STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE P. NOLAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 22, 2011
v	No. 300106 Eaton Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee/Cross-Appellant.	LC No. 10-000125-CZ

Before: TALBOT, P.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Lawrence P. Nolan appeals the trial court's summary disposition ruling denying his claim for coverage under a homeowner's insurance policy with Auto-Owners Insurance Company ("Auto-Owners"). We affirm.

Nolan purchased homeowner's insurance from Auto-Owners for a rental property. Nolan leased the property and discovered, on November 28, 2009, that his tenants had moved out of the home but continued to use the residence to house at least 18 animals, primarily dogs. The animals had urinated and defecated throughout the home, resulting in considerable damage. Nolan filed a property loss notice with Auto-Owners seeking coverage under the policy. On January 5, 2009, Auto-Owners forwarded correspondence to Nolan indicating his insurance policy precluded coverage based on an animal exclusion provision. Auto-Owners indicated Nolan could submit additional information pertaining to the coverage "for review." On January 16, 2009, Nolan submitted to Auto-Owners a proof of loss form and an itemized list of damages. On January 27, 2009, Auto-Owners sent correspondence to Nolan indicating a lack of coverage under the policy and a rejection of Nolan's proof of loss.

Nolan initiated a lawsuit on January 25, 2010. Auto-Owners filed a motion for summary disposition asserting that coverage was excluded based on the policy language and, as an alternative basis, that the claim was time-barred. The trial court rejected Auto-Owners' argument that the claim was untimely, but granted summary disposition in favor of Auto Owners premised on the exclusionary language pertaining to animals within the insurance policy.

As discussed by our Supreme Court:

> This Court reviews de novo a decision to grant a motion for summary disposition. We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.[1]

Similarly, this Court reviews de novo a trial court's interpretation of an insurance contract.[2]

> It is recognized:
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> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume.[3]

The exclusionary language contained in the insurance policy includes, in relevant part:

> Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from:
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> * * *
>
> 4. a. wear and tear, marring, scratching or deterioration;
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> * * *
>
> g. animals owned or kept by any insured or tenant[.]

Nolan initially argues that the exclusion is inapplicable as the damage to the property is attributable to the failure of the tenants to clean up the animal urine and feces over an extended period of time rather than the actual voiding by the animals in the residence. Such an argument is insupportable based on the language of the exclusion, which precludes a claim for loss resulting "directly or indirectly" attributable to "animals owned or kept by any insured or tenant." "Where the language of an insurance policy is clear and unambiguous, it must be enforced as written."[4]

Nolan also argues that the animal exclusion provision requires that a landlord have actual knowledge that a tenant is retaining animals on the property. Asserting he was unaware that his

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[1] *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007) (citation omitted).

[2] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

[3] *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998).

[4] *Id.* at 82-83.

tenants kept animals at the residence, contrary to their lease, Nolan contends the exclusion is unenforceable. As with any contract, an insurance contract comprises

> an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained the policy. The court must give the language contained in the policy its plain and ordinary meaning so that technical and strained constructions are avoided.[5]

While Nolan argues that the term "kept" necessarily implies knowledge, such an interpretation is strained. While a definition of "kept" implies possession, it does not necessarily infer knowledge as the language of the exclusion encompasses "animals owned or kept by any insured or tenant." Knowledge is not a prerequisite of the actual contractual language and this Court is required to be careful and circumspect in reading an ambiguity into a contract that does not exist.[6]

Nolan further contends that the doctrine of ejusdem generis is applicable, limiting the animal exclusion to "wear and tear" damage. "Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.'"[7] Application of this doctrine is inappropriate. Based on the contract's language and construction, the exclusions pertaining to "wear and tear" and animals are specific exceptions to coverage and any suggestion that one of these exceptions serves to expand or define the other is exceedingly strained. Based on the contract language within this subsection, the animal exclusion and the exclusion pertaining to wear and tear are clearly delineations of specific exceptions to coverage and are not related and need not be read or interpreted jointly in order to apply either exception.

While Nolan also asserts the exclusion should be construed as void because it is repugnant to public policy, such a claim is without merit. "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract."[8] "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."[9] Any implication by Nolan that verification of his tenants' compliance with the restrictions of their lease regarding the maintenance of animals on the property would violate their right to quiet enjoyment, in contravention of public policy, is

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[5] *Id.* at 82 (internal citations omitted).

[6] *Moore v First Security Cas Co,* 224 Mich App 370, 375; 568 NW2d 841 (1997).

[7] *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) (citation omitted).

[8] *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

[9] *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (citation omitted).

similarly unavailing given the specific provision within his lease permitting a right of inspection.[10]

Nolan's contention in the lower court suggesting that summary disposition was inappropriate based on the need for further discovery to ascertain the correct version of the insurance policy and the failure of Auto-Owners to provide him with notice of a change of language pertaining to the animal exclusion are similarly without merit. In the lower court, Auto-Owners provided documentation clarifying the policy in effect at the time of Nolan's claim. Further, testimony was provided verifying Auto-Owners' provision of notice with renewal of the policy informing Nolan of the change in the exclusionary language from "domestic animals" to "animals owned or kept by any insured or tenant." As Nolan failed to come forward with any evidence in contradiction, we find these assertions to be without merit. Similarly, on appeal, Nolan raises for the first time in his reply brief an argument regarding whether the animal exclusion precludes his claim for lost rent and personal property damage. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal."[11]

Based on our determination that Auto-Owners was entitled to summary disposition based on the language of the insurance policy, we decline to consider Auto-Owner's alternative argument for affirmance of summary disposition.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

[10] *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003).

[11] *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003); MCR 7.212(G).