

STATE OF MICHIGAN
COURT OF APPEALS

DAVID FEINBLOOM and LISA ANN
SCHOLNICK FEINBLOOM, a/k/a LISA ANN
SCHOLNICK-FEINBLOOM, a/k/a LISA ANN
SCHOLNICK,

UNPUBLISHED
April 24, 2008

Plaintiffs-Appellants,

v

AMERICAN INTERNATIONAL INSURANCE
COMPANY,

No. 276928
Oakland Circuit Court
LC No. 2006-074608-CK

Defendant-Appellee.

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10) in this breach of insurance contract action. Because no genuine issue of material fact exists regarding the interpretation of the insurance policy at issue defendant is entitled to judgment as a matter of law, and we affirm.

I

Plaintiffs contracted with a builder to construct their residence located in Franklin, Michigan. To insure their new home against damage, plaintiffs purchased a homeowner's insurance policy from defendant on February 19, 2003. Once the builder completed construction, plaintiffs moved into their new residence. On April 7, 2003, a grinder pump in plaintiffs' home exceeded capacity and caused the basement to flood. The water damaged the home's structure, finish work, flooring, as well as furniture and personal goods. Plaintiff filed a proof of loss with defendant, alleging \$664,966.64 in damages arising from the incident. Defendant paid in excess of \$200,000 in remediation and damages. Thereafter, plaintiffs submitted an additional claim for mold damage. Plaintiffs admitted that testing of the house showed preexisting mold damage unrelated to the "grinder pump" incident resulted from the builder's construction process but also claimed additional mold and mold-related damages due to the grinder pump failure. Defendant denied plaintiffs' claim for construction-related mold damage because the damage had occurred before the policy's inception. Defendant also denied

plaintiffs' claim for mold damage stemming from the grinder pump incident because a provision of the policy excludes from coverage loss caused by mold.

Plaintiffs filed a complaint alleging defendant's failure to pay for losses suffered resulted in a breach of the insurance contract and plaintiffs' detrimental reliance on the policy. Defendant answered that it had paid for plaintiffs' losses and asserted an affirmative defense that the policy covers neither mold damages nor preexisting damages. Defendant motioned for summary disposition under MCR 2.116(C)(10), alleging that the policy excluded mold related damage, even if the event is an "occurrence" within the meaning of the policy. In response, plaintiffs argued that the policy's language did not exclude their claim because the exclusion "only applies to loss 'caused by' mold, not mold as loss caused by some other event." The trial court agreed with defendant and granted defendant's motion dismissing plaintiffs' complaint with respect to mold-related damage.¹

II

This Court reviews a trial court's grant or denial of summary disposition de novo. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc.*, 267 Mich App 708, 713; 706 NW2d 426 (2005). The Court reviews "the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Under MCR 2.116(C)(10), summary disposition should be granted to the moving party only where the evidence and all legitimate inferences, when viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue regarding any material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Interpretation of an insurance policy is a matter the Court reviews de novo. *Royal Prop, supra* at 713-714. In a breach of contract action summary disposition is only appropriate where the terms of the contract are clear; if the terms are ambiguous, summary disposition is not appropriate. *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 NW2d 703 (1994).

III

On appeal, plaintiffs argue that the insurance policy does not exclude their loss due to mold that occurred during the policy period because of the grinder pump's failure because the policy affords coverage for mold that is an ensuing loss caused by another event. Defendant argues that the plain and unambiguous meaning of the policy expressly excludes plaintiffs' entire claim for any mold loss related to the grinder pump's failure.

¹ Regarding the non-mold related losses, the trial court's order provided plaintiffs with the opportunity to amend the complaint. However, the parties stipulated that plaintiffs should immediately pursue their appeal rights before pursuing their non-mold related damages claim in the trial court.

An insurance contract must be examined and read as a whole with meaning given to all terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). If a clear contract does not contravene public policy, the contract will be enforced as written, even if inartfully worded or clumsily arranged. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). An ambiguity is not created when a word of common usage is not defined in the contract. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Defendant's insurance policy contains the following exclusion:

1. Gradual or sudden loss. We do not cover any loss caused by rust, mold, rot, gradual deterioration or warping. In addition, we do not cover any loss caused by inherent vice, mechanical breakdown or latent defect. However, we do insure ensuing covered loss unless another exclusion applies.

The language of this provision is clear and unambiguous. It explicitly excludes from coverage "any loss caused by . . . mold." A court will find a contract's language ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. *Lansing Mayor v Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). Here, the language does not conflict with another provision of the policy, nor does the language have more than one meaning. Rather, the language of the first sentence unequivocally states that all losses due to mold are excluded from coverage under the policy.

Plaintiffs contend that the policy affords "coverage for mold which is ensuing loss caused by another event." In other words, plaintiffs' argue their loss should be covered because "it seeks . . . compensation for the presence of mold itself," and not loss "caused by mold." The distinction plaintiffs draw between loss caused by mold and mold as loss caused by some other event is predicated, in part, on *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004). The insurance policy in *Hayley* contained the following exclusion:

In addition, we do not cover loss consisting of or caused by any of the following:

* * *

d) rust or other corrosion, mold, wet or dry rot . . . [*Id.* at 575.]

Hayley concluded that the exclusion language covers "both losses caused by mold and losses consisting of mold damage." *Id.* at 575-576. Plaintiffs urge us to conclude that because the policy language in the instant case is different from and is not as broad as the exclusion in *Hayley*, we should find coverage under the contract for damage "consisting of" mold. Plaintiffs' argument is merely an exercise in semantics, and an exercise in semantics does not preclude the grant of summary disposition. *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000). Though the exclusionary language here is written differently than the *Hayley* language, its meaning and application are the same. Because mold is damage itself, the language is clear that "loss caused by" mold references damage "consisting of" mold and mold-related loss that is coextensive with the mold condition.

Plaintiffs contend that reading the exclusion in this manner--where mold is never covered under the insurance contract--renders the last line of the exclusion meaningless. We acknowledge that courts should avoid a construction that would render any part of the contract surplusage or nugatory. *Royal Prop Group, LLC, supra* at 715. But our construction of the exclusionary language, when read as a whole, renders no language surplusage or nugatory. *Id.* In fact the last sentence has independent meaning. The verb “ensue” is defined as “to follow in order; come afterward, esp. in immediate succession[;] to follow as a consequence.” *Random House Webster’s College Dictionary* (1997) (ordinal omitted). In context, an “ensuing covered loss” is a covered loss that followed as a consequence of the listed excluded losses: “rust, mold, rot, gradual deterioration or warping.” The insurance policy covers “all risks of physical loss or damage to your house, contents and other permanent structures unless an exclusion applies.” Therefore, for example, if a fire alarm malfunctions due to rust damage, and, as a result, sprinklers are tripped causing water damage, the water damage would be covered as a consequence of the excluded rust damage (absent, of course, the operation of another exclusion) but the rusty fire alarm would not be covered. We decline to adopt plaintiffs’ proffered application of the exclusionary language because it renders the first sentence nugatory. Because the exclusionary language, when read as a whole, renders no language surplusage or nugatory, and each phrase has independent meaning, plaintiffs’ argument fails.

IV

No genuine issue of material fact exists regarding the interpretation of the insurance policy at issue, and defendant is entitled to judgment as a matter of law.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis