

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

DONNA EWELL and GARY EWELL)
Plaintiffs,)
)
v.) C.A. No. S09C-07-031 RFS
)
THOSE CERTAIN UNDERWRITERS)
OF LLOYD'S, LONDON)
SUBSCRIBING TO POLICY)
NUMBER LSP110000249,)
)
Defendant.)
)

MEMORANDUM OPINION

Plaintiffs' Motion for Partial Summary Judgment. Denied.
Defendant's Motion for Summary Judgment. Denied.

Submitted Date: July 30, 2010
Decided Date: August 27, 2010

Paul G. Enterline, Esquire, Georgetown, Delaware, Attorney for Plaintiffs.

R. Stokes Nolte, Esquire, Reilly, Janiczek & McDevitt, P.C., Wilmington, Delaware, and John M. Clark, Esquire, Nelson Levine deLuca & Horst, LLC, Cherry Hill, New Jersey, Attorneys for Defendant.

STOKES, J.

Pending before me are two motions in this breach of contract case. Plaintiffs Donna Ewell and Gary Ewell have filed a motion for partial summary judgment. Defendant Those Certain Underwriters of Lloyd's, London Subscribing to Policy Number LSP110000249 have filed a motion for summary judgment. The issues pertain to a condition in the Course of Construction/Renovation Endorsement appended to the insurance policy issued by Defendant for coverage of Plaintiffs' residence. For the reasons explained below, neither party is entitled to judgment as a matter of law, and therefore both motions are denied.

Facts

The facts are straightforward. In October 2008, Plaintiffs purchased a home located at 5471 Galestown Road, Seaford, Delaware. Plaintiffs planned to renovate the house and reside in it thereafter. The property also contained a small shed used for tools and supplies. Plaintiffs insured the two-story house, but not the shed, with Defendant under Policy Number LSP110000249 ("the Policy") for the period from October 13, 2008 through October 13, 2009.

Shortly after purchasing the house, Plaintiffs notified Defendant of their intention to renovate the house. For this reason, Defendant issued a Special Use Form Policy that contained a single-page Course of Construction/Renovation Endorsement ("the Endorsement"). The Fire Protection condition is the focus of this action:

COURSE OF CONSTRUCTION/RENOVATION ENDORSEMENT

* * *

In the event of any construction or renovation work at the premises described in the Declarations the following conditions shall apply.

* * *

FIRE PROTECTION

You must ensure that visible and accessible fire extinguishers be placed on each level of the dwelling. Failure to comply with this condition will render this insurance null and void.

At their depositions, both Plaintiffs acknowledged having received a copy of the Policy, including the single-page Endorsement. Both Plaintiffs testified that they had not read the documents and that they were unaware of the provision regarding fire extinguishers. They acknowledged not having placed any fire extinguishers in the two-story house.

Several weeks after purchasing the home, Plaintiffs began removing the plaster from the walls and temporarily moved the downstairs bathroom to an upstairs room. The kitchen was gutted, as well as a room above the kitchen. Plaintiffs planned to do the renovation work themselves, with the exception of the electrical work. They did not work on the house every day, but the process was ongoing.

During the renovation period, Plaintiffs slept either in a new shed they constructed on their property for this purpose or at Mr. Ewell's mother's home. Defendant was not aware of the existence of either shed.

In the early morning hours of January 20, 2009, the house and its contents were destroyed by fire. Plaintiffs, asleep in the new shed, were awakened by the arrival of fire trucks.

Plaintiffs informed Defendant of the fire, and Defendant assigned an independent adjuster to investigate the loss. On April 1, 2009, Defendant denied the claim because Plaintiffs had not complied with the condition requiring them to place fire extinguishers on each floor of the house, as required under the Endorsement, quoted *supra*.

It is undisputed that two fire extinguishers were discovered after the fire. Their locations are also undisputed. One was found in the debris in the ground level back bedroom of the house, and the other was found in the pre-existing shed, which is not attached to the house and is not covered under the Policy. Plaintiff Gary Ewell testified that he had seen the fire extinguisher in the shed prior to the fire. He also testified that he had never noticed the fire extinguisher in the bedroom of the house and did not know how it came to be there.

Plaintiff Donna Ewell testified she had no knowledge of a fire extinguisher in the house or the shed prior to the fire. She stated that she and her husband discovered the fire extinguishers after the fire. She assumed that they had been put in place by a previous

owner.

The Complaint for breach of contract was filed by Plaintiffs on July 7, 2009. The First Amended Complaint was filed on August 17, 2009. Defendant filed its Answer to the First Amended Complaint on September 3, 2009. Discovery is complete, and trial is scheduled to begin on January 3, 2011.

Briefing on the motions for summary judgment is complete.

Standard of Review

When cross motions for summary judgment are submitted to the Court, the motions shall be deemed to be the equivalent of a stipulation for decision on the merits unless a party has argued that there is an issue of material fact in contention.¹ In this case, Plaintiffs assert that a question of material fact exists as to the materiality of their alleged breach of a condition of the Policy. Thus, the general standard for reviewing motions for summary judgment will be applied. The Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether a party is entitled to judgment as a matter of law.²

The Parties' Contentions

In its motion for summary judgment, Defendant argues that Plaintiffs cannot establish a *prima facie* case of breach of contract because Plaintiffs failed to comply with

¹Super. Ct. Civ. R. 56(h).

²*Premier Parks, Inc. v. TIG Ins. Co.*, 2006 WL 2709235 (Del. Super.).

the condition that a fire extinguisher be placed on each floor of the house. Defendant argues that this failure to comply with the condition renders the Policy null and void at the time of the fire, as stated in the Endorsement.

Plaintiffs answer that the Endorsement does not apply in this case because no work was being done in the house at the time of the fire. Plaintiffs also assert that there is a question of fact as to whether the alleged breach of the condition was material. Finally, Plaintiffs argue that Defendant breached the duty of good faith and fair dealing by not giving specific notice of the condition, waived the condition by inaction, and is estopped from enforcing the fire extinguisher condition due to constructive non-disclosure of the condition.

Defendant replies that the undisputed, determinative facts show that Plaintiffs were in the process of renovating the insured house; that Plaintiffs did not read the Policy, as is their obligation under Delaware law; that Plaintiffs did not place visible and accessible fire extinguishers on each level of the house; and the house caught fire during the course of Plaintiffs' renovations.

In their cross motion for partial summary judgment, Plaintiffs argue that the fire extinguisher condition was not triggered because (1) the work being done at the time of the fire was demolition, not construction or renovation and (2) Plaintiffs were asleep at the time of the fire, and therefore Defendant cannot show any prejudice from the lack of fire extinguishers. Plaintiffs argue that if the absence of fire extinguishers was a breach

of a condition contained in the Endorsement, there is a question of material fact as to whether the breach was material. Plaintiffs also argue that if Defendant had a good faith concern about fire extinguishers, it would have made efforts to ensure compliance.

Defendant answers that the condition applies because Plaintiffs were in the process of renovating the house, even though they were not working on it at the time of the fire. Defendant asserts that the language of the condition requiring fire extinguishers to be placed on each level of the house during renovation or construction is clear and unambiguous. Defendant also argues that Plaintiffs' contention that the alleged breach was immaterial is erroneous.

Plaintiffs reply that their duty under the fire extinguisher condition was not absolute. Plaintiffs argue that strict performance of a condition is not required, but rather substantial performance.

Discussion

The parties' contentions raise three primary issues. The first issue is whether the language of the fire extinguisher condition is plain on its face or is ambiguous. If the language of the condition is plain and unambiguous, the second question is whether Plaintiffs breached the condition. If Plaintiffs breached an unambiguous condition, the third question is whether that breach is material, thereby rendering the Policy null and void. Encompassed within these issues are the numerous subsidiary arguments raised by the parties.

