STATE OF MICHIGAN

COURT OF APPEALS

J & J CASTOR GROUP, INC.,

Plaintiff-Appellant,

v

HOME-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
August 19, 2021

No. 354832
Kent Circuit Court
LC No. 18-002888-CB

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

PER CURIAM.

Plaintiff, J & J Castor Group, Inc., appeals as of right the order of the trial court granting defendant, Home-Owners Insurance Company, summary disposition under MCR 2.116(C)(10). We affirm.

I. FACTS

This case involves a dispute over insurance coverage for a commercial building. In 2010, plaintiff purchased a commercial building in Walker, Michigan. Plaintiff insured the building by purchasing from defendant a Tailored Protection Policy. In the event of damage to the building, the policy provided coverage for the building as well as the business personal property located in the building, and permitted the insured to make a claim on an actual cash value basis. Thereafter, if the insured provided notice of the intent to rebuild to defendant within 180 days, the policy permitted a further claim for replacement cost value. The policy provided, however, that defendant was not obligated to make payment on a replacement cost basis for any loss or damage (1) until the lost or damaged property was actually repaired or replaced, and (2) unless the repairs or replacement were made as soon as reasonably possible after the loss or damage. Specifically, the policy provided in part:

> G. OPTIONAL COVERAGES
>
> * * *
>
> 3. Replacement Cost

* * *

c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.

d. We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced; and

(2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

On February 21, 2014, a portion of the roof of the building collapsed under the weight of snow and ice. Defendant paid plaintiff for the loss under the policy in the amount of $87,965.61, which represented the actual cash value of the structure minus the deductible. Defendant also paid plaintiff $51,784.07 representing the actual cash value of the business personal property, $12,805 for demolition, $10,695.76 for replacement of computers, $1,674.80 for storage, and $725 for an engineering assessment.

With regard to the replacement cost value of the building, defendant determined that the portion of the building where the roof collapsed was an addition to the building which could be restored without impacting the rest of the structure. Defendant offered to pay plaintiff up to an additional $65,266.34 in replacement costs, for a total of $153,231.95 for repair and loss related to the structure (up to $65,266.34 replacement cost value of the structure plus the $87,965.61 in actual cost value of the structure already paid to plaintiff), but only if plaintiff actually repaired the building and incurred that amount or more to restore the building to its former condition.

According to defendant, plaintiff initially informed defendant of its intent to secure financing and to repair the damaged portion of the building. Defendant asserts that from 2014 through 2016, it repeatedly advised plaintiff of the contractual terms under which it would pay replacement cost value, but plaintiff did not undertake the repair of the building. At some point during this process, plaintiff informed defendant that instead of replacing the damaged section of the building, plaintiff planned to demolish the entire building and build a new, much larger structure. Defendant also asserts that plaintiff informed defendant that the new building plan had raised code enforcement issues with the City of Walker, which was causing additional expense and delay. By contrast, plaintiff asserts that the code enforcement issues were raised by the City of Walker after the partial collapse of the building roof and were unrelated to the expanded nature of the proposed project.[1]

[1] In August 2018, plaintiff demolished the damaged part of the structure after the City of Walker obtained a court order for the demolition pursuant to the city's nuisance ordinance.

The policy also provided coverage for Business Income/Extra Expense, and included an endorsement for Ordinance or Law Coverage related to the increased cost of replacement or repair because of ordinance or law. According to defendant, in the fall of 2015, plaintiff informed defendant that in addition to seeking the replacement cost value of the building, it planned to present a claim to defendant for Business Income/Extra Expense, but did not do so. By letter dated June 17, 2016, defendant advised plaintiff that it would honor the replacement cost estimate of $153,231.96 until March 30, 2017. When plaintiff had not undertaken the replacement of the damaged portion of the building by that date, defendant denied the claim for replacement cost value.

Plaintiff filed its complaint in this action on March 29, 2018, alleging that defendant breached the contract of insurance between the parties by failing to pay for plaintiff's loss in accordance with the policy terms. Defendant moved for summary disposition under MCR 2.116(C)(10), contending that under the policy it was not obligated to pay replacement cost value until and unless the property was actually repaired or replaced, and only if the repair or replacement was made as soon as reasonably possible after the loss or damage. Defendant also contended that plaintiff never provided documentation to support its claim of Business Income/Extra Expense, entitling defendant to summary disposition of that claim under MCR 2.116(C)(10). After a hearing, the trial court granted defendant's motion for summary disposition of plaintiff's claim for Business Income/Extra Expense, but denied defendant summary disposition of plaintiff's claim for the replacement cost value of the structure.

Defendant moved for reconsideration of the trial court's ruling on the issue of replacement cost value. Upon reconsideration, the trial court agreed that it had misapplied the precedent of *Smith v Mich Basic Prop Ins*, 441 Mich 181; 490 NW2d 864 (1992) to the issue of replacement cost value and granted defendant summary disposition of plaintiff's remaining claim. The trial court further held that plaintiff was not entitled to amend its complaint because to do so would be futile.

Plaintiff moved for reconsideration and sought leave to amend its complaint to seek declaratory relief. The trial court denied plaintiff's motion and again denied plaintiff leave to amend its complaint. Plaintiff now appeals.

II. DISCUSSION

A. SUMMARY DISPOSITION

Plaintiff contends that the trial court erred by granting defendant summary disposition under MCR 2.116(C)(10). Plaintiff argues that it should not be required to repair or replace the damaged building in this case as a condition precedent to obtaining replacement value from defendant because plaintiff was precluded from repairing and replacing the building by municipal regulations and by defendant's own refusal to pay replacement cost value. We disagree.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). This Court also reviews de novo questions regarding the proper interpretation and construction of an insurance policy. *Gurski v Motorists Mut Ins Co*, 321 Mich App 657, 665; 910 NW2d 385

(2017). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil*, 504 Mich at 160. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* When reviewing a motion for summary disposition granted under MCR 2.116(C)(10), this Court considers the documentary evidence submitted by the parties in the light most favorable to the nonmoving party, *id.*, and will find that a genuine issue of material fact exists if "the record leaves open an issue upon which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citations omitted). The moving party has the initial burden to support its motion with documentary evidence, but once met, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005).

An insurance policy is a contractual agreement between the insurer and the insured, *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019), and is subject to the same principles of construction as other contracts. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). When interpreting an insurance policy, the primary goal is to honor the intent of the parties to the policy. *TNT Equip, Inc*, 328 Mich App at 682. To ascertain the meaning of a contract, this Court gives the words used in the contract their plain and ordinary meaning. *Rory*, 473 Mich at 464. If there is ambiguity in the contract, the ambiguity will be liberally construed against the insurer as the drafter of the contract. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261-262; 617 NW2d 777 (2000). However, it is not possible for an insurer to be liable for a risk that it did not assume. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014).

Michigan law specifically recognizes an insurer's right to require proof that the damaged property is actually repaired, rebuilt, or replaced before the insurer becomes liable to pay replacement cost benefits. MCL 500.2826 provides:

> 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.

MCL 500.2827 provides, in relevant part:

> (1) An insurer may issue a fire policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual cash value of the lost or damaged insured property at the time of the loss or damage, and the amount actually necessary to repair, rebuild, or replace the lost or damaged insured property to a condition and appearance similar to that which existed at the time of the loss or damage based on the use of conventional material and construction methods which are currently available without extraordinary

> expense. The insurer's liability shall not exceed the amount of liability covered by the contract of insurance.
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> * * *
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> (3) The contract of insurance established pursuant to subsection (1) may provide that there shall be no liability on the part of the insurer to pay an amount in excess of the actual cash value of the lost or damaged insured property at the time of the loss or damage, unless the lost or damaged property is actually repaired, rebuilt, or replaced at the same or another contiguous site. . . .

In this case, the parties do not dispute that the policy provides, in relevant part:

> c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.
>
> d. We will not pay on a replacement cost basis for any loss or damage:
>
> (1) Until the lost or damaged property is actually repaired or replaced; and
>
> (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

Plaintiff, however, contends that *Smith*, 441 Mich 181, provides support for plaintiff's argument that defendant is estopped from requiring the performance of repair or replacement as a condition precedent to defendant's obligation to pay replacement cost because plaintiff was unable to repair or replace the damaged building unless the replacement cost value was paid to it. A review of *Smith*, however, demonstrates that it does not provide the support hoped for by plaintiff. In *Smith*, our Supreme Court considered policy language similar to that in this case and held that when an insurance policy requires, as a condition precedent to receiving replacement value, that the insured first repair or replace the damaged property, the insured is required to do so to recover replacement value under the policy. *Smith*, 441 Mich at 183, 191.

Plaintiff focuses upon the remand order of the Court in *Smith*, which also presented some confusion for the trial court in this case. The trial court observed:

> [O]ur Supreme Court remanded *Smith* "to the circuit court for the entry of a modified judgment requiring payment, without regard to whether the Smiths actually repair, rebuild, or replace the home, of $42,107.92 plus interest, and to require an additional payment of an amount not exceeding $48,500 plus interest when and if the Smiths actually repair, rebuild or replace the home." *Smith*, 441 Mich at 197. A closer analysis of the *Smith* decision, however, reveals that its holding and its remand order can be harmonized. That is, the remand order requires that the insureds receive at least $42,107.92, which comprises "the fair actual cash value of the personal property damaged or destroyed in the fire," several other

> elements of loss, and the "actual cash value of the home of $7,500[.]" See *Smith*, 441 Mich at 187 n 7. Beyond that, the remand order states that the insured may also recover "an additional payment of an amount not exceeding $48,500 plus interest ***when and if the Smiths actually repair, rebuild or replace the home***." See *id*. (emphasis added). Put another way, if the insureds do not repair, rebuild or replace the home, all they get for the home itself is the "actual cash value of the home of $7,500[.]" See *id*. at 187 n 7. But if the insureds actually repair, rebuild, or replace the home, then they are entitled to an additional payment "not exceeding $48,500 plus interest when and if" they complete the job. See *id*. at 197. Applying that reasoning to the instant case, the Court concludes that plaintiff J & J must replace the structure at issue before it is entitled to its replacement cost above and beyond the actual cash value of the structure that it has already received from Home-Owners.

As the trial court in this case observed, neither the reasoning of the *Smith* opinion nor the remand instructions of the Court in *Smith* support plaintiff's reading of that case.

Plaintiff argues, however, that in this case it was prevented in part from rebuilding the building because defendant's refusal to pay replacement cost in advance made it difficult for plaintiff to obtain financing necessary to rebuild. This argument fails, however, because defendant had no obligation under the policy to pay replacement cost before the building was repaired; it cannot be concluded that defendant not paying money it had no duty to pay was a barrier to plaintiff obtaining financing. Addressing a similar circumstance in *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 363 n 8; 581 NW2d 781 (1998), this Court considered the argument that a lender might hesitate to loan money for the repair of a damaged building without assurance that the insured would obtain replacement cost money from the insurer. The Court in that case observed that the proper solution to that problem is the insurer paying actual cash value before repair or replacement pursuant to the policy, but not being obligated to pay the replacement cost value until and unless the repair or replacement occurred. *Id*.

As in *Salesin*, defendant in this case paid plaintiff the actual cash value of the loss, as required by the policy, thereby providing funds that potentially could be used toward rebuilding and at least theoretically obviating a potential barrier to financing and rebuilding. Furthermore, defendant advised plaintiff in June of 2016 that it would pay an additional $65,266.34 in replacement costs if plaintiff actually incurred those costs, and that it would honor that commitment until March of 2017. The policy obligates defendant to pay replacement cost value of the structure only if plaintiff repairs or restores the building and only if it occurs as soon as reasonably possible. The policy does not contemplate whether the insured is able to rebuild or replace the structure, but only whether the insured actually does rebuild or replace the damaged structure. Defendant's failure to pay plaintiff unless required to do so under the policy cannot be classified as behavior that interfered with plaintiff's ability to rebuild. Because plaintiff never rebuilt or replaced the building, defendant is not obligated under the policy to pay the replacement cost value.

B. MOTION TO AMEND COMPLAINT

Plaintiff contends that the trial court abused its discretion by denying plaintiff leave to amend its complaint on the basis of futility. Plaintiff asserts that because its proposed amended complaint sought declaratory judgment that, if granted, would have allowed it to seek financing to undertake the repair and replacement of the damaged structure, the amendment was not futile. We disagree.

MCR 2.116(I)(5) provides that when a party moves for summary disposition under MCR 2.116(C)(8), (9), or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by 2.118, unless the evidence then before the court shows that amendment would not be justified." Under MCR 2.118(A)(2), a party may amend a pleading upon leave of the trial court; leave to amend a pleading "shall be freely given when justice so requires." *Jawad A. Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 209; 920 NW2d 148 (2018).

A trial court must state a particularized reason for denying a party leave to amend a pleading. *Kostadinovski v Harrington*, 321 Mich App 736, 743; 909 NW2d 907 (2017). Acceptable reasons for denying leave to amend include undue delay, bad faith or dilatory motive by the party seeking leave, repeated failures to cure deficiencies, undue prejudice to the nonmoving party, and futility. *Id*. We review a trial court's decision to grant or deny leave to amend a pleading for an abuse of discretion. *Long v Liquor Control Comm*, 322 Mich App 60, 67; 910 NW2d 674 (2017). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Jawad A. Shah, MD, PC*, 324 Mich App at 208.

In granting defendant summary disposition upon reconsideration, the trial court acknowledged that "an award of summary disposition under MCR 2.116(C)(10) could require the Court to afford Plaintiff J & J the opportunity to amend its complaint under MCR 2.116(I)(5). But no amendment can cure the defect in J & J's claim, so amendment 'would be futile.' " Thereafter, the trial court denied plaintiff's motion for reconsideration, and denied plaintiff leave to amend its complaint.

A motion to amend a pleading is properly denied if the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Amendment of a pleading is futile if "(1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted). If further amendment of a pleading would be futile, summary disposition is appropriately granted. *Nowacki v State Employees' Retirement Sys*, 485 Mich 1037 (2010).

Here, plaintiff sought to amend its complaint to seek declaratory judgment that defendant was obligated to pay replacement cost if and when plaintiff replaced or repaired the building. The policy, however, does not obligate defendant to pay replacement costs if and when plaintiff repairs the building, but rather only if plaintiff fulfilled the condition precedent to replacement costs by repairing or replacing the damaged structure within a reasonable time. Plaintiff admits that as of the time of its motion seeking to amend its complaint on March 18, 2020, more than six years after the loss, plaintiff had not begun repairing the building. It therefore cannot be said that the trial

court abused its discretion by denying plaintiff leave to amend its complaint on the basis that amendment of the complaint would be futile.

Affirmed.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly
/s/ Michael F. Gadola