

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN SCHWARTZENFELD, KAREN
SCHWARTZENFELD, and DAVID
SCHWARTZENFELD,

UNPUBLISHED
April 26, 2011

Plaintiffs-Appellants,

v

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY,

No. 296752
Oakland Circuit Court
LC No. 2009-099026-CK

Defendant-Appellee.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). At issue is whether plaintiffs' loss is excluded under the homeowner's insurance policy issued by defendant to cover plaintiffs' home. We affirm.

On March 11, 2008, plaintiffs noticed some water staining to the dining room's plaster ceiling below the master bathroom and the foyer's plaster ceiling below a bathroom located off the second floor hallway. A contractor brought in that day opened the ceilings and determined that the source of the water was the upstairs bathtubs or toilets. Plaintiffs immediately notified defendant of their loss, and defendant's adjuster inspected the water-damaged areas that same day. Before leaving the home, the adjuster advised plaintiffs that their claim would be denied because, although the ceilings had just then sustained damage, it was his conclusion that water had previously damaged the bathroom subfloors for an extended period of time before leaking through and damaging the ceilings that day. A denial letter was sent the same day and stated:

According to your Homeowner's Policy, losses caused by wear, tear, marring, deterioration, and/or continuous or repeated seepage or leakage from a plumbing system are not covered.

* * *

Exclusions #3e and 3f1. These exclusions can be found on page D3 of the HO-21-B policy.

Plaintiffs hired a contractor and a plumber to inspect the premises. The report of their findings stated that both water spots originated from the same problem. Each upstairs bathroom had an iron tub with a small “tiling flange” that allowed water to seep into the walls and around and in back of the tub. The plywood and sub-floors of the bathrooms had rotted, allowing the tubs to “embed” into the floors, further increasing the amount of leaking. The report concluded that “[t]he only way to properly correct the water leaks at this residence is to totally ‘gut’ each bathroom, then replace the sub-floor and all else as necessary.” Nothing else contributed to the damage. Both the contractor and the plumber’s deposition testimony reiterated these findings. The plumber testified that because the ceilings were plaster, they could have absorbed water repeatedly for years before the ceiling would have shown a stain. The contractor gave a ballpark figure of \$40,000 to repair the damage properly, noting that the sink and toilet would have to be removed from each bathroom in order for the ceramic tile floor to be taken up.

The insurance policy at issue covers “accidental direct physical loss to property . . . caused by the following perils except for losses excluded under Section I – Property Exclusions.” Those property exclusions provided:

3. We do not cover loss to property described in Coverages A and B resulting directly from any of the following:

* * *

e) continuous or repeated seepage or leakage of water or steam over a period of time from a . . . plumbing system that results in deterioration, rust, or wet or dry rot. Continuous or repeated seepage or leakage from, within, or around any shower stall, shower tub, tub installation or other plumbing fixture, including their walls, ceilings or floors, is also excluded.

If loss caused by water or steam is not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance. We do not cover loss to the system or appliance from which the water or steam escaped.

f) (1) wear and tear, marring, deterioration;

(2) inherent vice, latent defect, mechanical breakdown;

* * *

(6) settling, cracking, shrinking, bulging or expansion of . . . walls, floors, . . . or ceilings; . . .

* * *

If any of items f)(1) through (8) cause water to escape from a plumbing . . . system . . . , we cover loss caused by the water not otherwise excluded. We also cover the cost of tearing out and replacing any part of a building necessary to

repair the system or appliance. We do not cover loss to the system or appliance from which the water escaped.

Under exclusions 3.a) through 3.f), any loss that follows is covered unless it is specifically excluded.

Plaintiffs filed suit on March 11, 2009, claiming breach of contract and violations of the Michigan Uniform Trade Practices Act, MCL 500.2001 *et seq.* Defendant moved for summary disposition, arguing that the damage was excluded because it had been caused by long-term leaking of the tubs. Defendant also argued that plaintiffs' suit was time-barred because it was filed more than one year after the loss occurred. Plaintiffs conceded that the costs of "actual repair or replacement of these tubs and the subfloor's [sic] themselves" were not covered, but argued that the costs of tear-out and replacement of "any part of the building necessary to repair or replace the part of the plumbing system from which water escaped" was covered by the policy. Specifically, plaintiffs sought the costs of replacing the damaged ceiling and gutting the otherwise undamaged parts of the bathrooms. They argued that the ceiling damage was not "deterioration, rust, or wet or dry rot," but was "sudden damage." Plaintiffs argued that coverage was provided by the clause that covered the cost of "tearing out and replacing any part of the building necessary to repair" a leaking system. Finally, plaintiffs asserted that their claim was not time-barred because their loss occurred on the day the ceiling became stained, March 11, 2008. Even if the hidden damage had been going on for years, plaintiffs were not asking for coverage of that, but only of the visible ceiling damage.

The trial court found the coverage was excluded under the clear and unambiguous language of the policy. The loss was caused by continuous or repeated seepage and was therefore excluded. In accord with this finding, the court granted defendant's motion for summary disposition. The trial court did not rule on the issue of whether plaintiffs' claim was time-barred.

We review *de novo* a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Issues of contract interpretation are also reviewed *de novo*. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

We agree with the trial court's conclusion that all of the damage was caused by the leaking tub installations, an unambiguously excluded type of loss. Although "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured[,] . . . [c]lear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume." *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 661; 730 NW2d 518 (2007) (citation omitted). "Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims." *Id.* Exclusions serve to limit the scope of coverage provided and must be read with the policy as a whole and independently of every other

exclusion. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 471; 688 NW2d 523 (2004).

The language of the policy is very clear: “Continuous or repeated seepage or leakage from, within, or around any shower stall, shower tub, tub installation or other plumbing fixture, including their walls, ceilings or floors, is also excluded.” There is no dispute that all the damage plaintiffs experienced was caused by the leaking tub installations. Any loss of this sort is excluded under 3(e) of the policy. The exceptions identified in 3(e) and 3(f) both apply only if the loss is not “otherwise excluded.” Because the loss is excluded, the exceptions do not apply. See *Brown*, 273 Mich App at 661.¹

In light of our conclusion above, we need not address the issue of whether plaintiffs’ claim is time-barred.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

¹ We note that *Liebel v Nationwide Ins Co*, 22 So 3d 111 (Fla App, 2009), a case cited by plaintiffs on appeal, is not persuasive. The *Liebel* court did not specifically address whether there was continuous or repeated seepage or leakage of water under the facts of the case, nor did it discuss the applicability of 3(e) of the policy to the facts. The court also relied on the “earth movement” exclusion included in the policy in reaching its conclusion, which is not at issue here. Therefore, we will not rely on the *Liebel* court’s analysis.