STATE OF MICHIGAN

COURT OF APPEALS

KIMBALL & RUSSELL, INC.

Plaintiff–Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant–Appellant.

UNPUBLISHED
October 11. 1996

No. 173343
LC No. 87-730765-CK

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Defendant appeals by right from the jury verdict awarding plaintiff $232,191.80 in damages, interest, and costs. Plaintiff brought this action against defendant, alleging that defendant had breached the parties' insurance contract by denying plaintiff's claim for a loss sustained when shelves loaded with inventory in plaintiff's warehouse fell. The dispute centered on whether the loss fell within the policy's exclusion for losses caused by collapse. We reverse.

Plaintiff, a wholesale distributor of building materials, stored its inventory in a warehouse in the City of Wixom. The warehouse was equipped with rows of storage racks or shelves which were connected to the ceiling by double steel bands wound twice around the rafters. Plaintiff was insured for loss in this warehouse by defendant's multi-peril or all-risk policy. The policy contained an exclusion for losses caused by collapse except as provided in the Collapse Additional Coverage. The Collapse Additional Coverage provided coverage where collapse of a building or part of a building was caused by weight of people or personal property. The policy defined the term "part of a building" to include fixtures, machinery, and equipment constituting a permanent part of the building and pertaining to the maintenance and service of the building.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On April 16, 1987, shelves in plaintiff's warehouse suddenly fell, spilling their contents of paint and oil cans to the floor. Defendant paid $16,000 to cover the cost of clean-up, but refused to cover the loss of shelves and inventory. Defendant asserted that the loss came under the policy's collapse exclusion and did not fit the definition of a building or structure. Plaintiff brought this action for breach of the insurance contract.

A lengthy procedural history ensued. Defendant moved for summary disposition, arguing that it was entitled to judgment as a matter of law because plaintiff's loss fell under the policy's collapse exclusion. Defendant's motion was denied. Plaintiff then filed its own summary disposition motion, arguing that the loss of inventory was not the result of the collapse, but instead was the result of an "ensuing peril" which occurred when the cans collided with the floor. For purposes of this motion only, plaintiff conceded that the shelves did indeed collapse. The trial court granted plaintiff's motion for summary disposition.

Defendant appealed to this Court. This Court reversed the grant of summary disposition in plaintiff's favor, holding that the policy language was clear and unambiguous, and that the loss of inventory was not caused by an ensuing peril. *Kimball & Russell, Inc. v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals (Docket No. 125683, issued April 23, 1992). This Court then granted a motion for rehearing and directed entry of judgment for defendant in an unpublished order dated August 3, 1992. The Supreme Court vacated this Court's order to the extent that it directed the trial court to enter a judgment for defendant and held that this Court's decision on the subject of ensuing peril was not dispositive "because the trial court still could determine that what occurred is not a 'collapse' within the meaning of this all risk policy." 442 Mich 911 (1993).

After the Supreme Court's order, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff could not raise a genuine issue of fact regarding whether the shelves collapsed. In response, plaintiff argued that the issue of whether the shelves collapsed or merely fell over was a fact question for the jury. Plaintiff argued that the term "collapse" referred to a fall which goes straight down, as opposed to a lateral fall. Plaintiff argued that it could produce evidence which would indicate that the shelves fell laterally. Plaintiff also argued in the alternative that if the fall were a collapse, the loss could be covered under the Collapse Additional Coverage because the shelves were part of the building as defined in the policy.

The trial court denied defendant's motion for summary disposition. It interpreted the Supreme Court's order as requiring that a jury determine the meaning of the word collapse as used in the insurance policy. When the case went to trial, the trial court instructed the jury that the policy language should be given its plain and ordinary meaning. Defendant objected, arguing that the meaning of a term in an insurance policy is a question of law to be resolved by the trial court.

On appeal, defendant first argues that the trial court erred when it interpreted the Supreme Court's order to submit the issue of the definition of "collapse" to the jury. We need not decide this issue because we find the second issue raised by defendant to be dispositive. That is, plaintiff's loss is

not covered in the insurance policy because the shelves do not constitute a fixture or personal property as a matter of law.

Defendant argued below that it was entitled to a directed verdict on the issue of the Collapse Additional Coverage because the shelves, as a matter of law, were not part of the building. The insurance policy provided in relevant part:

> COLLAPSE - This policy insures against risk of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following:
>
> * * *
>
> d. weight of people or personal property

The policy defines building as:

> Building(s) or structure(s) shall include attached additions and extensions; fixtures, machinery and equipment constituting a permanent part of and pertaining to the service of the building(s); materials and supplies intended for use in construction, alteration or repair of the building(s) or structure(s); yard fixtures; personal property of the insured used for the maintenance or service of the building(s), including fire extinguishing apparatus, floor coverings and appliances for refrigerating, ventilating, cooking, dishwashing and laundering (but not including other personal property in apartments or rooms furnished by the named insured landlord); all while at the designated premises.

We find that the shelves did not constitute a fixture under the insurance policy. The question whether an object is a fixture depends on the particular facts of each case and is to be determined by applying three factors: (1) annexation to the realty, either actual or constructive; (2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) intention to make the article a permanent accession to the freehold. *Velmer v Baraga Area Schools*, 430 Mich 385, 394; 424 NW2d 770 (1988). The controlling intention is that manifested by the annexing party by objective, visible facts. *Id.* Although the question whether a particular article is a chattel or a fixture is a mixed question of law and fact, when the facts are admitted or undisputed, only a question of law remains. *Nadolski v Peters*, 332 Mich 182, 187; 50 NW2d 744 (1952). Questions of law are for the court's determination.

The shelves were connected to the ceiling rafters with steel straps. One of plaintiff's witnesses testified that, six months before their collapse, the shelves were completely rearranged. The same witness testified that the shelves were periodically removed and replaced as they wore out. Accordingly, the undisputed facts of this case show that the shelves were not fixtures "constituting a permanent part of the building and pertaining to the service of the building." See, e.g., *Carmack v Macomb Co Comm College*, 199 Mich App 544, 547; 502 NW2d 746 (1993) (the gymnastic equipment was easily moveable and was removed on an almost daily basis and was, therefore, not part of the building).

Nor do we agree with plaintiff that the shelves were "personal property of the insured used for the maintenance or service of the building." There is no indication that the shelves were used for maintenance of the building or service of the building. Accordingly, there is no coverage for the shelves in this case because the shelves do not constitute a building or structure as defined in the insurance policy. Defendant was, therefore, entitled to a directed verdict or JNOV.

Reversed and remanded for judgment to be entered in defendant's favor. Jurisdiction is not retained.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky