STATE OF MICHIGAN

COURT OF APPEALS

FH MARTIN CONSTRUCTION COMPANY, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 289747 Oakland Circuit Court
SECURA INSURANCE HOLDINGS, INC., Defendant-Appellant.	LC No. 2008-089171-CZ

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

In this insurance coverage dispute, defendant Secura Insurance Holdings, Inc. (Secura)[1] appeals as of right the trial court's opinion and order granting summary disposition in favor of plaintiff FH Martin Construction Company (FH Martin) and declaring that Secura has a duty to defend and indemnify FH Martin in a separate lawsuit. Because we conclude that the trial court did not err when it concluded that Secura had a contractual duty to defend and indemnify FH Martin, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The present dispute has its origins in a lawsuit filed by David Slater against FH Martin and Cimarron Services, Inc. (Cimarron), among other defendants. In his complaint, Slater alleged that he was performing concrete work at a construction site for a Kroger store in January 2004. FH Martin was the general contractor for the project and Cimarron was a subcontractor. Slater alleged that a subcontractor—possibly Cimarron—left a ladder on the outside of the building for several days. The ladder was chained to the exterior of the structure and had to be removed in order to pour new sidewalks. However, FH Martin and the subcontractor did not remove the ladder and, as a result, Slater attempted to remove the ladder on his own. Slater climbed up the ladder and cut the chain. After he cut the chain, the ladder apparently shifted, and he fell.

[1] We note that, in its brief on appeal, Secura states that it should be identified as Secura Insurance Company rather than Secura Insurance Holdings, Inc.

Frederick Reger testified at his deposition that he was working as a foreman on the day of Slater's fall. He explained that Cimarron's crew was performing carpentry work on the inside of the store on that day, but that they had previously erected a parapet on the roof. Someone from the Cimarron crew placed the ladder in order to access the roof for the parapet work. Reger said the ladder was secured with a chain and lock in order to comply with safety regulations.

Slater sued FH Martin, Cimarron, and other defendants in December 2006 for injuries arising from his fall. In his May 2007 amended complaint, Slater alleged that FH Martin was liable for his injuries for failing to keep the common work areas reasonably safe and for general negligence. In part, Slater alleged that FH Martin negligently failed to supervise its subcontractors. As for Cimarron, Slater alleged that it had a duty to supply safe equipment and use due care with regard to the services and equipment that it supplied to the site. Slater also alleged that Cimarron negligently created a hazard when it chained the ladder to the roof and negligently failed to remove the ladder when they were finished with it.

FH Martin eventually moved for summary disposition of Slater's claims. In February 2008, the trial court entered an opinion and order dismissing the claims against FH Martin.[2] By way of a separate order, the trial court also dismissed the claims against Cimarron.

In the same month, FH Martin sued Secura for declarative relief. In its complaint, FH Martin stated that it had entered into a subcontractor agreement with Cimarron that required Cimarron to provide insurance coverage to FH Martin as an additional insured on its subcontractor's general liability policy. FH Martin alleged that Cimarron had such a policy with Secura and that it had named FH Martin as an additional insured under that policy. Nevertheless, after FH Martin tendered its defense to Cimarron, Secura wrongfully refused to provide FH Martin with a defense or insurance coverage in the underlying suit by Slater. FH Martin asked the trial court to declare that Secura had a duty under the insurance agreement with Cimarron to defend and indemnify FH Martin in the Slater litigation. FH Martin also asked the trial court to order Secura to reimburse FH Martin for all the costs, interest and attorney fees that it had already incurred in the underlying suit.

In June 2008, Secura moved for summary disposition under MCR 2.116(C)(10). In its motion, Secura maintained that FH Martin was not specifically named as an insured under the policy that it issued to Cimarron. For that reason, Secura argued it had no obligation to provide coverage to FH Martin under that policy.

