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United States District Court,
D. Minnesota, Sixth Division.

MESABA HOLDINGS, INC., et al., Plaintiffs,

v.

FEDERAL INSURANCE CO., Defendant.

No. Civ. 02–660RHKJGL.
|
Dec. 19, 2002.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

KYLE, J.

Introduction

***1** This matter comes before the Court on Plaintiff Mesaba Holdings, Inc. and Plaintiff Mesaba Aviation, Inc.'s (collectively, "Mesaba") Motion for Partial Summary Judgment. Mesaba, an air carrier, has sued Defendant Federal Insurance Company ("Federal"), its insurer, over Federal's refusal to cover certain losses to Mesaba's Detroit maintenance hanger caused by a severe windstorm in May of 2000. Mesaba has moved for partial summary judgment on the question of whether the insurance policy requires Federal to pay the costs of an updated fire suppression system for Mesaba's rebuilt hanger. Mesaba contends that the policy is clear on its face and summary judgment is appropriate. Federal, conversely, argues that disputes of material fact preclude that determination. For the reasons set forth below, the Court will grant Mesaba's motion.

Background

A. Mesaba's Hanger is Damaged

During the afternoon and evening hours of May 9, 2000, severe thunderstorms accompanied by 70–mile–per–hour winds struck southeast Michigan. The storm produced a combination of straight-line winds, tornadoes, and large, damaging hail. In total, the storm cut power to 200,000 households, caused several million dollars in property damage, and injured six persons.

The storm effectively destroyed the Mesaba maintenance hanger at Wayne County Metropolitan Airport. (Burke Aff. ¶ 3.) Built in 1990, the hanger's roof spanned 162 feet. Its east, west, and north walls were made of masonry, and its southern wall was a large metal hanger door. (*Id.*) Federal's claim adjuster described the storm's impact on the hanger:

> On Tuesday, May 9, 2000, extremely high winds associated with severe storms caused damage to the insured building. At the time of the loss the maintenance employees had opened the hanger doors to take an aircraft which was outside the building into the hanger to protect it from the approaching storm. While the employees were moving the aircraft high winds out of the southwest entered the building through the open hanger door, caused an uplift of the roof and blew out the east wall. As a result the roof at the east side collapsed onto the hanger floor, while the west side was still connected to the top of the west wall. The roof did pull out of the connections on the north wall causing it to twist as it fell to the east.

(Lonergan Aff. Ex. A.) The roof, the hanger door, and one of the masonry walls were completely destroyed; the remaining two walls were so severely damaged that Mesaba's construction consultants determined the walls could no longer be used as structural support. (Burke Aff. ¶ 3.)

B. Mesaba Constructs a New Hanger

Mesaba began to construct a new hanger within days of the storm. (*Id.*) In the summer of 2000, Ali Dib, Wayne County's project director responsible for overseeing the construction of Mesaba's new hanger, informed Mesaba that Wayne County would insist upon compliance with NFPA 409, enacted since the construction of the old hanger. (*Id.* ¶ 6.) NFPA 409 required Mesaba to install a far more sophisticated fire suppression system in its new hanger. (*Id.*) While the system in the prior hanger consisted of pumps and a sprinkler system, NFPA 409 required Mesaba to install a new system using a

high volume of fire-retardant foam. This so-called "deluge system" required extensive piping, foam heads, a foam tank, and a pump. (*Id.*) The cost of the new system exceeded the cost of the old by almost three million dollars. (*Id.* ¶ 16.)

***2** Wayne County's decision to require Mesaba to comply with NFPA 409 triggered a provision of Mesaba's insurance policy with Federal. Under the Policy, Federal must pay the replacement costs for damage to Mesaba's buildings as well as any upgrades required by changes in the building codes. (Frederickson Aff. Ex. A.) The policy's Ordinance and Law provision provides:

> If there is an ordinance or law in effect at the time of loss or damage that regulates ... construction of a building ... and if that ordinance or law affects the repair or replacement of the lost or damaged building ... and if you:
>
> A. repair or replace the building ... as soon as reasonably possible, the valuation will include:
>
> 1. the increased cost to repair ... the building ... to the same general size ... to the minimum standards of such ordinance or law ... except we will not include any costs:
>
> a. for ordinance or law that you were required to, but failed to, comply with before the loss....

(*Id.*)

C. Federal Disputes Compliance with NFPA 409

Wayne County's decision to require compliance with NFPA 409 had significant cost implications for Federal. As Federal's claim adjuster noted in his June 30, 2000 report, "Extra Expense will also be incurred to bring the repaired facility up to code. The biggest single item is the fire suppression system, which the Airport Authority has advised the insured will not be waived." (Lonergan Aff. Ex. A.) On September 5, 2000, Federal sent Mesaba a letter stating that it had retained a consultant and the consultant had determined "that there is a strong possibility that many, if not all of the upgrade work proposed, may not be required if the existing structure is rebuilt as it existed at the time of the loss." (Burke Aff. Ex. C.) In response to Federal's letter, Mesaba's contractor wrote the Wayne County Fire Marshall to ask whether the County would require Mesaba to comply with NFPA 409. (*Id.* Ex. D.) On September 22, 2000, the Fire Marshall replied that Mesaba would indeed be required to comply. (*Id.* Ex. E.)

In November 2000, after Federal's consultant filed a report reiterating his opinion that Mesaba was not required to comply with NFPA 409, representatives from Federal, Mesaba, the consulting firm, and Wayne County assembled to discuss the fire suppression system. (*Id.* ¶¶ 13, 14.) During this meeting, Federal and the consulting firm presented their argument for why compliance with NFPA 409 was not required. Wayne County's Fire Marshall and the Deputy Director of Airports for Properties, Planning, and Facilities rejected these arguments. (*Id.* ¶ 14.) Federal repeated its argument at a meeting three months later, which Wayne County once again rejected. (*Id.* ¶ 15.) Mesaba has since rebuilt its maintenance hanger in compliance with NFPA 409. (*Id.* ¶ 16.)

Standard of Decision

A party is entitled to summary judgment if the evidence demonstrates that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Tucker v. Evans,* 276 F.3d 999, 1001 (8th Cir.2002). In viewing the evidence, the Court makes its inferences in the light most favorable to the nonmoving party. *Enterprise Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996); *see also Adkinson v. G.D. Searle & Co.,* 971 F.2d 132, 134 (8th Cir.1992). The burden is on the moving party, *Enterprise Bank,* 92 F.3d at 747; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986), and summary judgment should be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *Liberty Lobby,* 477 U.S. 242, 250 (1986). In essence, the court performs a threshold inquiry to determine whether there is need for trial. *Id* .

Analysis

***3** Mesaba has moved for summary judgment on the ground that the Ordinance and Law provision of its policy with Federal unambiguously provides coverage for the increased costs of rebuilding to the standards of the building code in effect at the time of loss. Federal argues that summary judgment is not appropriate because (1) Mesaba has not met its burden of proving that there was a law in place when the loss occurred that affected the repair of the damaged building, and (2) a dispute of fact exists over whether Mesaba was required to have the deluge system in place when it built the original hanger in 1990. Because the Court concludes

that there is no genuine issue of material fact and Mesaba is entitled to judgment as a matter of law, the motion will be granted.

A. The Ordinance and Law Provision

The construction of insurance policies is governed by general contract principles. *Nathe Bros. v. American Nat'l Fire Ins. Co.,* 615 N.W.2d 341, 344 (Minn.2000). When the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning. *Medica, Inc. v. Atlantic Mut. Ins. Co.,* 566 N.W.2d 74, 77 (Minn.1997); *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.,* 383 N.W.2d 645, 652 (Minn.1986). Where the language of a policy is ambiguous, however, courts generally construe ambiguities in favor of the insured. *Nathe Bros .,* 615 N.W.2d at 344 (citing *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.,* 366 N.W.2d 271, 277 (Minn.1985)).

Federal asserts Mesaba has not demonstrated that it qualifies for coverage under the Ordinance and Law provision of the policy. Under that provision, Federal agreed to pay the increased costs imposed by ordinances or laws that affect the repair to, or replacement of, Mesaba's buildings at the time of loss. (Federickson Aff. Ex. A.) In order to demonstrate that it is qualified under the policy, Mesaba must demonstrate (a) "there is a law or ordinance in effect at the time of loss that regulates ... construction of a building," and (b) "that ordinance or law affects the repair or replacement of the lost or damaged building." (*Id.*)

Here, Federal argues Mesaba has not proved there was a law or ordinance regulating the construction of the building at the time its hanger was damaged. While Mesaba noted that it was required to comply with "applicable codes, including NFPA 409," Federal asserts NFPA 409 is not a law or an ordinance but rather a *standard* promulgated by the National Fire Protection Association. In a footnote, however, Federal acknowledges that "[h]ad it chosen to, Mesaba could likely have established [this] element" (Def.'s Opp'n Summ. J. at 11), and sure enough, in affidavits accompanying its reply papers, Mesaba demonstrates that NFPA 409 has been incorporated into local ordinance. (*See* Second Lonergan Aff. Ex. A (Wayne County Ord. No. 97–35, § 3).) Federal's argument here–especially considering its immersion in the nitty-gritty of Wayne County's building codes–is more cute than convincing, and the Court concludes with little difficulty that a "law or ordinance" regulated the construction of the new hanger.

