Court of Appeals, State of Michigan

ORDER

Hastings Mutual Ins Co v Mosher, Dolan, Cataldo, & Kelly

Docket No. 265621

LC No. 04-056508-CK

Alton T. Davis
Presiding Judge

Mark J. Cavanagh

Michael J. Talbot
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motions for reconsideration and for leave to file a reply brief are also GRANTED.

This Court's opinion issued March 28, 2006, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 18 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

MOSHER, DOLAN, CATALDO & KELLY, INC.,

Defendant-Appellee,

and

LISA FEINBLOOM AND DAVID FEINBLOOM,

Defendants.

UNPUBLISHED
May 18, 2006

No. 265621
Oakland Circuit Court
LC No. 04-056508-CK

ON RECONSIDERATION

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting judgment in favor of defendant Mosher, Dolan, Cataldo & Kelly, Inc. ("Mosher"). We reverse.

Plaintiff argues that the trial court erred by granting summary disposition in Mosher's favor. We agree. Both parties moved for summary disposition under MCR 2.116(C)(10). This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Interpretation and construction of insurance contracts are also questions of law that this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id*.

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). When confronted with a dispute between the parties to an insurance contract over the meaning of the policy, the reviewing court "must determine what the agreement is and enforce it." *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000). In making that determination, the reviewing court must look to the contract as a whole and confer meaning on all its terms. *Harrington, supra* at 381. When an insurance policy contains ambiguous terms, this Court will construe the terms of the policy in favor of the insured. *Nabozny v Burkhardt*, 461 Mich 471, 477 n 8; 606 NW2d 639 (2000). However, "[t]his Court cannot create ambiguity where none exists." *Churchman, supra* at 567. Where there is no ambiguity, the terms of the contract must be construed according to their plain and ordinary meanings. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Moreover, the terms of an insurance contract are to be interpreted in accordance with the definitions in that contract, or, if no definitions are provided, are to be given a meaning according to their "common usage." *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). An insured bears the burden of proving coverage; however, it is the insurer that must prove that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995).

"Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. This Court has held that an insurance policy provision is valid 'as long as it is clear, unambiguous and not in contravention of public policy.'" *Harrington, supra* at 382 (citations omitted). The first step of this Court's inquiry, therefore, is to determine whether coverage exists according to the general insurance agreement. *Id.* In order to do so, we must first decide which commercial general liability ("CGL") policies, if any, apply to Mosher's claim in this case. Mosher argues that the 2001 policy applies to its "visible mold" claim because the framing of the house in 2001 caused the mold. Mosher further argues that the 2001 and 2002 policies cover its "other losses" for defective work claims, and that the 2003 policy does not apply to any of its claims. Plaintiff does not discuss these issues, but simply contends that the policies contain identical terms and provisions. Regardless of which policy is used, however, the relevant policy language, contained in all three CGL policies, provides:

> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1). The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2). The "bodily injury" or "property damage" occurs during the policy period.
>
> * * *
>
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. "Property damage" means:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Thus, according to the policy language, before we inquire into whether the property damage at issue occurred during a particular policy period, we must first determine whether it was caused by an "occurrence" within the meaning of the policies.

The policies in question provide coverage for "bodily injury" or "property damage" that was "caused by an 'occurrence.'" "Occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because the term "accident" is not defined in the policy, we must define that term according to its common usage. *Cavalier Mfg Co, supra* at 94. Our Supreme Court has found that the term "accident," as is it commonly used, means "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999).

The damages at issue here include visible mold found on the sub-floor material and joists above the basement ceiling, for which the arbitrator found Mosher liable. The arbitrator also found Mosher liable for "other" deficiencies, including: (1) the mason subcontractor failed to properly install the Michigan fieldstone by leaving "unfilled cavities in two locations," (2) Mosher failed to satisfy applicable building code requirements regarding "brick ties" by installing 28-gauge anchors rather than 22-gauge as required by code, (3) Mosher failed to satisfy the code that requires flashing and weeps over lintels and below sills on all of the windows, (4) Mosher failed to install flashing at various miscellaneous locations, (5) Mosher failed to install additional ductwork for combustion air large enough to satisfy code requirements, and (6) Mosher failed to install sleeves in the exterior wall of the residence for several pipe penetrations in violation of code requirements. Mosher provided an affidavit from John Kelly that confirmed that subcontractors completed all of these projects. As discussed below, we find that these damages are not "accidents" within the meaning of the policies.

Of particular import to our resolution of this issue is *Hawkeye-Security Ins Co v Vector Const*, 185 Mich App 369; 460 NW2d 329 (1990), involving an insured who allegedly performed defective concrete work for an improvement project at a waste water treatment plant. When the owner of the plant discovered that the concrete installed by Vector, which,

incidentally, was provided by a subcontractor, did not meet project specifications, Vector was forced to remove and repour approximately 13,000 yards of concrete. *Id.* at 371-372. Vector sought indemnity from its insurance carrier pursuant to the terms of a CGL policy.[1] *Id.* at 372. The court held that "the defective workmanship of Vector, *standing alone*, was not the result of an occurrence within the meaning of the insurance contract." *Id.* at 378 (emphasis added).

