

STATE OF MICHIGAN
COURT OF APPEALS

OVERALL TRADING, INC. and CITY
FURNITURE,

UNPUBLISHED
January 15, 2009

Plaintiffs-Appellees,

v

HASTINGS MUTUAL INSURANCE
COMPANY,

No. 278859
Wayne Circuit Court
LC No. 05-530922-CK

Defendant-Appellant.

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this insurance dispute, defendant Hastings Mutual Insurance Company appeals as of right from the trial court's order denying its motion for summary disposition under MCR 2.116(C)(10) and granting plaintiff's summary disposition pursuant to MCR 2.116(I)(2). For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

This action arises from plaintiff Overall Trading, Inc.¹ claims for coverage for water damage to personal property in their warehouse that occurred on two separate occasions, January 14, 2005, and February 20, 2005, (referred to hereafter as the January claim and the February claim, respectively).

I. City Furniture

From the outset we note that defendant argues, and plaintiffs Overall Trading Inc. and City Furniture agree, that City Furniture is not a proper party in this insurance dispute and should be dismissed. Accordingly, upon remand the trial court shall enter an order dismissing City Furniture with prejudice.

¹ The parties agree that City Furniture should not be a party to this appeal. Accordingly, reference to plaintiff will be singular.

II. Summary Disposition

A. Standard of Review

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). A court must consider the submitted evidence in the light most favorable to the nonmoving party. *Corley, supra* at 278. Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

B. Insurance Policy Preconditions

The insurance policy requires that plaintiff fully comply with its provisions before filing a legal action. One of the provisions requires the insured to submit a proof of loss with information the insurer requests. The single proof of loss plaintiff submitted was for both the January and February claims. Defendant asserted that it rejected plaintiff's proof of loss because it disputed the alleged damages and plaintiff did not submit supporting documentation at that time. Plaintiff never disputed this assertion. Defendant argues that because plaintiff failed to submit a sufficient proof of loss after it rejected the one that plaintiff originally submitted, plaintiff failed to satisfy the condition that it provide a sworn statement with which to bind plaintiff and allow defendant to assess its liability. Defendant asserts that plaintiff was required to submit a separate inventory of the February losses in order for it to assess liability on that claim.

For a proof of loss to be unsatisfactory, after a rejection, an insurer must inform the insured what materials constitute a satisfactory proof of loss. *Griswold Properties, LLC v Lexington Ins Co*, 275 Mich App 543, 564; 740 NW2d 659 (2007), substituted in part 276 Mich App 551 (2007), citing MCL 500.2006(3). A proof of loss is not unsatisfactory simply because the insurer disputes the damages presented by the insured. *Id.* Failure to comply with the statute equals an acceptance of the proof of loss submitted. *Id.* at 564. A satisfactory proof of loss does not equate to an agreement regarding the amount of an insured's damages. *Id.* at 566.

Here, because defendant moved for summary disposition under MCR 2.116(C)(10), it had the initial burden of showing by evidentiary materials that it informed plaintiff what documentation was required to cure the proof of loss deficiency. *Coblentz, supra* at 569. Defendant makes only bald assertions that, before the lawsuit was filed, it repeatedly requested that plaintiff submit an inventory of its alleged damages from the February incident. Defendant failed to meet its burden of showing that plaintiff's proof of loss was unsatisfactory and, therefore, did not show that plaintiff failed to meet this policy precondition before filing this

action. Accordingly, the trial court did not err in denying defendant's motion for summary disposition on this basis.

C. January Claim

Defendant denied plaintiff's January claim shortly after it was made because it concluded, after an investigation, that the cause of loss was surface water infiltration, which is not covered under the insurance policy. The trial court found that all water damage was covered, but gave no explanation for this finding. Defendant presented evidence that the property damage that occurred in January was the result of surface water infiltration. Such a cause of loss is clearly excluded under defendant's policy. However, plaintiff presented two reports in which engineers opined that the January loss was caused by water leakage through the warehouse's roof, albeit at different locations. This evidence creates a genuine issue of material fact regarding the cause of the damage for the January incident. Therefore, the trial court erred in granting summary disposition in favor of plaintiff with regard to the January claim. But because a factual question exists, the trial court did not err in denying defendant summary disposition with respect to this issue.

Plaintiff argues that any coverage issue was properly part of the appraisal process once defendant accepted plaintiff's demand for an appraisal. Defendant argues that the appraisal process did not, and could not, resolve the coverage issue. We hold that defendant is correct in its assertion that the appraisal process did not resolve the issue of coverage. "[T]he issue of an insurance policy's coverage is for the court to decide, not the appraisers." *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 473; 717 NW2d 341 (2006); *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 487; 476 NW2d 467 (1991). Coverage issues can be subject to a court ruling even after an appraisal so long as there was no indication that coverage was conceded or waived by the insurer. *Angott, supra* at 473 n 3.

