

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN,

Plaintiff-Appellee,

v

DYNAMIC LAND, L.L.C.,

Defendant-Appellant.

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UNPUBLISHED  
February 24, 2009

No. 282072  
Oakland Circuit Court  
LC No. 2006-071793-CZ

Before: Whitbeck, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the trial court’s order granting summary disposition to plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was in the process of renovating a commercial property when a sprinkler system pipe burst on January 30, 2005. Defendant filed a claim for lost business income, specifically for lost rents and actual expenses, in the amount of \$288,181 for the 12 months following the incident. The property had two rental spaces. The first floor had been rented from December 2003 through July 2004 but was not rented at the time of the incident. The second floor had been rented on a month-to-month basis, but that lease had expired at the end of December 2004, in part because defendant intended to sell the building and felt it would show better if it were unoccupied. Therefore, the building was unoccupied at the time of the incident.

Plaintiff brought suit for declaratory judgment and moved for summary disposition under MCL 2.116(C)(10). Plaintiff asserted that any lost business income that defendant suffered was not caused by the pipe break. Defendant argued that it was owed lost rents under either the policy’s definition of “rents”<sup>1</sup> or under the policy’s provision requiring that lost business income be calculated based on the length of time that the property was untenable. Defendant asserted that because the building was untenable for 12 months after the pipe break, this was the

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<sup>1</sup> This definition of “rents” in the policy is “the fair rental value of any portion of said property which is occupied by you.”

amount of time for which lost rents were due. The trial court disagreed, granting plaintiff's motion and later denying defendant's motion for reconsideration.

On appeal, defendant raises the same arguments that it raised below. Defendant also argues that even if it did not show 12 months' lost income, the length of time that the property was untenable presents, at a minimum, a question of fact; thus, summary disposition was inappropriate. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When a motion is brought under MCL 2.116(C)(10), the moving party has the initial burden of supporting its position with admissible documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Then, the party opposing the motion has the burden of producing admissible evidence showing 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). The nonmoving party must go beyond the pleadings and set forth specific facts showing that a genuine issue of material fact exists. *Smith*, *supra* at 455. The motion is properly granted if the nonmoving party fails to present documentary evidence establishing the existence of a material factual dispute.

An insurance contract is read as a whole, and meaning is given to all terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003); *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 197; \_\_\_ NW2d \_\_\_ (2008). All parts should be harmonized so far as is reasonably possible, so as to give effect to each word and clause. *Berkeypile*, *supra* at 197.

In this case, the policy provides coverage for "the *actual loss* of business income sustained." The trial court reasoned that the policy insured against actual loss caused by the perils insured against (here, the pipe break) and that defendant had not shown any compensable, actual loss. Even if the building was not "vacant" (and thus not subject to coverage), the trial court noted that under the policy, "[i]n determining rents, due consideration will be given to the rental experience before the date of damages." There were no tenants at the time of the pipe break, and defendant failed to show either that the damage resulted in any tenants being unable to move in or that it even anticipated renting to any tenants. Defendant's agent, Andrew Kowal, testified in his deposition that the lower floor had not been rented for some time, and had only been rented for six months in the previous five years. There was no evidence of any anticipated tenants for this space. Similarly, the upper floor had been vacated at defendant's request just a month before the pipe break, and Kowal testified that he did not renew that tenant's lease, in part, because he planned to make renovations to help sell the building. Kowal testified that he was "not having any luck" renting the building. The policy provides that loss is calculated from the date the property would have been tenantable had no damage occurred. Here, defendant was still in the process of renovation and did not establish that the property would have been tenantable by any particular date if the break had not occurred. Even if the loss had not occurred, defendant would not have had any rental income because the building had no tenants and defendant's ongoing renovations had made the building untenable. In short, defendant failed to present any evidence that the pipe break caused it to lose any rental income that it otherwise would have received. The trial court correctly found in plaintiff's favor.

Moreover, defendant's argument that it was occupying the building and is entitled to "fair rental value" fails because defendant must first show that it has suffered an actual *loss of income*.

Defendant was not paying rent to itself, nor was it renovating the building in order to install new tenants. Construing this provision in the way defendant prefers is contradictory to the express provision that only actual losses are compensable. Defendant's ongoing renovations had made the building unrentable; thus, the building had no "fair rental value." Even if the pleadings raised a question of fact regarding the length of time that the building was untenable as a result of the pipe break, defendant was obligated to support that allegation with some documentary evidence in order to successfully counter plaintiff's motion. Because it failed to do so, the trial court correctly granted plaintiff's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens