

SIXTH DIVISION  
November 30, 2012

No. 1-11-1507

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|-------------------------------------|---|------------------|
| WEST BEND MUTUAL INSURANCE COMPANY, | ) | Appeal from the  |
|                                     | ) | Circuit Court of |
| Plaintiff-Appellant,                | ) | Cook County.     |
|                                     | ) |                  |
| v.                                  | ) | 10 CH 1688       |
|                                     | ) |                  |
| NEW PACKING COMPANY, INC.,          | ) | Honorable        |
|                                     | ) | Mary Anne Mason, |
| Defendant-Appellee.                 | ) | Judge Presiding. |

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Lampkin and Justice Garcia concurred in the judgment.

**ORDER**

*HELD:* "Vacancy provision" excluding coverage for losses resulting from vandalism, theft, and other specified hazards if the building in which the losses occurred was vacant for more than 60 consecutive days before such loss, does not apply to exclude coverage under the circumstances in this case.

¶ 1 West Bend Mutual Insurance Company (West Bend), appeals from a circuit court order

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denying its motion for summary judgment and granting the cross-motion for summary judgment filed by New Packing Company, Inc. (New Packing). For the reasons that follow, we affirm.

¶ 2 This declaratory judgment action involves an insurance coverage dispute concerning the interpretation and application of a "vacancy provision" that excludes coverage for losses resulting from vandalism, theft, and other specified hazards if the building in which the losses occurred was vacant for more than 60 consecutive days before such loss. Vacancy provisions such as the one at issue in this case were established in recognition that buildings that are vacant or unoccupied for extended periods of time often face an increased risk of damage from theft and vandalism or from mere neglect. See *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 40 Cal. 4th 19, 22, 145 P.3d 472, 474 (2006).

¶ 3 On August 17, 2008, West Bend issued a commercial property insurance policy to New Packing. The one-year policy became effective on August 17, 2008. The policy initially covered a building located at 1249 West Lake Street in Chicago, Illinois. This building housed New Packing's meat processing operations. The policy included a "vacancy provision" providing that West Bend "will not pay for any loss or damage caused by," among other things, vandalism or theft "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs."

¶ 4 On April 30, 2009, New Packing closed on the purchase of a warehouse located at 4151 West Lake Street in Chicago, Illinois. At the time of the purchase, the warehouse was vacant and had been vacant for more than 60 consecutive days prior to closing. On May 7, 2009, West Bend issued an endorsement to the policy adding the warehouse as an insured property effective April 30, 2009.

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¶ 5 On May 5 and 17, 2009, the warehouse was vandalized and allegedly sustained losses of over \$1,000,000. New Packing submitted a claim for coverage under the policy. West Bend subsequently denied coverage, citing the vacancy provision.

¶ 6 West Bend then filed the present declaratory judgment action, seeking a declaration that it was not obligated to indemnify New Packing for the claimed losses under the policy. In response, New Packing filed an answer, affirmative defense, and a two-count counterclaim. In count I of the counterclaim, New Packing alleged that West Bend breached the insurance contract by refusing to pay for the claimed losses. Count II of the counterclaim asked for monetary damages pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2010)).

¶ 7 Thereafter, the parties filed cross-motions for summary judgment regarding the applicability of the vacancy provision. On November 2, 2010, the circuit court entered a memorandum opinion and order finding that the vacancy provision was not applicable under the circumstances of the case. The court granted New Packing's motion for summary judgment on count I of its counterclaim as to liability. However, the court made no ruling as to damages under count I of the counterclaim or to any portion of count II of the counterclaim.

¶ 8 The parties then filed a joint motion, stipulating that the proper measure of damages as to count I of New Packing's counterclaim was \$1,027,013.37, excluding prejudgment interests and costs. The parties requested that the remaining issues in New Packing's counterclaims be stayed pending the outcome of an appeal of the circuit court's order of November 2, 2010. The parties also requested a finding that pursuant to Illinois Supreme Court Rule 304(a), there was no just reason for delaying appeal of the circuit court's order of November 2, 2010.

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¶ 9 On May 2, 2011, the circuit court entered an order granting the joint motion. The court also held that pursuant to Supreme Court Rule 304(a), there was no just reason for delaying appeal of the court's order of November 2, 2010. This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 Our review of the circuit court's order granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171, (2003). Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999).

¶ 12 As in this case, where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law. *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill. App. 3d 128, 134 (2001). "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 13 In construing an insurance policy, the court's primary function is to ascertain and enforce the intent of the parties as expressed in the agreement. *American Economy Insurance Co. v. DePaul University*, 383 Ill. App. 3d 172, 177 (2008). To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into

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account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). If the words in the policy are unambiguous, the court will afford them their plain, ordinary meaning, and will apply them as written. *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391.

¶ 14 The dispute in this case centers on the interpretation and application of the policy's vacancy provision. West Bend claims that the losses at issue should be excluded under the terms of the vacancy provision because the warehouse had been vacant for more than 60 consecutive days before the property was vandalized.

¶ 15 In contrast, New Packing argues that the period of vacancy that existed prior to the date it purchased the warehouse and had it added as an insured property to its policy, should not be counted toward the sixty days of vacancy. New Packing contends that the 60-day period referred to in the vacancy provision did not begin to run until April 30, 2009, the effective date of the endorsement to the policy adding the warehouse as an insured property. New Packing maintains that since the losses at issue occurred respectively, five and seventeen days after the policy was endorsed, which was well within the 60-day period, then the vacancy provision does not apply to exclude coverage. In the alternative, New Packing maintains that the terms of the policy are ambiguous and therefore the vacancy provision should be strictly construed against West Bend, the insurer who drafted the policy. United Policyholders filed an *amicus curiae* brief in support of New Packing.

¶ 16 We must disagree with New Packing's interpretation of the vacancy provision. The vacancy provision excludes coverage for losses resulting from vandalism, theft, and other specified hazards

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"[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs." Under this provision, when a loss occurs, the inquiry is whether the building has been vacant for 60 consecutive days "before that loss or damage occurs." If so, recovery is generally precluded. See, *e.g.*, *Gas Kwick, Inc. v. United Pacific Insurance Co.*, 58 F.3d 1536, (11th Cir. 1995) (interpreting similarly worded provision).

¶ 17 Therefore the vacancy provision defines the vacancy period retrospectively, whereby the days of vacancy are calculated by looking back from the date of the loss, rather than prospectively by looking forward from the effective date of coverage. *Id.* The cases cited by New Packing all employ prospective language, distinguishable from the language used in the vacancy provision at issue in this case. See, *e.g.*, *Old Colony Insurance Company v. Garvey*, 253 F. 2d 299, 300 (4th Cir. 1958) (exclusion for vacancy "beyond a period of sixty consecutive days"); *United States Fidelity & Guaranty Company v. Board of Education of Fairfield*, 339 F. Supp. 315, 317 (N. D. Ala. 1972) (same); *Bledsoe v. Farm Bureau Mutual Insurance Co.*, 341 S.W.2d 626, 629 (Mo. App. 1960) (same); *Pappas Enterprises, Inc. v. Commerce & Industry Insurance Co.*, 422 Mass. 80, 81, 661 N.E.2d 81, 82 (1996) (same); *Estate of Higgins v. Washington Mutual Fire Insurance Co.*, 838 A.2d 778, 781 (Pa. Super 2003) (same); *Kolivera v. Hartford Fire Insurance Co.*, 8 Ill. App. 3d 356, 360 (1972) (relying on same language); *Home Mutual Fire Insurance Co. v. Pierce*, 240 Ark. 865, 870, 402 S.W.2d 672, 674 (1966) (exclusion for vacancy "beyond a period of thirty days").

¶ 18 Nevertheless, we find that the vacancy provision cannot be relied upon to exclude coverage under the circumstances in this case. Prior to issuing an endorsement to the policy adding the warehouse as an insured property, West Bend had an opportunity to inspect the premises to

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determine if it was vacant. Thereafter, West Bend could have chosen not to underwrite the risk or it could have chosen to provide coverage at an additional premium.

¶ 19 Under these circumstances, West Bend cannot now claim a violation of a vacancy provision where it took no steps to discover whether the subject building was vacant. See *Kolivera*, 8 Ill. App. 3d at 360-1 (companies issuing policies within 60-day period had an opportunity to inspect premises prior to issuance, and since they failed to exercise this opportunity, the preexisting vacancy would be disregarded unless the policies specifically provided otherwise). "An insurance policy may not be issued on a vacant building and then be excluded from coverage because it is a vacant building." *Poland v. Phillips*, 371 So.2d 1053, 1056 (Fla. 3d DCA 1979).

¶ 20 Accordingly, for the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.