STATE OF MICHIGAN

COURT OF APPEALS

THE BANCORP GROUP, INC., a Michigan corporation,

Plaintiff-Appellant,

v

THOMAS SCHADEN and SCHADEN, ROCHOW & COMPANY, a Michigan corporation,

Defendants,

and

SAFECO INSURANCE COMPANY, a foreign corporation,

Defendant-Appellee,

and

USX CREDIT CORPORATION, a foreign corporation,

Not Participating.

UNPUBLISHED
October 22, 1996

No. 179940
LC No. 91-128710

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Safeco Insurance Company. Plaintiff alleged that Safeco had a duty to defend and indemnify plaintiff in the lawsuit that USX Credit Corporation filed against plaintiff.

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

The trial court found that Safeco's insurance policies did not provide coverage for the type of lawsuit that USX filed against plaintiff. We affirm.

Plaintiff first argues that Safeco had a duty to defend and indemnify plaintiff in the action which USX filed against plaintiff. That action stemmed from the transaction in which Pacific Air Lease Ltd., as lessor, and Lai Sun Manufacturing, as lessee, entered into an Equipment Lease agreement involving twelve computerized knitting machines. One month later, plaintiff's Executive Vice President visited the Lai Sun manufacturing sight and noted that some of the machines were missing parts, some were in disrepair, and some were not operating at all. In spite of this observation, plaintiff entered into an agreement with Pacific Air Lease whereby plaintiff purchased the knitting machines and accepted an assignment of the original Equipment Lease.

To finance the purchase of the knitting machines, plaintiff borrowed money from USX and entered into a loan and security agreement with USX. In the loan and security agreement, plaintiff gave a warranty that it had good title to the knitting machines, free and clear from encumbrances. Plaintiff's obligation to repay USX was evidenced by a promissory note. As security for the loan, plaintiff granted USX a security interest in the knitting machines and assigned to USX all of its rights under the original Equipment Lease. USX agreed to look solely to the collateral for repayment of the loan, unless an event of default occurred, in which case USX would have the right to proceed directly against plaintiff. Pursuant to the agreement, an event of default included a materially incorrect representation or warranty by plaintiff.

USX subsequently filed suit against plaintiff, alleging that plaintiff's representation and warranty of good title was untrue at the time it was made because the equipment did not exist at the time of the loan and security agreement and the serial numbers therein were fictitious. Plaintiff tendered the defense of the action to defendant Safeco. Safeco advised plaintiff that the USX claim was not covered by either of the insurance policies which Safeco issued to plaintiff.

Plaintiff claims that the trial court erred in granting summary disposition to Safeco because the insurance policies that Safeco issued to plaintiff provided coverage for the type of lawsuit that USX filed against plaintiff. In reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995).

When presented with a dispute regarding an insurance policy, a court must determine what the parties' agreement is and enforce it. *Fragner v American Community Mutual Ins Co*, 199 Mich App 537, 542-543; 502 NW2d 350 (1993). Each of the policies issued by Safeco provided that Safeco would have the duty to defend any suit seeking damages because of bodily injury or property damage. The policies defined property damage as "(a) physical injury to tangible property . . . or (b) loss of use of tangible property that is not physically injured."

Plaintiff argues that the "loss of use" definition includes the USX claim because the underlying theory of the USX suit was that plaintiff was liable for damages arising from a breach of warranty since plaintiff's negligence allegedly resulted in the loss of USX's equipment. Our review of the complaint filed by USX, however, reveals that USX did not seek damages for loss of use of the knitting machines. USX's suit was based on plaintiff's breach of contract. USX alleged that plaintiff made false representations and warranties that it had good title to the equipment when plaintiff and USX entered into the agreement because the equipment did not exist at the time of the agreement. In light of plaintiff's false representations, USX had the right, pursuant to the loan agreement, to proceed directly against plaintiff for recovery of the balance of the note. USX's suit against plaintiff was not based upon any theory of loss of use of the equipment. USX's suit was for breach of contract as a direct result of plaintiff's misrepresentations. We therefore conclude that Safeco's insurance policies did not provide coverage for the type of lawsuit that USX filed against plaintiff. Summary disposition in Safeco's favor was appropriate.

Plaintiff argues next that it did not own the knitting machines because it transferred ownership of the knitting machines to USX in a conditional sale when it transferred all of its rights under the original lease to USX. We disagree. A conditional sale is an agreement for the sale of a chattel in which the vendee undertakes to pay the purchase price, and possession of the chattel is immediately given to the vendee, but the title to the property is retained by the vendor until the purchase price is paid. *Alger v Davis*, 345 Mich 635, 641; 76 NW2d 847 (1956).

Our review of the facts of this case reveals that plaintiff did not make a conditional sale and that plaintiff did own the equipment. USX never agreed to pay the purchase price of the machines to plaintiff. The agreement between plaintiff and USX was titled, "Loan and Security Agreement and Assignment of Lease." The title alone indicates that USX did nothing more than lend money to plaintiff. Plaintiff was obligated to repay USX, as evidenced by the promissory note that plaintiff executed in favor of USX. Plaintiff never transferred title to USX. Even if this Court were to accept plaintiff's argument that this was a conditional sale, there is no evidence that plaintiff was ever paid the purchase price, because USX did not pay any money to plaintiff and Lai Sun failed to make its payments under the lease. Since the purchase price was never paid, title would have remained with plaintiff. We agree with the trial court that plaintiff owned the knitting machines.

Since plaintiff owned the knitting machines, Safeco was not required to defend and indemnify plaintiff in the USX action because both of Safeco's insurance policies clearly excluded coverage for damage to property owned by the insured. This Court must enforce clear and specific exclusions contained in an insurance contract. *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992). Even if this Court accepted plaintiff's argument that the USX action was based upon property damage to the knitting machines, summary disposition for Safeco was appropriate because Safeco's insurance policies clearly excluded coverage for property owned by the insured.

Plaintiff's final argument is that Thomas Schaden and Schaden, Rochow & Company were agents of Safeco, and that therefore Safeco was vicariously liable for their tortious behavior. Again, we disagree. Thomas Schaden, an employee of Schaden, Rochow & Company, was the agent who placed

plaintiff's insurance with Safeco. Plaintiff's Director of Financing and Accounting submitted an affidavit that Schaden was Safeco's agent because he dealt with Schaden and Schaden, Rochow & Company at the direction of Safeco representatives. In *Mayer v Auto Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983), this Court stated that an independent insurance agent is ordinarily the agent of the insured, not the insurer. In that case, the agent testified that he was an independent insurance agent and that he had the power to place insurance with different companies. This Court affirmed the principle of *Mayer* in *Harwood v Auto Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995). Schaden testified that he was an independent agent with the power to place insurance with several different companies. The record shows that Schaden, Rochow & Company placed insurance for Bancorp with at least two other agencies. In light of the foregoing authority, we conclude the Schaden and Schaden, Rochow & Company were agents of plaintiff, not Safeco. Safeco cannot be held vicariously liable for the alleged tortious acts of Schaden and Schaden, Rochow & Company.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski