COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP997 **Cir. Ct. No. 2005CF255**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LEACH FARMS, INC.,

PLAINTIFF,

V.

VALLEY BAKERS COOPERATIVE ASSOCIATION, D/B/A PROGRESSIVE WAREHOUSING,

DEFENDANT,

ICEMAN INVESTMENTS, LLC,, THOMAS LESKE, D/B/A SERV-ICE AND SERVE-ICE, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENOR-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA KEY, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. West Bend Mutual Insurance Company appeals from an order dismissing its third-party complaint against Certain Underwriters at Lloyd's London and determining that Lloyd's warehouseman's insurance policy does not provide coverage for the potential liability of Valley Bakers Cooperative Association for spoiled celery that Valley Bakers was keeping in frozen storage. The issue is whether storage space leased by Valley Bakers was a "newly acquired" location within the meaning of Lloyd's policy. We agree with the circuit court that a newly acquired location covered under the policy is one that has ownership or control associated with it. We affirm the order dismissing Lloyd's from the action.

¶2 Leach Farms contracted with Valley Bakers for frozen storage of its 2002-2003 celery crop. Lacking sufficient space at its own facility, Valley Bakers, with the approval of Leach Farms, leased storage space from Serv-Ice, Inc. Leach Farms sued Valley Bakers and others alleging that the celery was not kept at the proper temperature and was rejected by buyers as damaged.

¶3 West Bend issued a commercial general liability policy to Valley Bakers and its liability is excess over that of a primary insurer for Valley Bakers's "work." Its third-party complaint against Lloyd's alleges that Lloyd's is the primary insurer of the potential liability for the damaged celery. West Bend

sought a declaration that Lloyd's owes the duty to defend Valley Bakers and that it should reimburse West Bend for expenses incurred in providing a defense.

¶4 Both parties moved for summary judgment. Our standard of review is de novo for the dual reason that we review summary judgment de novo and the interpretation of an insurance contract is a question of law. ***Klinger v. Prudential Property & Cas. Ins. Co.***, 2005 WI App 105, ¶7, 282 Wis. 2d 535, 700 N.W.2d 290. Using rules of contract interpretation, we construe an insurance policy to give effect to the intent of the parties as expressed in the language of the policy. ***Id.***, ¶8.

¶5 Lloyd's policy states that it will pay "all sums which the insured shall become legally obligated to pay by reason of liability imposed upon him as a warehouseman or bailee, for loss or destruction of or damage to personal property of others contained in the premises hereinafter specified…." It is undisputed that the leased space for storage of the celery was not one of the three premises specified in the policy.[1]

¶6 The policy extends coverage to "newly acquired locations." The phrase "newly acquired" or "acquired" are not defined in the policy. The absence of a definition does not create an ambiguity subjecting the contract to an interpretation against its drafter. *See* ***United States Fire Ins. v. Ace Baking***, 164 Wis. 2d 499, 502-03, 476 N.W.2d 280 (Ct. App. 1991).

[1] Lloyd's does not dispute that the claim by Leach Farms for spoilage of the celery is the type of claim which its warehouseman's liability policy typically covers.

¶7 Relying on the dictionary definition that "acquired" means to "gain possession of," West Bend contends the storage space at the Serv-Ice facility was acquired by Valley Bakers because Valley Bakers took possession of it.[2] Possession is defined as "taking into one's control or holding at one's disposal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1770 (1993). Thus, a "newly acquired" location would be one that Valley Bakers either owns or has exclusive control over.

¶8 Our construction of "newly acquired" is consistent with other provisions in the policy. The policy covers damage to property "contained in the premises" of Valley Bakers. The policy defines "premises" as "that portion of the building(s) located at the address(es) shown in Part 2, which is (are) *occupied by the Insured as a public warehouse*, including loading platforms, sidetracks and area immediately adjacent thereto." (Emphasis added.) Although the Serv-Ice facility may in fact be a public warehouse, it was not occupied by Valley Bakers as a public warehouse because it was used by Valley Bakers for the sole and limited purpose of storing the celery. Valley Bakers could not offer space at the facility to the public. Additionally, the policy provides for a reduction in the extended coverage if a newly acquired location is not reported to Lloyd's within ninety days. This signals Lloyd's entitlement to assess a new premise for risk based on the insured's control and maintenance of the premise. It is unreasonable to read the contract to bind an insurer to provide coverage for a facility over which

[2] West Bend's reliance on ***Southern Trust Company v. Dr. T's Nature Products Company***, 584 S.E. 2d 34 (Ga. Ct. App. 2003), where the court held that an insured "acquired" a temporary warehouse facility when it stored stock there, is unpersuasive because the insured in that case was not in the warehouse business and did not own any storage facilities.

its insured has no control regarding maintenance and storage practices, the very elements of risk.

¶9 Although a Valley Bakers employee was in charge of loading the celery into and out of the facility, Valley Bakers did not control the maintenance of the facility or, most notably, the temperature at which the facility was kept. The rate of compensation was based on a per pallet charge and Valley Bakers did not have a free hand to use a certain amount of space for any purpose it desired. The location where the celery was stored was not a location that Valley Bakers had "newly acquired."

¶10 Having concluded that Lloyd's does not provide coverage for the alleged loss, we need not address West Bend's additional claims that Lloyd's coverage is primary insurance and Lloyd's is required to compensate West Bend for defense costs. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (the appellate court need not decide an issue if the resolution of another issue is dispositive).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.