74 Mass.App.Ct. 1129
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Joseph J. CIAMPA
v.
USAA PROPERTY AND
CASUALTY INSURANCE CO.

No. 08–P–2002.
|
Aug. 11, 2009.

By the Court (COHEN, GRAHAM & MEADE, JJ.).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** After his claim was denied, the plaintiff brought this action for damages in Superior Court against the defendant, his insurer, for the cost of repairing structural damage to his house caused by rot. The plaintiff alleged breach of contract and unfair insurance settlement practices. Following a jury-waived trial, a judge found in favor of the defendant.

On appeal, the plaintiff argues, among other things, that the trial judge misconstrued the terms of the insurance agreement, issued findings not supported by the record, and improperly placed the burden of proof of coverage on him. After review, we conclude that the claims lack merit and, accordingly, affirm the judgment.

1. *Facts.* The trial judge found the following material facts. The plaintiff is the owner of a two-story home built in 1974, located in the Monument Beach section of the town of Bourne. The original construction was defective to the extent the trim, windows, and walls did not have proper flashing to deflect water from the structural elements. Neither the walls nor the roof were repaired from 1974 to 2006.

In the spring of 2006, Shawn Hildreth, a contractor, was replacing a roof on a nearby home and noticed that the plaintiff's roof was sagging between the rafters. After discussion, the plaintiff hired Hildreth to replace the roof of his house. In the course of replacing the roof, Hildreth removed several trim boards, revealing rotted walls and areas of structural damage to the house. Hildreth made extensive repairs to the structural elements of the house and garage for a cost that exceeded $70,000. The judge found that the damage to the house was caused by water entering behind the trim boards and wall sheathing over an extended period of time, some ten to twenty years, causing the wood to rot. However, despite the extensive damage to the house, the structure was never in imminent danger of collapse, and the plaintiff continued to live in the home as the repairs were completed.

Concurrent with hiring Hildreth, the plaintiff notified the defendant of the intended repairs and requested coverage. The defendant investigated the claim, but refused coverage, citing the general exclusion in the policy for property damage caused by wet or dry rot, and the limited coverage for collapse of a building, or any part thereof, caused by hidden decay.

2. *Discussion.* The plaintiff's homeowner's insurance policy with the defendant defines "collapse" of a building or any part of a building as follows:

> "a. a sudden falling or caving in;
>
> "b. a sudden breaking apart or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use."

The policy continues:

> "We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
>
> "...
>
> "b. decay that is hidden from view, meaning damage that is unknown prior to collapse or that does not result from a failure to reasonably maintain the property...."

***2** The judge concluded that Ciampa's claim failed because he "did not prove there was a sudden falling or caving in of any part of the home. Nor did he prove a sudden breaking apart or deformation such that any part of the home was in imminent danger of falling in or caving in." Ciampa alleges numerous errors in the judge's conclusions; we address them in turn below.

A. *Interpretation of policy terms.* The plaintiff argues first that the trial judge misinterpreted the terms "collapse," "deformation," and "imminent," as used in the insurance

policy. This argument is not supported by the record. "The interpretation of an insurance policy is a 'question of law for the trial judge, and then for the reviewing court.' " *Nelson v. Cambridge Mut. Fire Ins. Co.,* 30 Mass.App.Ct. 671, 673, 572 N.E.2d 594 (1991), quoting from *Cody v. Connecticut Gen. Life Ins. Co.* 387 Mass. 142, 146, 439 N.E.2d 234 (1982). "In interpreting the provisions of a policy, we construe and enforce unambiguous terms according to their plain meaning.... When the provisions of a policy are plainly and definitely expressed, the policy must be enforced in accordance with the terms." *Somerset Sav. Bank v. Chicago Title Ins. Co.,* 420 Mass. 422, 427, 649 N.E.2d 1123 (1995) (citations omitted).

The policy provided coverage for "direct physical loss to covered property involving collapse of a building or any part of a building caused only by ... decay that is hidden from view, meaning damage that is unknown prior to collapse or that does not result from a failure to reasonably maintain the property." Collapse is defined, within the policy, as "a. a sudden falling or caving in; b. a sudden breaking apart or deformation such that a building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use." There is no evidence that the trial judge construed these policy terms according to a meaning other than their plain meaning. The trial judge did not interpret the insurance policy to require "suddenness" as a condition for recovery, as the plaintiff contends.

B. *Unsupported inferences.* The plaintiff argues that the trial judge abused his discretion when he found that: (1) "[t]he original construction [of the plaintiff's home] was defective to the extent that the trim, windows and walls did not have proper flashing to deflect water from the structural elements"; (2) "[t]he process of decay in the structural elements of the home had been going on for at least ten years"; and (3) the plaintiff had neglected to maintain his property. We see no clear error. See Mass.R.Civ.P. 52, as amended, 423 Mass. 1408 (1996).

There is evidence in the record to support a finding that the damage to the plaintiff's home was caused by improper flashing. Given the plaintiff's testimony that there had been no major repairs to his home since its original construction, the trial judge could reasonably have found that the original construction was defective and that the plaintiff had neglected to maintain his home. In addition, at trial, the defendant's expert witness, Steven Smolski, testified that, in his opinion, "based on the extent and severity of the rot, [the rot process] ha[d] probably been going on somewhere between 10 and 20 years time."

***3** C. *Interpreting the policy against the insured.* We now address the plaintiff's arguments that the trial judge (1) erred in failing to consider the entire insurance policy, including those terms not cited by the plaintiff in his complaint, and (2) misapplied the policy terms to the facts. We decline to disturb the Superior Court judgment on these grounds.

In interpreting an insurance policy, "[t]he court's focus should be on determining the intent of the parties by examining the language of the policy, read as a whole." *Mass. Property Ins. Underwriting Assn. v. Wynn,* 60 Mass.App.Ct. 824, 827–828, 806 N.E.2d 447 (2004), citing *King v. Prudential Ins. Co. of America,* 359 Mass. 46, 50, 267 N.E.2d 643 (1971). "The objective is to 'construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose." *Wynn, supra* at 828, 806 N.E.2d 447, quoting from *Gross v. Prudential Ins. Co. of America,* 48 Mass.App.Ct. 115, 119, 718 N.E.2d 383 (1999). Thus, the plaintiff's arguments based on his reading of the entire contract are not waived, as the defendant contends.

In his decision, the trial judge stated,

> "Rot damage is covered under the ADDITIONAL COVERAGES portion [of the policy] per the collapse provision.... [1] No other portion of the policy has been cited by the plaintiff as the basis for coverage. To recover the plaintiff must prove his claim under the collapse provision."

Even if the trial judge had failed to consider the entire insurance policy, the plaintiff has not shown that he was prejudiced by the error. See Mass.R.Civ.P. 61, 365 Mass. 829 (1974). The insurance policy clearly excludes from coverage damage caused by "wet or dry rot," and there is no dispute that the damage to the plaintiff's property was caused by rot. Other terms of the policy—including the terms providing coverage for "ensuing loss" [2] and the terms which, according the plaintiff's reading, exclude some, but not all, water damage—will not be interpreted to render meaningless

the clear exclusion of damage caused by rot. See *Wynn, supra* at 829–830, 806 N.E.2d 447 (insured's interpretation of a policy term rejected in part because it would render the term meaningless); *Ames Privilege Assocs. Ltd. Partnership v. Utica Mut. Ins. Co.,* 742 F.Supp. 704, 707 (D.Mass.1990) (insured's interpretation of the "ensuing loss" clause of an insurance policy rejected where the interpretation was "a way of nullifying the exclusion for rot").

Nor do we find convincing the plaintiff's reliance on *Jussim v. Massachusetts Bay Ins. Co.,* 415 Mass. 24, 610 N.E.2d 954 (1993). In *Jussim,* the Supreme Judicial Court outlined the "train of events test," which provides that if the efficient cause of a loss is an insured risk, then there will be coverage even though the final form of the property damage, produced by a series of related events, appears to take the loss outside the terms of the policy. *Id.* at 27, 610 N.E.2d 954. Here, the exclusion for rot was preceded by the following preamble: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Thus, the plaintiff is "foreclosed from invoking the train of events rule." *Id.* at 30–31, 610 N.E.2d 954. Setting aside the provision providing coverage for collapse, we do not see, and the plaintiff has not shown, that he has suffered a loss as a result of a peril covered under any insuring provision in the policy.

***4** The judge properly applied the policy terms governing coverage for collapse to the facts. Collapse is defined as "a. a sudden falling or caving in; b. a sudden breaking apart or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use." There is no evidence within the record from which a reasonable fact finder could conclude that any part of the plaintiff's home had fallen or caved in, or was in imminent peril of falling or caving in.

D. *Conflict with prior order.* The plaintiff argues that the trial judge failed properly to consider the memorandum of decision and order on the parties' cross-motions for summary judgment which, he claims, allowed coverage and shifted the burden of proof to the defendant. There is no merit to this argument as the motion judge neither allowed coverage nor shifted the burden of proof to the defendant.

A judge considering a party's motion for summary judgment must determine whether, on viewing the evidence submitted by the parties in a light most favorable to the nonmoving party, there exists a genuine issue as to any material fact. Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002); *Jupin v. Kask,* 447 Mass. 141, 143, 849 N.E.2d 829 (2006). Here, the motion judge determined that the applicable provision of the policy was the provision governing coverage for collapse. He then determined that the plaintiff had shown, via Hildreth's testimony, that there was a genuine issue of material fact as to whether any part of the plaintiff's home had collapsed. [3] Contrary to the plaintiff's assertions, the motion judge did not find that there had been collapse. And although the motion judge stated the law on the burden of proof in property insurance cases such as this, he did not state that the burden had shifted to the defendant. The plaintiff's reliance on Mass.R.Civ.P. 56(d), 365 Mass. 824 (1974), is misplaced because the motion judge did not specify facts that were without substantial controversy.

E. *Ambiguity in policy terms.* The plaintiff argues that the trial judge erred when he found that "[w]ith respect to rot, there is no inherent ambiguity in the USAA policy" because the policy purports to provide coverage for collapse caused by decay while simultaneously excluding from coverage all damage caused by rot. We decline to disturb the judgment for this reason.

"Where ... there is more than one rational interpretation of policy language, 'the insured is entitled to the benefit of the one that is more favorable to it.' " *Hakim v. Massachusetts Insurers' Insolvency Fund,* 424 Mass. 275, 281, 675 N.E.2d 1161 (1997), quoting from *Trustees of Tufts Univ. v. Commercial Union Ins. Co.,* 415 Mass. 844, 849, 616 N.E.2d 68 (1993). "This rule of construction applies with particular force to exclusionary provisions." *Hakim, supra* at 282, 675 N.E.2d 1161. " '[E]xclusions from coverage are to be strictly construed,' and any ambiguity in the exclusion 'must be construed against the insurer.' " *Ibid.,* quoting from *Vappi & Co., v. Aetna Cas. & Sur. Co.,* 348 Mass. 427, 431, 204 N.E.2d 273 (1965).

***5** Even if the judge erred in concluding that there was no ambiguity on the issue of whether the insurance policy covered loss caused by rot, there was no prejudice to the defendant because the judge ultimately found that there was no coverage under the policy not because of the rot issue, but because of failure to show collapse.

F. *Burden of proof on insured.* We disagree with the plaintiff's argument that the motion judge erroneously placed the burden of proof on the plaintiff when the burden should have shifted

to the defendant. "As a general rule, the policyholder bears the initial burden of proving coverage within the policy description of covered risks." *Camp Dresser & McKee, Inc. v. Home Ins. Co.,* 30 Mass.App.Ct. 318, 321, 568 N.E.2d 631 (1991), citing *Markline Co. v. Travelers Ins. Co.,* 384 Mass. 139, 140, 424 N.E.2d 464 (1981). "Once basic risk coverage is established, the burden shifts to the insurer to prove the applicability of any exclusion to coverage set forth outside of the insuring clause." *Camp, Dresser & McKee, Inc., supra,* citing *Murray v. Continental Ins. Co.,* 313 Mass. 557, 563, 48 N.E.2d 145 (1943), and *Ratner v. Canadian Universal Ins. Co.,* 359 Mass. 375, 381, 269 N.E.2d 227 (1971). The burden of proof did not shift to the defendant at trial because the plaintiff failed to meet his initial burden to show coverage under the "Additional Coverages" section of the policy, or under any other part of the policy describing covered risks.

G. *Unfair claim settlement practices.* Finally, the plaintiff argues that the trial judge erred in denying his claim for relief under G.L. c. 93A and c. 176D. He argues that the defendant (1) failed promptly to inspect his home upon receipt of his communications that "collapse" had occurred; (2) denied coverage, without inspection, on the day that it was notified of the damage to the plaintiff's home; and (3) for two years, failed to provide a reasonable explanation for the denial of the claim. The plaintiff further argues that the defendant has acted in bad faith by causing him to incur legal fees that exceed recovery. The plaintiff's arguments are without merit.

It is the law of the Commonwealth that no person may engage in any trade or practice that constitutes "an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." G.L. c. 176D, § 2, inserted by St.1972, c. 543, § 1. Under G.L. c. 176D, § 3, paragraph 9, unfair methods of competition or unfair or deceptive acts or practices in the business of insurance include unfair claim settlement practices. The following constitute unfair claim settlement practices:

> "(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> "...
>
> "(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> "...
>
> "(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

***6** G.L. c. 176D, § 3, paragraph 9, inserted by St.1972, c. 543, § 1. Any person whose rights are affected by another person's unfair settlement practices may bring an action in the Superior Court "for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." G.L. c. 93A, § 9, as amended by St.1979, c. 406, § 1.

The motion judge could reasonably find that there was insufficient evidence to support the plaintiff's claim that the defendant failed promptly to inspect the plaintiff's home upon receipt of the plaintiff's communications that "collapse" had occurred. The plaintiff asserts that he notified the defendant of collapse as early as June, 2006. The record shows that the defendant expressed willingness to send an inspector to the plaintiff's property in late August, 2006, but by that time, the repairs to the plaintiff's property were complete. A judge could have found that any delay on the part of the defendant was not unreasonable given that, except for a brief letter from Hildreth, the plaintiff's communications were unaccompanied by documentation, such as photographs, supporting the existence of a collapse.

Contrary to the plaintiff's assertions, the defendant did not deny coverage on May 17, 2006, the day it received notice of the plaintiff's claim. Rather, the defendant's May 17 letter stated that it would continue to investigate the plaintiff's claim, and reserved the defendant's right to deny coverage "at a later date." In its June 20, 2006, letter denying the plaintiff's claim, the defendant stated,

> "[T]here is no coverage under your Homeowner Policy for the water and rot damage found in your home, because the loss was caused by the following excluded perils:
>
> "...
>
> "(3) wet or dry rot...."

The letter also stated,

> "Please note, the Mold Endorsement carried under the Homeowners policy covers mold damage only if the source

> of the water or moisture was the result of a covered loss. Since the cause of loss is excluded under the Homeowner policy, we are unable to extend coverage under the Mold Endorsement."

The trial judge could reasonably have found that the defendant's explanation of the grounds for denial was sufficient. There is no evidence in the record to support a finding that the defendant otherwise acted in bad faith. We find no error in the judge's denial of the plaintiff's claim for relief under G.L. c. 93A and c. 176D.

Judgment affirmed.

All Citations

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Footnotes

1 The parties do not dispute this reading of the collapse provision on appeal.

2 The policy provides:

"We do not insure for loss caused by any of the following. However, any ensuing loss which is not excluded or excepted in this policy is covered.
"a. Weather conditions....
"b. Acts or decisions....
"c. Faulty, inadequate or defective:
"...
"(2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
"...
"(3) materials used in repair, construction, renovation, or remodeling; or
"(4) maintenance;
of part or all of any property whether on or off the residence premises."

3 The motion judge stated,

> "The contractor, Mr. Hildreth, testified in his deposition that he observed a sagging roof and determined that the sagging was caused by hidden decay in the supporting walls and beams. He further testified that the whole structure was collapsing before he began working on it. Viewed in the light most favorable to Ciampa, this testimony is sufficient to establish coverage within the policy description of the covered risks."