The language of the Endorsement. Historically, there has been a distinction between a condition precedent and a condition subsequent:

Conditions are of two kinds, precedent and subsequent. Conditions precedent are those kinds which relate to the attachment of the risk, whereas conditions subsequent are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those condition which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect (Internal citations omitted.)³

Although common in the law of property, examples of true conditions subsequent in contracts are rare.⁴ The distinction between conditions precedent and conditions subsequent is only important procedurally. The burden of allegation and proof of a condition precedent is on the plaintiff, while the burden of proof and allegation of a condition subsequent is on the defendant.⁵

However, conditions subsequent are not favored in law, and the Restatement (Second) of Contracts and other commentators have abandoned the term condition subsequent, replacing it with the concept of an event that terminates a duty.⁶ The concept

³6 Couch on Insurance 3rd, § 81:19 (2003).

⁴Laurence P. Simpson, *Handbook of the Law of Contracts*, 301 (1965).

⁵*Id.* at 303.

⁶*Pointe Development, LLC v. Enterprise Bank and Trust*, 2010 WL 3118572, n. 3 (Mo. App. W.D.). See also *Bd. of Public Education in Wilmington v. St. Patrick's Roman Church, Wilmington, Delaware*, 136 A.833, 835 (Del. Ch. 1927); *First Presbyterian Church of Wilmington v. Bailey*, 97 A. 583, 584 (Del. Ch. 1916).

of termination of a duty presumes an existing contract.⁷ The following sections of the Restatement (Second) of Contracts are relevant.

§ 224. Condition Defined.

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

§ 230. Event That Terminates a Duty.

(1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.

(2) The obligor's duty is not discharged if occurrence of the event

(a) is the result of a breach by the obligor of his duty of good faith and fair dealing, or

(b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.

(3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.

In this case, the Endorsement created a condition requiring the insured to place fire extinguishers on each level of the house. Pursuant to subsection (1) above, Defendant's duty under the Policy was discharged if the fire extinguisher condition was not met.

⁷*Id.*

Failure to comply with a condition may result in forfeiture, which is a harsh result.⁸ However, where the contract language is clear and unambiguous, the Court must give that language its plain meaning.⁹ The test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.¹⁰ A contract provision is not ambiguous simply because the parties do not agree on its construction.¹¹ An ambiguity does not exist when a court can determine the plain meaning of an insurance contract based on the simple facts and the nature of the language in general.¹²

Plaintiffs make three arguments based on the language of the fire extinguisher condition. First, Plaintiffs contend that the condition was not triggered because the work being done was demolition work, not construction or renovation. Plaintiffs testified that they had begun removing plaster and from the walls and had temporarily moved the downstairs bathroom to an upstairs room. They had gutted the kitchen and a room above the kitchen. These activities are a necessary and inherent part of renovation, and it cannot reasonably be disputed that Plaintiffs had begun the renovation of their house.

⁸*Stoltz Realty Co. v. Paul*, 1995 WL 654152, at *9 (Del. Super.).

⁹*Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super.) (citing *AES Puerto Rico, LP v. Alstom Power, Inc.*, 429 F. Supp. 2d 713, 717 (D.Del.2006) (applying Delaware law).

¹⁰*Phillips Home Builders v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997).

¹¹*Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 642 (Del. 2002).

¹²*Id.*

Plaintiffs also argue that the fire extinguisher condition is meaningless because no one was present in the house when the fire started and that Defendant cannot show prejudice from the lack of fire extinguishers. As support for this assertion, Plaintiffs rely on *Starr v. Nationwide Mut. Ins. Co.*¹³ In *Starr*, the Court of Chancery applied a two-part test for determining when failure to notify the insurance carrier of certain changes will cause a forfeiture of the insured's right to recover. For there to be forfeiture for failure to provide notice, the insurer must show that the notice provisions were violated and that the insurer was prejudiced thereby.¹⁴ *Starr* pertains specifically to notice provisions, and Plaintiffs offer no authority or other reason to extend the test to a condition that imposes an unequivocal duty on Plaintiffs, a duty that reasonably reduces the risk of harm from fire. The Endorsement provides for conditions that are required during the "Course of Construction/Renovation." The Endorsement does not indicate that the course of construction or renovation ends at nightfall or when no one is present in the house. On its face, the Endorsement refers to a course of construction/renovation, which by its plain meaning indicates the process of renovation, from the beginning to the end of the construction/renovation.

The argument that the fire extinguisher condition pertains only to times when someone is present in the house is strained and unsupportable. The condition requires

¹³548 A.2d 22, 26-27 (Del. Ch. 1988).

¹⁴*Id.* at 27.

that “visible and accessible fire extinguishers be placed on each level of the dwelling.” This requirement reasonably reduces the risk of fire damage, and there is no indication that such placement is required only when someone is present or at work on the house. The plain and unambiguous language of the condition requires the insured to place a fire extinguisher on each level of the house during the course of construction or renovation.

Third, Plaintiffs argue that the condition is merely a trap for unwary persons because (1) it does not specify the type of fire extinguisher to be used; (2) Defendant did nothing to ensure compliance with the condition, thereby breaching its duty of good faith and fair dealing; and (3) estoppel and waiver may arise from the fact that Defendant remained silent when it should have spoken or should have inspected the house for compliance.

(1) The phrase “fire extinguisher” is not defined in the Endorsement. Courts are typically instructed to give words their ordinary and commonly understood meaning, although if the word is used in a technical sense the technical meaning prevails.¹⁵ The condition does not use the term “fire extinguisher” in a technical sense, and the Court gives it the ordinary meaning. The phrase “fire extinguisher” has been defined as “a portable or wheeled apparatus for putting out small fires by ejecting fire-extinguishing chemicals.”¹⁶ Similarly, the phrase has been defined as “a portable container, usually

¹⁵*Liberty Mutual Ins. Co. v. Viking Pump, Inc.*, 2007 WL 1207107, at *15 (Del. Ch.), Title 1 *Del. C.* § 303.

¹⁶Webster’s Ninth New Collegiate Dictionary 465 (1986).

filled with special chemicals for putting out a fire.”¹⁷ Thus, the phrase “fire extinguisher” has a commonly understood meaning that is not susceptible of more than one meaning or otherwise creates an ambiguity.

(2) Plaintiffs have not shown that Defendant had a duty to ensure that Plaintiffs were in compliance with the fire extinguisher condition. Neither the Policy nor Delaware law imposes an obligation on Defendant to inspect the insured premises for compliance with policy conditions. Defendant had no such duty and therefore was not in breach of the implied duty of good faith and fair dealing.¹⁸

(3) Similarly, Plaintiffs have not shown that Defendant had a duty to specifically inform Plaintiffs about the fire extinguisher condition. Plaintiffs rely on *State Farm Mutual Automobile Ins. Co. v. Arms*,¹⁹ which pertains to an insurer’s statutory duty under 18 Del. C. § 3902(b) to disseminate certain information which a consumer might not discover. Section 3902(b) pertains to uninsured motor vehicle coverage and does not govern the issues in this case. Plaintiffs point to language in *Arms* which states that “[t]he [insurance] industry has its own obscure terminology which, despite efforts toward plain

¹⁷Dictionary.com (2010).

¹⁸The covenant of good faith and fair dealing attaches to every contract, including contracts of insurance. The covenant is a way of implying terms in the agreement, but it may not be used to create a duty unattached to the underlying legal document. *Dunlap v. State Farm Fire and Casualty Co.*, 878 A.2d 434, 441 (Del. 2005)(citations omitted.).

¹⁹477 A.2d 1060, 1065 (Del. 1984).

language policies, is nevertheless difficult for the typical consumer to understand fully.”²⁰

In this case, the Course of Construction/Renovation Endorsement is a single sheet establishing five conditions. The language at issue is repeated here for the sake of convenience:

In the event of any construction or renovation work at the premises described in the Declarations the following conditions shall apply.

* * *

FIRE PROTECTIONS

You must ensure that visible and accessible fire extinguishers be placed on each level of the dwelling. Failure to comply with this condition will render this insurance null and void.

This language is not difficult to understand or phrased in “obscure terminology” specific to the insurance industry. It does not impose a duty on Defendant to specifically inform Plaintiffs of its meaning. Estoppel and waiver therefore do not apply.

The Court concludes as a matter of law that the language of the fire extinguisher condition is clear and unambiguous, and that failure to comply results in rendering the insurance contract null and void.

Plaintiffs’ non-compliance with the fire extinguisher condition. The next question is whether Plaintiffs complied with the condition. Before a plaintiff can recover in contract, there must be substantial compliance with all of the provisions of that

²⁰*Id.*

contract.²¹ By their own admission, Plaintiffs did not read the Policy or the Endorsement and were unaware of the fire extinguisher condition.²² They concede that they did not place any fire extinguishers in the house.

It is undisputed that, after the fire, a fire extinguisher was found in the back bedroom on the ground level of the house but that Plaintiffs did not place it there. It is also undisputed that a fire extinguisher was found in the pre-existing shed, which was not covered by the Policy. On these facts, Plaintiffs cannot show substantial performance with the condition requiring that the insured place a fire extinguisher on each level of the house.

Materiality of the breach. Plaintiffs argue that if they did breach the condition, the breach was immaterial. A party clearly in material breach of contract cannot thereafter complain of the other party's failure to perform.²³ The Restatement (Second) of Contracts (current through April 2010) reiterates this proposition:

²¹*Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super.); *SLMSoft.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *13 (Del. Super.) (citing *Eastern Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.* 1987 WL 9610 (Del. Super.)).

Defendant argues that pursuant to *Dover Glass-Works Co. v. American Ins. Co.*, 29 A. 1039 (Del. 1894), an insurer is entitled to strict performance of any condition precedent in an insurance contract, even if the risk of loss may not have changed or increased by the non-performance. More recent cases, as cited above, require substantial compliance.

²²Under Delaware law, Plaintiffs have a duty to read their insurance policy. *Graham v. State Farm Mut. Auto Ins. Co.*, 565 A.2d 908, 913 (Del. 1989); *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1362 (Del. Super. 1990).

²³*SLMsoft.com, Inc. v. Cross Country Bank*, *supra*, at *13.

§ 229. Excuse of a Condition to Avoid Forfeiture

To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence unless that condition was a **material part** of the agreed exchange. (Emphasis added.)

The Restatement also sets forth the factors to be considered when determining whether a failure of performance is material:²⁴

§ 241. Circumstances in Determining Whether a Failure is Material

In determining whether a failure to render or offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform will suffer forfeiture; (d) the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances; (e) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing.

These factors are helpful to determining materiality, but they must be tailored to fit the facts of this case. Delaware case law makes clear that the question of the materiality of the breach of the fire extinguisher condition is a fact question for the jury.²⁵

²⁴*Id.*. See also *Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc.*, *supra*, at 19; *Texas Instruments Inc. v. Qualcomm Inc.*, 2004 WL 516560 (Del. Ch.).

²⁵*Commonwealth Construction*, *supra*, at *19; *SLMSoft.com, Inc.*, *supra*, at 13; *Texas Instruments Inc.*, *supra*, at *3; *Saienni v. G & C Group, Inc.*, 1997 WL 3633919 (Del. Super.).

Conclusion

As explained above, the Court finds the fire extinguisher requirement to be a clear and unambiguous condition to Defendant's performance under the Policy. Further, Plaintiffs did not substantially comply with the condition and therefore breached a clear provision of the Policy. Material questions of fact exist as to the materiality of the breach. Thus, the parties' motions for summary judgment are **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary