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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001609-MR

LEWIS J. HAMPTON;
MICHAEL WORTHINGTON and
TERESA WORTHINGTON — APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
CIVIL ACTION NO. 97-CI-00662

KENTUCKY GROWERS INSURANCE, INC. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, KNOPF and TACKETT, Judges.

HUDDLESTON, Judge: Lewis J. Hampton, Michael Worthington and Teresa Worthington (hereinafter sometimes collectively referred to as "Hampton") appeal from a Greenup Circuit Court order that denied their motion to alter, amend or vacate the court's prior order dismissing their complaint against Kentucky Growers Insurance Co., Inc. for lack of prosecution.

In July 1996, the appellants purchased a homeowner's insurance policy from Kentucky Growers for the residence where

Lewis Hampton lived.[1] In July 1997, a water hose connecting the washing machine to the water pipe burst while Lewis Hampton was on vacation resulting in extensive damage on the second and first floors of the residence. When Hampton attempted to file a claim, a representative of Kentucky Growers told him that the damage was not covered under the insurance policy.

On November 25, 1997, Hampton filed a complaint claiming coverage for the water damage based on the insurance policy and Kentucky Growers' failure to pay under the contract. On December 15, 1997, Kentucky Growers filed an answer acknowledging the existence of the insurance policy but denying coverage under the contract. At the same time, it propounded its first set of interrogatories and request for documents. Nothing happened in the case until January 1998 when Kentucky Growers took the depositions of each of the three appellants.

On December 30, 1998, Hampton filed a motion for summary judgment pursuant to Kentucky Rules of Civil Procedure (CR) 56.01. He asserted that there was no factual dispute that he had suffered water damage from a burst hose connected to the washing machine. Hampton alleged that Kentucky Growers was liable under the "Explosions" provision of the insurance policy, which did not specifically include an explosion from a water hose among its list of exclusions. The motion included an affidavit from one of Lewis Hampton's daughters stating that she discovered water damage caused by a ruptured water hose.

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[1] The residence was owned by Teresa and Michael Worthington, Lewis Hampton's daughter and son-in-law.

In January 1999, Kentucky Growers filed a response to Hampton's motion for summary judgment and a motion to compel a response to its discovery requests. It argued that the situation was not an explosion covered by the insurance policy. On January 14, 1999, the circuit court conducted a hearing on the summary judgment motion and the motion to compel. The court orally denied the summary judgment motion and granted the motion to compel. While the court entered a written order on the motion to compel, it did not issue a written order on the summary judgment motion.

Again there was no activity in the case for over a year, so on February 21, 2000, the court issued a notice to dismiss for lack of prosecution under CR 77.02(2) and scheduled a show cause hearing for April 27. On April 24, 2000, Hampton filed a response to the notice to dismiss in which he requested a review of his motion for summary judgment because he was without knowledge that the court had ruled on the motion. On April 27, 2000, Kentucky Growers appeared for the show cause hearing and filed a response to the renewed motion for summary judgment. At the hearing, Kentucky Growers restated the arguments it raised in its initial response to the summary judgment motion. Hampton's attorney failed to appear for the show cause hearing, so after Kentucky Growers presented its position, the court indicated it would take the matter under submission.

On May 11, 2000, the circuit court entered an order dismissing the complaint without prejudice for lack of prosecution under CR 77.02(2). On May 19, 2000, Hampton filed a CR 59.05 motion to alter, amend or vacate the order dismissing the complaint for lack of prosecution stating he had filed a response to the show

cause notice to dismiss in which he requested a continuance of the action and an order directing the parties to engage in mediation. On May 23, 2000, Kentucky Growers filed a response to the CR 59.05 motion stating the motion failed to set forth any justification for vacating the order of dismissal.

On May 25, 2000, the court conducted a hearing on the CR 59.05 motion with attorneys for both parties arguing the merits of Hampton's request for summary judgment. On June 1, 2000, the court entered an order denying the motion to alter, amend or vacate the prior order dismissing the complaint for lack of prosecution. The court stated that after reviewing the motion for summary judgment, it was again denying the motion. It said, "The Court is convinced that under the terms of the insurance policy, the Defendant has no liability. Therefore, the Court will not resurrect this case pursuant to the terms of the insurance policy. Since the case was dismissed with out [sic] prejudice, however, the Plaintiffs may refile the case but only with a cause of action other than contract." This appeal followed.