Secura did note that the policy contained a clause that defined insured to include any person or organization for whom Cimarron was performing operations when Cimarron and the person or organization have agreed in a written contract or agreement that such person or

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[2] This Court later reversed the trial court's order and remanded for further proceedings. See *Slater v FH Martin Construction Company*, unpublished opinion per curiam of the Court of Appeals issued June 23, 2009 (Docket No. 285845). On remand, the matter went to trial and the jury returned a verdict in favor of FH Martin. The trial court entered a judgment of no cause for action on April 8, 2010.

organization is to be added as an additional insured. However, it argued that it nevertheless was not obligated to provide coverage to FH Martin because the clause only applied to liability arising out of Cimarron's ongoing operations for the additional insured person. Because Cimarron had ceased working outside, Secura further argued, Slater's fall did not arise out of Cimarron's ongoing operations for FH Martin and, consequently, the clause did not apply. For these reasons, Secura asked the trial court to dismiss FH Martin's complaint for declaratory relief or, in the alternative, to declare that Secura had no duty to defend or indemnify FH Martin.

In July 2008, FH Martin filed a reply to Secura's motion and counter-moved for summary disposition under MCR 2.116(C)(10). In its motion, FH Martin argued that it clearly was an insured under the policy obtained by Cimarron from Secura. It also argued that the allegations in Slater's complaint alleged a claim against FH Martin arising out of Cimarron's ongoing operations for FH Martin. For those reasons, it concluded, Secura plainly had a contractual duty to both defend and indemnify FH Martin in the underlying suit.

In September 2008, the trial court issued an opinion and order denying Secura's motion for summary disposition and granting FH Martin's counter-motion for summary disposition. In December 2008, the trial court ordered Secura to pay more than $25,000 in reimbursement to FH Martin.

Also in December 2008, Secura moved for additional declaratory relief. Specifically, Secura argued that its policy with Cimarron only provided excess coverage where the insured has additional primary insurance. Secura noted that FH Martin had a liability policy with a different insurer and, as a result, FH Martin had to exhaust its limits under that policy before it was entitled to coverage under Cimarron's policy with Secura. In response, FH Martin argued that the motion for additional declaratory relief was untimely and should not be considered by the trial court. The trial court determined that Secura's motion for additional declaratory relief was not properly before it and denied the motion in December 2008.

This appeal followed.

II. DEFINITION OF INSURED

A. STANDARD OF REVIEW

Secura first argues that the trial court erred when it granted FH Martin's motion for summary disposition. Secura argues that there was no evidence that Slater's fall arose out of Cimarron's operations, which must be distinguished from the provision of equipment. For that reason, FH Martin was not an insured within the meaning of the policy between Cimarron and Secura.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc. v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of contractual agreements. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. ANALYSIS

It is undisputed that FH Martin entered into a written agreement with Cimarron that required Cimarron to name FH Martin "as an additional insured on [Cimarron's] General Liability Insurance policy . . . ." Cimarron also provided FH Martin with a certificate of liability coverage that listed FH Martin as an additional insured on the policy with respect to work performed by the insured. And it is undisputed that Cimarron had purchased a Commercial General Liability policy from Secura.

The introduction to the general liability policy issued by Secura defines insured to mean "any person or organization qualifying as such under Section II—Who Is An Insured." Additionally, Cimarron purchased additional coverage for the general liability policy through an endorsement referred to as the general liability wrap. This endorsement amended the definition of an insured to include certain persons or organizations that enter into agreements with Cimarron:

> G. ADDITIONAL INSURED BY CONTRACT
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> 1. With respect to SECTION I—COVERAGE A. BODILY INJURY AND PROERPTY DAMAGE LIABILITY, Section II—Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

This section is unambiguous and, therefore, must be enforced as written. *Rory*, 473 Mich at 468. With regard to Cimarron, this endorsement plainly provides three things: (1) it expands the definition of an insured to include those persons or organizations with which Cimarron has entered into a written agreement providing that the person or organization will be named as an additional insured, (2) but only "with respect to liability arising out of [Cimarron's] ongoing operations" performed for the additional insured, and (3) provides that the additional insured will cease to have that status after Cimarron completes its operations for that insured. There is no dispute that Cimarron and FH Martin entered into a written agreement that required Cimarron to name FH Martin as an additional insured on Cimarron's general liability policy. Likewise, there is no dispute that, at the time Slater fell, Cimarron had not yet completed the operations that it was contractually obligated to perform at the project site. Hence, the only issue is whether the liability at issue arose out of Cimarron's "ongoing operations" performed for FH Martin.

The endorsement limits FH Martin's status as an insured to situations where it incurs liability arising from Cimarron's "ongoing operations" performed for FH Martin. The term "ongoing operations" plainly refers to those operations that occur prior to the completion of the project at issue—that is, those operations that were taken in furtherance of the project before the project's completion. In this case, Cimarron placed and secured the ladder at issue in order to facilitate its operations on the roof. Thus, the ladder was clearly placed as part of its "ongoing

operations" to complete performance under the terms of its contract with FH Martin. Further, although Cimarron's operations moved from the roof to the interior of the store, the operations were nevertheless "ongoing" until such time as it completed its performance for FH Martin, which included completing the work and cleaning its work site. Moreover, as alleged in Slater's complaint, the claims against FH Martin were plainly premised on Cimarron's placement of the ladder and failure to remove it after it moved its operations into the interior of the store. Consequently, FH Martin's potential liability necessarily arose from Cimarron's ongoing operations.

On appeal, Secura argues that the incident that gave rise to the suit against Cimarron and FH Martin did not involve Cimarron's "ongoing operations." Rather, Secura contends, the injuries at issue were "nothing more than a fortuitous, incidental or remote relationship between [Slater's] accident and Cimarron's equipment." That is, Secura invites this Court to construe "ongoing operations" to refer to something other than liability arising from Cimarron's handling of equipment. However, we are not at liberty to rewrite this provision to limit it in this way; rather, we must give this phrase its plain and ordinary meaning. *Rory*, 473 Mich at 464 ("In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument."). And the phrase arising "out of your ongoing operations" plainly encompasses the placement and securing of the ladder as well as the failure to remove and store it safely after it was no longer needed.

The trial court did not err when it granted FH Martin's counter-motion for summary disposition and denied Secura's motion.

III. EXCESS LIABILITY

Secura next argues that the trial court erred when it denied its motion for a declaration that, under the terms of Cimarron's general liability policy, any coverage provided to FH Martin must be limited to excess coverage, because FH Martin had a policy through a different insurer. We conclude that the trial court properly denied the motion.

To the extent that Secura's motion could be understood to be a dispositive motion under MCR 2.116(C)(10)—that is, a motion seeking a determination as to the proper application of a contractual clause under the undisputed facts of the case, Secura failed to provide any admissible evidence that FH Martin actually had insurance through a different insurer and failed to provide a copy of the competing policy. Therefore, the motion was not properly supported and had to be denied. *Barnard Mfg*, 285 Mich App at 370. Likewise, to the extent that Secura sought a declaration of rights and obligations under a hypothetical situation—one in which the trial court was to assume that FH Martin had a policy with a different insurer and that the other insurer had the primary obligation to defend and indemnify FH Martin—that request would in essence be a request for an advisory opinion, which the trial court properly refused to give. See *Rozankovich v Kalamazoo Spring Corp*, 44 Mich App 426, 428; 205 NW2d 311 (1973) (stating that courts ordinarily do not render advisory opinions).

Finally, to the extent that it might be possible for a trial court to order declaratory relief on a party's motion, we nevertheless conclude that the trial court correctly determined that it could not issue such relief under the facts of this case. Although styled as a motion for declaratory relief in the present action, Secura essentially sought a separate determination of

rights and liabilities as between potentially competing insurers—that is, Secura sought relief that it could not properly obtain without bringing the other insurer into court to represent its own interests. If Secura wanted the trial court to sort out the competing rights and obligations as between FH Martin, Secura, and a potential third-party insurer, Secura should have brought a separate declaratory action, MCR 2.605, or amended its pleadings to state a third-party claim or a counterclaim for declaratory relief and joined the necessary parties. See MCR 2.205; MCR 2.206. Only then could the trial court settle the competing interests of each of the parties under the various agreements.

The trial court correctly determined that the motion was not properly before it and refused to grant the requested relief.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly