TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00879-CV

Safeco Insurance Company of Indiana, Appellant

v.

Logan Moss, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NOS. D-1-GN-16-000956, HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellee Logan Moss sued appellant Safeco Insurance Company of Indiana after Safeco denied Moss's claim for water damage under his homeowners insurance policy. After the parties both filed motions for summary judgment on the issue of coverage, the trial court signed an order denying Safeco's motion and granting a partial summary judgment in favor of Moss. This permissive appeal followed.[1] Because we conclude as a matter of law that the policy's exclusion for damage caused by surface water applies and consequently bars coverage for Moss's claim, we will reverse the trial court's order.

[1] Safeco filed an unopposed petition for permissive appeal pursuant to Texas Civil Practice and Remedies Code Section 51.014, subsections d and f. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d), (f); *see also* Tex. R. App. P. 28.3 (permissive appeals in civil cases). This Court granted the petition, *see* No. 03-16-00879, 2017 Tex. App. LEXIS 1002, at *2 (Tex. App.—Austin Feb. 3, 2017, order) (per curiam), allowing Safeco to appeal what is otherwise an unappealable interlocutory order. *See* Tex. R. Civ. P. 168.

BACKGROUND

From April 23, 2015 to April 23, 2016, Safeco insured Moss's home at 11902 Pleasant Panorama View, Austin, Texas, under Texas Quality Select Homeowners Policy No. OY6936502 ("the Policy"). Following excessive rainstorms in May 2015, Moss contacted Safeco to report water damage at his home, namely, water in the master bedroom closet, a bedroom, and two additional rooms.

Safeco hired two professional engineers to inspect the damage. First, Safeco hired Jason Womack to determine the cause of the interior water intrusion into Moss's home. Upon completion of his inspection of the Moss home, Womack issued a report concluding that the water had entered the home through an electrical meter conduit and traveled into the closet. Safeco then hired a second engineer, Darin Lasater, to determine the original source of the water. In his report, Lasater concluded, in relevant part, that (1) surface water runoff flowed down the swale south to north between 11905 and 11901 Pleasant Panorama View; (2) the runoff flowed into an uncovered electrical basin at the corner of 11905 Pleasant Panorama View, filling the basin with water; (3) the rising water in the electrical distribution basin then drained through an electrical conduit outlet in the basin downgrade to the electric distribution basin at the southeast corner of 11906 Pleasant Panorama View and, in turn, drained downgrade to the Moss's residence; and (4) "sufficient head pressure in the electrical service conduit" forced the water up the riser and out of the service entrance into the master closet, and the water spread across the floor and into the other rooms in the house. Based on the engineers' reports, Safeco denied Moss's water damage claim citing the Policy's exclusion for damage caused by surface water.

Moss subsequently filed suit against Safeco asserting that the insurance company had committed breach of contract and seeking a declaration that his claim was covered under the Policy. In addition, Moss claimed that Safeco had breached the common-law duty of good faith and fair dealing and had violated various provisions of the Texas Insurance Code. Moss filed a traditional motion for summary judgment on his claims for breach of contract and for declaratory relief. In his motion, Moss asserted that Safeco had incorrectly applied the Policy's exclusion for surface water and, therefore, had wrongly denied coverage on his claim.

Safeco then filed a combined traditional and no-evidence motion for summary judgment on the issue of coverage. In support of its motion, Safeco attached the business-records affidavit of the Safeco manager assigned to Moss's claim and, as exhibits to the affidavit, copies of the Policy, Womack's report, and Lasater's report. Safeco also attached the affidavit of Lasater, in which Lasater testified to his education, qualifications, the scope of his investigation, and a summary of his conclusions. Lasater's curriculum vitae and a copy of his report were attached to Lasater's affidavit as exhibits. In moving for summary judgment on traditional grounds, Safeco asserted that its summary-judgment evidence established, as a matter of law, that Moss's claim was excluded from coverage under the Policy. In the no-evidence portion of its motion for summary judgment, Safeco argued that "there is no evidence that the water damage to Moss's home was not caused directly or indirectly by surface water."

Upon considering the competing motions, the trial court signed an order granting Moss's motion for summary judgment and denying Safeco's motion for summary judgment. In addition, the trial court found that Moss was entitled to judgment on his claim that Safeco

"breached the insurance contract making the basis of this lawsuit" and declared that Moss was "entitled to coverage under the insurance contract making the basis of this lawsuit." This permissive appeal followed.

STANDARD OF REVIEW

We review a party's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). When, as here, both parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we consider the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004). When the trial court does not specify the ground for its ruling, summary judgment must be affirmed if any of the grounds on which the judgment was sought were meritorious. *State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency*, 390 S.W.3d 289, 292 (Tex. 2013).

The resolution of this appeal requires us to interpret Moss's insurance policy with Safeco. Texas courts construe insurance policies "using ordinary rules of contract interpretation" to ascertain the parties' intent as reflected in the terms of the policy itself. *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010)). "When interpreting an insurance contract, we consider all its parts, read all of them together, and give effect to all of them." *Greene v. Farmers*

Ins. Exch., 446 S.W.3d 761, 766 (Tex. 2014) (citing *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994)). The terms of the policy are given their ordinary and generally accepted meaning unless the policy shows the words were meant in a technical or different sense. *3109 Props, L.L.C. v. Truck Ins. Exch.*, No. 03-13-00350-CV, 2015 WL 3827580, at *2 (Tex. App.—Austin June 18, 2015, pet. denied) (mem. op.) (citing *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008)).

Whether an insurance contract is ambiguous is a question of law. *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010). If the language of the policy lends itself to a clear and definite legal meaning, the policy is not ambiguous and will be construed as a matter of law. *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017); *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 459 (Tex. 2015). A policy is ambiguous only if it is genuinely subject to more than one reasonable interpretation after applying the pertinent rules of contract interpretation. *Nassar*, 508 S.W.3d at 258 (citing *RSUI Indem. Co. v. The Lynd Co.,* 466 S.W.3d 113, 118 (Tex. 2015)). "The fact that the parties may disagree about the policy's meaning does not create an ambiguity." *Primo*, 512 S.W.3d at 893 (quoting *Page*, 315 S.W.3d at 527).

ANALYSIS

In one issue on appeal, Safeco asserts that the trial court erred in granting Moss's partial motion for summary judgment and denying Safeco's motion for partial summary judgment on the overlapping issue of coverage. The pertinent underlying facts leading to the water damage claimed by Moss are undisputed. Consequently, the dispositive issue before the trial court, and now before us, is whether the damage to Moss's home was caused by "surface water," as that term is used

in the Policy. If so, the loss is excluded from coverage, and the trial court erred in granting summary judgment in favor of Moss.

The Policy provides the following:

PROPERTY LOSSES WE DO NOT COVER

> We [Safeco] do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of the cause of loss or any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
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> . . .
>
> 8. **Water Damage**, meaning:
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> a. (1) flood, surface water, waves, tidal waves, overflow of a body of water, or spray from any of these, whether or not driven by wind, including hurricane or similar storm; and
>
> (2) release of water held by a dam, levee or dike or by a water or flood control device.
>
> . . .
>
> Water includes any water borne materials.
>
> This exclusion, 8., applies whether caused by or resulting from human or animal forces or any act of nature.

Although the term "surface water" is not defined in the Policy, numerous Texas courts have interpreted the term in the context of insurance. These courts have construed the term "surface water" as follows:

> "Surface water" is defined as water or natural precipitation diffused over the surface of the ground until it either evaporates, is absorbed by the land, or reaches channels where water naturally flows.

State Farm Lloyds v. Marchetti, 962 S.W.2d 58, 61 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (citing *Transamerica Ins. Co. v. Raffkind*, 521 S.W.2d 935 (Tex. Civ. App.—Amarillo 1975, no writ)); *see also Crocker v. American Nat'l Gen. Ins. Co.*, 211 S.W.3d 928, 931 (Tex. App.—Dallas 2007, no pet.); *Sun Underwriters Ins. Co. of N.Y. v. Bunkley*, 233 S.W.2d 153, 155 (Tex. Civ. App.—Fort Worth 1950, writ ref'd).

Both parties rely on this established definition of surface water in support of their competing motions for summary judgment and in support of their positions on appeal. First, Safeco argues that the summary-judgment evidence establishes that "the rainwater which flowed along the surface of the ground, into an electrical distribution basin, and through electrical conduit into Moss's home constituted surface water excluded from coverage by the plain language of the homeowner's insurance policy Safeco issued to Moss." Thus, according to Safeco, the undisputed evidence establishes that the water that entered the electrical conduits originated as surface water, as that term has long been recognized by Texas courts.

Conversely, pointing to the same definition of surface water, Moss contends that the summary-judgment evidence establishes that the water was not surface water at the time it caused damage to his home. Moss does not dispute that the water entered his home by flowing through the electrical conduit or that the water originated as surface water. Instead, Moss argues that, as a matter of law, the water lost any status it may have had as surface water once it entered the electrical conduit, which Moss contends is a "channel where water naturally flows." *See Marchetti*, 962 S.W.2d

at 61 (defining "surface water"). In support of his position, Moss relies on several cases in which Texas courts have held that water originating as excluded surface water lost its status as surface water by the time it actually caused property damage. *See id.*; *Raffkind*, 521 S.W.2d at 939. In each of these cases, as in this case, the dispute concerned whether the damages claimed by the homeowner was covered under a homeowners policy that excluded losses caused by surface water.

In *Marchetti*, the evidence established that "excessive rainfall caused [a] sanitation sewer system to exceed its capacity and direct waters back through the underground lines from the street into [appellees'] home, in turn, causing non-flood water and sewage to accidently discharge or overflow within the plumbing system in [appellees'] home." 962 S.W.2d at 61. The First Court of Appeals held that the damages were covered under the policy because "the losses sustained by appellees were caused by, or resulted from, water (and sewage) after it had lost its status as surface water by flowing into underground sewage lines." *Id*. Similarly, in *Raffkind*, the Amarillo court of appeals held that water that had seeped into underground ducts and discharged as vapor into the home was not "surface water" excluded from coverage. 521 S.W.2d at 937-38. The court explained that "all of the damage was caused by or resulted from the water after it had lost its status as surface water by being absorbed into the ground." *Id*. at 939.

Because the relevant facts presented in *Marchetti* and *Raffkind* are distinguishable from those presented in this case, we do not find these cases to be instructive on the issue of whether the surface water that flowed onto Moss's property was, in fact, still surface water at the time it entered Moss's home. In those cases, the evidence established that the surface water itself was altered when, in the case of *Marchetti*, the water flowed through a pipe and combined with sewage (non-surface water), or when, in the case of *Raffkind*, the water was absorbed into the ground and

became vapor before causing damage. *See Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, L.L.P.*, 174 S.W.3d 254, 258-59 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (distinguishing *Marchetti* and *Raffkind* and rejecting argument that water lost its status as surface water). Here, the undisputed summary-judgment evidence establishes that natural precipitation flowed along the surface of the ground and, as a result of gravity, eventually made its way into a man-made structure, i.e. an electrical conduit, and into Moss's home. Thus, the evidence establishes that the water originated as surface water and did not co-mingle with non-surface water or change in form before entering Moss's home. *See id*.

Moreover, several of our sister courts have rejected the suggestion that the term "surface water" does not include precipitation that collects on or subsequently flows in man-made structures. *See Crocker*, 211 S.W.3d at 936 (concluding that "surface water" included rain that had collected on raised patio and caused water to drain into house instead of flower beds); *Valley Forge*, 174 S.W.3d at 259 (holding that water did not lose character as surface water when it flowed from the surface, through pedestrian tunnels, and into other man-made structures before flooding insured's premises); *see also Tsai v. Liberty Mut. Ins. Co.*, No. 01-14-00677-CV, 2015 WL 6550769, at *7 (Tex. App.—Houston [1st Dist.] Oct. 29, 2015, no pet.) (mem. op.) (concluding that water did not lose its status as "surface water" when absorbed by mulch in flower bed). These cases are directly contrary to Moss's assertion that the rain water in this case necessarily "lost any status it had as surface water once it began to flow through the electrical conduit."

In any event, we need not decide whether the unimpeded flow of the surface water into a man-made structure, i.e. the electrical conduit, necessarily changed the character of the surface

water in this case. Unlike the policies presented in *Marchetti* and in *Raffkind*, the policy governing this dispute contains a lead-in clause stating that damage from surface water is excluded if the loss was "caused directly or indirectly" by surface water. *See Valley Forge*, 174 S.W.3d at 259 (noting that unlike policies in *Marchetti* and *Raffkind*, policy at issue contained "a lead-in clause excluding damage from flood or surface water regardless of other contributing causes"); *see also Tsai*, 2015 WL 6550769, at *7 (noting that policy included "lead-in clause stating that water damage from surface water is excluded if the loss was caused directly or *indirectly* by surface water"). Neither party asserts, and we cannot conclude, that this lead-in clause is ambiguous. Under this clause, the damage to Moss's home is excluded from coverage if the surface water directly caused damage by entering the home or if the surface water indirectly caused damage by forcing other non-surface water into the home. *See Tsai*, 2015 WL 6550769, at *7 (concluding that damage was excluded under policy even if water lost its character as surface water when it was "absorbed by the mulch in the flower bed and drained into Tsai's house" because loss was either directly or indirectly caused by surface water). Therefore, even assuming the status of the water as surface water changed upon entering the electrical conduit, as Moss contends, we conclude that the summary-judgment evidence establishes that surface water indirectly caused the loss claimed by Moss.

Based on the plain language of the Policy and the summary-judgment evidence, we conclude that the damage to Moss's home is excluded from coverage as a matter of law. *See* Tex. R. Civ. P. 166a. Therefore, the trial court erred in granting Moss's motion for summary judgment and erred in denying Safeco's motion for summary judgment. Accordingly, we sustain Safeco's issue on appeal.

CONCLUSION

We reverse the trial court's judgment and render judgment that Moss take nothing on his claims for breach of contract and for declaratory relief.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Rendered

Filed June 29, 2017