NO. COA08-1048

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

MICHAEL CRAIG, SHERRILL CRAIG and MARION A. SUITT,
Plaintiffs-Appellees,

v.

Wake County
06 CVS 10020

SANDY CREEK CONDOMINIUM ASSOCIATION, INC.; MEMBERS OF THE BOARD SANDY CREEK CONDOMINIUM ASSOCIATION, INC. IN THEIR OFFICIAL CAPACITY AS BOARD MEMBERS; HARLEYSVILLE MUTUAL INSURANCE COMPANY; CHAD FOGG; MARSHALL L. FOGG; and BARRY L. FOGG,
Defendants-Appellants,

and

SANDY CREEK CONDOMINIUM ASSOCIATION, INC.,
Third-Party Plaintiffs,

v.

PHILLIP E. LANGFORD, POWELL LOOS and LANGFORD, INC.,
Third-Party Defendants.

Appeal by Defendants Sandy Creek Condominium Association and Harleysville Mutual Insurance Company from partial summary judgment order entered 26 March 2008 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 24 February 2009.

The Kuhn Lay Firm, PLLC, by Benjamin R. Kuhn, for Plaintiffs-Appellees.

Emanuel & Dunn, PLLC, by Raymond E. Dunn, Jr. and Charles Cushman; Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr. and Brian S. Edlin, for Defendant-Appellant Sandy Creek Condominium Association, Inc.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers, David L. Brown, and David G. Harris, for Defendant-Appellant Harleysville Mutual Insurance Company.

McGEE, Judge.

Plaintiffs owned condominium unit 127 (the unit) in the Sandy Creek Condominium development located in Raleigh, North Carolina. Plaintiffs' unit was part of a four-unit building and was adjacent to unit 129, owned by Defendants Marshall L. Fogg and Barry L. Fogg. Barry Fogg lived in unit 129 with his brother, Defendant Chad Fogg. A fire started in the Foggs' unit on the afternoon of 7 January 2006. The fire spread to the adjoining units and caused substantial fire and smoke damage to Plaintiffs' unit.

A "Declaration of Unit Ownership Under Chapter 47A North Carolina General Statutes for The Sandy Creek Condominium" (the Declaration) was recorded with the Wake County Register of Deeds on 11 April 1974. Sandy Creek Condominium bylaws (the bylaws) were recorded simultaneously with the Declaration. Pursuant to Chapter 47A, the Declaration and the bylaws established the Sandy Creek Condominium Association (Sandy Creek) as the governing body for the condominium development. Every person or entity that owns an interest in one or more of the condominium units is automatically a member of Sandy Creek. Sandy Creek is led by a Board of three to seven volunteer residents elected by the members of Sandy Creek. According to the bylaws, those Board members have powers and duties

including, but not limited to, purchasing, selling or leasing property, making and entering into contracts, effecting insurance, levying assessments against residents, employing a property manager and other professionals, and making financial transactions and decisions.

Paragraph 15(A)(i) of the Declaration required Sandy Creek to carry casualty or physical damage insurance for the condominium property; however, the parties disagree over the extent of property coverage required by the Declaration. Sandy Creek purchased a Commercial Output Program Insurance Policy (the policy) from Defendant Harleysville Mutual Insurance Company (Harleysville). The policy was in effect from 1 August 2005 until 1 August 2006, and covered the date Plaintiffs' unit was damaged by the fire.

Claims were presented to Harleysville by Sandy Creek for the damage to Plaintiffs' unit. Harleysville made payments to Sandy Creek that covered damages to certain structural elements of the buildings, but did not cover property losses Plaintiffs suffered to the interior of their unit.

Plaintiffs filed suit against Sandy Creek, Harleysville, and Chad, Marshall, and Barry Fogg on 12 July 2006 for damages caused as a result of the fire. Plaintiffs argued that under the insurance policy purchased by Sandy Creek, Harleysville was liable for the damage to the interior of their unit and for the loss of personal property therein. Harleysville argued the policy only covered the exterior elements of the building, *inter alia*, siding, studs, beams, and sub-floor. Harleysville argued that the policy

did not cover finished flooring, drywall covering the ceilings and walls, or anything contained within Plaintiffs' unit.

Harleysville filed an answer and counterclaim against Plaintiffs and a cross-claim against Sandy Creek for declaratory judgment on 14 January 2008. Harleysville sought an adjudication regarding the extent of property coverage under the policy issued to Sandy Creek for damages to the solely-owned parts of any individual condominium unit, as well as an adjudication regarding the extent of commercial general liability coverage for Sandy Creek. Plaintiffs filed a motion for partial summary judgment against Sandy Creek and Harleysville on 19 February 2008. Plaintiffs requested the trial court rule as a matter of law that the policy covered damages sustained within Plaintiffs' unit, as well as damages to the exterior elements.

The trial court granted Plaintiffs' motion for partial summary judgment against Sandy Creek and Harleysville on 26 March 2008. Sandy Creek and Harleysville appeal. Further relevant facts will be discussed in the body of our opinion.

We first note that Sandy Creek and Harleysville are appealing from an interlocutory order. Plaintiffs' eleventh claim for relief in their third amended complaint was a request for a declaratory judgment on Sandy Creek's duty to maintain insurance covering the type of damage suffered by Plaintiffs. In Plaintiffs' sixth claim for relief, Plaintiffs contend Harleysville was liable under the policy for damages Plaintiffs incurred as a result of the fire, and that Harleysville failed to honor the policy by refusing to pay for

all Plaintiffs' damages covered by the policy. Plaintiffs' complaint placed both Sandy Creek and Harleysville in a position where they had to defend their legal interests against Plaintiffs' claims. The partial grant of summary judgment in Plaintiffs' favor obligated Sandy Creek and Harleysville to proceed with their defense of the suit. This Court has held that

> the duty to defend involves a substantial right to both the insured and the insurer. Accordingly, we conclude that the order of partial summary judgment on the issue of whether [the insurer] has a duty to defend [the insured] in the underlying action affects a substantial right that might be lost absent immediate appeal.

Enter. Leasing Co. Southeast v. Williams, 177 N.C. App. 64, 67-68, 627 S.E.2d 495, 497-98 (2006). The grant of summary judgment in favor of Plaintiffs thus involves the substantial rights of both Harleysville, the insurer, and Sandy Creek, the insured. These appeals are properly before us.

Sandy Creek's Appeal

In Sandy Creek's first argument, it contends the trial court erred in granting Plaintiffs' motion for partial summary judgment by determining that Sandy Creek had an affirmative duty to insure Plaintiffs' unit. We disagree.

Our standard of review of a trial court's ruling on a motion for summary judgment is *de novo*. "'[T]his Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.'" *Thrash Ltd. Partnership v. County of Buncombe*, __ N.C. App.

__, __, 673 S.E.2d 689, 692 (2009) (citation omitted).

The claims in the case before us are governed by Article 1, Chapter 47A, the "Unit Ownership Act." N.C. Gen. Stat. §§ 47A-1 to 28 (2008).

> Unit ownership may be created by an owner or the co-owners of a building by an express declaration of their intention to submit such property to the provisions of the Article, which declaration shall be recorded in the office of the register of deeds of the county in which the property is situated.

N.C. Gen. Stat. § 47A-2 (2008). "The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the Declaration. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the Declaration and such amendment is duly recorded." N.C. Gen. Stat. § 47A-18 (2008).

> The manager of the board of directors, *or other managing body, if required by the declaration*, bylaws or by a majority of the unit owners, shall have the authority to, and *shall, obtain insurance for the property against loss or damage by fire* and such other hazards under such terms and for such amounts as shall be required or requested. *Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of unit owners, as trustee for each of the unit owners* in the percentages established in the declaration. *The trustee so named shall have the authority on behalf of the unit owners to deal with the insurer in the settlement of claims*. []Provision for such insurance shall be without prejudice to the right of each unit owner to insure his own unit for his benefit.

N.C. Gen. Stat. § 47A-24 (2008) (emphasis added). Pursuant to Article 1, Chapter 47A: "'Property' means and includes the land,

the building, all improvements and structures thereon . . . and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this Article." N.C. Gen. Stat. § 47A-3(10) (2008). "'Building' means a building, . . . each building containing one or more units, and comprising part of the property[.]" N.C. Gen. Stat. § 47A-3(1a) (2008). "'Unit' . . . means an enclosed space consisting of one or more rooms occupying all or a part of a floor or floors in a building . . . and shall include such accessory spaces and areas as may be described in the Declaration, such as garage space, storage space, balcony, terrace or patio[.]" N.C. Gen. Stat. § 47A-3(12) (2008). Therefore, pursuant to Article 1, Chapter 47A, "property" includes the "units" which are housed inside the "buildings."

All Sandy Creek Condominium units, including Plaintiffs' unit, are subject to the Declaration, which was duly recorded as required by Article 1, Chapter 47A. Pursuant to Article 1, Chapter 47A, the bylaws of Sandy Creek were recorded simultaneously with the Declaration. N.C. Gen. Stat. § 47A-18 (2008). The bylaws state: "[Sandy Creek] shall be an unincorporated association and shall be called 'The Sandy Creek Condominium Association'. The business and property of Sandy Creek Condominium shall be managed and directed by the Board of Directors of [Sandy Creek]." Further: "Each Unit Owner upon acquisition of an Ownership Interest in a Unit, shall automatically become a member of [Sandy Creek]." The Board of Directors consists of between three and seven nominated or elected

persons, who must own at least a partial interest in a condominium unit. "Except as otherwise provided by law, the Declaration or these bylaws, all power and authority of [Sandy Creek] shall be exercised by the Board." This power includes the power to "make contracts" and "effect insurance[.]"

Pursuant to the Declaration, Sandy Creek, by action of the Board of Directors as stated in the bylaws, "shall" carry insurance covering the "Condominium Property" "in an amount equal to the full replacement value (i.e., 100% of full 'replacement cost') of the condominium property, exclusive of excavations and foundations[.]" The Declaration requires Sandy Creek to purchase insurance coverage for "loss or damage by fire[.]" "'Condominium Property' means all the property described in Paragraph 2 above [the land upon which the development sits], buildings and all other improvements thereon[.]" "'Unit' means *that part of the Condominium Property* described in Paragraph 6 hereof." [Emphasis added]. Paragraph 6 of the Declaration defines "unit" as "a single freehold estate and means an enclosed space consisting of one or more rooms occupying all or part of one or more floors in buildings[,]" excluding exterior walls and structural elements but including everything enclosed by and including the ceiling and boundary walls, including drywall, and all finished flooring. By the express definitions of the Declaration, the "units" are part of the "Condominium Property" and Sandy Creek was required to purchase casualty insurance covering fire damage to the "Condominium Property."

"All Casualty Insurance policies shall be purchased by [Sandy

Creek] for the benefit of . . . the Unit Owners[.]" Further, "all proceeds payable as a result of casualty losses shall be paid to The Board of Directors as trustee, for each of the Unit Owners . . . and for the benefit of . . . the Unit Owners[.]" The Declaration allows Unit Owners to purchase additional insurance, and

> recommends that each owner of a Condominium Unit . . . obtain, in addition to the insurance hereinabove provided to be obtained by [Sandy Creek] a "Tenant's Homeowners Policy", or equivalent, to insure against loss or damage to personal property used in or incidental to the occupancy of the Condominium Unit, additional living expense, vandalism or malicious mischief, theft, personal liability and the like.

Under the Declaration, "Unit Owner" is defined as "any person or persons, natural or artificial, owning the fee simple estate in a Unit and an undivided percentage interest in the common elements." Plaintiffs meet the definition of Unit Owners under the Declaration. "If any portion of the Condominium Property shall be damaged by perils covered by the Casualty Insurance, [Sandy Creek] shall cause such damaged portion to be promptly reconstructed or repaired with the proceeds of insurance available for that purpose." If the insurance proceeds are insufficient to cover the estimated damage to a unit, "assessments shall be made against all Unit Owners in sufficient amounts to provide funds for the payment of such costs," and such funds will be held by the Board of Directors. In addition, the Declaration states: "In the event the property subject to this Declaration of Unit Ownership is totally or substantially damaged or destroyed, the repair, reconstruction,

or disposition of the property shall be as provided by the provisions of the Unit Ownership Act [Article 1, Chapter 47]."

We hold that the provisions of Article 1, Chapter 47A, the Declaration, and the bylaws imposed a duty upon Sandy Creek to purchase casualty insurance coverage for the type of damage incurred by Plaintiffs, including damage to those portions of their unit owned by Plaintiffs in fee simple. We note that Sandy Creek, through its attorney, Henry W. Jones, Jr. (Jones), interpreted the Declaration in the same manner. Jones, in a letter to Harleysville's attorneys, stated that under the provisions of the Declaration, Sandy Creek "is obligated to insure and provide for the reconstruction of all Condominium Property, including Units[.]" This argument is without merit.

In Sandy Creek's second argument, it contends that the trial court erred in concluding that Sandy Creek breached its duty to insure Plaintiffs' unit. However, we disagree with Sandy Creek's argument because we find nothing in the trial court's order that concludes Sandy Creek breached any duty to Plaintiffs by failing to properly obtain coverage for Plaintiffs' unit. The trial court's order concludes that: (1) Sandy Creek owed Plaintiffs a duty to insure Plaintiffs' unit, (2) Sandy Creek and Plaintiffs had an insurable interest in Plaintiffs' unit, (3) the policy provided coverage for all damage to Plaintiffs' unit, and (4) Harleysville breached its duty under the policy by refusing to cover all the damage to Plaintiffs' unit. This argument is without merit.

Harleysville's Appeal

In Harleysville's arguments, it contends that the trial court erred in granting summary judgment to Plaintiffs because Sandy Creek, as the named insured, had no insurable interest in Plaintiffs' unit, and therefore Plaintiffs' unit was not insured under the policy. In the alternative, Harleysville contends that there were genuine issues of material fact concerning whether the damage to Plaintiffs' unit was covered by the policy. We disagree.

Harleysville first contends that the Declaration and bylaws demonstrate that Sandy Creek never intended to purchase insurance coverage for Plaintiffs' unit. As we have held in Sandy Creek's appeal that the Declaration and bylaws, along with Article 1, Section 47A, did impose a duty on Sandy Creek to insure Plaintiffs' unit for fire damage, we hold, for the reasons stated above, that this contention is without merit.

Harleysville next contends that the policy purchased by Sandy Creek does not cover the damages to Plaintiffs' unit. The policy included two types of coverage: (1) commercial general liability coverage to Sandy Creek and to other insureds as defined and described in that part of the policy, and (2) property coverage to the named insured, Sandy Creek. Though the parties' arguments involve both the commercial general liability coverage section and the property coverage section of the policy, we find the property coverage section determinative of this issue. *See Fulford v. Jenkins*, __ N.C. App. __, __, 672 S.E.2d 759, 762 (2009).

In *Gaston County Dyeing Machine Co. v. Northfield Ins. Co*, 351 N.C. 293, 524 S.E.2d 558 (2000), our Supreme Court set forth the

rules governing the interpretation of insurance contracts as follows:

> As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Id. at 299-300, 524 S.E.2d at 563.

> The intention of the parties as gathered from the language used in the policy is the polar star that must guide the courts in the interpretation of such instruments. "The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." Therefore, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties.

McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 253-54, 63 S.E.2d 538, 540-41 (1951).

The policy in the instant case states: "In return for 'your'

payment of the required premium, 'we' provide the coverage described herein subject to all the 'terms' of the Commercial Output Program." Harleysville argues: "'Your' is defined as '. . . the persons or organizations named as the insured on the "declarations"', which is Sandy Creek[.] Nowhere in the property policy is there any indication that individual Unit Owners are insureds under the policy." However, pursuant to N.C. Gen. Stat. § 47A-24:

> The manager of the board of directors, or other managing body, if required by the declaration, bylaws or by a majority of the unit owners, shall have the authority to, and shall, obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested. *Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of unit owners, as trustee for each of the unit owners*[.] The trustee so named shall have the authority *on behalf of the unit owners to deal with the insurer in the settlement of claims*. []Provision for such insurance shall be without prejudice to the right of each unit owner to insure his own unit for his benefit.

N.C. Gen. Stat. § 47A-24 *mandated* that Sandy Creek purchase the policy as trustee for each unit owner, and that the named insured on the policy be the manager or board of directors of the unit owners' association. N.C. Gen. Stat. § 47A-24 does not provide for the absurd requirement that every unit owner be named individually as an insured, which would require constant revision of the policy as units are purchased and sold. The named insured is "Sandy Creek Condominium Association." Pursuant to the Declaration and the bylaws, it is the board of "Sandy Creek Condominium Association"

that had the authority and duty to purchase casualty insurance for the individual unit owners. Sandy Creek did this, in full compliance with the mandate of N.C. Gen. Stat. § 47A-24. Further, "Sandy Creek Condominium Association" is comprised of every person owning even a partial interest in a Sandy Creek Condominium unit, including Plaintiffs. Plaintiffs are members of Sandy Creek, and thus, even under Harleysville's interpretation of the policy, they are named insureds.

Further, Harleysville argues that because Sandy Creek is the named insured, and Sandy Creek does not own any part of Plaintiffs' unit, the policy coverage is limited to common areas of the condominium property. Sandy Creek, however, owns nothing. The individual Unit Owners own all common areas as tenants in common. Sandy Creek is the organization through which the individual owners conduct their joint business, and the board of directors is the designated body within Sandy Creek that performs certain duties outlined in the Declaration and the bylaws, such as purchasing insurance for Sandy Creek (i.e. the individual Unit Owners). Therefore, unless otherwise excluded from coverage, Plaintiffs, as owners of a unit, part owners of the common areas, and therefore members of Sandy Creek, had an insurable interest under the policy.

The policy states: "'We' cover direct physical loss to covered property at 'covered locations' caused by a covered peril. 'We' cover the following types of property[:]"

> Building Property
>
> This means buildings and structures including:

> 1. completed additions
>
> 2. fixtures, machinery, and equipment which are a permanent part of a covered building or structure.
>
> . . . .
>
> 4. personal property owned by "you" and used to maintain or service a covered building or structure or its premises. This includes air-conditioning equipment; fire extinguishing apparatus; floor coverings; and appliances for refrigerating, cooking, dish washing, and laundering[.]

The policy contains a section titled: "Property Not Covered." The only relevant provision in this section is: "10. Property More Specifically Insured[,]" which states: "'We' do not cover property which is more specifically insured in whole or in part by any other insurance. 'We' do cover the amount in excess of the amount due from the more specific insurance." Plaintiffs obtained additional insurance on their unit, but this insurance did not cover all the costs of repair or replacement. Therefore, by the terms of paragraph ten, Harleysville is responsible for those costs not covered by Plaintiffs' additional insurance. Nowhere in the "Property Not Covered" section does the policy exclude coverage for the individual units.

Under a section of the policy titled: "Additional Property Not Covered or Subject to Limitations[,]" the policy states: "7. Interior of Buildings - 'We' do not cover loss to the interior of buildings or structures or to personal property in the buildings or structures caused by rain, snow, sleet, ice, sand or dust [except under certain conditions]." It is undisputed that fire is a

covered peril under the policy, and paragraph seven of the policy does not mention fire as one of the perils for which it may exclude coverage for the interiors of buildings, or personal property, covered under the policy.

Harleysville, as the author of the policy, could have expressly excluded individual units from coverage, and it could have expressly excluded fire damage to the interiors of buildings, as it excluded rain, snow, sleet, ice, sand and dust. Having done neither, we hold that there is nothing in the Property Coverage section of the policy indicating any intention on Harleysville's part to exclude the type of damage suffered by Plaintiffs to their unit. *Dixie Fire Ins. Co. v. American Bonding Co.*, 162 N.C. 384, 390, 78 S.E. 430, 433 (1913); *Cowell v. Gaston County*, __ N.C. App. __, __, 660 S.E.2d 915, 918 (2008).

The Declaration and bylaws imposed a duty on Sandy Creek to have purchased insurance covering the type of damage suffered by Plaintiffs to their unit. This duty implies an intent on the part of Sandy Creek to do just that. Sandy Creeks' attorney stated his opinion that Sandy Creek had such a duty and intent, and that the policy purchased by Sandy Creek covered Plaintiffs' losses. Upon reading the clear language of the policy, and examining the intent of the parties to that policy, we hold that the policy covers the fire damage to Plaintiffs' individually owned unit. Furthermore, any ambiguities in the policy are to be construed in favor of coverage, *McCoy v. Coker*, 174 N.C. App. 311, 315, 620 S.E.2d 691, 694 (2005) (citations omitted), and exclusionary provisions in the

policy "are not favored by the courts and will be construed against the insurance carrier and in favor of coverage for the insured." *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 317, 374 S.E.2d 430, 433 (1988) (citations omitted).

In light of our decision, Harleysville's argument that Plaintiffs lacked standing to bring a direct action against Harleysville because standing "requires that the party seeking relief have an enforceable contractual right under the [policy]" must fail. Because Plaintiffs are insured under the policy, they have standing to sue on the policy. *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 601, 544 S.E.2d 797, 799 (2001).

Finally, because we construe the terms of the policy *de novo*, and we hold as a matter of law that Plaintiffs' damages are covered under the policy, Harleysville's argument that genuine questions of material fact exist concerning whether the policy covers Plaintiffs' damages is without merit.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).