

STATE OF MICHIGAN
COURT OF APPEALS

CORAL REEF PRODUCTIONS, INC., d/b/a ONE
SOURCE TALENT,

UNPUBLISHED
June 19, 2012

Plaintiff-Appellant,

v

AXIS SURPLUS INSURANCE COMPANY,

No. 302706
Oakland Circuit Court
LC No. 2010-109892-CK

Defendant-Appellee.

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Plaintiff Coral Reef Productions, Inc. filed a declaratory judgment action against defendant Axis Surplus Insurance Company seeking a declaration that Axis had a duty to defend and indemnify Coral Reef. Coral Reef appeals as of right the trial court's order granting summary disposition in favor of Axis. We affirm.

I. FACTS

Coral Reef purchased a "Miscellaneous Professional Liability Insurance Policy" from Axis. The policy covered the period of November 29, 2008, to November 15, 2009. On March 6, 2009, Primesites, Inc., initiated litigation against Coral Reef. In its complaint, Primesites alleged that Coral Reef hacked into Primesites' customer list and directly solicited customers. On March 23, 2009, Coral Reef submitted a claim for coverage to Axis. Axis denied coverage because the claims against Coral Reef were outside the scope of Coral Reef's insurance policy. Coral then filed suit against Axis.

The trial court denied Coral Reef's motion for summary disposition pursuant to MCR 2.116(C)(10) and granted Axis' declaratory motion that it did not breach a duty to defend Coral Reef. The trial court noted that Coral Reef's "alleged actions of misrepresenting itself as associated with Primesites or referred by Primesites would be both dishonest and fraudulent." Thus, the trial court concluded that none of the underlying allegations fell within the policy period or were arguably covered by the policy. The trial court also noted that Coral Reef failed to establish that "any claims beyond the face of pleadings . . . would be arguably covered by the insurance contract." Coral Reef now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

In reviewing a trial court's decision on a motion for summary disposition, this Court will apply a de novo standard of review.¹ Summary disposition is proper pursuant to MCR 2.116(C)(10) when reviewing the submitted affidavits, depositions, admissions or other documentary evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact.² A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party."³

After Axis filed a cross motion for summary disposition, the trial court granted Axis summary disposition pursuant to MCR 2.116(I)(2), which is properly granted in favor of the nonmoving party, rather than the moving party, if the nonmoving party is entitled to judgment as a matter of law.⁴ This Court also reviews the construction and interpretation of insurance contracts de novo.⁵

B. DUTY TO DEFEND

1. LEGAL STANDARDS

The duty of an insurer to defend the insured depends on whether "the allegations of the underlying suit arguably fall within the coverage of the policy"⁶ An insurer owes the insured a duty to defend if there are any theories of recovery alleged in the underlying complaint that fall within the policy even if there are asserted theories of recovery not covered by such policy.⁷ The insurer must look beyond the specific language of the allegations and determine whether coverage is plausible.⁸ If doubt exists regarding whether the complaint alleges liability that falls under the policy, such doubt must be resolved in the insured's favor.⁹

¹ *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008).

² *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

³ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁴ *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009).

⁵ *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

⁶ *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996).

⁷ *Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134, 137; 610 NW2d 272 (2000).

⁸ *Id.* at 137-138.

⁹ *Id.* at 138.

The principles of contract construction apply when determining whether there is a duty to defend.¹⁰ This Court also applies the following principles of insurance law:

It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify. In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy. Generally, an insurance policy is a contract between the insurer and the insured. If a trial court is presented with a dispute between these parties over the meaning of the policy, the trial court must determine what the agreement is and enforce it. When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written.^[11]

2. APPLYING THE STANDARDS

Here, an ambiguity exists because it is unclear whether Coral Reef was "performing Insured Services for others" when it engaged in the conduct alleged by Primesites. The underlying complaint alleges that Coral Reef engaged in the unauthorized use of Primesites' website by directly soliciting Primesites' members. The complaint also alleges that Coral Reef "hacked" into Primesites' customer lists and directly contacted Primesites' customers. This conduct, if it constituted Insured Services, would fall under several provisions of the covered conduct. "Insured Services" is defined as "[t]alent consulting including talent promotion and membership services for others." The policy does not define what constitutes a "membership service" nor does it define who constitutes a "member" or "others." Without knowing what the "membership services" are, it cannot be concluded that soliciting a client base is automatically excluded from the definition of a membership service. Thus, without such definition, the policy coverage is inherently ambiguous and broad. Under step 1 of the *Royce* approach, a trial court must first determine whether the conduct falls within the scope of the policy coverage and, if so, then decide whether an exclusion applies to deny coverage.¹² Due to the ambiguous nature of the policy, as required by principles of insurance law, the trial court should have construed the policy in Coral Reef's favor and concluded that the policy covered the underlying conduct.¹³

¹⁰ *Citizens*, 279 Mich App at 74.

¹¹ *Royce*, 219 Mich App at 542-543 (internal citations omitted).

¹² *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 115; 617 NW2d 725 (2000).

¹³ *Royce*, 219 Mich App at 542-543.

Nevertheless, summary disposition was proper because, under step 2 of the *Royce* approach, the policy's exclusions unambiguously exclude the underlying conduct from coverage.

The "Miscellaneous Professional Liability Insurance Policy" sets forth a few of the following exclusions:

A. The **Company** is not obligated to pay **Damages** or **Claim Expenses** or defend Claims for or arising directly or indirectly out of:

* * *

2. An act or omission that a jury, court or arbitrator finds dishonest, fraudulent, criminal, malicious or was committed while knowing it was wrongful. This exclusion does not apply to any **Individual Insured** that did not commit, acquiesce or participate in the actions that gave rise to the Claim.^[14]

* * *

4. Unfair competition, restraint of trade or any other violation of antitrust laws.

* * *

6. Gain, profit or advantage to which any Insured is not legally entitled.

Thus, Axis was not obligated to defend Coral Reef in a claim arising directly or indirectly out of the stated exclusions. "Unfair Competition" is defined as "the misuse of an intellectual property right in Matter." The underlying conduct involves allegations of hacking into Primesites' database and retrieving and misusing information from Primesites' Customer Lists without authorization. Such conduct unambiguously falls under Exclusion A.4 and A.6. Unlike Exclusion A.2, Exclusions A.4 and A.6 exclude the defense of claims for or arising directly or indirectly out of the stated exclusion regardless of whether the insured establishes that it did not commit, acquiesce or participate in the actions giving rise to the underlying claim. At a minimum, Primesites' claims arose directly or indirectly out of the advantage Coral Reef gained as a competitor of Primesites when, allegedly, it unlawfully obtained access to Primesites' Customer Lists and subsequently contacted Primesites' customers. Therefore, Axis was not

¹⁴ While it appears that the trial court made a "finding" that the underlying conduct was dishonest and fraudulent, there would still be a genuine issue of material fact regarding whether Coral Reef committed, acquiesced or participated in the conduct that gave rise to Primesites' claims because the exclusion provides the insured an opportunity to establish that it was not connected to such conduct.

required to defend Coral Reef in the underlying lawsuit. Accordingly, summary disposition was proper because the policy's exclusions preclude coverage.¹⁵

We affirm.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan

¹⁵ While the trial court “employed incorrect reasoning” in concluding that Axis did not have a duty to defend because the underlying conduct did not fall within the policy’s coverage, not on the ground that an exclusion applied, “[it] is well settled that we will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason.” *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 225-226; __NW2d__ (2011).