NO. COA03-1413

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

BAGELMAN'S BEST, INC.,
D/B/A BOULEVARD BAGEL;
JOHN GRILLO, Individually,
BOULEVARD BAGEL SHOP, INC.,
Plaintiffs,

v. Pitt County
No. 01 CVS 2307

NATIONWIDE MUTUAL INSURANCE
COMPANY,
Defendant.

Appeal by plaintiffs from judgment entered 15 April 2003 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 25 August 2004.

Dixon Doub Conner & Foster, by Jeffrey B. Foster, for plaintiff-appellants.

Wallace, Morris, Barwick, Landis, Braswell & Stroud, P.A., by Thomas H. Morris and Kimberly A. Connor, for defendant-appellee.

THORNBURG, Judge.

Bagelman's Best, Inc., doing business under the trade name Boulevard Bagel, and Boulevard Bagel Shop, Inc., are both North Carolina corporations with their principal place of business in Greenville, North Carolina. John Grillo is the principal shareholder and owner of Bagelman's Best, Inc., and Boulevard Bagel Shop, Inc. (collectively "plaintiffs"). During the relevant period

of time, plaintiffs were covered by insurance policies, designated as "Business Insurance," purchased from defendant. Plaintiffs appeal from the trial court's summary judgment in favor of defendant as to all plaintiffs' claims against defendant. We affirm.

This action arises from the closure of plaintiffs' businesses for a period in September of 1999. Plaintiffs' businesses were served and provided electrical power by the Greenville Utilities Commission ("GUC"). In September 1999, eastern North Carolina experienced several severe hurricanes. As a result of these hurricanes and related storms, the entire Pitt County region was subjected to rising flood waters. Due to the rising flood waters, GUC elected to cease power transmission from their main power distribution center. GUC made a public announcement that they would cease transmitting power to their customers. Plaintiffs were without electricity from 16 September 1999 to 21 September 1999. The businesses were forced to close during that period and suffered loss of business income and food spoilage.

Plaintiffs made claims under their insurance policies for damages due to the loss of business income and food spoilage. Plaintiffs and defendant settled the spoilage claim but defendant denied coverage for the loss of business income claim. Following defendant's refusal to pay this claim, plaintiffs filed the instant action on 2 October 2001 against defendant claiming breach of contract, insurance malpractice and unfair and deceptive trade practices. Defendant moved for summary judgment on 10 February

2003. The trial court granted this motion in a judgment filed 15 April 2003. Plaintiffs appeal.

Pursuant to N.C.R. Civ. P. 56(c), summary judgment is appropriate when "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 any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). A defendant moving for summary judgment bears the burden of showing that no triable issue of fact exists on the record before the court or that the plaintiff's claim is fatally flawed. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). In deciding whether to grant or deny the motion, the trial court must draw all inferences of fact against the moving party and in favor of the party opposing summary judgment. *Id.* On appeal from a ruling by the trial court on a motion for summary judgment, the question for our determination is whether the court's conclusions of law were correct. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

Plaintiffs contend that the trial court erred in granting defendant's motion for summary judgment against plaintiffs because there was a genuine issue of material fact as to whether the insurance policy covered plaintiffs' loss of business income. We disagree.

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of

construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). "If an insurance 'policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision.'" *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 275, 576 S.E.2d 681, 684 (quoting *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996)), *disc. review denied*, 357 N.C. 457, 585 S.E.2d 382 (2003). It is also well established that:

> a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Trujillo v. N.C. Grange Mut. Ins. Co., 149 N.C. App. 811, 813, 561 S.E.2d 590, 592 (quoting *Grant v. Insurance Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978)), *disc. review denied*, 356 N.C. 176, 569 S.E.2d 280 (2002).

The issue before us is whether, as a matter of law, plaintiffs' loss of business income is a recoverable loss under the insurance policies. Defendant refused to pay plaintiffs' loss because defendant contends the event that precipitated the loss was not an "accident" as that term is defined in the policies.

The relevant provision of the insurance policies is contained in the "Systems Protector Endorsement." The endorsement provides:

> A. COVERAGE
>
> Subject to all the provisions of the Businessowners Property Coverage Form which do not conflict with any of the provisions of this endorsement, we will pay for:
>
> > 1. direct damage to Covered property caused by a Covered Cause of Loss; and
> >
> > 2. your loss and expense resulting from the necessary interruption of business caused by a Covered Cause of Loss.

A "Covered Cause of Loss" is defined as an "accident." The "Coverage Extensions" provision of the Systems Protector Endorsement addresses the defendant's liability when there is an "Off Premises Service Interruption." That provision states:

> d. Off Premises Service Interruption
>
> We will pay your loss and expense resulting from the necessary interruption of business caused by an "accident" to any equipment that is:
>
> > (1) located on or within 500 feet of your premises;
> >
> > (2) owned by the building owner (if you are a tenant) or a public utility company; and
> >
> > (3) used to supply electrical power, heating, air conditioning, gas, water, steam or telephone services to your premises.

The plaintiffs' policies define an "accident" as the "sudden and accidental breakdown of . . . any mechanical or electrical machine or apparatus used for the transmission or utilization of mechanical or electrical power." The triggering of the "off premises service

interruption" provision would allow plaintiffs to recover lost business income and extra expenses for up to a 12-month period.

Plaintiffs contend that an accident occurred, within the meaning of the policies, when GUC ceased transmitting electricity to plaintiffs' businesses. Plaintiffs argue that the decision to cease transmitting electricity was a "sudden and accidental breakdown . . . of any mechanical or electrical machine or apparatus used for the transmission or utilization of mechanical or electrical power" and that, since the transmission lines were connected to plaintiffs' businesses, the breakdown occurred within 500 feet of the premises. Plaintiffs contend that had GUC not decided to discontinue the transmission of electricity the flood waters would have breached the main electrical substation while it was transmitting electricity, causing extensive long-term damage to the transmission equipment, which clearly would be an accident under the insurance policy. Thus, the loss of power was inevitable and defendant should not be allowed to avoid coverage because GUC took preventive measures to mitigate the accident rather than allow a larger accident to occur.

In construing the terms of an insurance policy, "nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise." *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978). The word "sudden" is defined as "happening or coming unexpectedly." *Webster's New World Dictionary* 589 (2nd ed. 1995). Plaintiffs admit that they were aware that GUC planned

to cease transmitting electricity, because GUC made a public announcement to that effect before they actually stopped transmitting electricity. We cannot conclude that the cessation of the transmission of electricity happened unexpectedly. For this reason, we conclude that the cessation of the transmission of electricity was not an accident as defined in the insurance policies. Accordingly, the trial court properly entered summary judgment in favor of defendant.

Affirmed.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).