESTORS LLC,

Defendant-Appellant,

and

MICHAEL BEYDOUN d/b/a NATIONAL SPECIALTIES, INC.,

Defendant/Counter-Plaintiff,

and

DETROIT DESIGN IMAGE LLC, ADNAN H. AL-SAATI d/b/a A&M CONSULTANTS, INC., and ABLE DEMOLITION,

Defendants.

UNPUBLISHED
July 15, 2008

No. 278518
Oakland Circuit Court
LC No. 2006-075865-CZ

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant Ammar Shell Investors (Ammar) appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff West American Insurance Company (West). We affirm, albeit partially on different grounds.

The parties do not dispute the significant underlying facts. Ammar owns a gasoline service station that they sought to remodel. Ammar contracted with National Specialties, Inc. (NSI) as general contractor. NSI obtained an insurance policy from West.[1] NSI retained Able Demolition (Able) as one of its subcontractors. The remodeling plans called for a canopy over the gasoline pumps to remain undisturbed, but Able demolished the canopy anyway. Apparently, the parties generally agree that Able intentionally demolished the canopy because Able believed – presumably due to a communications failure between it and NSI – that it was *supposed* to demolish the canopy. There is no assertion in this case that the demolition was performed incompetently; rather, the demolition should not have occurred at all. In an underlying action, Ammar sued NSI and Able for, among other things, negligence and breach of contract arising out of the demolition. West was also a named defendant. West commenced the instant suit, seeking a declaratory judgment that it was not required to defend or indemnify NSI in the underlying action. We note that NSI stopped participating in the proceedings below at some point before West moved for summary disposition, and NSI is not participating in this appeal.

The gravamen of West's case was three basic arguments. First, for the most part, the damage for which Ammar sought to be compensated arose out of a breach of contract, which is not covered by the insurance policy. Second, the policy covered property damage only if it arose out of an "occurrence," which in turn is defined as an "accident"; although "accident" is not defined in the policy, the demolition of the canopy was the intentional result of an intentional act performed in good faith and therefore could not be considered "accidental." Third, even if the demolition constituted a covered "occurrence," the policy contained several specific exclusions, at least one of which applied. The trial court concluded that the demolition constituted an "occurrence" within the meaning of the insurance policy, but that one of the exclusions applied; it therefore granted summary disposition in West's favor.

A trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo to determine whether the evidence, when it and any reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party, shows that there exists a genuine question as to any material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). We review de novo as a question of law the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Although insurance contracts and any coverage exclusions found therein are construed strictly in favor of the insured, any ambiguous terms are given their plain and commonly understood meanings as much as possible, and an insurer cannot be held liable for risks it did not contract to assume. *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635, 653; 572 NW2d 686 (1997).

In relevant part, the insurance policy at issue covers property damage "caused by an 'occurrence.'" An "occurrence" is "an accident, including continuous or repeated exposure to

[1] NSI was the "named insured," but West notes that defendant Beydoun would also be entitled to policy coverage to the extent a claim against him arose out of his role as principal of NSI.

substantially the same general harmful conditions." The policy does not define "accident," so we apply the general definition of "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) (quotations and citations omitted). The focus is the act itself, and whether it is accidental must be "evaluated from the standpoint of the insured," rather than the standpoint of the injured party or a reasonable person. *Id*., 282-283. Even an intentional act by the insured can constitute an "accident" if the insured did not and had no reason to expect the consequences. *Id*. Here, it is undisputed that Able intentionally demolished the canopy, but Able is not the insured. It appears equally undisputed that NSI neither expected nor intended the demolition. The trial court correctly found that, when the demolition is viewed from the perspective of the insured, it was an "accident" and therefore an "occurrence" within the meaning of the policy.[2]

However, there are three possibly applicable exclusions to coverage also found in the policy, under which the "insurance does not apply" 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.

The trial court found that exclusion (5) applied because the canopy was a fixture included in the construction site. We disagree.

Exception (5) pertains to "that particular part of real property" being worked on "on [the insured's] behalf." Able apparently believed, at the time, that it was demolishing the canopy on NSI's behalf. However, we believe this inquiry must be viewed from the standpoint of the insured, just like the question of whether an accident took place. From NSI's perspective, Able was not performing operations on the canopy on its behalf; rather, Able demolished it without authorization. Therefore, no property damage occurred to any "real property on which . . . subcontractors working directly or indirectly on [NSI's] behalf are performing operations."

However, we find exception (6) applicable. The contract explicitly defines "your work" as including "providing of or failure to provide warnings or instructions." It is not disputed that the demolition of the canopy was the proximate result of NSI's failure to provide proper instructions to Able. Furthermore, NSI's job as a general contractor included supervision and

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[2] West also argues that no "occurrence" took place because Ammar styled some of its claims in the underlying suit as "breach of contract." However, whether an insurer has a duty to defend or indemnify depends not on how the underlying claim is styled, but on the *substantive facts* that are alleged. *US Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493-494; 506 NW2d 527 (1993). We find the labels Ammar used insignificant to this case.

orchestration of the operations generally to be performed, and whether NSI is alleged to have breached its contract or engaged in negligence, the underlying claim is that NSI performed its work incorrectly. Because NSI allegedly performed its work incorrectly, the canopy required restoration, repair, or replacement.

Furthermore, Ammar asserts an alternative reason why exception (5) should not apply: that the canopy was not a fixture and therefore not real property. We have no need to decide the issue, but we agree with West that, *if* the canopy was not real property, it would have to be personal property. West's assertion that NSI "had virtually *carte blanche* on [Ammar's] property, as long as the end result was a gas station and convenience store" is clearly an exaggeration. However, the extensive remodeling on the entire site, and the affirmative instruction that the canopy should be retained, strongly indicates that the canopy was "in the care, custody or control of" NSI as general contractor, even if only to ensure that the canopy was unharmed by operations. Presuming it to be personal property, exception (4) would apply.

We recognize that the parties also extensively argued the applicability of several out-of-state cases, in particular *Bituminous Casualty Corp v Kenway Contracting Inc*, 240 SW3d 633 (Ky, 2007). That case involved a property owner who retained a contractor to demolish a carport attached to a house, but the contractor's employee demolished much of the house as well. After finding an "occurrence," the *Bituminous* court considered an identical set of policy exceptions and found them all inapplicable. We see no need to consider unbinding, out-of-jurisdiction authority for exception (5), which is the only exception for which the parties cite *Bituminous*, because we independently found it inapplicable. We nevertheless observe that the *Bituminous* court also discussed exception (6). We find that discussion significantly distinguishable and therefore unpersuasive because in that case, the evidence viewed in the light most favorable to the non-moving party on summary disposition indicated that the employee *was* properly instructed that he should demolish *only* the carport. *Id*., 642. We therefore do not consider *Bituminous* persuasive in the instant case.

The trial court correctly found that the demolition of the canopy constituted an "occurrence" within the meaning of the insurance policy, but that the policy also contained an applicable exclusion to coverage under the circumstances. Although we disagree with the trial court's finding of which particular exception applied, the result remains the same.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis