STATE OF MICHIGAN

COURT OF APPEALS

PASSALACQUA CORPORATION,
d/b/a MARIO'S RESTAURANT,

Plaintiff-Appellant,

v

AIG CLAIM SERVICES, INC., AMERICAN INTERNATIONAL GROUP INSURANCE COMPANY, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN INTERNATIONAL INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE GROUP, REPUBLIC UNDERWRITERS, INC.,

Defendants-Appellees.

UNPUBLISHED
January 29, 2002

No. 223273
Wayne Circuit Court
LC No. 98-805345-CK

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants summary disposition in this breach of contract action. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition to defendant AIG[1] because there was a genuine issue of material fact regarding whether the insurance policy provided both lease insurance and replacement coverage for computer equipment. We disagree.

We review a trial court's decision regarding a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In deciding a motion under MCR 2.116(C)(10), the trial court considers the affidavits, pleadings, admissions, and

[1] Defendant New Hampshire Insurance Company is a subsidiary of defendant AIG Claim Services, Inc. Because plaintiff refers to defendants AIG Claim Services, Inc., American International Group Insurance Company, American International Group, Inc., American International Insurance Company, and New Hampshire Insurance Company collectively as AIG, this Court will do the same.

documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition may be granted if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. The construction and interpretation of an insurance contract, including whether contract language is ambiguous, are questions of law that we likewise review de novo. *Morley v Automobile Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998); *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

Unambiguous insurance contract language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382-383; 591 NW2d 325 (1998). The language of an insurance contract is unambiguous if it fairly admits of but one interpretation, and a court should not create ambiguity where none exists. *Id.* at 382. An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in different ways. *Id*. at 383. Ambiguous terms in an insurance policy must be construed against the drafter and in favor of the insured, although a court must not hold an insurance company liable for a risk that it did not assume. *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993).

When determining the existence or extent of coverage under the rule of reasonable expectation, a court examines whether a policyholder, upon reading the contract, was led to reasonably expect coverage. *Gelman Sciences, Inc v Fidelity & Casualty Co,* 456 Mich 305, 318; 572 NW2d 617 (1998). An insured is obligated to read his insurance policy and raise questions concerning coverage within a reasonable time after the policy is issued. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 324; 575 NW2d 324 (1998).

In this case, based on a reading of the policy as a whole, the insurance coverage applied to leased computer equipment. However, the policy also provided that, if the computer equipment was owned by one other than the insured, the owner would be compensated for the loss or damage. According to plaintiff's alleged expectation, plaintiff's lease would be paid off *and* plaintiff would get a new set of computer equipment. However, there is nothing in the language of the contract that indicates that the owner/lessor of the leased property would be compensated *and* that the insurer would pay the insured/lessee for the cost of replacing the damaged leased equipment. Plaintiff's expectation that it contracted for such coverage is unreasonable because it would provide plaintiff with a double recovery.

Plaintiff also alleged that it was entitled to coverage for replacement of data up to twenty-five percent of the amount of equipment coverage, and coverage for extra expenses up to twenty-five percent of the amount of equipment coverage. The contract language clearly includes such coverage. However, plaintiff presents no argument in its brief on appeal regarding what extra expenses it incurred as a result of the damaged computer equipment. Because this issue is not properly presented on appeal, this Court is not required to address it. *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000). Even if this Court were to address the issue,[2] there

[2] This Court may address an issue raised in a nonconforming brief if it is one of law for which the record is factually sufficient. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994).

is no evidence in the lower court record to support plaintiff 's claims for extra expenses. Plaintiff presented no argument to the trial court about the amounts or specifics of these losses, and the only evidence in the lower court record supporting the claim is the vague and uncorroborated testimony of plaintiff's owner, Vincent Passalacqua. Viewing this evidence in the light most favorable to plaintiff, there is no genuine issue of fact regarding whether plaintiff sustained extra expenses as a result of the damaged computer, and the trial court did not err in dismissing plaintiff 's claims against AIG.

Plaintiff next argues that the trial court erred in granting summary disposition to defendant Republic Underwriters, Inc. (Republic) because there was a genuine issue of material fact regarding whether Republic could be liable for breach of contract because the insurance policy did not provide the coverage that plaintiff requested. We disagree.

Plaintiff cites *Harts v Farmers Ins Exchange,* 461 Mich 1; 597 NW2d 47 (1999), in support of its argument that Republic is liable for not obtaining the coverage that plaintiff requested, i.e., lease insurance and replacement coverage. In *Harts,* the plaintiff sued the defendant insurance agent on a negligence theory arguing that he had a duty to offer advice or counsel concerning uninsured motorist coverage. *Id*. at 6. In this case, plaintiff sued Republic on a breach of contract theory, not a negligence theory. Therefore, the reasoning in *Harts* provides no support for plaintiff 's argument.

Even if plaintiff had pleaded a negligence theory or had presented an alternative argument for its breach of contract claim, the evidence in the lower court record does not support either of these claims. In October 1994, plaintiff entered into a lease agreement for computer equipment with C & W Leasing. After obtaining the computer equipment, plaintiff contacted Neil Shaw of Republic for the addition of computer equipment coverage. Plaintiff discussed the type of coverage that it preferred with Shaw. Passalacqua did not recall if Republic was notified that the computer equipment was leased. Passalacqua reviewed the policy, but not "with a fine tooth comb." Passalacqua did not recall whether Shaw told him that plaintiff was "fully covered."

On appeal, plaintiff cites to its own interrogatory answer that it informed Shaw that it wanted lease insurance and replacement coverage. However this answer contradicts Passalacqua's deposition testimony cited above. Plaintiff also cites to portions of Shaw's deposition transcript that were never presented to the trial court, and therefore, not part of the lower court record.[3] Additionally, plaintiff is charged with knowledge of the contents of the contract and should have raised questions about the coverage within a reasonable time of receiving the policy. *Marlo Beauty Supply*, *supra* at 324. For these reasons, the trial court did not err in granting summary disposition of plaintiff 's breach of contract claim against Republic.

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[3] In an appeal from a lower court decision, the record consists of the original papers filed in that court, or a certified copy, the transcript of any testimony or other proceedings, and the exhibits introduced. MCR 7.210. Expanding the record on appeal is not permitted. *Reeves v Kmart Corp,* 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

Plaintiff finally argues that the trial court erred in granting defendants summary disposition because plaintiff "had standing" to bring a claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. We disagree.

The MCPA prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.901 *et seq*. It defines the term "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and included the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d). The intent of the act is to protect consumers in their purchases of goods that are primarily used for personal, family or household purposes. *Zine v Chrysler Corp,* 236 Mich App 261, 272; 600 NW2d 384 (1999)

Plaintiff argues that *Catallo Assoc, Inc v MacDonald & Goren, PC,* 186 Mich App 571; 465 NW2d 28 (1990), requires us to conclude that the MCPA applies to commercial transactions such as the one at issue in this case. In *Catallo,* we held that, according to MCL 445.902(c), "personal" means "of or relating to a particular person" and the MCPA defines "person" as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity." *Id.* at 573. Based on this language, this Court held that office furnishings sold to a business for its own use in its own office were primarily for personal use. *Id.*

However, this Court determined in *Zine* that *Catallo* was wrongly decided,[4] and held instead that "if an item is purchased primarily for business or commercial rather than personal purposes, the MCPA does not supply protection." *Zine*, *supra* at 273. See also *Robertson v State Farm Fire & Casualty Co,* 890 F Supp 671 (ED Mich, 1995), and *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 85-86; 592 NW2d 112 (1999).

In this case, plaintiff claims that defendants violated the MCPA in the transaction involving the sale of business insurance which offered protection for, among other business concerns, computer equipment used solely in plaintiff 's restaurant. Plaintiff does not argue that the insurance was primarily for family or household purposes. Rather, plaintiff argues that the MCPA protects the transaction even though plaintiff, a business, purchased the insurance solely for a business purpose. Based on *Zine*, *supra*, plaintiff 's purchase of the business insurance was not protected by the MCPA, and the trial court did not err in granting defendants summary disposition of plaintiff's claim under the MCPA.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

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[4] *Zine* also noted that *Catallo* is not binding under MCR 7.215(I) because it was decided in October 1990. *Zine, supra* at 273 n 7.