MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Betty Lanko,
Appellant-Plaintiff,

v.

Trumbull Insurance Company, Property-Owners Insurance Company, Auto-Owners Insurance Company, Village Community, Inc., and Absolutely Dry, LLC,
Appellees-Defendants.

December 30, 2021

Court of Appeals Case No. 21A-CT-81

Appeal from the Porter Superior Court

The Honorable Roger V. Bradford, Judge

Trial Court Cause No. 64D01-1903-CT-2531

Weissmann, Judge.

[1] When a leaking pipe in Betty Lanko's condominium flooded her with out-of-pocket repair costs and other expenses, Lanko sued her homeowners' association, three insurance companies, and one of the contractors she hired to make repairs. All but the contractor filed motions for summary judgment, which the trial court granted. On appeal, Lanko primarily argues that the homeowners' association and insurance companies were not entitled to summary judgment on her claims for breach of contract. We find that genuine issues of material fact preclude the entry of summary judgment in favor of the homeowners' association but not the insurance companies. Accordingly, we reverse in part, affirm in part, and remand.

Facts

[2] Lanko owns one of ten condominium units in a subdivision governed by the Village Community, Inc. homeowners' association (Association). The Association operates under a declaration of condominium ownership (HOA Declaration), which sets forth certain rights and responsibilities of the Association and the condominium owners. Most notably, the HOA Declaration requires the Association to procure fire insurance for the condominium units and common areas, while the condominium owners are responsible for insuring the personal property within their respective units.

[3] Pursuant to the HOA Declaration, the Association purchased a business owner's insurance policy from Property-Owners Insurance Company (Property-Owners). The Property-Owners policy provided full replacement cost coverage for fire and water damage to the condominium units and common areas. Only the Association was named as an insured under the policy, but it specifically listed Lanko's address as a covered property.

[4] For her part, Lanko purchased a homeowner's insurance policy from Trumbull Insurance Company (Trumbull). The Trumbull policy provided the following coverages and limits: personal property ($24,000), dwelling ($74,400), loss of use ($9,600), and personal liability ($100,000). The policy's property coverages also provided that they would be secondary to any insurance in the name of a homeowners' association.

[5] In January 2018, a leaking pipe beneath the subfloor of Lanko's condominium unit caused water damage to the unit and the adjacent common areas. Lanko initially hired Absolutely Dry LLC to repair the damage. However, she later hired ASG Roofing & Remodeling to complete the repairs due to concerns with Absolutely Dry's work. While repairs were being made, Lanko was displaced from her condominium unit, and her personal property had to be removed and stored.

[6] The total cost to repair Lanko's condominium unit and the common areas is not clear from the record. However, it appears to have been at least $145,000. App. Vol. IX, p. 141. Of this sum, Trumbull paid its policy's $74,400 dwelling coverage limit, and Property-Owners paid at least $16,000 on behalf of the Association. The remainder fell to Lanko after Property-Owners denied her coverage under the Property-Owners policy.

[7] Lanko also incurred around $19,000 in expenses for the removal and storage of her personal property while repairs were being made (Storage Expenses). Trumbull initially advised Lanko that it, not Property-Owners, "would be paying for" the Storage Expenses. App. Vol. X, p. 108. However, Trumbull disclaimed coverage of the expenses once Lanko exhausted the Trumbull policy's dwelling limit.

[8] Seeking recovery for the uncovered damage to her condominium unit, the uncovered damage to the common areas, and the Storage Expenses, Lanko sued the Association, Property-Owners, Trumbull, and Absolutely Dry as well

as Property-Owners' parent company, Auto-Owners Insurance Company (Auto-Owners). In her complaint, Lanko asserted breach of contract and negligence claims against the Association; breach of contract and bad faith claims against Property-Owners, Auto-Owners, and Trumbull; and a negligence claim against Absolutely Dry. All but Absolutely Dry filed motions for summary judgment, which the trial court granted. Lanko now appeals.[1]

Discussion and Decision

[9] Lanko challenges the trial court's entry of summary judgment in favor of the Association, Auto-Owners, Property-Owners, and Trumbull. When reviewing the grant of a summary judgment motion, we apply the same standard applicable to the trial court. *Wagner v. Yates*, 912 N.E.2d 805, 808 (Ind. 2009). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We do not weigh the evidence but will consider the facts in the light most favorable to the non-moving party. *Wagner*, 912 N.E.2d at 808. We must reverse the grant of a summary judgment motion if the record discloses an incorrect application of the law to those facts. *Id.*

[1] Lanko filed and the trial court denied cross-motions for summary judgment against the Association, Auto-Owners, Property-Owners, and Trumbull. Lanko does not challenge the denial of these motions on appeal.

I. Claims Against the Association

[10] Lanko argues that the Association is not entitled to summary judgment because there are genuine issues of material fact as to whether it breached the HOA Declaration. Covenants like those contained in the HOA Declaration are a "species of express contract" and are generally construed in the same manner as other written contracts. *Vill. Pines at the Pines of Greenwood Homeowners' Ass'n, Inc. v. Pines of Greenwood, LLC*, 123 N.E.3d 145, 156 (Ind. Ct. App. 2019), *reh'g denied*. If the contractual language is unambiguous, we give it its plain and ordinary meaning. *Id.*

A. Failure to Repair Common Areas

[11] Lanko claims the designated evidence established a genuine issue of material fact as to whether the Association breached Section 3.01 of the HOA Declaration by failing to repair the uncovered damage to the common areas. Section 3.01 provides, in pertinent part:

> 3.01 MAINTENANCE, REPAIR, AND REPLACEMENT OF COMMON AREAS:
>
> (a) Except as otherwise specifically provided in the Declaration, maintenance, repair, and replacement of the Common Areas shall be furnished by the Board as part of the Common Expenses.

App. Vol. IV, p. 127.

[12] The Association counters that Section 3.04 of the HOA Declaration eliminated its obligation to repair the uncovered damage to the common areas because that damage was caused by Absolutely Dry's neglect. Section 3.04 provides:

> 3.04 DAMAGE CAUSED BY OWNER: If due to the act of or the neglect of any Owner . . . or invitee of such Owner, damage shall be caused to a part of the Property and maintenance, repairs, or replacements shall be required which would otherwise be a Common Expense, then such Owner shall pay for such damage and such maintenance, repairs, and replacements, as may be determined by the Board, to the extent not covered by insurance, if any, carried by the Residential Association.

Id. at 128.

[13] In support of its claim, the Association points to evidence that "Absolutely Dry cut through the trusses in the subfloor . . . by improperly setting the depth of their saws when they cut out the floor of [Lanko's condominium unit]." App. Vol. X, p. 79. But the designated evidence also indicates that repairs to the trusses may have been necessitated by the water loss caused by the faulty pipe, *id.* at 78, or the "poor design/maintenance of the subfloor." *Id.* at 80. Moreover, Lanko's negligence claim against Absolutely Dry remains pending. We therefore find genuine issues of material fact as to whether the Association breached Section 3.01 of the HOA Declaration.

B. Failure to Repair Condominium Unit

[14] Lanko next claims that the designated evidence established a genuine issue of material fact as to whether the Association breached Section 3.07 of the HOA

Declaration by failing to repair certain uncovered damage to her condominium unit. Section 3.07 provides:

> 3.07 DECORATING: Each Owner shall furnish and be responsible for, at his own expense, all of the decorating within his Home, from time to time, including painting, wall papering, washing, cleaning, paneling, floor covering, and window treatment. . . . Decorating of the Common Areas . . . and any redecorating of Homes to the extent made necessary by damage to existing decorating of such Homes caused by maintenance, repair, or replacement work performed on the Common Areas under the authority of the Board, shall be furnished exclusively by the Board as part of the Common Expenses.

App. Vol. IV, p. 128.

[15] Though Lanko's Section 3.07 claim may have merit, we agree with the Association that Lanko waived this claim by failing to present it to the trial court below. At no point during her opposition to the Association's motion for summary judgment did Lanko allege a breach of Section 3.07 or damage to her condominium unit "caused by" repair work performed on the common areas. *Id.* "Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal." *Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004).

C. Failure to Procure Insurance

[16] Lanko further claims the designated evidence established a genuine issue of material fact as to whether the Association breached Section 5.01 of the HOA

Declaration by failing to name her as an additional insured on the Property-Owners policy. Section 5.01 provides:

> 5.01 FIRE INSURANCE: The Board shall have the authority to and shall obtain insurance for the Property against loss or damage by fire and such other hazards as the Board may deem desirable, for the full insurable replacement cost of the Common Areas and the Homes; premiums for such insurance shall be Common Expenses. Such insurance coverage shall be written in the name of, losses under such policies shall be adjusted by, and the proceeds of such insurance shall be payable to the Board as trustee for each of the Owners in accordance with their Undivided Interests. . . . Owners and members of their Family, Mortgagees, and the Converter or, alternatively, all such parties shall be named as additional insured parties.

App. Vol. IV, p. 131.

[17] The Association counters that Section 5.01 only required it to obtain insurance "against loss or damage *by fire.*" *Id.* (emphasis added). Therefore, according to the Association, its obligation to name Lanko as an additional insured did not apply to the discretionary insurance it obtained against water loss. We disagree. Although Section 5.01 did not require the Association to purchase insurance against water loss, its obligation to name Lanko as an additional insured applied to "such insurance" once the Association, in its discretion, decided to obtain it. *Id.* The Association's claim is therefore without merit.

[18] The Association also claims it satisfied its obligations under Section 5.01 by procuring the Property-Owners policy. But there is no dispute that Lanko is not named as an additional insured on that policy as required by the HOA

Declaration. Thus, the Association is not entitled to judgment as a matter of law on Lanko's breach of contract claim. *See All Am. Ins. Co. v. James River Petroleum, Inc.*, No. 3:21CV8, 2021 WL 2284608, at *4 (E.D. Va. June 4, 2021) (holding commercial tenant's failure to list sub-tenant as an additional insured under tenant's CGL policy, as required by sublease, could constitute a material breach of that agreement).

D. Waiver of Subrogation

[19] Finally, as a general defense, the Association claims it is entitled to judgment as a matter of law on Lanko's breach of contract claims because she waived them under Section 5.06 of the HOA Declaration. That Section provides:

> 5.06 WAIVER OF SUBROGATION: Each Owner hereby waives and releases any and all claims which he may have against any other Owner, the Residential Association, its Directors and Officers, the Converter, the managing agent and their respective employees and agents, for damage to the Common Areas, the Homes, or to any personal property located in the Homes or Common Areas, caused by fire or other form of casualty insurance (sic), and to the extent this release is allowed by policies for such fire or other casualty insurance (sic).

App. Vol. IV, p. 133.

[20] We note that Section 5.06 ambiguously waives claims for damage "caused by . . . casualty insurance." *Id.* When contract language is ambiguous, "the paramount rule for interpretation is to give effect to the actual intent of the parties as collected from the whole instrument." *Johnson v. Dawson*, 856 N.E.2d

769, 773 (Ind. Ct. App. 2006) (cleaned up). Because Lanko and the Association both acknowledge Section 5.06 as a waiver of subrogation clause, as is indicated by the provision's heading, we follow suit. *See* Appellant's Br. p. 27; Association's Br. p. 9.

[21] In the insurance context, "subrogation" is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Subrogation*, *Black's Law Dictionary* (11th ed. 2019). Thus, a waiver of subrogation generally only applies to claims involving damage for which there is insurance coverage. *See, e.g., Bd. of Comm'rs of Cty. of Jefferson v. Teton Corp.*, 30 N.E.3d 711, 716 (Ind. 2015); *see also* Association's Br. p. 9 (describing Section 5.06 waiver as applying to "losses covered by insurance"). Lanko's claims against the Association only seek recovery for uncovered damage to her condominium unit and the common areas. Therefore, Section 5.06 of the HOA Declaration is not applicable.

[22] As there remain genuine issues of material fact as to whether the Association breached Sections 3.01 and 5.01 of the HOA Declaration, we reverse the trial court's summary judgment as to the Association and remand for further proceedings.

II. Claims Against Auto-Owners

A. Breach of Contract

[23] Lanko argues that Auto-Owners, the parent company of Property-Owners, is not entitled to summary judgment because there are genuine issues of material fact as to whether it breached the Property-Owners policy by refusing to pay for the uncovered damage to her condominium unit and the common areas. Auto-Owners claims it is entitled to judgment as a matter of law because it is not a party to the Property-Owners policy.

[24] Insurance agreements are contracts that are subject to the same rules of construction as other contracts. *Sheehan Const. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 169 (Ind.), *modified*, 938 N.E.2d 685 (Ind. 2010). When the language of a contract is clear and unambiguous, we give it its plain and ordinary meaning. *Id.* Generally, only parties to a contract have rights under its terms. *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1314-15 (Ind. 1996).

[25] Lanko contends that Auto-Owners is a party to the Property-Owners policy because the policy's cover page is branded with the names, "Auto-Owners Insurance Group," "Auto-Owners Insurance," and "Auto-Owners."[2] App. Vol. X, p. 165. However, she rightfully concedes that the policy declarations list

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[2] In its brief, Auto-Owners explains that "Auto-Owners Insurance Group" and the like "are trade names referring to a group of separate insurers comprised of five property and casualty companies and a life insurance company that includes Property-Owners Insurance Company and Auto-Owners Insurance Company." Appellant's Br. p. 23-24. All six of these companies are identified on the cover page to the Property-Owners policy under a logo for "Auto-Owners Insurance." App. Vol. X, p. 165.

Property-Owners as the named insurer. *See* Appellant's Br. p. 9. And the policy's property coverages define the word "we" as "the Company providing this insurance" before stating, "*We* will pay for direct physical loss of or damage to Covered Property." *Id.* at 215 (emphasis added).

[26] Because Auto-Owners is not a party to the Property-Owners policy, it was not contractually obligated to pay for the uncovered damage to Lanko's condominium unit and the common areas. Lanko's breach of contract claim against Auto-Owners is therefore without merit.

B. Bad Faith

[27] Lanko also argues that Auto-Owners is not entitled to summary judgment because there are genuine issues of material fact as to whether it acted in bad faith with respect to her insurance claim. "Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured." *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993). But as concluded above, there is no insurance contract between Auto-Owners and Lanko. Accordingly, Auto-Owners did not owe Lanko a duty of good faith and fair dealing.

[28] Finding no genuine issues of material fact and concluding that Auto-Owners is entitled to judgment as matter of law on Lanko's breach of contract and bad faith claims, we affirm the trial court's summary judgment as to Auto-Owners.[3]

III. Claims Against Property-Owners

A. Breach of Contract

[29] Lanko argues that Property-Owners is not entitled to summary judgment because there are genuine issues of material fact as to whether it breached the Property-Owners policy by refusing to pay for the uncovered damage to her condominium unit and the common areas.

[30] Acknowledging that she is not a party to the Property-Owners policy, Lanko claims she is entitled to payment as a third-party beneficiary thereof. "One not a party to an agreement may nonetheless enforce it by demonstrating that the parties intended to protect him under the agreement by the imposition of a duty in his favor." *OEC-Diasonics*, 674 N.E.2d at 1315. "To be enforceable, it must clearly appear that it was the purpose or a purpose of the contract to impose an obligation on one of the contracting parties in favor of the third party." *Id.*

[31] Lanko asserts that Property-Owners and the Association intended to protect her under the Property-Owners policy because the HOA Declaration required the Association to name her as an additional insured. However, "[t]he intent of the

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[3] Auto-Owners was also entitled to summary judgment because Lanko was not a party to the Property-Owners policy, as discussed in Section III.

contracting parties to bestow rights upon a third party must affirmatively appear from the language of the instrument" sought to be enforced. *Id.* (noting "it is not necessary that the intent . . . be demonstrated any more clearly than the parties' intent regarding any other terms of the contract."). Thus, on the issue of Property-Owners' intent, the HOA Declaration is irrelevant.

[32] Lanko also contends that Property-Owners and the Association intended to protect her under the Property-Owners policy because it specifically identifies her condominium unit as a covered property. But "[i]t is not enough that performance of the contract would be of benefit to the third party." *Id.* "The intent necessary to the third-party's right to sue is . . . an intent that the promising party or parties shall assume a direct obligation to him." *Centennial Mortg., Inc. v. Blumenfeld*, 745 N.E.2d 268, 276 (Ind. Ct. App. 2001).

[33] Although the Property-Owners policy generally provides coverage for Lanko's condominium unit and the common areas, it does not impose upon Property-Owners an obligation to pay Lanko directly for such coverage. Therefore, Lanko is not a third-party beneficiary of the policy.

B. Bad Faith

[34] Lanko also argues that Property-Owners is not entitled to summary judgment because there are genuine issues of material fact as to whether it acted in bad faith with respect to her insurance claim. But like Auto-Owners, Property-Owners did not owe Lanko a duty of good faith and fair dealing. Such a duty arises from the "special relationship" between an insurer and its insured. *Erie*,

622 N.E.2d at 518. Not even a third-party beneficiary can sue an insurer in tort for acting in bad faith. *Cain v. Griffin*, 849 N.E.2d 507, 515 (Ind. 2006). Because Lanko is not an insured under the Property-Owners policy, her bad faith claim fails.

[35] Finding no genuine issues of material fact and concluding that Property-Owners is entitled to judgment as matter of law on Lanko's breach of contract and bad faith claims, we affirm the trial court's summary judgment as to Property-Owners.

IV. Claims Against Trumbull

A. Breach of Contract

[36] Lanko argues that Trumbull is not entitled to summary judgment because there are genuine issues of material fact as to whether Trumbull breached the Trumbull policy by disclaiming coverage for the Storage Expenses. According to Lanko, she was entitled to payment under the Trumbull policy's personal property coverage because the policy defines "property damage" to include "loss of use of tangible property." App. Vol. V, p. 118. This defined term, however, is only used in the policy's liability coverages. *See id.* at 130 ("If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' . . . we will . . . pay up to our limit of liability for the damages for which an 'insured' is legally liable.").

[37] The Trumbull policy's personal property coverage makes no reference to "property damage." *See id.* at 119, 124. And Lanko does not otherwise

challenge Trumbull's determination that the Storage Expenses fell under the policy's dwelling coverage, which Lanko exhausted. Accordingly, Lanko has failed to show that summary judgment was improper.

B. Bad Faith

[38] Lanko also argues that the designated evidence established a genuine issue of material fact as to whether Trumbull acted in bad faith with respect to her insurance claim.

> The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Erie, 622 N.E.2d at 519. "Proving bad faith amounts to showing more than bad judgment or negligence: 'it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It contemplates a state of mind affirmatively operating with furtive design or ill will.'" *Smith v. Progressive Se. Ins. Co.*, 150 N.E.3d 192, 203 (Ind. Ct. App. 2020) (cleaned up) (quoting *Oxendine v. Pub. Serv. Co. of Ind., Inc.*, 423 N.E.2d 612, 620 (Ind. Ct. App. 1980)), *trans. denied*.

[39] Lanko claims that Trumbull acted in bad faith by: not accepting coverage for the loss until a month after she filed her insurance claim; twice misrepresenting her dwelling coverage limit as $650 and $5,000, respectively; and disclaiming

coverage for the Storage Expenses after advising that it "would be paying for" them. App. Vol. X, p. 108. Lanko does not, however, allege or point to any evidence that Trumbull was "operating with furtive design or ill will." *Smith*, 150 N.E.3d at 203.

[40] To the contrary, the designated evidence negated any culpable mental state. Trumbull did not accept coverage immediately after Lanko filed her claim because it was waiting for Property-Owners to make its coverage determination, which impacted whether Trumbull's coverage would be primary or excess. When Lanko challenged Trumbull's misrepresentations of her dwelling coverage limit, Trumbull remedied the errors less than a week later by accepting coverage under the full $74,400 limit. And the record reveals that Trumbull indeed would have paid the Storage Expenses had Lanko not exhausted her dwelling coverage limit.

[41] Finding no genuine issues of material fact and concluding that Trumbull is entitled to judgment as matter of law on Lanko's breach of contract and bad faith claims, we affirm the trial court's summary judgment as to Trumbull.

V. Conclusion

[42] In summary, we reverse the trial court's judgment on Lanko's breach of contract claims against the Association and remand for further proceedings. We

affirm the court's judgment on Lanko's claims against Auto-Owners, Property-Owners, and Trumbull.

Mathias, J., and Tavitas, J., concur.