

STATE OF MICHIGAN
COURT OF APPEALS

FRANK S. HIDALGO

Plaintiff-Appellee

v

MASON INSURANCE AGENCY, INC.,

Defendant,

and

SECURA INSURANCE, a/k/a SUCURA
INSURANCE,

Defendant-Appellant.

UNPUBLISHED

June 2, 2005

No. 260662

Ingham Circuit Court

LC No. 03-001129-CK

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant Secura Insurance appeals as of right the circuit court's grant of summary disposition and award of damages of \$51,937.05 to plaintiff in this action for breach of contract under a homeowners insurance policy. We affirm in part and reverse in part. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff obtained a homeowners insurance policy with Secura for a home that he occupied as his sole residence, along with his children, until August 1999, when he remarried. After he remarried, plaintiff lived with his wife at her rented apartment, but his children continued to reside in the insured premises and plaintiff continued to store his personal items there. Plaintiff intended to renovate the house after his children moved out and then live there full time.

The insured property was unoccupied after November 23 or 24, 2002, when plaintiff's last child, Gina Tovar, moved out. Tovar stated in an affidavit that when she moved out, she left the heat on at between seventy and seventy-three degrees and that the furnace was working. On December 10, 2002, plaintiff's house was damaged after one or more pipes burst. At his deposition, plaintiff testified that he visited the insured property twice after his daughter moved out; he discovered the damage on his second visit. Plaintiff filed a claim with Secura, but the claim was denied on the basis that he was not residing at the property at the time of the accident.

Plaintiff subsequently commenced this action for breach of contract.¹ Secura moved for summary disposition, arguing that under the policy's definitions of "insured," "insured location," and "residence premises," plaintiff was not entitled to coverage because he was not residing at the property at the time of the incident. The circuit court determined that there was a genuine issue of material fact with regard to whether plaintiff resided at the property and denied Secura's motion. Secura subsequently filed a second motion for summary disposition regarding damages, and plaintiff also moved for summary disposition, arguing that other policy provisions established that coverage existed for this incident. The circuit court agreed with plaintiff that the policy afforded coverage for the damage caused by the broken pipes, and that damages were not limited to the cost to repair the insured property.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The circuit court granted summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

When interpreting an insurance contract, this Court reads it as a whole and accords its terms their plain and ordinary meaning. *State Farm Mut Automobile Ins Co v Descheemaeker*, 178 Mich App 729, 731; 444 NW2d 153 (1989). Courts will enforce an insurance contract as written if no ambiguity exists. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). As our Supreme Court explained in *Nikkel, supra* at 566:

An insurance contract is ambiguous when its provisions are capable of conflicting interpretations. . . . In *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982), we explained:

"A contract is said to be ambiguous when its words may reasonably be understood in different ways.

If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.

Yet if a contract, however, inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." [Citation omitted.]

¹ Plaintiff alleged other theories of recovery, but those claims were dismissed and are not at issue on appeal.

The guidelines for enforcing exclusionary clauses are summarized in *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998):

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume.

When reviewing an exclusionary clause, this Court must read the contract as a whole to effectuate the overall intent of the parties. *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996).

Secura asserts that the definitions in its policy require that plaintiff must be living at the insured property in order for coverage to exist. But Secura's policy also contains the language that contemplates that the property may be vacant, and that the insured will possess multiple residences:

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:

* * *

2. Caused by:

a. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. *This exclusion applies only while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:*

(1) *Maintain heat in the building; or*

(2) *Shut off the water supply and drain the system and appliances of water; . . . [Emphasis added.]*

Pursuant to the above provision, the policy reasonably suggests that coverage for vacant or unoccupied property is not excluded if the insured has taken reasonable steps to prevent damage from bursting pipes, such as by maintaining heat in the building.

The policy must be read as a whole. Accepting Secura's interpretation that coverage is available only if plaintiff was using the property as his permanent residence at the time of the loss would negate the effect of the above exclusion. Secura would not have to limit the exclusion to unheated vacant dwellings if the policy did not cover property that was no longer occupied by the insured. We therefore agree with the circuit court that coverage is not excluded where insured property is left temporarily vacant or unoccupied and reasonable care is made to maintain heat in the building. Secura did not challenge the affidavit from plaintiff's daughter wherein she averred that the heat was left on and the furnace working when she left the house

two weeks earlier. Therefore, plaintiff established that the above exclusion was not applicable because reasonable care was taken to maintain heat in the home.

Secura's reliance on *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155; 534 NW2d 502 (1995), is misplaced because that case is factually distinguishable. In *Heniser*, the plaintiff had sold the property on land contract and had given possession to the vendee. *Id.* at 157. The issue was whether the policy required that the insured location be a residence premises at the time of the loss or only at the time the policy was issued. *Id.* at 158-160. The Supreme Court specifically noted that the plaintiff had manifested his intent to no longer reside at the residence premises in the future, and had relinquished his right to do so. *Id.* at 160, n5. Here, the absence of a member of plaintiff's family in the premises was temporary and plaintiff intended to perform some renovations and return to the premises. He still received mail there, kept belongings there, and intended to reside there.

Further, the policy specifically contemplates that the insured may have residences other than the "residence premises." The policy provides:

"Insured location" means:

- a. The "residence premises";
- b. The part of other premises, other structures and grounds used by you as a residence and:
 - (1) Which is shown in the Declarations; or
 - (2) Which is acquired by you during the policy period for your use as a residence;

* * *

"Residence premises" means:

- a. The one family dwelling, other structures, and grounds; or
- b. That part of any other building:

where you reside and which is shown as the "residence premises" in the Declarations.

Another section entitled COVERAGE D – Loss of Use provides:

1. If a loss covered under this Section makes that part of the "residence premises" where you reside not fit to live in, we cover, at your choice, either of the following. However, if the "residence premises" is not your principal place of residence, we will not provide the option under paragraph b. below.

Thus, the policy clearly contemplates that the "residence premises" may not be the insured's principal place of residence, that the "residence premises" need not be the "one family dwelling,"

and that other premises used as a residence and shown in the declarations qualify as the “insured location.”

We conclude that the circuit court correctly rejected Secura’s argument that the property had to be occupied by plaintiff at the time of the loss.

Secura also argues that the circuit court erred in awarding plaintiff damages of \$51,937.05. We agree in part. The court correctly determined that there was no genuine issue with respect to the amount of damages relating to the repair of the property.² However, the court erred in determining that no genuine issue remained with respect to additional damages.

Under the policy, Secura agreed to pay for “additional living expenses” defined as

a. **Additional Living Expense**, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living;

* * *

Payment under a. or b. will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

Plaintiff’s entitlement to additional damages under this section involved numerous questions of fact.

We reject plaintiff’s argument that the circuit court erred in denying his request for attorney’s fees under MCR 2.114. Defendant did not violate the court rule in asserting its defenses.

Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski

² Secura neither challenged the accuracy of those estimates or submitted its own estimates of the cost to repair the property in its response to plaintiff’s motion. Furthermore, at the time of oral argument, in response to questioning from the circuit court, Secura’s counsel essentially admitted that if Secura was liable under the policy, it would owe plaintiff damages in the amount he was requesting.