Court of Appeals, State of Michigan

ORDER

Hani & Ramiz, Inc v North Pointe Insurance Company

Docket No. 316453

LC No. 2011-121029 CK

Kirsten Frank Kelly
Presiding Judge

Christopher M. Murray

Michael J. Riordan
Judges

The Court orders that the motion for reconsideration is GRANTED limited to correcting a factual error on page 4 footnote 1, and this Court's opinion issued December 12, 2013 is hereby VACATED. A new opinion is attached to this order.

In all other respects, the motion for reconsideration is DENIED.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 04 2014
Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

HANI & RAMIZ, INC., d/b/a MORE FOOD 4 LESS, and HANI & RAMIZ PROPERTIES, L.L.C., Plaintiffs-Appellees.	UNPUBLISHED February 4, 2014
v	No. 316453 Oakland Circuit Court
NORTH POINTE INSURANCE COMPANY, Defendant-Appellant,	LC No. 2011-121029-CK
and BLACKMORE ROWE FLUSHING, INC., INNOVATIVE INSURANCE CONCEPTS, ROWE SWARTZ CREEK, INC., and BLACKMORE-ROWE SWARTZ CREEK, INC., Defendants.	

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant-appellant, North Pointe Insurance Company, appeals as of right an order granting summary disposition to plaintiffs-appellees, Hani & Ramiz, Inc. d/b/a More Food 4 Less and Hani & Ramiz Properties LLC, in this insurance coverage dispute. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The roof of plaintiffs' Pontiac grocery store collapsed from the weight of snow and ice. It was discovered that the trusses used in building the store were made of lumber that had been treated with flame-retardant chemicals and that the lumber had been weakened over time because of the chemicals. It is undisputed that plaintiffs were unaware that the trusses had degraded since the building's construction. Plaintiffs sued North Pointe after North Pointe failed to pay on plaintiffs' claim under a policy of insurance.

North Pointe denied that it was obligated under the policy, arguing that the occurrence was expressly excluded from coverage under the general exclusions portion of the policy. The insurance policy contains general exclusions for "decay, deterioration, hidden or latent defect[s]

or any quality in property that causes it to damage or destroy itself" and "[c]ollapse." However, the collapse exclusion does not apply to the "specified causes of loss," which includes the "weight of snow, ice[,] or sleet." A provision titled "Additional Coverage – Collapse" adds that defendant "will pay for direct physical loss or damage . . . caused by abrupt collapse of a building or any part of a building" if the collapse is caused by, *inter alia*, "[b]uilding decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse," and "[u]se of defective material or methods in construction . . . if the collapse is caused in part by . . . [o]ne or more of the 'specified causes of loss.'"

The trial court initially denied competing motions for summary disposition, finding that the dispute over the definition of "decay" and "defective material" "achieve[d] enough of a question" of fact to deny the cross-motions for summary disposition. However, upon reconsideration, the trial court and parties agreed that there was no relevant extrinsic evidence for a jury to consider and that the policy was not rendered ambiguous simply because the parties used different definitions for the policy terms. The trial court granted plaintiffs summary disposition, finding that the trusses had "decayed" and were, therefore, covered under the "Collapse" provision of the policy:

> The parties' stipulated facts plus Oxford's Dictionary [sic] equals the trusses did decay. Decay is defined as either rot or decomposition . . . . The word rot in turn is defined [as] limited to bacteria or fungi, loss of form. Rot therefore excludes inorganic loss of form. Decomposition . . . is not so limited. It is defined as separation into its elements or simpler constituents. . . . Hence, . . . the collapse was caused by decay.
>
> With respect to the defective condition, the [c]ourt concludes that . . . it's undisputed that the trusses had a shelf life of 50 to 100 years, [and] the collapse occurred as a result of the application of the [flame retardant chemicals] prematurely, in 25 years . . . .

II. ANALYSIS

Defendant argues that the trial court erred when it granted plaintiffs' motion for summary disposition and denied that of defendant because the insurance policy between the parties did not cover the partial collapse of the roof of plaintiffs' grocery store and did not fall within exceptions for "building decay" or "defective material." We disagree.

A. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). 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). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). "This Court reviews the motion by considering the pleadings,

admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011).

This case involves the interpretation of an insurance contract. Unambiguous contract provisions are "enforced as written unless the provision would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). "Like any other contract, an insurance policy is an agreement between the parties." *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). "An insurance contract must be read as a whole and meaning given to all terms. The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001) (internal citations omitted). "The interpretation of clear contractual language is an issue of law, which is reviewed de novo on appeal." *Tenneco,* 281 Mich App at 444.

"[R]eviewing courts must interpret the terms of the policy in accordance with their commonly used meanings," *Liparoto Const, Inc v General Shale Brick, Inc,* 284 Mich App 25, 35; 772 NW2d 801 (2009). A court may use a dictionary to define a word or phrase not defined in an insurance policy. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). "Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 111; 812 NW2d 799 (2011), remanded on other grounds 493 Mich 859 (2012). "While the burden of proving coverage is on the insured, it is incumbent on the insurer to prove that an exclusion to coverage is applicable." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, ___; 836 NW2d 257 (2013), slip op at 6.

B. DECAY EXCEPTION

North Pointe argues that the roof collapse is within the general exclusion for collapses and does not fall within either the decay exception or the defective-material exception. With respect to the decay exception, it argues that "[c]ase law, expert opinion, and general word usage all support the determination that 'decay' is an organic, fungal process, and does *not* include the effects of inorganic chemical treatment such as the FRT chemicals applied here." It cites no binding precedent in support of this position, however, relying in part on two unpublished federal district court opinions from Michigan that, in turn, cited a dictionary definition that narrowed "decay" to "*organic* rot or deterioration from a normal state." Plaintiffs counter with a plethora of dictionary definitions that support a broader view of decay not limited to bacterial or fungal decomposition.

The common understanding of the noun form of "decay" supports plaintiffs' generalized definition of decomposition. *Random House Webster's College Dictionary* (1997) defines the noun form of decay first as "decomposition; rot," then as "a gradual and progressive decline," "a gradual falling into an inferior conduction; progressive decline." While defendant's expert defined "decay" as "biological degradation," he admitted that lay "people talk about decay and they mean anything that is a loss of something" and clarified that "in the scientific community," decay referred to "a biologically induced event." Unless otherwise defined, however, "[t]he language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided." *Singer*, 245 Mich App at 374. Moreover, North Pointe's argument that "decay" refers only to biological decomposition is belied by the appearance of a

separate exclusion concerning "[f]ungus, wet rot, dry rot and bacteria." That provision excludes from coverage a loss caused by "[p]resence, growth, proliferation, spread or any activity of fungus, wet or dry rot or bacteria," unless it "results in a 'specified cause of loss.'" Therefore, the placement of "[f]ungus, wet rot, dry rot and bacteria" and "decay" in separate paragraphs suggests that the parties did not intend to restrict the interpretation of "decay" to biological decomposition because to have done so would have created surplusage out of one provision.

Because the parties agree that the chemicals used to treat the roof trusses accelerated the lumber's decomposition and that the roof of plaintiffs' grocery store would not have collapsed but for the chemically-treated lumber, the collapse was a "direct physical loss . . . caused by abrupt collapse of . . . part of a building" caused by "[b]uilding decay that [was] hidden from view." Thus, the loss was covered under an exception to the general collapse exclusion. Accordingly, the trial court did not err in granting plaintiffs' motion for summary disposition.

C. DEFECTIVE MATERIAL EXCEPTION

With respect to the defective-material exception to the general exclusion on collapses, defendant argues that, because the chemically-treated lumber was "state-of-the-art when initially used . . . decades earlier," it could not "become 'defective' years or even decades later based on advancements in knowledge, so as to trigger coverage." Because lumber treated with flame-retardant chemicals was required by building and fire codes when the grocery store was built, the argument continues, it cannot "retroactively be rendered 'defective' at the time of its installation by subsequent changes in safety or building standards." Plaintiffs respond that the trial court correctly ruled that the lumber was "defective material" because, giving "defective" its commonly used meaning, the lumber "caused the roof to prematurely collapse long before its minimum life expectancy of 50 years."

As with "decay," "defective" is not defined in the policy and must be interpreted using its commonly used meaning, which may be derived from a dictionary. Defendant's argument that materials required by safety codes is *per se* not defective is without merit. Because "defective" means "faulty," *Random House Webster's College Dictionary* (1997), and apparently contains no inherent temporal reference, and because the parties do not dispute that the prematurely degraded lumber was a direct cause of the roof collapse, the damage is covered by the defective-material exception to the collapse exclusion. North Pointe has not offered a competing definition as it did for "decay." The trial court properly granted summary disposition in favor of plaintiffs.[1]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[1] There is no need to address the doctrine of the *contra proferentem*, which provides that "an agreement is construed against its drafter," *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). This appeal was resolved without resorting to that rule.