STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0816

Timeshare Systems, Inc., et al.,
Appellants,

vs.

Mid-Century Insurance Company, et al.,
Respondents.

Filed November 26, 2012
Affirmed in part, reversed in part, and remanded
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CV-11-6948

Daniel N. Rosen, Anthony G. Edwards, Parker Rosen, LLC, Minneapolis, Minnesota (for appellants)

Kevin J. Kennedy, Forrest G. Hopper, Borgelt, Powell, Peterson & Frauen S.C., Oakdale, Minnesota (for respondents)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Appellants, the insureds on a policy providing storm damage coverage for a commercial building, challenge the district court's summary judgment dismissing their claim that respondent company breached its insurance contract. Appellants assert that a vacancy clause did not defeat their claim because of ambiguity in the policy definition of vacancy. They also challenge the district court's summary judgment dismissing their claim that respondents insurance agency and agent were negligent. We affirm the judgment on appellants' negligence claim, but we reverse and remand on appellants' breach-of-contract claim.

FACTS

Appellants Timeshare Systems, Inc. and 1010 Metrodome Square, LLC own an office building in downtown Minneapolis (1010 Building). The 1010 Building is approximately 210,000 square feet of office space, with an attached ramp structure with nearly 210,000 square feet of parking space.

Respondent Greg Ganyo Insurance Agency, which sells insurance for respondent Mid-Century Insurance Companies (a subsidiary of the Farmers Insurance Group of Companies), sought to sell insurance to Basant Kharbanda, an owner of the 1010 Building. Respondent insurance agent John Rice obtained information from Kharbanda to prepare a quote, including a profit-and-loss statement that reflected the tenants and their anticipated rents; approximately 2,500 square feet of the office space was rented and

the entire parking ramp was rented. Appellants purchased an insurance policy from respondents that covered the 1010 Building and another site, 511 11th Avenue.

During the coverage period, a storm produced an excessive amount of rainwater, causing storm-sewer piping to fail and resulting in flooding in the basement of the 1010 office structure. Appellants made a claim to respondent insurer, which was denied based on appellants' failure to comply with the policy's vacancy condition. Rice submitted a letter to the insurer stating that Kharbanda sought complete coverage for his premises and that Rice believed that he sold Kharbanda a policy providing complete coverage. Respondent insurer did not reverse its denial.

The district court granted summary judgment dismissing appellants' claims of breach of contract and negligence. The court concluded that the 1010 Building and its parking ramp are two "independently insured buildings"; thus, because the office structure was vacant according to the unambiguous language of the vacancy provision in the insurance policy, respondents rightly denied coverage. The court also concluded that the agent and his agency were not negligent because Kharbanda made representations that impeded them in making a proper determination regarding occupancy.

D E C I S I O N

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of fact exists if reasonable persons might draw different conclusions based on the evidence. *DLH, Inc.*

v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments" and must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *Id.* at 71. This court reviews de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact when the evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

1. Contract interpretation

Our primary goal in interpreting a contract is to determine the intent of the parties from a document's plain language and enforce that intent. *Travertine Corp. v. Lexington–Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). As such, "[u]nambiguous contract language must be given its plain and ordinary meaning." *Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009). A contract term is ambiguous "if it is susceptible to two or more reasonable interpretations." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). "The construction and effect of a contract is . . . a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003).

The policy term at issue defines "building" as used in the vacancy clause, saying that building "means the entire building."[1] Vacancy exists when 70% or more of the

[1] The policy does not provide a more particularized definition of building outside of the one in the vacancy provision. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990) (stating that a review court is to construe a contract as a whole and avoid a construction that would render one or more provisions meaningless).

square footage of the building is not rented or otherwise used for customary operations. Appellants interpret "the entire building" to include the 1010 Building and its parking ramp; viewed as one unit, the building was not vacant.[2] The district court concluded that "the entire building" refers only to the 1010 Building office space because the parking ramp is a separate structure. This conclusion conflicts with policy provisions rendering the entire-building language ambiguous.

The district court's rationale is based on the evident reality that each unit of the facility is identified as a separate building. But the wording of the policy is reasonably susceptible to being read to treat the 1010 Building, with the attached ramp, as one unit. The declarations page lists two insured sites, two different Minneapolis properties, one of them being the 1010 Building site and the other at 511 11th Avenue[3]; it does not list the parking ramp as a separate premises.

Additionally, although the policy provides coverage for "buildings," the use of the plural refers to the building on the first site and another on the second site; there is no indication that the use of the plural refers to the 1010 Building and the adjoining parking ramp as separate buildings. Finally, on the declarations page, the policy provides the address of the two sites covered. Under the first, the 1010 Building, there is one address; there is no separate address for the parking ramp; the declaration indicates that the 1010

[2] Respondents concede that if "the entire building" includes the parking ramp, the building is not vacant and the vacancy provision would not preclude coverage.

[3] The insurance policy mistakenly added a digit to the 511 building's address, identifying its address as "5115 11th Ave." We note this discrepancy for accuracy purposes only as this building's address is irrelevant to our analysis of the issues on appeal.

Building and its parking ramp may reasonably be treated as one building. As a result of these references to the office space and the ramp as one building, the term building, as defined in the policy, is susceptible to two or more reasonable interpretations.

The district court also looked to the policy's signature page. The court found that on this page Kharbanda identified the covered properties as "1010 Metrodome Sq. LLC (Building + Ramp)." The court determined that this notation demonstrated Kharbanda's intent that the 1010 Building and the parking ramp would be treated as individually covered units. But this may not show Kharbanda's intent to treat the 1010 Building and parking ramp as separate units; it may show only that Kharbanda provided a general description of the covered premise.

The district court also found that Kharbanda provided respondents with a "Schedule of Locations," on which he identified "Location #1 - Building 1" as the parking ramp and "Location #2 – Building 2" as the 1010 Building. The court again reasoned that this evidence showed that Kharbanda treated the 1010 Building and the parking ramp as separate buildings.[4] But Kharbanda submitted this schedule to provide respondent with the correct addresses for the covered premises. Several policy provisions identify both structures as the 1010 Building.

Arguing that the term "building" unambiguously refers to the office portion of the 1010 Building site, respondents rely on language in the vacancy provision that states that

[4] There is also evidence to the contrary. Kharbanda provided respondents with a profit-and-loss statement that included major tenants and their annual rents. The parking ramp tenant is listed as a major tenant. Additionally, the rent paid by each tenant can be broken down into how much square footage each tenant rents. Based on these calculations, only a small portion of the office space was rented.

coverage will be denied "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before the loss or damage occurs." Respondent suggests that "building where the loss or damage occurs" must be limited to the 1010 Building because the basement of the 1010 Building was damaged. This argument also is unpersuasive. The use of "building where loss or damage occurs" does not narrow the definition of the term "building" to mean anything less than "the entire building." Just as damage did not occur to the roof or in office space, the damage did not have to occur in the parking ramp for it to be considered part of the entire building in order to be inclusive in the vacancy condition.

When policy language is ambiguous—that is, susceptible to more than one reasonable interpretation—extrinsic evidence may be considered to determine the intent of the parties. *See Dykes*, 781 N.W.2d at 582. The interpretation advanced by appellants that the entire building includes the 1010 Building and the attached parking ramp is as reasonable as respondent's asserted interpretation that the language means only the 1010 Building. Because the term is reasonably interpreted in two different ways, reviewing the policy alone, there is a material fact issue as to what the term "the entire building" means in the context of the vacancy condition. The district court must ascertain the intent of the parties in forging the agreement.

2. Negligence

Appellants also argue that respondents agency and agent were negligent in selling a policy that lacked coverage for their office space. In establishing negligence, appellants must show (1) the existence of a duty; (2) a breach of the duty; (3) causation; and

(4) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). An insurance agent has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989) (alteration in original) (quotation omitted). This duty is limited to acting in good faith and following the insured's instructions. *Id.*

Under special circumstances an agent may have a "duty to take some sort of affirmative action, rather than just follow the instructions of the client." *Id.* at 543-44. The facts of each case will dictate whether special circumstances create this extra duty. *Id.* at 543 n.1. Facts to consider in determining whether special circumstances exist include whether the agent knew that the insured (1) was unsophisticated in insurance matters, (2) was relying on the agent to provide appropriate coverage, and (3) needed protection from a specific threat. *See id.* at 544.

Appellants allege two acts of negligence: failure to inspect the property and failure to inform of no coverage due to vacancies. The district court correctly determined that respondents sold appellants the policy that they sought. This decision is supported by the record, as appellants sought a policy that was nearly identical to their previous policy and respondents sold appellants such policy. Therefore, respondents followed appellants' instructions. *See Gabrielson*, 443 N.W.2d at 543 (stating that an insurance agent must act in good faith and follow his client's instructions).

Also, there are no special circumstances presented here. Kharbanda is a sophisticated property owner who is experienced with insurance matters. *Id.* at 544.

Kharbanda was not relying on respondents to provide protection from a particular threat. *Id.* Kharbanda asked only for a policy that provided coverage identical to that of appellants' previous policy. Further, respondents are assumed to have knowledge of the policy's vacancy condition because Kharbanda provided the profit-loss statement that showed that much of the office space was vacant. Kharbanda did not indicate that there was concern that the office-structure basement might flood, especially when the record indicates that piping was sound and compliant. There are no coverage gaps in the policy provided for appellants.

The district court's judgment premised on interpretation of language on "the entire building" is reversed and remanded; the provision is ambiguous, being reasonably susceptible to more than one interpretation. The court's judgment in favor of respondents agency and agent is affirmed; as a matter of law, these parties were not negligent in selling appellants the insurance policy that appellants sought.

Affirmed in part, reversed in part, and remanded.