As an initial matter, we recognize the unusual procedural posture of this case, which affects the standard of review. Hampton's initial motion for summary judgment was denied by the circuit court. Due to inactivity in the case, the court issued a show cause notice of dismissal under CR 77.02(2). CR 77.02(2) is a "housekeeping" rule designed to expedite the removal of stale cases from the docket.[2] A dismissal for lack of prosecution

[2] Hertz Commercial Leasing Corp. v. Joseph Ky. App., 641 S.W.2d 753, 755 (1982); Bohannon v. Rutland, Ky., 616 S.W.2d 46 (1981).

pursuant to CR 77.02(2) operates as a dismissal without prejudice.[3] Dismissal of a claim with prejudice acts as an adjudication on the merits and bars subsequent assertion of the cause of action under the doctrine of res judicata.[4] Meanwhile, dismissal of a claim without prejudice does not prevent a party from refiling and raising the same cause of action at a later time. Summary judgment constitutes an adjudication on the merits.

In the current case, Hampton's initial motion for summary judgment was denied by the circuit court; however, it failed to enter an order and merely noted its ruling on the court calender, which is insufficient to constitute an order or judgment.[5] Hampton renewed his summary judgment motion through his CR 59.05 motion to alter, amend or vacate and asked the court to reconsider the issues raised in the summary judgment motion as part of the CR 59.05 motion involving the order of dismissal under CR 77.02(2). The court's order denying the CR 59.05 motion states that it had reconsidered the issues in the summary judgment motion and that Kentucky Growers had no liability under the insurance policy. The court further stated that Hampton could refile the case but could not reassert a contracts claim. This mixing of an adjudication on the merits within the framework of a dismissal for lack of prosecution under CR 77.02(2) introduces confusion and inconsistency in the circuit court's action. Hampton argues that

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[3] See CR 77.02(2) and CR 41.02(3).

[4] See, e.g., Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994); Polk v. Wimsatt, Ky. App., 689 S.W.2d 363 (1985); Hertz, supra, n. 2.

[5] See CR 58; Hertz, supra, n. 2.

the circuit court dismissed the action based on its view of the merits rather than for a lack of prosecution, and therefore should be considered in the nature of a summary judgment for Kentucky Growers. We agree that the circuit court's order constitutes an adjudication on the merits and should be treated as a summary judgment. Thus, we will review the appeal under the standards applicable to summary judgment, rather than those for dismissal for lack of prosecution.

The law involving interpretation of insurance policies shares many of the same principles for contracts generally, but with a few nuances. "The words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning."[6] Insurance contracts should be liberally construed in favor of the insured and any exclusions should be strictly construed in favor of coverage.[7] However, insurance policies should be construed according to the mutual intention of the parties deducible, if possible, from the language of the contract.[8] Under the doctrine of reasonable expectations, an insured is entitled to all the coverage he may reasonably expect to be

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[6] Nationwide Mut. Ins. Co. v. Nolan, Ky., 10 S.W.3d 129, 131 (1999); Sutton v. Shelter Mut. Ins. Co., Ky. App., 971 S.W.2d 807, 808 (1997); City of Louisville v. McDonald, Ky. App., 819 S.W.2d 319, 320 (1991).

[7] See Kentucky Farm Bureau Mut. Ins. Co. v. McKinney, Ky., 831 S.W.2d 164, 166 (1992); Transport Ins. Co. v. Ford, Ky. App., 886 S.W.2d 901, 904 (1994).

[8] Nolan, supra, n. 6 at 131-32; National Ins. Underwriters v. Lexington Flying Club, Inc., Ky. App., 603 S.W.2d 490, 493 (1979).

provided under the terms of the policy.[9] The reasonable expectations doctrine involves an objective, rather than subjective, analysis of the policy and circumstances.[10] A conspicuous, plain and clear manifestation of the insurance company's intent to exclude coverage will defeat the insured's expectation of coverage.[11] Both the principles of strict construction and the doctrine of reasonable expectations apply only when the language of the insurance contract is ambiguous.[12] As the court stated in St. Paul Ins. Co. v. Powell-Walton-Milward, Inc.:[13]

> The rule of strict construction against an insurance company certainly does not mean every doubt must be resolved against it and does not interfere with a reasonable interpretation consistent with the parties' object and intent or narrowly expressed in the plain meaning and/or language of the contract. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. We consider that courts should not

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[9] Marcum v. Rice, Ky., 987 S.W.2d 789, 791 (1999); Hendrix v. Fireman's Fund Ins. Co., Ky. App., 823 S.W.2d 937, 938 (1991)(citing Woodson v. Manhattan Life Ins. Co., Ky., 743 S.W.2d 835, 839 (1987)).

[10] Consolidated American Ins. Co. v. Anderson, Ky. App., 964 S.W.2d 811, 814-15 (1998); Marcum, supra, n. 9 at 791; Estate of Swartz v. Metropolitan Property and Cas. Co., Ky. App., 949 S.W.2d 72, 75 (1997).

[11] Philadelphia Indemnity Ins. Co. v. Morris, Ky., 990 S.W.2d 621, 625 (1999).

[12] Peoples Bank and Trust Co. v. Aetna Cas. and Surety Co., 113 F.3d 629, 636 (6th Cir. 1997)(applying Kentucky law).

[13] Ky., 870 S.W.2d 223 (1994).

rewrite an insurance contract to enlarge the risk to the insurer.[14]

The standard of review on appeal when a trial court grants summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[15] The court must view the evidence in the light most favorable to the nonmoving party and resolve all doubts in favor of that party.[16] The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[17]

In the case under consideration, as discussed earlier, we treat the trial court's dismissal as a summary judgment on the merits. Although Kentucky Growers did not formally move for summary judgment, it argued in its response to Hampton's motion for summary judgment that there was no liability under the insurance policy. The trial court had authority to consider and enter

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[14] Id. at 226-27. See also Meyers v. Kentucky Medical Ins. Co., Ky. App., 982 S.W.2d 203 (1997).

[15] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 881 (1996); Palmer v. International Ass'n of Machinists & Aerospace Workers, Ky., 882 S.W.2d 117, 120 (1994); CR 56.03.

[16] Steelvest, Inc. v. Scansteel Service Center Inc., Ky., 807 S.W.2d 476, 480 (1991); Leslie v. Cincinnati Sub-Zero Products, Inc., Ky. App., 961 S.W.2d 799, 804 (1998).

[17] Steelvest, supra, n. 16 at 482. See also Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992); Hibbitts v. Cumberland Valley Nat'l Bank and Trust Co., Ky. App., 977 S.W.2d 252, 253 (1998).

summary judgment in favor of Kentucky Growers upon a finding that no genuine issues of fact existed and Kentucky Growers was entitled to judgment as a matter of law because Hampton's renewal of his summary judgment motion put the relevant issues before the court, and a formal motion by Kentucky Growers was not required.[18] In addition, the trial court conducted two hearings on Hampton's motion for summary judgment and he was allowed to fully argue the issues therein.

Hampton argues the trial court erred in construing the insurance policy. He contends that the damage caused by the burst water hose was covered by the homeowner's insurance policy, and that the disputed issue of coverage is factual one precluding summary judgment. Hampton's claim to coverage relies on the section discussing explosions in the contract, which provides as follows:

> 3. EXPLOSION, including direct loss resulting from the explosion of accumulated gases or unconsumed fuel with the firebox (or combustion chambers) of any fire vessel or within the flues or passages which conduct the gases or combustion therefrom; but excluding loss from explosion, rupture or bursting of steam boilers, steam pipes, steam engines or rotating parts of machinery caused by centrifugal force, if owned by, leased by, or

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[18] See Green v. Bourbon County Joint Planning Commission, Ky., 637 S.W.2d 626 (1982); Collins v. Duff, Ky., 283 S.W.2d 179 (1955); Cellular Telephone Co. v. Commonwealth Revenue Cabinet, Ky. App., 897 S.W.2d 601 (1995)("If the trial court, in ruling on one party's motion for summary judgment, determines that the other party is entitled to the relief they seek, then a motion for summary judgment by that party is not required").

> actually operated under the control of the insured or located in the insured building(s) or in building(s) containing the property insured.
>
> The following are not explosions within the meaning of these provisions: (a) Concussion unless caused by explosion, (b) Electrical arcing, (c) Water hammer, (d) Rupture or bursting of water pipes, (e) Sonic Boom.

Hampton asserts that the determinative issue on appeal is whether a hose is a pipe. He maintains that because the word "hose" does not specifically appear in the exceptions listed in the Explosion provision, damage related to a burst hose is covered by the policy. He further contends that a hose is not a pipe, and therefore is not excluded under the exception for the rupture or bursting of water pipes.

We begin with Hampton's contention that the coverage issue is a material issue of fact in dispute. First, this assertion is contrary to the position Hampton presented in his motion for summary judgment. A party generally may not raise an issue or argument on appeal that was not raised before the trial court.[19] Additionally, this issue involves interpretation of the insurance policy, which is a matter of law for the court.[20] Thus, there are no genuine issues of material fact in dispute.

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[19] See Commonwealth v. Lavit, Ky., 882 S.W.2d 678, 680 (1994); Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

[20] Stone v. Kentucky Farm Bureau Mut. Ins. Co., Ky. App., 34 S.W.3d 809, 810 (2000); Foster v. Kentucky Housing Corp., 850 F.Supp. 558, 560-61 (E.D. Ky. 1994)(applying Kentucky law); Perry's Adm'x v. Inter-Southern Life Ins. Co., 254 Ky. 196, 71 S.W.2d 431 (1934).

Hampton's second argument that his homeowners policy covered the damage caused by the burst water hose is likewise without merit. The Explosion provision provides coverage for gas or fuel explosions but specifically exempts situations involving the rupture or bursting of water pipes and water hammer. A "pipe" is defined as "a long tube or hollow body for conducting a liquid, gas, or finely divided solid" or "a tubular or cylindrical object, part, or passage."[21] A "water hammer" is defined as "a concussion or sound of concussion moving water against the sides of a containing pipe or vessel (as a steam pipe)."[22] A "hose" is defined as "a flexible tube for conveying fluids (as from a faucet or hydrant)."[23] The plain, ordinary meaning of pipe would reasonably include a hose used to connect an appliance such as a washing machine to the main source of water in the house. In this situation, the hose was merely an extension of the metal pipe and served the same purpose. The list of situations excluded from the Explosion section is not necessarily exhaustive and the failure to use the exact word "hose" does not preclude a finding that the rupture or bursting of a water hose is a covered explosion.

Furthermore, Hampton has not shown that the doctrine of reasonable expectations compels finding coverage under the insurance policy. Hampton testified that he believed the policy covered his situation because homeowner's insurance is supposed to

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[21] Webster's Ninth New Collegiate Dictionary (1988).

[22] Id.

[23] Id. See also Encarta World English Dictionary (1999), defining "hose" as "a flexible tube or pipe, often made of rubber or plastic through which fluids such as water or gasoline can flow."

cover accidents at home and protect property. He was unable to identify any language in the contract to support his belief of a broad all-encompassing scope of coverage. Indeed, the policy contains numerous exclusions. An objective review of the policy and the record does not indicate that he paid for extended coverage for water related damage.

In conclusion, even taking in consideration the principle of construing insurance contracts in favor of the insured, the policy language is sufficiently clear under a reasonable interpretation that the damage caused by the burst water hose in this situation was not covered under Hampton's homeowner's insurance policy. Consequently, there was no genuine issue of material fact in dispute and Kentucky Growers was entitled to judgment as a matter of law. Treating the order as a summary judgment, we hold that the trial court did not err in dismissing the complaint.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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