[Cite as *Eiben v. Grange Mut. Cas. Co.*, 2010-Ohio-1673.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93730

WILLIAM EIBEN

PLAINTIFF-APPELLANT

vs.

GRANGE MUTUAL CASUALTY CO.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-682016

BEFORE: Kilbane, J., Rocco, P.J., and Celebrezze, J.

RELEASED: April 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, William Eiben ("Eiben"), appeals the trial court's grant of summary judgment in favor of appellee, Grange Mutual Casualty Company

("Grange"), upholding Grange's denial of Eiben's claim against his homeowner's insurance policy. Eiben's claim sought the replacement cost of hand tools, power tools, and copper supplies that were stolen at a residential construction job site that was not Eiben's primary residence. After reviewing the law and facts, we affirm.

Factual and Procedural History

{¶ 2} On May 10, 2007, Eiben purchased a house located at 4178 West 20th Street, Cleveland, Ohio ("the West 20th Street house"), at sheriff's sale. Sometime between March 23 and March 25, 2008, thieves broke into the unoccupied house, which Eiben was rehabilitating, and stole approximately $2,863.78 worth of hand tools, power tools, and plumbing supplies, including among other things: copper piping, a pipe cutter, an 18-volt DeWalt power tool, an air compressor, and a pneumatic finish nailer.

{¶ 3} At the time of the theft, Eiben had a Grange Homeowner Insurance Policy ("the policy") that insured his primary residence at 4804 West 19th Street ("primary residence"), Cleveland, Ohio. Eiben filed a claim against the policy for the loss of his property at the West 20th Street house, which Grange denied.

{¶ 4} On January 16, 2009, Eiben filed suit against Grange seeking to recover on his homeowner's policy for the loss of his personal property at the

West 20th Street house. Eiben also claimed that Grange acted in bad faith in denying him coverage for the theft.

{¶ 5} On May 20, 2009, Grange filed its motion for summary judgment.

{¶ 6} On June 19, 2009, Eiben filed his brief in opposition.

{¶ 7} On July 9, 2009, the trial court granted summary judgment in favor of Grange without opinion.

{¶ 8} On August 6, 2009, Eiben appealed.

{¶ 9} Eiben asserts one assignment of error for our review:

> **"The trial court erred in granting summary judgment to Grange."**

Summary Judgment Standard of Review

{¶ 10} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 11} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving

party, that conclusion is adverse to the nonmoving party." *Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326, 672 N.E.2d 654.

{¶ 12} The moving party carries the initial burden of setting forth specific facts that support the motion for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. If the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Analysis

{¶ 13} As this court recently noted, "[i]nsurance policies are contracts which we construe according to their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Neal-Pettit v. Lahman*, 8th Dist. No. 91551, 2008-Ohio-6653, citing *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212, 216, 259 N.E.2d 123. In *Kincaid v. Erie Ins.*, 183 Ohio App.3d 748, 754, 2009-Ohio-4372, 918 N.E.2d 1036, this court summarized the rules of insurance contract interpretation as follows:

> **"When the language in a contract is reasonably susceptible of more than one interpretation, the meaning of the ambiguous language is a question of fact. If no ambiguity exists, however, the terms of the contract must simply be applied without resorting to methods of construction and interpretation. * * * [I]f a contract is clear and unambiguous, then its interpretation is a matter of law, there is no issue of fact to be determined, and a court**

cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." Id. at 754-755 (Internal citations omitted.)

{¶ 14} Eiben argues that the provisions of the homeowner's policy are ambiguous and, thus, should be interpreted strictly against Grange as Grange drafted the policy. Grange argues that the policy is explicit in its denial of coverage, that no ambiguities exist in the contract, and thus, no questions of fact remain for the grant of summary judgment.

I. Whether Coverage Exists Under the Policy

{¶ 15} Eiben's policy contains an introductory provision under "Section I – Property Protection Coverage C – Personal Property," that states:

> **"We cover personal property owned or used by an insured person anywhere in the world. Any person or property away from the residence premises is covered for up to 10% of the Personal Property coverage limit but not less than $1,000 (This limitation does not apply to personal property in a newly acquired principal residence for the first 30 days after you begin to move there.)"**

{¶ 16} Therefore, Eiben correctly asserts that coverage exists under the policy in its most general terms. However, our analysis does not end there.

II. Whether Coverage is Excluded Under the Policy

{¶ 17} A separate portion of Eiben's policy, titled "Perils We Insure Against[,]" states, at Section 9, that the policy insures against:

> **"Theft or attempted theft, including loss of property from a known place if it is likely that a theft has occurred.**

(a) This peril does not apply to theft

* * *

(2) in or from a dwelling under construction or of construction material and supplies until completed and occupied.

* * *

(b) This peril does not apply away from the residence premises to theft of:

(1) property while in any other dwelling or its premises owned, rented or occupied by an insured person except while an insured person is temporarily residing there. Property of an insured person who is a student is covered at a residence away from home if the student has been there any time during the 45 days immediately before the loss."

{¶ 18} Thus, while the insurance policy states generally in its introductory language that it covers loss to an insured "anywhere in the world," it specifically excludes coverage for situations where, as here, theft of property occurs in a dwelling under construction, or of construction materials and supplies, until that structure is completed and occupied. Coverage is also excluded for theft away from the home unless the insured is temporarily residing there. Eiben admitted at his deposition that the West 20th Street house was under construction, unoccupied at the time the tools were stolen,

and that the tools were being used for the construction and rehabilitation of the house. (Tr. 13.)

{¶ 19} Contractual language is considered ambiguous where the meaning of the language cannot be determined from the four corners of the agreement, or where the language is susceptible to two or more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, 784 N.E.2d 186, appeal not allowed, 99 Ohio St.3d 1435, 2003-Ohio-2902, 789 N.E.2d 1117. Here, as Grange points out in its brief, coverage is provided for personal property "anywhere in the world," but only for the perils insured by the policy. In short, the perils Eiben requested coverage for were excluded by the plain, unambiguous contract language. We are constrained by its language and will not create a new contract where the plain and ordinary language used in the policy is apparent from the contents of the policy. See *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146.

{¶ 20} Further, Ohio courts of appeals in at least two other jurisdictions have upheld the denial of coverage under policies excluding coverage for theft of tools away from the primary residence. See *Higley v. Cincinnati Ins. Co.* (July 8, 1983), Licking App. No. CA-2938; *Koontz v. Auto Owners Ins. Co.* (May 28, 1999), Richland App. No. 98-CA-59. In a case factually similar to the instant case, the *Higley* court found that a clause excluding coverage for stolen tools away from the primary residence was not "vague, ambiguous or

uncertain," and that plaintiff's tools that were stolen from a rental property were not covered by the insurance policy. *Higley* at 4.

{¶ 21} In *Koontz*, the Fifth District Court of Appeals upheld the exclusion of coverage for stolen tools under language in a homeowner's policy similar to the language at issue in this case.[1] While the dwelling at issue in *Koontz* was a summer home in Canada that was unoccupied for part of the year, as opposed to an unoccupied house that was being rebuilt, the same principles of contract construction and interpretation apply.

{¶ 22} Though we sympathize with Eiben's interpretation of the contract, we are constrained to apply its clear and unambiguous terms to uphold the exclusion of coverage in this case. The trial court did not err in granting summary judgment in Grange's favor.

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[1]The exclusionary language in the policy in *Koontz* is as follows:

"'Coverage C' includes theft loss, described in subsection 10 of 'PERILS WE INSURE AGAINST.' The theft provision provides, in pertinent part:

10. Theft or Attempted Theft, including loss of property from a known place if it is likely a theft has occurred.

* * *

b. This peril does not apply away from the residence premises to theft of:

(1) property while in any other dwelling or its premises owned, rented or occupied by an insured person except while an insured person is temporarily residing there. Property of an insured person who is a student is covered at a residence away from home if the student has been there at any time during the 45 days just before the loss; * * *." Id. at 2.

III. Final Appealable Order Issue

{¶ 23} We note that while the trial court granted summary judgment in favor of Grange on the coverage issue, it also granted "declaratory judgment" in Grange's favor without declaring the obligations and responsibilities of the parties in its order. In so doing, the court potentially created a final appealable order issue, since judgments in declaratory judgment actions "[m]ust declare all of the parties' rights and obligations in order to constitute a final, appealable order." *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. No. 86600, 2006-Ohio-1077, ¶10, citing *Accent Group, Inc. v. Village of N. Randall*, 8th Dist. No. 83274, 2004-Ohio-1455; *Haberley v. Nationwide Mut. Fire Ins. Co.* (2001), 142 Ohio App.3d 312, 755 N.E.2d 455; see, also, *Darrow v. Zigan*, 4th Dist. Nos. 07CA25 and 07AP25, 2009-Ohio-2205.

{¶ 24} "Simply put, 'a trial court does not fulfill its function in a declaratory judgment action when it disposes of the issues by journalizing an entry merely sustaining or overruling a motion for summary judgment without setting forth any construction of the document [or ordinance] under consideration.'" *Bowman v. City of Middleburg Hts.,* 8th Dist. No. 92690, 2009-Ohio-5831, quoting *Alea London Ltd. v. Skeeter's 19th Hole, Inc.*, 11th Dist. No. 2007-G-2803, 2007-Ohio-6013, ¶4.

{¶ 25} However, a review of the record reveals that neither party sought declaratory judgment in either the complaint or answer in this matter, nor is

there a counterclaim seeking declaratory judgment. Instead, Grange inserted the words "declaratory judgment" in the title of its motion for summary judgment and prayed for declaratory judgment at the end of its motion. Outside of these insertions, there is no mention of declaratory judgment in the record.

{¶ 26} Civ.R. 13 governs counterclaims and states in subsection (A):

> **"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."**

{¶ 27} "In determining whether claims arise out of the same transaction or occurrence, courts most frequently utilize the 'logical relation' test." *Rettig Ent., Inc. v. Koehler* (1994), 68 Ohio St.3d 274, 277, 626 N.E.2d 99, 102.[2] "'[T]he two-pronged test for applying Civ.R. 13(A) is: (1) does the claim exist at the time of serving the pleading * * *; and (2) does the claim arise out of the transaction or occurrence that is the subject matter of the opposing claim.' If both prongs are met, then the present claim was a compulsory counterclaim in the earlier action and is barred by virtue of Civ.R. 13(A)." Id., quoting *Geauga*

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[2]"The 'logical relation' test, which provides that a compulsory counterclaim is one which is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts, can be used to determine whether claims between opposing parties arise out of the same transaction or occurrence." *Rettig* at 278.

Truck & Implement Co. v. Juskiewicz (1984), 9 Ohio St.3d 12, 14, 457 N.E.2d 827, 829.

{¶ 28} Grange's declaratory judgment arises out of the same transaction or occurrence that is the subject of Eiben's claims and is logically related to Eiben's claims. We find it should have been pled as a compulsory counterclaim, not merely inserted into it's motion for summary judgment. We therefore affirm the trial court's grant of summary judgment in favor of Grange on the issue of coverage generally. Rather than reversing and remanding this case for a final entry from the trial court to determine the responsibilities and obligations of the parties, we find the trial court's grant of declaratory judgment in favor of Grange to be harmless error.[3] We do not address Grange's claim for declaratory judgment because it was not properly pled at the trial court. The trial court's grant of summary judgment on the issue of coverage in favor of Grange is affirmed.

{¶ 29} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[3]Harmless error is one that does not affect the substantial right of the parties. *Werts v. Goodyear Tire & Rubber Co.*, 8th Dist. No. 91403, 2009-Ohio-2581, citing *Knor v. Parking Co. of Am.* (1991), 73 Ohio App.3d 177, 596 N.E.2d 1059. An appellate court will not reverse a judgment on the basis of any error that is harmless. Id.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR