STATE OF MINNESOTA
IN COURT OF APPEALS
A10-36

Hometown America, LLC,
Appellant,

vs.

Liberty Insurance Corporation, et al.,
Respondents.

Filed August 24, 2010
Affirmed
Lansing, Judge

Washington County District Court
File No. 82-CV-08-3549

John F. Bonner III, Robert J. Borhart, Bonner & Borhart LLP, Minneapolis, Minnesota (for appellant)

Jeanne H. Unger, Jessica Schulte Williams, Bassford Remele PA, Minneapolis, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Muehlberg, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

LANSING, Judge

This appeal from summary judgment in an insurance-coverage dispute between Hometown America, LLC and Liberty Insurance Corporation, its insurer under a commercial-general-liability policy, raises issues relating to an insurer's duty to defend and indemnify a manufactured-home-park owner in a class action brought by its residents. Because the judgment in the class action was based on claims against Hometown that were not covered by Liberty's policy, and the jury's verdict identifying the source of the class-action liability was final before Hometown tendered its defense, we affirm the district court's judgment that Liberty did not have a duty to defend or indemnify Hometown in the underlying class action.

F A C T S

Hometown America, LLC owns and operates the Cimarron Manufactured Home Park. As part of its monthly rental fee for leases entered into before February 2001, Hometown provided water and sewer services. At the end of February 2001, Hometown sent a letter to Cimarron residents notifying them that their leases were being changed and that they would be billed separately for water and sewer services. Hometown completed its installation of water meters on residents' homes in September 2001 and, beginning in January 2002, Hometown charged Cimarron residents separately for water and sewer services in addition to their monthly rent. Hometown also charged each resident $5.00 for the administration of the meters. Correspondingly, Hometown reduced by $5.00 the monthly rent for each resident.

Cimarron residents brought a class action against Hometown, alleging a breach of contract for failing to provide water and sewer services as part of the monthly rental fee. The complaint also alleged that Hometown violated Minn. Stat. § 327C.02, subd. 2 (2000), and Minn. Stat. § 327C.05 (2000), which prohibit manufactured-home-park owners from adopting unreasonable rules or substantial modifications to existing lease agreements; Minn. Stat. § 327C.04 (2000), which regulates utility metering and billing; and Minn. Stat. § 327C.14, subds. 1, 2 (2000), which prohibit park owners from entering residents' homes except "to prevent damage to the park premises or to respond to an emergency" and from coming on residents' lots except for the purposes of inspection, making necessary or requested repairs, supplying necessary or requested services, or showing the lot to prospective purchasers or other interested parties. Cimarron residents sought an injunction against Hometown and a declaration that the new rule was void. They also sought damages, and attorneys' fees and costs.

At the conclusion of the October 2004 trial, the jury answered ten special-verdict questions, which the district court incorporated into its findings of fact and order for judgment. The jury found that Hometown's new rule imposing separate water and sewer charges was not unreasonable but was a substantial modification because of the significant increase in cost. The jury also found that Hometown's installation of meters and imposition of separate sewer and water charges breached the Cimarron residents' lease agreements. Based on the residents' sewer and water charges, the jury assessed the damages of the Cimarron residents at $288,697.21.

Finally, the jury found that when Hometown employees installed the water meters, they did not enter the Cimarron residents' lots "for reasons other than to make necessary or agreed[-]upon repairs or improvements or [to supply] necessary or agreed[-]upon goods or services."

Hometown moved for a new trial or remittitur. The motion alleged four district court errors: certification of the class, allowing the section 327C.04 claim to be based on differential utility rates, accepting the jury's damages award, and the exclusion of a real-estate expert's testimony on the amount of damages. The district court denied the motion and Hometown appealed the judgment, renewing the arguments about class certification, damages, and excluded testimony. *Cavanaugh v. Hometown Am., LLC*, No. A05-595, 2006 WL 696259, at *1 (Minn. App. Mar. 21, 2006), *review denied* (Minn. May 24, 2006). We affirmed the judgment. *Id.* at *7.

On September 6, 2005, while the appeal was pending and more than ten months after the conclusion of the jury trial, Hometown sent a letter to Liberty tendering its defense in the class action (*Cavanaugh* action) and several other similar actions. On October 6, 2005, Liberty denied a duty to defend or indemnify Hometown in any of the actions. Hometown brought this declaratory-judgment action in May 2008, alleging that Liberty breached its duty to defend and indemnify Hometown in the *Cavanaugh* action. Liberty moved for summary judgment, which the district court granted based on the combination of the jury's findings in the *Cavanaugh* action and the date that Hometown tendered its defense to Liberty.