The *Vector* Court discussed with approval *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962), which involved an insured's defective workmanship that caused damage to the property of others, but distinguished *Bundy* on its facts. In *Bundy*, the insured was the manufacturer of radiant heat tubing installed in the concrete floors of buildings. *Id.* at 151. A defect in the tubing caused it to leak, which in turn caused damage to certain furnishings inside the buildings. *Id.* at 152. In order to replace the defective tubing, portions of the concrete floors had to be removed and repoured. *Id.* at 153. The owners of several of the buildings brought suit against the insured alleging breach of warranty and negligence. *Id.* at 151-152. The insurer agreed to indemnify only for the cost of replacing various damaged furnishings, and the insured brought suit to recover for the other alleged damages, including the costs of removing and repouring the concrete floors. *Id.* at 153.

The Sixth Circuit held that the insurer was required to indemnify the insured for the costs of removing the defective tubing and the costs of installing new tubing, but not for the costs of the new tubing itself, clearly ruling that the broader duty to defend was mandated. *Id.* at 154. The property damage that was not confined to the insured's own work product was deemed to be "unforeseen, unexpected and unintended" and therefore an "accident," *id.* at 153, which would qualify as an occurrence under the terms of the policy at issue in the present case. The *Bundy* court, moreover, rejected the argument that an "accident," or "occurrence," cannot arise on the basis of the insured's negligence or breach of warranty. *Id.*

Further, in *Radenbaugh, supra,* the plaintiffs alleged breach of contract against their insurance carrier for breach of its duty to defend and indemnify plaintiffs in an underlying cause of action that arose out of the sale of a doublewide mobile home. *Radenbaugh, supra* at 136. In conjunction with the sale, the plaintiffs provided erroneous schematics and instructions to contractors hired by the purchaser of the home for the construction of the home's basement foundation and erection of the home on its basement. *Id.* The homeowner alleged that the plaintiffs' defective instructions to the basement contractor caused the basement of the mobile home to be improperly constructed and the home improperly erected. *Id.* at 136-137. As a result of the alleged faulty instructions, the basement was rendered unusable because water seeped into and condensed on the walls, causing mildew and mold. *Id.* at 142. The plaintiffs filed suit against their insurance carrier seeking to enforce its duty to defend and indemnify the plaintiffs pursuant to a CGL policy. *Id.* at 136-137.

This Court in *Radenbaugh* acknowledged the holdings of both *Vector* and *Bundy*:

---

[1] The policy in *Vector, supra,* is substantially similar to the policies at issue in this action.

> At first blush, the result in *Bundy* appears to be inconsistent with the result in *Vector*. Whereas the *Vector* court held there was no coverage for damage arising out of the insured's defective workmanship, in *Bundy*, the Sixth Circuit held that the insured was required to pay for damage arising out of the insured's defective workmanship.
>
> * * *
>
> The holdings in *Bundy* and *Vector* can be reconciled by focusing on the property damage at issue in each case. In *Vector*, the insured's defective workmanship resulted only in damage to the insured's work product. In *Bundy*, the insured's defective workmanship resulted in damage to the property of others. *Taken together, these cases stand for the proposition that when an insured's defective workmanship results in damages to the property of others, an "accident" exists within the meaning of the standard comprehensive liability policy.* This construction is supported by the definition of "accident" adopted by the Michigan Supreme Court.[2] [*Radenbaugh, supra* at 146-147, quoting *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich 1992), (emphasis and footnote added).]

The *Radenbaugh* Court, further relying on analogous federal decisions, found that, because the defendant's defective work had caused damage to the plaintiff's property that was not part of defendant's work product, an "occurrence" had occurred under the terms of the policy. *Radenbaugh, supra* at 147. It should be noted that the definition of "occurrence" in *Radenbaugh* was identical to the definition of "occurrence" in the present case. *Radenbaugh, supra* at 140. In interpreting this policy language, this Court held that CGL policies do not cover damages that consist of a mere diminution in value of the insured's work product caused by alleged defective workmanship, breach of contract, or breach of warranty. *Id*. at 140-141. Accordingly, the rule is clear:

> [W]hen an insured's defective workmanship results in property damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy. . . . However, when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy. [*Id*. at 147]

---

[2] The *Radenbaugh* Court cited *Vector, supra* at 374, quoting *Guerdon Industries, Inc v Fidelity & Cas Co*, 371 Mich 12, 18-19; 123 NW2d 143 (1963), for the definition of "accident" as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Radenbaugh, supra* at 147.

In the present case, the arbitrator found that all the defects in the Feinblooms' home resulted from Mosher's poor workmanship or installation of defective materials, constituting both a breach of contract and a breach of the implied warranty of habitability. Further, the arbitrator found that all the defects could be remedied by either replacing the defective materials or repairing the defective work. The arbitrator specifically rejected the Feinblooms' contention that Mosher's defective work had caused damage to other property in the home, such as the Feinblooms' furniture, that was not part of defendants' work product. Thus, there is no evidence indicating that either the visible mold or the "other losses" went beyond Mosher's liability to repair or replace its own defective products. Therefore, the damages from the visible mold and the "other losses" are excluded from coverage because they are not "occurrences" according to the general insurance agreement. *Radenbaugh, supra* at 147; *Harrington, supra* at 382.

With regard to the "other losses," the trial court erroneously distinguished *Vector* on its facts, stating:

> The construction company distinguishes *Vector Construction* on grounds that it applies where "an insured's defective workmanship . . . results solely in damage to the insured's work product" and not to situations where "a subcontractor's work damages the insured's property." All of the problems with the home in this case were the result of work done by subcontractors and, therefore, coverage is available. See *Calvert Ins Co v Herbert Roofing and Insulation Co*, 807 F Supp 435 (ED Mich 1992) (distinguishing *Vector* and providing coverage on this basis).
>
> * * *
>
> The Court agrees that this is the proper analysis, and that *Vector Construction* can be distinguished on grounds that the defects are attributable to the subcontractors. Therefore, Hastings can avoid coverage only if the policies' exclusions apply.

The trial court erroneously relied on *Calvert, supra*, as support for its holding. In *Calvert*, the defendant roofing company installed a roof at a school. Shortly after completion of the project, the roof leaked and "caused damage to the interior of the school building (e.g., ceiling tiles, light fixtures, lockers, flooring, etc.), the exterior of the building (e.g., walls and foundation), and to various articles of personal property of school district employees and students." *Calvert, supra* at 436. The federal district court, interpreting policy language nearly identical to that in the instant case, wrote, "the Court gleans three elements that must be established in order to establish coverage: (1) an accident, (2) resulting in bodily injury or property damage, (3) which is neither expected nor intended from the standpoint of the insured." *Id.* at 437. Nowhere in *Calvert* did the Court distinguish *Vector* on its facts or indicate that *Vector* does not apply to situations in which a subcontractor's work damages the insured's property. In fact, as noted above, Boichot Concrete Company, a subcontractor, supplied the defective concrete that Vector installed. *Vector, supra* at 371.

Finally, in applying the policy language to the specific facts of this case to determine coverage, as we are required to do, we find that Mosher's argument and the trial court's holding

cannot stand in light of the rule explained in *Radenbaugh, supra.* Specifically, the policy language defines Mosher's work as follows:

> 21. "Your Work" means:
>
> a. Work or operations performed by you *or on your behalf*; and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.
>
> "Your Work" includes:
>
> a. Warranties or representations made at any time with respect to the fitness qualify, durability, performance or use of "your work", and
>
> b. The providing of or failure to provide warnings or instructions.[3] [Emphasis and footnote added.]

According to the plain language of the policies, Mosher's "work" includes work performed by subcontractors. Additionally, the existence of an "occurrence" is dependent on the nature of the act, not on who performs it. The defects in Mosher's and its subcontractor's work are, therefore, not "occurrences" within the meaning of any of the CGL policies, and, thus, not covered losses. In light of this finding, it is unnecessary to apply any of the exclusions to any of the CGL policies. *Harrington, supra* at 382.

The trial court erred by granting summary disposition in favor of Mosher and in denying summary disposition for plaintiff with regard to plaintiff's duty to indemnify. The CGL policy, however, also created a duty to defend against claims for covered damages. "It is well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify." *Radenbaugh, supra* at 139.

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. [*Smorch v Auto Club Ins Co*, 179 Mich App 125, 128; 445 NW2d 192 (1989).]

---

[3] This language is found verbatim in the 2001 and 2002 CGL policies. The 2003 CGL policy contains the substantially identical wording, but is it found in Section V(22), and it is listed slightly differently.

Where there is doubt concerning whether the complaint "alleges liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Radenbaugh, supra* at 138 (citation omitted). The insurer owes the duty to defend until such time as the insurer has confined the claims against the insured to those theories that the policy would not cover. *American Bumper and Mfg Co v Hartford Fire Ins Co*, 207 Mich App 60, 67; 523 NW2d 841 (1994). "Until that point, the allegations must be regarded as coming arguably within the liability policy, thus resulting in a duty to defend." *Id.*

Because the Feinblooms' complaint in arbitration alleged damages to property other than Mosher's work-product, i.e., household furniture, this damage was arguably covered by the policy; therefore, plaintiff had a duty to defend Mosher. The arbitrator's later determination that Mosher is not liable for those damages does not affect plaintiff's initial duty to defend against the Feinblooms' claims. *Smorch, supra*. However, once the Feinblooms claims are limited to only damages that fall outside the scope of the policy, i.e., Mosher's own work-product, plaintiff's duty to defend ends. *American Bumper, supra*. On remand, it is therefore necessary to determine at what point in time, if any, plaintiff can confine the Feinblooms' claims against Mosher to those theories that the policy would not cover, and to determine the extent of plaintiff's liability for the cost of Mosher's defense until that point.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot