STATE OF MICHIGAN

COURT OF APPEALS

ACORN INVESTMENT COMPANY,

Plaintiff-Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
September 15, 2009

No. 284234
Wayne Circuit Court
LC No. 07-704138-CK

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In this insurance dispute, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), and denying its own motion for a declaratory judgment. We affirm in part, reverse in part, and remand for further proceedings.

This case involves a single-family residential dwelling in Detroit. The property was owned by plaintiff, who used it as rental property, and insured by defendant. After plaintiff's tenants moved out, the property was damaged when apparent thieves removed the water meter, copper piping, and other fixtures, which in turn led to extensive flooding. Plaintiff sought coverage under a section of the policy that provided coverage for losses resulting from vandalism. After defendant denied plaintiff's claim, plaintiff filed this action. The trial court granted defendant's motion for summary disposition.

On appeal, we first consider plaintiff's claims regarding coverage for vandalism and the earth movement exclusion in the insurance policy, inasmuch as these provisions formed the basis for the trial court's decision to grant summary disposition in favor of defendant.

A trial court's decision on a motion for summary disposition is reviewed de novo. *White v Taylor Distributing Co, Inc*, 482 Mich 136, 139; 753 NW2d 591 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties, and views that evidence in a light most favorable to the nonmoving party. *Id.* at 56. The motion "should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

We also review de novo issues concerning the proper interpretation of an insurance policy. *Id.* at 55. Insurance contracts are subject to the same principles of construction as other contracts. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 714; 706 NW2d 426 (2005). They should be read as a whole, with the language given its ordinary and plain meaning. *Id.* at 715. When considering an undefined term that has not been given prior legal meaning, resort to a lay dictionary is appropriate. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). Summary disposition is appropriate if an insurance policy is not ambiguous. *Mahnick v Bell Co,* 256 Mich App 154, 159; 662 NW2d 830 (2003). "A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Royal Prop Group, supra* at 715.

Our first task in evaluating plaintiff's insurance claim is to determine if coverage exists. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 172; 534 NW2d 502 (1995). The policy here is one that is commonly referred to as a named or specific perils policy, which means that plaintiff must bring itself within the policy's express provisions, i.e., show that a named peril applies. See generally *Poulton v State Farm Fire & Cas Cos*, 267 Neb 569, 574; 675 NW2d 665 (2004).

We agree with plaintiff that the vandalism peril applies to the loss caused by the removal of the copper pipes, water meter, and other fixtures in the basement of the property. The policy expressly provides coverage for direct physical loss caused by vandalism. Although the word "vandalism" is not defined in the policy, it is defined in *Random House Webster's College Dictionary* (1997), p 1419, in pertinent part, as the "deliberate destruction or damage to private or public property." Here, the evidence that someone broke off plumbing fixtures, the water meter, and water supply lines, with no way to stop the water from flowing, falls squarely within this common understanding of vandalism.

The fact that the evidence showed that a theft of the removed items also occurred is not material because we have not been presented with any claim that the stolen items constitute a covered loss, but rather a claim for property damage caused by the removal of the items. Causation in an insurance case is not concerned with culpability, but rather with the nature of the injury and how it happened. *Vanguard Ins Co v Clarke*, 438 Mich 463, 466 n 3; 475 NW2d 48 (1991).

Here, the insurance policy expressly requires that "direct physical loss" be caused by the act of vandalism. The use of the word "direct" signals "immediate" or "proximate" cause, as distinct from remote or incidental causes. *de Laurentis v United Services Automobile Ass'n,* 162 SW3d 714, 723 (Tex App, 2005); see also *Roundabout Theatre Co v Continental Cas Co,* 302 AD2d 1, 8; 751 NYS2d 4 (2002) (plain meaning of the words "direct" and "physical" preclude any off-site property damage); *Random House Webster's College Dictionary* (1997), p 371 (defining "direct," in pertinent part, as "without intermediary agents, conditions, etc.; immediate"). But causation does not require that vandalism be the last act in the chain of events upon which the loss is based. *Cresthill Industries, Inc v Providence Washington Ins Co,* 53 AD2d 488, 498-499; 385 NYS2d 797 (1976). The removal of severed fixtures from the premises does not change the essential character of a completed act of vandalism. *Id.* at 497.

Because no genuine issue of material fact was shown with respect to whether an act of vandalism, as understood in its plain and ordinary sense, occurred in this case, the trial court

erred in finding that the vandalism peril was inapplicable as a matter of law. But because the parties' evidence was not directed at or factually developed with regard to the particular items of "direct physical loss" that plaintiff sought to recover under the policy, we cannot conclude that either party was entitled to summary disposition with respect to the amount of plaintiff's covered loss.

Keeping in mind this question of fact, we next consider whether the coverage for vandalism is negated by an exclusion. *Heniser, supra* at 172. In considering this issue, we decline to consider plaintiff's argument in its reply brief that defendant either waived the "earth movement" exclusion or should be estopped from relying on that exclusion based on *Kirschner v Process Design Assoc, Inc,* 459 Mich 587, 594; 592 NW2d 707 (1999). Plaintiff did not present a waiver or estoppel claim in its principal brief. "Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief." MCR 7.212(G). Raising an issue for the first time in a reply brief is insufficient to present the issue for appeal. *Maxwell v Dep't of Environmental Quality,* 264 Mich App 567, 576; 692 NW2d 68 (2004). Therefore, we limit our review to plaintiff's challenge to the trial court's determination that the earth exclusion applies.

Although a court strictly construes exclusions in favor of an insured, we must "read the insurance contract as a whole to effectuate the intent of the parties and enforce clear and specific exclusions." *Tenneco, Inc v Amerisure Mut Ins Co,* 281 Mich App 429, 444; 761 NW2d 846 (2008). Here, the general exclusions section of the insurance policy provides, in pertinent part:

> **We** do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.
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> * * *
>
> **3. Earth movement** – **We** do not pay for loss which results from earth movement whether the earth movement results from natural or artificial causes.
>
> Earth movement includes but is not limited to:
>
> a. earthquake;
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> b. landslide, subsidence, erosion;
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> c. mudflow;
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> d. earth sinking, rising, shifting, expanding, or contracting. This does not include Sinkhole Collapse as described under Perils Insured Against; or
>
> e. volcanic explosion. Volcanic explosion does not include Volcanic Action as described under Perils Insured Against.
>
> **We** do not pay for direct loss for fire, explosion (other than volcanic explosion) and, if covered by this policy, theft resulting from earth movement. [Emphasis in original.]

In pertinent part, "movement" has a commonly understood meaning of "the act, process, or result of moving" *Random House Webster's College Dictionary* (1997), p 858. But the policy exclusion itself provides an aide in determining what type of movement is excluded because it contains a nonexclusive list of excluded earth movements. "Where specific words follow general ones, the rule of ejusdem generis restricts application of the general term to things that are similar to those enumerated." See *Belanger v Warren Consolidated School Dist,* 432 Mich 575, 583; 443 NW2d 372 (1989).

Reading the policy as a whole, we reject plaintiff's argument that the exclusion does not apply to the damage to the basement walls of the insured property. According to the unrebutted affidavit of the engineer who examined the property, the failure of the basement walls was caused by or resulted from lateral earth pressure. He explained how water can increase lateral pressure, and averred that "soil behind the walls was in the liquid state before the failure and the wall . . . failed from hydrostatic pressure."

Viewed in a light most favorable to plaintiff, the specific movement involving water-saturated soil indicated by the engineer falls within the listed exclusion for "shifting, expanding, or contracting." Plaintiff's reliance on *Clyce v St Paul Fire & Marine Ins Co,* 850 F2d 1398 (CA 11, 1987), as creating distinctions between "pressure" and "movement" is misplaced, because the exclusion at issue in *Clyce* did not include the expanding and contracting types of movement that are expressly listed in the policy in this case. Further, unlike *Clyce,* the instant case does not involve any issue concerning jury instructions regarding the meaning of "movement." Whether "pressure" should be distinguished from "movement" is immaterial to defendant's entitlement to summary disposition because, under the clear language of the policy, there was earth movement. The fact that the movement set in motion the change in pressure that caused the failure of the basement walls does not render the exclusion inapplicable.

Similarly, *Jones v St Paul Ins Co,* 725 SW2d 291 (Tex App, 1986), is distinguishable because the earth movement exclusion in that case did not include expansion or contraction in its nonexclusive list of earth movements. In any event, while the court in *Jones* construed the exclusion there as contemplating abnormally large movements, we do not find its reasoning persuasive. The specific exclusion in the policy at issue here applies, regardless of whether the movement results from "natural or artificial causes." While events such as an earthquake, landslide, and volcanic explosion are indicative of abnormally large movements, other movements, including expansion and contraction, are not.

"Respect for the freedom of contract entails that we enforce only those obligations actually assented to by the parties." *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 63; 664 NW2d 776 (2003). A court cannot rewrite a contract if its terms are expressly stated. *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 197; 747 NW2d 811 (2008), Because the parties did not limit the excluded "earth movements" to abnormally large movements, we decline to add such a limitation to the exclusion by construction.

Considering the evidence presented to the trial court, we conclude that no genuine issue of material fact was shown with respect to the applicability of the exclusion to plaintiff's claim for damage to the basement walls. Further, the exclusion applies, regardless of whether the loss is also caused by vandalism, because it contains broad language applying it to a loss "regardless of other causes or events that contribute or aggravate the loss, whether such causes or events act

to produce the loss before, at the same time as, or after the excluded causes or events." *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58; 530 NW2d 120 (1995). But because the trial court erred in determining that there is no coverage for vandalism, and factual development is necessary to determine the amount of loss, if any, recoverable for vandalism that is not subject to the exclusion, we remand for further proceedings regarding this claim.

The additional argument presented by plaintiff on appeal, regarding whether defendant has a right to rescind the insurance policy, is not properly before us because it was not decided by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). But because defendant has responded by arguing that it has a right to rescission, and this issue was presented by defendant to the trial court, we shall consider it to determine if defendant has shown an alternative basis for affirmance. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006).

" 'To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning . . . .' " *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938), quoting 1 Black on Rescission and Cancellation (2d ed), § 1. In order to properly rescind an insurance policy, the insured must tender the paid premium to the insured after discovery of a misrepresentation in the application for insurance. *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 517; 540 NW2d 480 (1995); see also *Taylor Group v ANR Storage Co*, 452 Mich 561, 565 n 7; 550 NW2d 258 (1996). Considering the deposition testimony of plaintiff's agent, Ernest Karr, regarding plaintiff's payment of a partial premium, and the absence of any evidence that defendant made any tender to return the payment to plaintiff, we find merit to plaintiff's argument that rescission is not available to defendant.

Even assuming that there was evidence of the tender, we would reject defendant's argument that Karr's disclosure in his deposition that he discovered that the property was vacant on December 18, 2006, entitled it to rescission. Rescission is an equitable remedy committed to a court's sound discretion. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). Although rescission is an appropriate remedy when an insurance applicant makes a material misrepresentation in the application, *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995), the specific question before us involves an applicant's duty to disclose facts in the application that are no longer true while the insurance company is still deliberating on whether to accept the application. *New York Life Ins Co v Modzelewski*, 267 Mich 293, 297; 255 NW 299 (1934).

Defendant has not shown any evidence that supports an inference that it was still deliberating whether to issue a policy when plaintiff discovered that the property was vacant, contrary to what was indicated on the application. At most, Karr's deposition indicates that he probably did not receive the policy until after he discovered that the property was vacant on December 18, 2006. But because the declarations page of the policy has a "print date" of December 17, 2006, and states "COMPANY HAS ACCEPTED THE DECLARATIONS OF THE INSURED SET FORTH IN THE APPLICATION AND HAS CAUSED THIS POLICY TO BE ISSUED," it is reasonable to infer that defendant issued the policy before Karr learned that the property was vacant. The actual delivery of the insurance policy to the insured was not essential to its validity, although in some circumstances, where different terms from the application are proposed in a policy, it may serve as a counterproposal. *Michigan Pipe Co v Michigan Fire & Marine Ins Co*, 92 Mich 482, 491; 52 NW 1070 (1892). A delivery may also

affect the formation of the contract if it is a condition of the application. *G P Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 564-565; 509 NW2d 780 (1993).

Viewed in a light most favorable to plaintiff, the evidence did not establish that defendant was entitled to rescission as a matter of law. Therefore, we find no alternative basis for affirming the trial court's summary disposition decision on this ground. In view thereof, it is unnecessary to consider the other arguments presented by plaintiff with respect to the viability of defendant's rescission claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra