Court of Appeals, State of Michigan

ORDER

Howard Casey v Hastings Mutual Insurance Company

Docket No. 258203

LC No. 02-001861-CK

Kirsten Frank Kelly
Presiding Judge

Kathleen Jansen

Michael J. Talbot
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued April 11, 2006 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 2 0 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

HOWARD CASEY and CONNIE LEGG, Plaintiffs-Appellees, v HASTINGS MUTUAL INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED June 20, 2006 No. 258203 Ingham Circuit Court LC No. 02-001861-CK ON RECONSIDERATION

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

In this declaratory action arising from a homeowner's insurance contract, defendant appeals as of right the trial court's judgment against it for $90,000 plus interest. We affirmed the trial court's ruling in *Casey v Hastings Mut Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket No. 258203). On defendant's motion for reconsideration, we vacate our previous opinion and conclude that the trial court erred in its rulings. Accordingly, we reverse and remand for further proceedings.

I. Basic Facts

Plaintiff[1] Howard Casey's residence was insured by defendant Hastings Mutual Insurance Company. On May 4, 2002, the residence and contents were damaged by fire. In a sworn statement of proof of loss, plaintiff specified that the value of the contents was just over $24,000 and the cash value of his residence at the time of loss was $125,000. The policy limit for loss of the residence was $125,000. In an affidavit, plaintiff claimed that he received two estimates to rebuild the home, but both were in excess of the policy limit. During his examination under

[1] Although plaintiff Connie Legg is an additional insured under the policy, she had no financial interest in the property at issue. Thus, for the sake of clarity, we use the singular term "plaintiff" in this opinion and omit any reference to Legg.

oath, plaintiff said that he did not plan on making a decision on whether to rebuild the residence until the matter with defendant was resolved. However, plaintiff later specified that he would likely take a cash payment because the cost of repair exceeded the policy limits and the city would not let him replace the residence because of non-conforming zoning use issues.

Defendant rejected plaintiff's sworn statement of loss. In its rejection letter, defendant stated, in relevant part,

> PLEASE NOTE THAT THIS IS NOT A DENIAL OF YOUR INSURANCE CLAIM, BUT SIMPLY A REJECTION OF YOUR SWORN STATEMENT AND PROOF OF LOSS.
>
> This will serve as formal notification that after careful consideration, the Sworn Statement and Proof of Loss submitted to [defendant] . . . seeking insurance proceeds for the above referenced loss is rejected and returned to you with this correspondence.
>
> This letter is also written to you in compliance with the requirement that insurance companies provide reasons for rejection of insurance claims. . . .
>
> * * *
>
> Your Sworn Statement and Proof of Loss cannot be accepted as submitted and is rejected and returned to you because of [sic] the inventory of personal property which you claim was damaged or destroyed in the loss . . . does not reflect the loss which you sustained as a result of the fire . . . and is excessive both in nature and amount. Further, the referenced contents inventory seeks insurance proceeds for personal property not owned or used by you or any other insured, nor for which you had requested coverage prior to the loss.
>
> By specifying the above grounds for rejection of your Sworn Statement in Proof of Loss, [defendant] . . . does not intend to waive, but rather specifically reserves all of its rights, including other defenses which may be applicable to your insurance claim.

Less than six months later, plaintiff sued defendant seeking declaratory relief. Instead of filing an answer, defendant demanded appraisal by filing a motion to compel appraisal and dismiss plaintiff's complaint under MCR 2.116(C)(7). Defendant argued that appraisal was still available under the policy terms and case law. Defendant also argued that because plaintiff had yet to repair or replace the dwelling, he was only entitled to the actual cash value of the residence. Plaintiff moved for declaratory relief claiming that defendant's letter only rejected the personal property portion of the sworn statement and not the valuation of the residence. Plaintiff also claimed that he was not required to repair or replace the residence before he could receive payment for the loss of the residence.

Ultimately, the trial court determined that defendant's rejection letter covered only the personal property and not the residence. Subsequently, the trial court denied defendant's motion to compel appraisal and ordered defendant to pay $90,000, representing the difference between

the actual cash value of the residence and the policy limits, plus costs and interest. On defendant's motion for reconsideration, the trial court ordered that the valuation of the personal property be submitted to appraisal.

II. Analysis

Defendant first contends that the trial court erred in ruling that its rejection letter only operated to reject the plaintiff's personal property claim and not his residence valuation. We agree. Plaintiff's motion for declaratory relief was essentially brought under MCR 2.116(C)(10) because the trial court considered documentary evidence outside the pleadings. See *Steward v Panek,* 251 Mich App 546, 555; 652 NW2d 232 (2002). "This Court reviews de novo a trial court's grant or denial of summary disposition in a declaratory judgment action." *Michigan Ed Employees Mut Ins Co v Turrow,* 242 Mich App 112, 114; 617 NW2d 725 (2000). In so doing, this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Id.,* quoting *Unisys Corp v Comm'r of Ins,* 236 Mich App 686, 689; 601 NW2d 155 (1999).

The record demonstrates that plaintiff submitted one sworn statement of proof of loss, which included both the value of plaintiff's residence and personal property to defendant. Defendant responded with a letter rejecting plaintiff's statement of proof of loss. Although the only reasons specifically articulated for rejecting the proof of loss related to plaintiff's valuation of personal property, not the valuation of plaintiff's residence, the rejection letter explicitly stated that the sworn statement could not be accepted and was being returned. Moreover, defendant emphasized that the rejection was not a denial of the claim, but rather was simply a rejection of the proof of loss. This rejection letter did not limit defendant's challenge to the personal property valuation. Rather, defendant rejected the statement in total and reserved all of its rights and defenses. By rejecting the sworn statement of proof of loss in its entirety, defendant did not waive its right to challenge any payment with respect to the residence. The trial court erred in ruling that defendant's rejection letter precluded defendant from challenging plaintiff's residence valuation.

Defendant next argues that, pursuant to the plain language of the insurance contract and MCL 500.2826, plaintiff was required to repair or replace his residence to receive replacement-cost benefits. We agree. This Court reviews issues of statutory interpretation de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). In addition, interpretation of a contract is a question of law reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

MCL 500.2826 provides as follows:

> An insurer may issue a fire insurance policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual value of the insured property at the time any loss or damages occurs, and the amount actually expended to repair, rebuild, or replace with new materials of *like size, kind, and quality*, but not to exceed the amount of liability covered by the fire policy. *A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless*

the property damaged is actually repaired, rebuilt, or replaced at the same or another site. [Emphasis added.]

The applicable provision of the insurance contract between the parties provides for replacement cost for "like construction and use." Moreover, it specifically states that defendant "will pay no more than the actual cash value of the damage until actual repair or replacement is complete." These contractual provisions fall squarely within terms of MCL 500.2826.

Plaintiff argues that the insurance contract provision is governed by MCL 500.2827 because it is similar to the policy language in *Cortez v Fire Ins Exchange,* 196 Mich App 666, 669; 493 NW2d 505 (1992), which provided for replacement costs for "'equivalent construction.'" In *Cortez*, this Court concluded that MCL 500.2827 applied because it "addresse[d] replacement-cost policies that require the insurer to rebuild or replace the lost or damaged property 'to a condition and appearance *similar* to that which existed at the time of loss based on the use of *conventional* materials and construction methods.' " *Id.* This Court held that, pursuant to MCL 500.2827(3), when the replacement cost of the insured's property exceeds the policy limits, the insured is not required to repair or replace the property to receive replacement-cost benefits. *Id.* at 670.

In this case, however, the policy language does not cover "similar" or "equivalent" replacement construction and materials. Rather, it covers the "replacement cost of that part of the building damaged for like construction and use on the same property." *Cortez* is not applicable. Instead, *Smith v Michigan Basic Prop Ins Ass'n*, 441 Mich 181; 490 NW2d 864 (1992), is applicable because the relevant policy language in *Smith* is virtually the same as the language at issue here. *Id.* at 185, n 3. The insurer in *Smith* disputed coverage entirely claiming that the insured committed arson and fraud in reporting the loss. *Id*, 184. In particular, the insurer argued that, in the event the insureds obtained a favorable verdict, the insurer was only obligated to pay the actual cash value as the insureds had yet to complete repair or replacement of the home. *Id.* at 184-185. In construing the policy and the predecessor of MCL 500.2826, our Supreme Court held that the insurer was not liable for the difference between the actual cash value and the replacement cost until the insured actually replaced the residence. *Id.* at 189-192. In this case, the trial court erred in awarding plaintiff the balance between the actual cash value of the property and the valuation absent proof that plaintiff's actual repair or replacement of the building was completed.

Finally, defendant argues that the trial court erred in not granting defendant's motion to compel appraisal on the entire claim. We agree.

MCL 550.2833(1) requires all fire insurance policies issued in this state to include an appraisal provision. In insurance cases, the appraisal process is a substitute for a judicial determination, and is a favored means to resolve disputes. Under § 2833(1), if either party makes a written appraisal demand, each party must then select an appraiser. Defendant never denied plaintiff's claim and continued to negotiate with the plaintiff through November 13, 2002, at which time, plaintiff abruptly filed suit.

After being served with plaintiff's complaint, defendant immediately filed its motion to compel appraisal. Defendant then appointed an appraiser, and plaintiff had twenty days to appoint his in accordance with the policy. Immediately prior to the hearing, plaintiff sent

defendant a letter informing defendant that he had selected an appraiser, thus conceding, even though he filed a lawsuit, that he was still subject to appraisal under the policy.[2] The trial court erred in denying defendant's motion because both parties had effectively invoked the appraisal process.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[2] On the day of defendant's motion hearing, plaintiff did not give defendant's counsel the letter, and defendant had not yet received the letter. Further, plaintiff failed to inform the trial court that he had selected an appraiser.