Hometown appeals from summary judgment, arguing that Liberty had a duty to defend and indemnify Hometown because the Cimarron residents alleged wrongful entry by Hometown, and this wrongful entry was the cause of all of the residents' damages. In their reply brief, and at oral argument, Hometown also contended that it tendered its defense to Liberty before the September 6, 2005 letter and that the earlier tender preceded the jury's verdict.

D E C I S I O N

Insurance-coverage issues and the interpretation of policy language are questions of law that we review de novo. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). When interpreting insurance policies, we apply general principles of contract interpretation. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). "[W]ords are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured." *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). On review of a district court's grant of summary judgment, we determine whether any genuine issues of material fact exist and whether the district court correctly applied the law. *Yang v. Voyagaire Houseboats, Inc*., 701 N.W.2d 783, 788 (Minn. 2005).

I

We first address Hometown's assertion that it tendered its defense before its September 6, 2005 letter and before the jury reached its verdict. Although Hometown did not identify this as a separate issue, the district court's summary-judgment analysis rests on the September 6, 2005 tender date and, if a genuine issue of material fact exists on

whether this is the date of tender, that fact issue would affect our analysis of the issues in this appeal. We conclude, however, that no genuine issue of fact exists on the September 6, 2005 date of tender.

The only evidence in the record that supports Hometown's assertion that the defense of the *Cavanaugh* action was tendered to Liberty before September 6, 2005, is an affidavit by Hometown's Northern-Division president, Jim Anderson. He states that he "recalls that shortly after the service of the [c]omplaint, a copy was sent to the corporate office and forwarded to the insurer" and that he "was advised by Thomas Coorsh, then the COO of the company[,] that the claim had been denied." Anderson also states that he "believes that Hometown America would have, in conjunction with subsequent renewals, disclosed pending litigation to the company and that this claim would have been a part of those disclosures."

The Minnesota Rules of Civil Procedure require that when an affidavit is submitted in opposition to summary judgment, it "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05. The district court concluded that Anderson's affidavit failed to meet this standard because it did not state when or by whom the complaint was sent to Liberty, the comment attributed to Coorsh about a denial of tender was inadmissible hearsay, and the affidavit failed to establish any first-hand knowledge by Anderson that Hometown tendered its defense before September 6, 2005. We agree.

The evidence that Hometown tendered its defense on September 6, 2005, in contrast, is clear and uncontroverted. Hometown sent the letter to Liberty nearly a year after the jury verdict and after the judgment was appealed and briefing was submitted to this court. The record also shows that Hometown satisfied the judgment before sending this letter. The language of the letter indicates that it is the first notice Hometown provided to Liberty of the *Cavanaugh* action and it refers to no previous correspondence or communication about Hometown's class-action litigation. In its reply, Liberty cited policy provisions requiring Hometown to inform Liberty of an action as soon as practicable and stating that if Hometown makes a payment without Liberty's consent, it does so at its own cost. Liberty then states, "Your breach of policy conditions has deprived us of the opportunity to investigate and defend these matters." These two letters between Hometown and Liberty further confirm that no genuine issue of material fact exists on whether prior communication took place between them about the *Cavanaugh* action.

Because Hometown failed to set forth competent and admissible evidence that it tendered its defense before September 6, 2005, no genuine issue of material fact exists on the date of tender. And we analyze Liberty's obligations under its policy based on the September 6, 2005 tender date.

II

We next review whether Liberty breached its duty to defend or its duty to indemnify Hometown in the *Cavanaugh* action. The duty to defend begins when the insured formally tenders the defense to the insurer. *Home Ins. Co. v. Nat'l Union Fire*

Ins. of Pittsburgh, 658 N.W.2d 522, 531 (Minn. 2003) (stating that tender of defense is condition precedent to liability for defense costs). An insurer is only liable for posttender defense costs. *Id.* Because Hometown did not tender its defense until after briefing was completed on its appeal of the *Cavanaugh* action, Liberty could only be liable for defense costs associated with oral argument before this court and other actions that occurred after Hometown's tender.

The duty to defend "extends until it can be concluded as a matter of law that there is no basis on which the insurer may be obligated to indemnify the insured." *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 416 (Minn. 1997) (emphasis removed). An insurer does not have a duty to indemnify an insured for liability based on noncovered claims. *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302, 308 (Minn. App. 2002), *review denied* (Minn. May 14, 2002). If the complaint includes covered and noncovered claims, the duty to indemnify can only be determined once the underlying action is final. *Id.*

Before Hometown tendered its defense, the jury returned a verdict; the district court issued findings of fact and an order for judgment; and Hometown submitted its appeal raising several claims but not challenging the jury's findings on the grounds for Hometown's liability. While the *Cavanaugh* action as a whole was not final at the time of tender, the basis of Hometown's liability was. Consequently, at the time the defense was tendered, Liberty's duty to indemnify extended, at most, to those claims in the complaint that the jury found to be proved. Indemnity, and therefore the duty to defend for the remainder of the appeal, could not arise from any rejected claims. It is therefore

necessary only to analyze Liberty's duty to indemnify Hometown based on the liability claims proved in the *Cavanaugh* action.

Hometown argues for indemnity based on policy coverage for "wrongful entry." Liberty's policy provides coverage for damages because of "personal and advertising injury." "Personal and advertising injury" is defined to include "injury . . . arising out of . . . wrongful entry into . . . a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord, or lessor." The Cimarron residents alleged that Hometown violated Minn. Stat. § 327C.14 by entering their homes for a purpose other than responding to an emergency and by entering their lots for a purpose other than inspections, making agreed-upon repairs or improvements, or supplying agreed upon services. These claims essentially alleged wrongful entry by Hometown.

The special-verdict form replicated the claims in the complaint and the jury was asked to make a finding on whether Hometown entered the residents' lots for a purpose other than those allowed by statute. The jury answered "no." At the time defense was tendered, the jury's rejection of this basis for liability had been established, and it cannot trigger a duty to defend.

Hometown argues that the jury interrogatory is too narrow to preclude coverage because Minnesota law defines wrongful entry more broadly as "the invasion of an interest in real property," citing *Garvis v. Emp'rs Mut. Cas. Co.*, 497 N.W.2d 254, 259 (Minn. 1993). Hometown asserts that its entry on Cimarron residents' lots over the residents' objections was wrongful under this definition despite the jury verdict and that the damages resulted from this covered activity.

Hometown's argument, however, asks us to look beyond the specific claims alleged in the complaint, which were limited to a particular set of circumstances that made entry wrongful, and to find "an invasion of an interest in real property" that was not alleged and not considered by the jury. Minnesota law does not permit an inquiry that extends beyond the complaint and the jury verdict to assess whether some claim could have been made that would have been favorably viewed by the jury and would have been covered by Liberty's policy. An insurer's duty to defend and indemnify an insured is based on coverage for the claims alleged, not claims that might have been brought but were not. *See Meadowbrook*, 559 N.W.2d at 415 (stating that "a court will compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy" to determine duty to defend (emphasis removed)); *Timmer*, 641 N.W.2d at 311-15 (finding possible duty to indemnify by comparing policy language with only those claims brought against insured).

Hometown relies heavily on the unpublished case from the U.S. District of Minnesota, *Am. Modern Home Ins. Co. v. Bethel Props., Inc.*, No. 02-4060 (D. Minn. May 19, 2003). The plaintiffs in *Bethel* alleged wrongful entry under section 327C.14, subdivision 2, similar to the allegations of wrongful entry in the *Cavanaugh* action. *Bethel*, slip op. at 2. But critically, the *Bethel* court concluded that the mobile-home-park owner entered the lots without legal justification and that this constituted a wrongful entry. *Id.*, slip op. at 5. It would have been possible for the jury in the *Cavanaugh* action to make a similar finding, but it did not.

Instead, the jury rejected the specific form of wrongful entry alleged by the Cimarron residents. The jury's special-verdict form also makes clear that its assessment of damages was not based on Hometown's alleged wrongful entry. Because the damages were based on claims against Hometown other than the wrongful-entry allegation, and the jury's verdict that identified the source of liability became final before Hometown tendered its defense, Liberty did not have a duty to defend or indemnify Hometown in the *Cavanaugh* action.

Because we conclude that Liberty did not have a duty to defend or indemnify Hometown based on the jury's findings and the timing of Hometown's tender of its defense, we need not reach Liberty's argument that its policy excludes the claim against Hometown under the policy's specific exclusion for breach-of-contract claims.

Affirmed.