***4** Federal also contends Mesaba has failed to prove that any law or ordinance "affects the repair or replacement of the damaged building." Mesaba, Federal asserts, did not merely replace the prior hanger but instead added 5,700 more feet upon rebuilding; Mesaba must therefore prove that a law or ordinance would have required a deluge system had it rebuilt the hanger to its prior dimensions. To counter this argument, Mesaba has provided affidavits from the Wayne County officials charged with implementing the building code. They unambiguously testify that its "applicable ordinances, including NFPA 409" required Mesaba to install the upgraded fire suppression system "regardless of whether the hanger was rebuilt to its original footprint or expanded." (Carnell Aff. ¶ 3.) Federal's argument appears to be that Wayne County's officials charged with implementing its building code were *wrong.* This argument, however, is not persuasive. Wayne County has the right to interpret its own laws and Mesaba has no obligation to contest its decisions, *see Stevick v. Northwest G.F. Mut. Ins. Co.,* 281 N.W.2d 60, 64 (N.D.1979). Even if that were not the case, the Court finds Wayne County's interpretation of its laws reasonable and persuasive. Accordingly, the Court concludes that Mesaba has satisfied its requirements under the Ordinance and Law provision.

B. Exclusion

Federal also argues that it should not be required to pay for Mesaba's updated fire suppression system because the prior system was not in compliance and therefore Mesaba's claim falls within a policy exclusion. Under the exclusion, Federal will not pay the increased costs of rebuilding imposed by an "ordinance or law that you were required to, but failed to, comply with before the loss...." (Frederickson Aff. Ex. A.) Federal asserts that Mesaba was required to have a deluge system in place at the time it constructed the original hanger and it should not have to pay the increased cost of the new system. Mesaba argues, on the other hand, that its prior system had been "grandfathered" into compliance.

Under the policy, the relevant question is whether Mesaba was "required to, but failed to" comply with NFPA 409 before the loss. (Frederickson Aff. Ex. A.) Exclusions contained in an insurance policy are a part of the contract and must be given the same consideration as any other part in determining what the policy covers. *Lobeck v. State Farm Mut. Auto. Ins. Co.,* 582 N.W.2d 246, 249 (Minn.1998). Courts are, however, to interpret the language of an exclusionary provision in accordance with the expectations of the insured. *American Family Mut. Ins. Co. v. Walser,* 628 N.W.2d 605, 613 (Minn.2001); *American Family Mut. Ins. Co. v. Peterson,*

405 N.W.2d 418, 422 (Minn.1987). Exclusions are strictly construed against the insurer. *Walser,* 628 N.W.2d at 613; *SCSC Corp. v. Allied Mut. Ins. Co.,* 536 N.W.2d 305, 314 (Minn.1995).

Federal argues Mesaba was required to install a deluge system when it built the original hanger in 1990. Mesaba's 1990 building permit was conditional upon "strict compliance with the BOCA Basic National Building Code," which indirectly incorporated an earlier version of NFPA 409. While the 1997 revisions to the Wayne County building code permitted nonconforming buildings to continue to operate, such grandfathering was limited to buildings "heretofore approved." To the extent Mesaba failed to satisfy a condition of its 1990 permit, Federal's argument goes, Mesaba was not grandfathered by the 1997 code revisions. Accordingly, Federal argues Mesaba was "required to" but "failed to" comply with a relevant ordinance, thus qualifying for the exclusion.

***5** Mesaba counters that if its hanger was not in compliance with the Wayne County ordinance when built in 1990, such compliance was clearly waived. Wayne County officials have testified under oath that Mesaba was not required to install a deluge system before the May 9, 2000 storm because its hanger had been grandfathered prior to that point. (Carnell Aff. ¶¶ 3–6; Dib Aff. ¶¶ 3–6.) Indeed, the County issued a construction permit approving Mesaba's hanger without the deluge system and–to the extent the prior system violated a condition of the building permit–never sought to withdraw its approval. Finally, Wayne County issued clear "[f]inal approval" for the hanger's compliance with the fire codes on July 9, 1996. (Lonergan Third Aff. Ex. B.) Because coverage under the policy is excluded only if "you were required to, but failed to" comply with a law or ordinance, Mesaba argues, summary judgment is appropriate because it was not required to comply in the decade prior to the loss.

Granting Federal all appropriate inferences, the Court concludes that the exclusion does not apply to Mesaba's claim. Here, the undisputed evidence indicates that Wayne County granted a permit for Mesaba's 1990 hanger, issued final approval of the hanger in 1996, considered the hanger to be grandfathered into compliance after the 1997 code changes, and required Mesaba to install the deluge system only when it was forced to rebuild. As a matter of law, construing the exclusion in a manner consistent with Mesaba's expectations and resolving ambiguities in its favor, the Court concludes that Wayne County, not Federal, is the arbiter of what its ordinances "require" and Mesaba could rely on Wayne County's determination as to whether or not it was in compliance. Accordingly, the Court concludes that Mesaba was not "required to, but failed to" install a deluge system prior to the storm. Summary judgment is therefore appropriate.

Conclusion

Based on the foregoing, and all of the files, records and proceedings herein, IT IS ORDERED that Plaintiff Mesaba Holdings, Inc. and Plaintiff Mesaba Aviation, Inc.'s Motion for Partial Summary Judgment (Doc. 36) is GRANTED. Plaintiffs are entitled to the costs of installing an updated fire suppression system in a hanger built to the same general size as the hanger destroyed in the May 9, 2000 storm.

All Citations

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