Here, defendant reserved its rights and defenses under the insurance policy when it denied plaintiff's January claim. Defendant also stated that it reserved its rights and defenses under the policy when it accepted plaintiff's appraisal demand. Further, throughout the subsequent litigation, defendant continually asserted that it was not liable for plaintiff's January claim because it did not involve a covered loss. Thus, defendant never conceded coverage for the January claim or waived its right to assert the defense.

At the hearing on defendant's first summary disposition motion, the trial court found that there were questions of fact for the appraisers to resolve and denied defendant's summary disposition motion without specifically addressing plaintiff's January claim. Because coverage issues are within the province of the courts, the trial court should have suspended the appraisal process in regard to the January claim until the coverage issue was resolved. "[A] court is to determine coverage in a declaratory action before an appraisal of the damage to the property." *Angott, supra* at 473, quoting *Kwaiser, supra* at 486. Thus, the trial court erred in allowing the January claim to be part of the appraisal process. Accordingly, we remand to the trial court for resolution of the issue of coverage with respect to the January claim.

Plaintiff's reliance on a bulletin issued by Michigan's Office of Financial and Insurance Services to argue that the question of coverage is to be resolved by the appraisers is misplaced. The bulletin states, in pertinent part:

Once an insurer determines that a loss is covered under the subject policy of insurance, and there is a demand for appraisal by the policyholder or insurer, disagreements between policyholders and insurers over factual issues of whether some of the damages claimed by the policyholder are part of the amount of loss caused by the covered event are part of the appraisal process. These issues do not constitute a “coverage question” for the Courts, and are manifestly included within the mandatory legislative requirements that disputes over the “amount of loss” be subject to appraisal.

This directive is only applicable once an insurer concedes that a loss is covered. Here, defendant never conceded that the January loss was covered.

D. February Claim

Defendant also argues that the trial court erred by denying its motion for summary disposition with respect to the February claim. Defendant asserted that plaintiff failed to carry its burden of establishing that their February losses were covered under the policy because plaintiff did not identify the property damaged only by the February incident, or establish that the damage was caused by a covered cause of loss.

1. Covered Cause of Loss

In regard to cause of loss, defendant presented no evidence that the February claim was not covered. Plaintiff presented evidence that the February water damage was caused by water leakage from the warehouse roof. Defendant’s evidence also indicated that the February water damage was caused by a roof leak. Causes of loss are covered under the policy unless they are expressly excluded or limited. Defendant has not provided any basis for concluding that such a cause of loss is not covered under its policy. Therefore, the trial court did not err in granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2) with respect to the issue of coverage for the February incident.

2. Covered Damages

In regard to the damaged property arising from the February incident, defendant focuses on the fact that plaintiff never separated their January and February losses. This dispute is about damages, not coverage. Such a dispute is properly resolved in the appraisal process once there has been a demand. *Kwaiser, supra* at 488. “Judicial review of the [appraisal] award is limited to instances of bad faith, fraud, misconduct, or manifest mistake.” *Id.* at 486.

In this case, however, the issues of damages is complicated by the fact that there are two separate claims, one involving a covered loss, and the other involving a loss for which there is a question of fact on the issue of coverage. The appraisal award expressly states that it was based on the total value of damaged property, without differentiating whether the damage occurred in either the January or February incidents. If the coverage issue regarding the January claim is resolved in plaintiff’s favor, there is no manifest mistake in regard to the amount of the appraisal award and it should stand. However, if the coverage issue regarding the January claim is resolved in defendant’s favor, property damaged in the January incident should not have been included in the appraisal award and there was a manifest mistake. In this event, the trial court

will need to determine what damaged property is associated only with the January claim, and revise the appraisal award accordingly.

Accordingly, we conclude that the trial court did not err in granting summary disposition in favor of plaintiff with respect to their February claim. However, because the appraisal award consisted of damages that occurred in both the January and February incidents, the damages attributable to the January incident will need to be separated on remand if the trial court determines that plaintiff's January claim is not covered.

III. Dismissal as Sanction

Lastly, defendant argues that the trial court erred by denying its request to dismiss plaintiff's complaint for failure to comply with the court's earlier order requiring plaintiff to submit separate inventories for the January and February claims. It is clear from the record that plaintiff did not comply with the trial court's order. However, dismissal for failure to comply with a court order is a drastic sanction, and requires a balancing of several factors. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 632; 750 NW2d 228 (2008). In this case, the purpose of separate inventories is significant only if it is determined that there is no coverage for the January incident. Conversely, if coverage exists for the January incident, this issue is of no consequence because the appraisal award encompassed both the January and February losses. Thus, consideration of whether dismissal or some other sanction for failure to submit separate inventories is premature at this point. The trial court may revisit this issue after the question of coverage for the January incident is resolved.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher