STATE OF MICHIGAN

COURT OF APPEALS

TOM FABATZ and HENRIETTA FABATZ,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 350209
Grand Traverse Circuit Court
LC No. 2019-034745-CK

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In this homeowner's insurance policy dispute, plaintiffs brought claims for declaratory judgment and breach of contract, also seeking consequential damages and penalty interest stemming from that alleged breach, and for coverage of a bathhouse under an "other structures" endorsement to the insurance policy. The trial court granted summary disposition to defendant under MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiffs appeal by right, and for the reasons set forth in this opinion, we affirm.

I. BACKGROUND

In early 2017, plaintiffs began a remodeling project to add approximately 2,100 square feet to the existing home. The permit plaintiffs obtained indicated a total cost of $229,016 for the addition. Plaintiffs did not contact defendant to inform it of the expansion; instead, plaintiffs intended to contact defendant when the work was complete. The work commenced in April 2017.

While work was still ongoing, in early August 2017, defendant sent plaintiffs an annual renewal policy. The renewal included a "Notice of Change in Policy Terms Guaranteed Home Replacement Cost." (GHRC). The notice informed the policyholder that GHRC was subject to the requirement that the policyholder notify their agent "immediately of any additions, alterations, or improvements to [their] dwelling which individually or cumulatively increases your dwelling replacement cost by $10,000 or more." The specific policy terms of the GHRC endorsement provided:

It is agreed:

If, prior to covered loss to your dwelling, you have:

1. permitted us to increase the Coverage A - Dwelling limit of insurance stated in the Declarations to reflect:

a. any increase because of inflation; and

b. any property valuation estimates made by us; and

2. notified us of any additions, alterations or improvements to your dwelling which individually or cumulatively increased your dwelling replacement cost by $10,000 or more; and

3. paid an additional premium for any increase in the limit of insurance

then at the time of a covered loss to your dwelling, if you repair or replace your dwelling:

1. the Coverage A- Dwelling limit of insurance stated in the Declarations shall, if necessary, be increased to equal the current replacement cost of your dwelling and shall apply to the cost of repairing or replacing your dwelling at the residence premises . . .

Plaintiffs did not read the notice or the policy and did not inform defendant of the ongoing home addition.

On the evening of January 15, 2018, a fire consumed and destroyed the original house and much of the incomplete addition. By this point in time, plaintiffs still had not informed defendant of the addition despite paying approximately $150,000 toward the expansion. The dwelling limit at time of loss was $175,000, which was paid by defendant.

Following payment by defendant, plaintiffs submitted their sworn proof of loss, listing the damages and coverages involved with respect to the dwelling, its contents, and additional living expenses. While plaintiffs discussed damages to a bathhouse near the main home and defendant's adjuster had evaluated the bathhouse for coverage under the policy's "other structures" endorsement, plaintiffs did not include it in their proof of loss. Defendant provided additional living expenses (rent) for 12 months, then denied plaintiffs any additional claims under the policy.

After denial of their claims, plaintiffs filed a complaint alleging that defendant failed to pay the GHRC coverage based on defendant's belief that plaintiffs were required to immediately notify defendant of their intention to begin an addition. Plaintiffs set forth three counts, seeking declaratory relief (I) and penalty interest (III), and alleging breach of contract for failure to pay the GHRC (II.) In their count for declaratory relief, plaintiffs alleged that defendant had improperly interpreted the GHRC endorsement and sought a declaration that they were entitled to GHRC coverage under the policy. Their contract claim asserted that defendant breached the policy by failing to pay the GHRC, resulting in contractual and consequential damages, i.e., additional living expenses, within the contemplation of the parties. Finally, plaintiffs sought penalty interest in violation of MCL 500.2006 averring that defendant failed to timely pay the GHRC.

Eventually, defendant moved for partial summary disposition under MCR 2.116(C)(10), arguing that plaintiffs were not entitled to GHRC coverage because plaintiffs did not comply with the policy's GHRC endorsement. Specifically, defendant asserted, plaintiffs failed to notify defendant of each addition, improvement, or alteration that increased the replacement cost over $10,000, and plaintiffs did not pay the related increased premiums.

Plaintiffs responded, maintaining that summary disposition should be granted in their favor under MCR 2.116(I)(2) or, at a minimum, that genuine issues of fact existed that precluded summary disposition. Plaintiffs maintained that they had no duty under the policy to notify defendant of the improvements until after the project was complete. In particular, plaintiffs asserted that the subject language – requiring notice of "any additions, alterations, or improvements" that increase dwelling replacement by $10,000 or more—is ambiguous as to when notice is required and should be construed in favor of plaintiffs.

The trial court held a hearing on the motion in July 2019, and following arguments held:

> [T]he Plaintiffs have focused the bulk of their arguments on the second prong of the language [in the GHRC endorsement]. . . that is that the notification requirement is ambiguous and therefore their failure to notify the insurance company of the addition doesn't preclude them from coverage under the Guaranteed Home Replacement Cost portion of their policy.
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> In reviewing that language again, it is the Court's opinion that the language is not ambiguous, that it is clear, it does spell out when it is -- pardon me -- it does spell out what actions will trigger the requirement of notice and that is the "additions, alterations and improvements" that cumulatively or individually increase the dwelling replacement cost by $10,000 or more. That is the triggering event. It is clear in the language.
>
> It's unfortunate that it is very unfortunate that the Plaintiff did not review, read and understand that provision. I don't think it is difficult to understand. I don't disagree with the sentiment that it may be challenging to have to file several notifications every $10,000 with the insurance company, but that is the agreement that the parties struck. That is the language that the parties are held to here and that is the nature of the policy that both parties did agree to.
>
> So it is the opinion of the Court that the contract is clear, it's unambiguous, notice was to be provided as I said when individual or cumulative additions, alterations or improvements increase replacement costs by $10,000 or more. That did not occur and therefore the additions, alterations and improvements cannot be said to be considered part of the covered loss. The Defendant is entitled to summary disposition via (C) (10). The parties will proceed to evaluate and resolve the personal property issues that remain . . . .

The parties then agreed to a stipulated order of dismissal for purposes of perfecting an appeal by right, dismissing plaintiffs' personal property claim and preserving plaintiffs' right to appeal the partial summary disposition order. This appeal ensued.

II. ANALYSIS

We review a lower court's decision on a motion for summary disposition de novo. "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating a motion for summary disposition brought under this subsection, [this Court] considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id*. at 119-120. The motion is properly granted if "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "In addition, the proper interpretation of contracts and the legal effect of contractual provisions are questions of law subject to review de novo." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012).

As they did in the trial court, plaintiffs argue that the plain language of the policy did not require them to notify defendant of improvements before they were completed in order for GHRC coverage to apply. Instead, plaintiffs argue, the policy required notification of the renovation only after a project's completion. Accordingly, plaintiffs contend that defendant wrongly denied them GHRC coverage based on plaintiffs' failure to notify defendant of each improvement that increased dwelling replacement cost of the property by $10,000 or more. Alternatively, plaintiffs argue that the GHRC endorsement is ambiguous and should be construed against defendant.

This Court construes "an insurance policy in the same manner as any other species of contract [in accord with principles of contract construction.]" *Id*. at 367. "In ascertaining the meaning of a contract, [the Court must] give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Cont'l Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). When not contrary to law, "a court must construe and apply unambiguous contract provisions as written." *Id*. at 461. Alternatively, a contract is "ambiguous on its face only if it is equally susceptible to more than a single meaning." *Kendzierski v Macomb Co*, 503 Mich 296, 311; 931 NW2d 604 (2019) (citation and quotation omitted). "[C]ourts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity." *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003).

Based on the relevant policy language, for GHRC to apply, the insured must have, prior to the loss: (1) permitted defendant to increase the dwelling limits, (2) notified defendant of "any additions, alterations or improvements to [the] dwelling which individually or cumulatively increased [the] dwelling replacement cost by $10,000 or more," and (3) paid an additional premium. The parties largely dispute only the second requirement, regarding notification. We conclude the language in the contract is clear, and not subject to differing or varying interpretations. Here, the policy language required plaintiffs to provide notification to defendant, prior to a loss, of "any additions, alterations or improvements" to the home that, "individually or

cumulatively increased" the home's replacement cost "by $10,000 or more." "Alteration"[1] means to change or alter something; "addition,"[2] in the building context, means a part added; and, "improvement"[3] means to enhance value. These terms are qualified by the word "any," which means in context, "one, some, . . . or all."[4] Giving these terms their plain meaning, the types of modifications for which notice is required are broadly defined to encompass a wide array of modifications. Next, the phrase, "which individually or cumulatively increased your dwelling replacement cost by $10,000 or more," qualifies the terms "any alterations, additions or improvements," and describes when, and under what circumstances, notice is required for the modifications. Therefore, any modifications that together or alone increase dwelling replacement cost by $10,000, needed to be reported to defendant.

We note that plaintiffs disagree with this construction, arguing that because the policy used the past tense, "increased," the policy contemplated notification only when the project was completed. As previously explained, plaintiffs contend that an "addition, alteration, or improvement" does not exist until it is finished and can only be measured in value at that time. Plaintiffs also point out that other insurance companies' replacement cost provisions include a time frame for notification, either at the start of the project or within days of completion. Plaintiffs concede that the instant policy did not include a notice time frame, however, they argue, construing the policy as requiring plaintiffs to have notified defendant every time $10,000 in value was added during the course of the project is not reasonable.

Plaintiffs present an unavailing argument as to how to read the contract. In order to find agreement with plaintiffs' reading, we must insert into the policy language the term, "completed," an action that is expressly prohibited by our case law. We have been instructed by our Supreme Court that "insurance policies are to be enforced as written unless a contractual provision violates law or public policy," *Rory*, 473 Mich at 491. Here, the verb "increased" is modified by a prepositional phrase: "by $10,000 or more," not by "completed." The phrase thus indicates what action triggers notification. We cannot glean any language within the policy, explicitly or implicitly stating or requiring that any of the alterations, additions or improvements be completed prior to notification, or that completion of those things is a condition of notification. Consequently, the triggering event for notice to defendant is any modification (alone or together with others and whether complete or not), that results in an increase of home replacement cost by $10,000. Hence,

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[1] See Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/alteration, accessed August 8, 2020 (defining "alteration" as "the act or process of altering something" or "the result of changing or altering something").

[2] See Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/addition, accessed August 8, 2020 (defining "addition").

[3] See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/improvement, accessed August 8, 2020 (defining "improvement" as "the act or process of improving" especially "something that enhances value."

[4] See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/any, accessed August 8, 2020 (defining "any").

any alteration addition or improvement which increases the replacement value of the home by $10,000 or more must be reported to defendant. Admittedly, plaintiffs failed to do so.

Plaintiffs' additional arguments are also unavailing. Plaintiffs point out that other insurers' policies provide an express time frame for notification. In particular, plaintiffs note that their prior insurer required notification within a number of days after completion of a project. The question presented for review in this appeal is not what is stated in other policies of insurance, but whether the instant policy language is unambiguous. See *Rory*, 475 Mich at 464. Hence, the terms of these other policies are immaterial to the policy language at issue in this appeal.

Plaintiffs also assert that the absurd results doctrine should invalidate the GHRC provision. In particular, plaintiffs argue that it would be unreasonable or unfair to require that they file a notification for every $10,000 in replacement cost value added since it would be impossible to determine exactly when that threshold would be met. However, we are precluded by decisions of our Supreme Court from reaching such a conclusion. Our Supreme Court has not recognized the absurd results doctrine as a valid tool of construction, see cf. *People v McIntire*, 461 Mich 147, 155-160; 599 NW2d 102 (1999) (rejecting absurd result doctrine in statutory construction context), and, "fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory*, 473 Mich at 461.

Plaintiffs also claim that they are entitled to compensation for the loss of their bathhouse. Defendants argue that the trial court's dismissal of this claim should be affirmed because plaintiffs failed to timely amend the pleadings to include this claim. Notwithstanding plaintiffs' procedural failure, plaintiffs are not entitled to damages for defendant's failure to cover the bathhouse under the other structures endorsement. There is no disagreement that plaintiffs failed to submit a proof of loss, as required by the policy, that included the bathhouse as an itemized loss. The policy's proof of loss provision provides:

WHAT TO DO IN CASE OF LOSS

1. PROPERTY

If a covered loss occurs, the insured must:

* * *

d. send to us, within 60 days after you notify us or our agency of the loss, a proof of loss signed and sworn to by the insured, including:

(1) the time and cause of loss;

(2) the interest of insureds and all others in the property;

(3) actual cash value and amount of loss to the property;

(4) all encumbrances on the property;

(5) other policies covering the loss;

(6) changes in the title, use, occupancy or possession of the property;

(7) if required, any plans and specifications of any damaged building or fixtures; and

(8) the inventory of all damaged or stolen property required by 1.c. above.

The policy includes a number of "Conditions," including the condition that, "We may not be sued unless there is full compliance with all the terms of this policy." From these terms, it is plain that a timely submission of a proof of loss is a condition precedent to filing suit against defendant.

Michigan courts have recognized "the general rule that an insured's failure to render a proof of loss within sixty days of the loss precludes a claim under the policy, absent waiver of the sixty-day requirement by the insurance carrier, because compliance with the requirement is considered a condition precedent to the liability of the insurer." *Auto-Owners Ins Co v Gallup*, 191 Mich App 181, 183-184; 477 NW2d 463 (1991). Thus, a proof of loss requirement is enforceable as written, unless enforcement "would violate the law or public policy or a traditional defense to the provision's enforcement [applies]." *DeFrain*, 491 Mich at 373.

Plaintiffs do not argue that the proof of loss requirement violates law or public policy. Nor do they otherwise appear to raise a traditional contract defense. Instead, plaintiffs assert that their noncompliance should not bar coverage because defendant "acknowledged the damage and determined the amount of the loss for purposes of paying it." In other words, plaintiffs argue that defendant was not prejudiced by the fact that plaintiffs failed to itemize the bathhouse in the proof of loss. However, our Supreme Court has made clear that whether a plaintiff's failure to comply with a proof of loss requirement prejudiced the defendant is irrelevant in cases where notice provisions in the contract are for a specified time, as in this contract. *DeFrain*, 491 Mich at 376. Accordingly, prejudice is not grounds for waiving this condition precedent to recovery as "imposing a prejudice requirement here would be inconsistent with this Court's ruling in *Rory*." *Id.* (reiterating that "an unambiguous contractual provision…is to be enforced as written."). We therefore conclude the trial court did not err by granting summary disposition to defendant on plaintiffs' bathhouse claim.

II. CONCLUSIONS

The clear language of the policy required plaintiffs to notify defendant "of any additions, alterations or improvements" to their dwelling which individually or cumulatively increased their dwelling replacement cost by $10,000 or more. Undisputed evidence revealed that at the time of the loss, plaintiff had paid approximately $150,000 toward home expansion. Admittedly, plaintiffs failed to notify defendant of such expenditures and as a result, they are not entitled to any form of additional recovery from defendant. See, *Rory*, 473 Mich at 491. As to the loss of their bathhouse, failure by plaintiffs to adhere to the plain language of the policy requiring that they submit a proof of loss, precludes their claim under the policy. *Auto-Owners Ins Co*, 191 Mich App at 183-184.

Affirmed. Defendants having prevailed may assign costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello