STATE OF MICHIGAN

COURT OF APPEALS

EXECUTIVE PROPERTY DEVELOPMENT, LLC, Plaintiff-Appellant,	UNPUBLISHED September 23, 2010
v	No. 291368 Genesee Circuit Court
NAUTILUS INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-088716-CK

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In this insurance coverage dispute, the trial court issued an order dated December 29, 2008, granting defendant Nautilus Insurance Company's motion for summary disposition. The trial court subsequently issued an order dated March 17, 2009, denying plaintiff Executive Property Development, LLC's motion for reconsideration. Plaintiff appeals as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff owns properties known as the Fisher Hotel and Fisher Hotel Annex in Flint, Michigan. This case arises out of vandalism to the properties that occurred when the properties were vacant. The properties became vacant as a result of a complaint for abatement of a public nuisance filed by the state. In November 2005, the trial court ordered that the properties be closed for business and barred anyone, including plaintiff's representatives, from entering. Thereafter, defendant issued policies of insurance for the properties. The first six policies, issued in three-month intervals, were identical and were collectively effective December 31, 2005 through June 30, 2007. The seventh policy was effective June 30, 2007 through September 30, 2007.

Each of the seven policies issued by defendant contained a "Causes of Loss – Basic Form," which stated, in part:

A. Covered Causes of Loss

* * *

8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

But, the policies contained limitations to the coverage for vandalism under circumstances of vacancy. All seven policies contained a "Building and Personal Property Coverage Form," which stated, in part:

E. Loss Conditions

* * *

6. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

* * *

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sub-lessee and used by the lessee or sublessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where the loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

The first six policies also contained an endorsement entitled "Vandalism Exclusion," which stated, in part:

This endorsement modifies insurance provided under the following:

CAUSES OF LOSS – BASIC FORM
CAUSES OF LOSS – BROAD FORM
CAUSES OF LOSS – SPECIAL FORM

A. The following is added to the EXCLUSIONS section and is therefore not a Covered Cause of Loss:

VANDALISM

Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

But if vandalism results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

The first six policies also contained an endorsement entitled "Vacancy Permit," which stated:

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM

* * *

STANDARD PROPERTY POLICY

		SCHEDULE Excepted Causes of Loss		Permit Period	
Prem No.	Bldg. No.	Vandalism	Sprinkler Leakage	From	To
1	1	x	x	12/31/05	3/31/06
2	1	x	x	12/31/05	3/31/06

A. The VACANCY Loss Condition does not apply to direct physical loss or damage:

1. At the locations; and

2. During the Permit Period;

Shown in the Schedule or in the Declarations

B. This Vacancy Permit does not apply to the Excepted Causes of Loss indicated in the Declarations or by an "X" in the Schedule.

The seventh policy did not contain a "Vandalism Exclusion" or "Vacancy Permit."

Plaintiff initiated this action in May 2008, asserting that after the trial court barred anyone from entering its properties, unknown persons trespassed on the properties, broke into the buildings, and vandalized or otherwise damaged the buildings and other physical property. Plaintiff did not discover the damage until July 1, 2007, when its representatives inspected the properties with the court's permission. Plaintiff asserted that it repeatedly demanded compensation from defendant, which defendant denied. Defendant does not dispute that plaintiff informed it of the damage or that it denied plaintiff's requests for compensation.

After filing its complaint in this case, plaintiff submitted a "Sworn Statement in Proof of Loss," which provided in part:

5. State the cause and origin of the loss:

Vandalism. The buildings were vacant. . . .

Defendant rejected plaintiff's proof of loss and denied its claim in full.

In November 2008, defendant filed its motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that under the terms of the policies, vandalism was not a covered cause of loss when the damage occurred. Following a hearing, the trial court granted defendant's motion. Thereafter, plaintiff filed its motion for reconsideration, which the trial court denied. Plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court improperly granted summary disposition to defendant. We disagree.

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendant moved for summary disposition under both MCR 2.116(C)(8) and (10). Although the trial court did not state under which subrule it granted defendant's motion, it is apparent that it granted the motion under MCR 2.116(C)(10) because it relied on evidence outside of the pleadings. See *Spiek v Dep't of Transp*, 456 Mich 331, 338 and n 9; 572 NW2d 201 (1998). When reviewing a motion

under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119-120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Id*. at 605-606. A motion for reconsideration may be granted when the court has made "a palpable error by which the court and parties have been misled," and when correction of that error would have led to a different disposition of the motion. MCR 2.119(F)(3).

As indicated, pursuant to a November 15, 2005, trial court order entered in a related nuisance action, plaintiff's properties were closed for business. The court barred anyone from entering. Plaintiff asserts that on July 1, 2007, its representatives entered the properties and discovered that they had been vandalized or otherwise damaged. Plaintiff reported the damage to defendant and submitted requests for compensation, which defendant denied. Because it is unclear when the damage actually occurred, it is necessary to consider all seven of the insurance policies issued by defendant between December 31, 2005 and September 30, 2007 in determining whether plaintiff was entitled to coverage.

Insurance policies are interpreted according to the principles of contract construction. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). An insurance policy should be read as a whole, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003), and should be construed so as to give effect to every word, clause, and phrase, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Exclusions to coverage should be read with the insuring agreement and independently of every other exclusion. *English v BCBSM*, 263 Mich App 449, 471; 688 NW2d 523 (2004). If any exclusion applies to a claim, coverage is precluded. *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 661; 730 NW2d 518 (2007). Exclusions are strictly construed in favor of the insured, but clear and specific exclusions must be enforced as written. *Id*. An insurance policy is clear if it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that we review de novo. *Henderson*, 460 Mich at 353.

All seven of the insurance policies issued by defendant contained a "Causes of Loss – Basic Form," which stated that vandalism was a covered cause of loss. But the first six policies also contained an endorsement entitled "Vandalism Exclusion," which modified the coverage provided in the "Causes of Loss – Basic Form." It added vandalism to the "Exclusions" section of the policy, indicating that vandalism was, therefore, not a covered cause of loss. The endorsement contained an exception stating that "if vandalism results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss." But plaintiff does not assert on appeal that the vandalism in this case resulted in a separate covered cause of loss. The first six policies also contained an endorsement entitled "Vacancy Permit." The permit specifically stated that it did not apply to vandalism. Plaintiff acknowledges these

provisions and does not dispute that, on their face, the first six policies precluded coverage for vandalism.

Plaintiff asserts, however, that the seventh policy issued by defendant provided coverage for vandalism because it did not contain the "Vandalism Exclusion" or "Vacancy Permit" included in the first six policies. Thus, according to plaintiff, it is at least entitled to compensation for vandalism that occurred between June 30, 2007 and August 30, 2007, being the first 60 days of the seventh policy. Plaintiff asserts that the amount of damage that occurred during that time period, if any, is a question of fact. We note, however, that the coverage available for vandalism under the seventh policy was limited by the policy's plain language. Although the policy stated in its "Causes of Loss – Basic Form" that vandalism was a covered cause of loss, the seventh policy, like the first six policies, also contained a "Building and Personal Property Coverage Form," which stated that if "the building where the loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs," defendant would not pay for loss or damage caused by certain otherwise-covered causes of loss, including vandalism. Plaintiff argues that when the damage to the properties was discovered on July 1, 2007, less than 60 days had passed since the effective date of the policy, June 30, 2007. But, plaintiff's argument ignores the plain language of the policy. The provision at issue specifically refers to buildings being vacant for "60 consecutive days before th[e] loss or damage occur[ed]," not 60 consecutive days since the policy took effect, and contractual language must be given its ordinary and plain meaning. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Plaintiff has repeatedly admitted that its properties were closed for business and that no one was permitted to enter pursuant to the trial court's order issued in November 2005. Thus, the properties had been vacant for well over 60 consecutive days when the damage allegedly occurred, and there was, therefore, no coverage available under the seventh policy.

Plaintiff also argues that the insurance policies were ambiguous because defendant was aware that the properties were vacant and included a "Vacancy Permit" in six of the seven policies, yet all of the policies included various limitations to coverage for vacant properties. The policies also listed vandalism as a covered cause of loss, but then limited that coverage in various provisions. "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." *Id*. While plaintiff is correct that the insurance policies issued by defendant contained multiple forms and provisions, those forms and provisions must be read and construed as a whole. *Wilkie*, 469 Mich at 50 n 11. Plaintiff has not pointed to any provision that irreconcilably conflicts with another or is equally susceptible to more than one meaning. See *Royal Prop Group, LLC*, 267 Mich App at 715. Rather, when the provisions at issue are read together, they admit of but one meaning, as explained above. See *Farm Bureau Mut Ins Co*, 460 Mich at 566. The fact that defendant was aware that the properties were vacant when it issued the policies is irrelevant. The parties were free to agree to limited coverage for vacant properties and the "judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties." *Royal Prop Group, LLC*, 267 Mich App at 715 (quotation marks and citation omitted).

In the alternative, plaintiff argues that the vacancy provisions at issue were not applicable in this case because at the time the vandalism occurred, the properties were not vacant. Rather, the properties were under renovation. Plaintiff points to the description of the term "vacancy" in

the "Building and Personal Property Coverage Form," which stated that "[b]uildings under construction or renovation are not considered vacant," and claims that, as part of the related nuisance action, it was required to renovate the properties and that renovation would commence as soon as permitted by the court. But even assuming that plaintiff was required to renovate the properties and that defendant was so aware, as plaintiff claims, it has not established that the properties were actually under renovation at the time the vandalism occurred. Plaintiff merely asserts that renovation would commence at some point in the future and has repeatedly admitted—in its complaint, sworn statement, motion for reconsideration, and elsewhere—that the properties were closed for business, padlocked, and no one was permitted to enter without court permission, even to perform renovations. Thus, there is no merit to plaintiff's argument that the properties should not be considered vacant for purposes of insurance coverage.

The trial court properly granted summary disposition to defendant and, therefore, did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering