STATE OF MICHIGAN

COURT OF APPEALS

COMMERCE CENTER PARTNERSHIP, Plaintiff-Appellant,	UNPUBLISHED May 9, 2006
V	No. 265147 Saginaw Circuit Court
CINCINNATI INSURANCE COMPANY, Defendant-Appellee.	LC No. 05-055188-NZ

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals as of right the trial court's order granting summary disposition for defendant. We affirm.

Plaintiff purchased a businessowner's insurance policy from defendant. The policy did not cover the personal property located in the building. Plaintiff reported to defendant that the basement of its building had been damaged by water and black mold, and suggested that the water had originated from a break in a nearby, underground city water main. When defendant denied payment, plaintiff sued for declaratory relief, asserting that its loss was covered. The trial court granted summary disposition for defendant, ruling that all of plaintiff's losses were excluded by the policy's "water" exclusion of § I.B.1.g.

Because the trial court considered the documentary evidence, we review its grant of summary disposition under MCR 2.116(C)(10). We review a decision granting summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). If no reasonable person could differ with respect to the proper application of the insurance policy's terms to the undisputed material facts, summary disposition is appropriate under MCR 2.116(C)(10). *Henderson v State Farm Fire & Casualty Co,* 460 Mich 348, 353; 596 NW2d 190 (1999). We also review the interpretation of an insurance contract de novo. *Morley v Automobile Club of Michigan,* 458 Mich 459, 465; 581 NW2d 237 (1998).

Although the source of the water has not been conclusively established, it is undisputed that the loss at issue was caused by a combination of water damage and black mold. Plaintiff asserts that its losses are insured even if one of these two causal factors is excluded, so long as the other factor is covered. We have rejected such "dual causation" arguments. *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 495; 506 NW2d 527 (1993). In cases where two or more factors combine to cause a loss, the entire loss is excluded

so long as *any one* of the separate causes is excluded. *Vanguard Ins Co v Clarke*, 438 Mich 463, 466; 475 NW2d 48 (1991), rev'd on other grounds sub nom *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 58-60; 664 NW2d 776 (2003). "Coverage under a policy is lost if *any* exclusion in the policy applies to an insured's particular claims." *Hayley v Allstate Ins Co,* 262 Mich App 571, 574; 686 NW2d 273 (2004) (emphasis added). A limitation on recovery in cases of concurrent causation may also be provided in the contract's language. *Sunshine Motors Inc v New Hampshire Ins Co*, 209 Mich App 58, 59; 530 NW2d 120 (1995). Here, the policy provided that defendant "will not pay for 'loss' caused directly or indirectly" by any of the excluded causes "regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'" Thus, under both Michigan law and the policy's plain language, plaintiff's total loss is excluded if *either* the water damage or the black mold damage is excluded.

The insurance policy stated that defendant would pay for any loss caused by a "covered cause of loss." A covered cause of loss was defined as any risk of loss other than those excluded in § I.B or limited in § I.A.4.[1] The policy's exclusions, contained in § I.B, provided in part that defendant "will not pay for 'loss' caused directly or indirectly" by:

> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
>
> (2) Mudslide or mudflow;
>
> (3) Water that backs up or overflows from a sewer, drain or sump; or
>
> (4) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) Foundations, walls, floors or paved surfaces;
>
> (b) Basements, whether paved or not; or
>
> (c) Doors, windows or other openings.
>
> However, if Water, as described in B.1.g (1) through (4) above, results in fire, explosion or sprinkler leakage, we will pay for the "loss" caused by that fire, explosion, or sprinkler leakage.
>
> Other than in the state of Florida, this Exclusion does not apply to the office furniture and fixtures that are covered Business Personal Property.

[1] These limitations are not involved in this case.

As noted, plaintiff did not purchase coverage for its personal property. Moreover, none of the water damage to plaintiff's basement resulted in "fire, explosion or sprinkler leakage." Accordingly, if the type of water damage that contributed to plaintiff's loss is enumerated in § I.B, plaintiff's total loss is excluded.

Plaintiff's principal partner submitted an affidavit, averring that he had "observed a city waterline break outside the building at issue, wherein I observed water leaking into the ground and bubbling up to the surface and flowing along the surface." He also averred that he had personally observed "four or five inches of water" in the basement of plaintiff's building, and that "due to the large amount of water in the basement in a relatively short period of time, the water would have entered the basement by some means other than seepage and could have entered through electrical conduit from an underground service vault, or over the surface." His affidavit concluded that the water in plaintiff's basement had originated from the city water main break that he had observed. Assuming *arguendo* that plaintiff's affidavit is admissible documentary evidence, and viewing its contents in a light most favorable to plaintiff, the document still fails to create a genuine issue of fact with respect to coverage. The affidavit leaves open two possibilities: (1) that the water could have entered plaintiff's building above the surface of the ground; or (2) that the water could have entered plaintiff's building through an opening or "electrical conduit" below the surface of the ground. It is also possible – despite the affidavit to the contrary – that the water seeped or leaked into the building from below the surface of the ground. A loss caused in part by any of these three possible causes is excluded.

Among other things, § I.B.1.g(1) excludes coverage for losses caused "directly or indirectly by . . . *surface water*" (emphasis added). If, as the affidavit suggests, the water escaped from a water main by "bubbling up to the surface and flowing along the surface," and entered the building "over the surface," the subsequent damage to plaintiff's basement would be excluded by § I.B.1.g(1). While "surface water" is not defined in the policy, our Supreme Court has given the term a broad meaning in the context of exclusionary clauses:

> [W]aters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence. [*Fenmode v Aetna Casualty & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942).]

Although the water in this case did not apparently originate from rain or snow, the definition above only specifies that surface water "*usually*" results from precipitation. The definition does not *require* that "surface water" originate from precipitation or other natural sources. In all other respects, water that escapes from a broken water line and rises to the surface fits squarely within the definition of *Fenmode*. Such water would be located "on the surface of the ground," would possess "a casual or vagrant character," and would follow "no definite course and hav[e] no substantial or permanent existence." This Court must give the language of an insurance policy its ordinary and plain meaning. *Royce v Citizens Ins Co,* 219 Mich App 537, 542; 557 NW2d 144 (1996). The ordinary and common understanding of the term "surface water" is water on the surface of the ground – which *may* result from rain or snow – that is temporary in nature and follows no defined path or channel. *Fenmode, supra* at 192. If the water in this case entered plaintiff's building "over the surface," the subsequent loss is excluded by § I.B.1.g(1).

Section I.B.1.g(4)(c) excludes coverage for losses caused "directly or indirectly by . . . [w]ater under the ground surface pressing on, or flowing or seeping through . . . [d]oors, windows or *other openings*" (emphasis added). Plaintiff's affidavit suggests that the water may have entered "through an electrical conduit from an underground service vault." Such an "electrical conduit" certainly falls within the definition of "other openings" in § I.B.1.g(4)(c). Thus, if the water entered the building "through an electrical conduit from an underground service vault," the subsequent damage is excluded under § I.B.1.g(4)(c).

Finally, §§ I.B.1.g(4)(a) and I.B.1.g(4)(b) exclude coverage for losses caused "directly or indirectly by . . . [w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces [or] [b]asements, whether paved or not." Plaintiff's principal partner averred that the water "would have entered the basement by some means other than seepage." However, if contrary to this averment the water *did* enter plaintiff's building by leaking through basement walls, plaintiff's loss is excluded under §§ I.B.1.g(4)(a) and I.B.1.g(4)(b).[2]

Plaintiff next argues that it is entitled to payment under the "Pollutant Clean Up and Removal"[3] and "Water Damage, Other Liquids, Powder or Molten Material Damage" additional coverage provisions of §§ I.A.5.o and I.A.5.s. We disagree. These sections are triggered only if the pollutant damage results from a "covered cause of loss," or the insured's loss is otherwise "a covered 'loss' to which this insurance applies." As noted, the water damage, which partially caused plaintiff's loss and led to the growth of black mold, is not covered. Thus, the additional coverage provisions of §§ I.A.5.o and I.A.5.s do not apply.

Plaintiff finally argues that it is entitled to payment under the § I.B.2.i pollutant exclusion. Even assuming *arguendo* that black mold is a "pollutant," plaintiff's argument disregards the fact that an exclusionary clause cannot create coverage for an otherwise-excluded loss. "[E]xclusionary clauses limit the scope of coverage provided under [an] insurance contract; they do not grant coverage." *Hawkeye-Security Ins Co v Vector Construction Co,* 185 Mich App 369, 384; 460 NW2d 329 (1990). Nor can an exception to an exclusionary clause create coverage if the loss is otherwise excluded. *Id*. at 384-385. Plaintiff's loss was partially caused by excluded water damage. Plaintiff's reliance on the exclusionary clause and its exceptions to provide coverage for an otherwise-excluded loss is unavailing.

Because the water damage was excluded by § I.B.1.g, plaintiff cannot recover under the general coverage provisions of the policy. Nor can plaintiff rely on the additional coverage

---

[2] We note that "[w]ater under the ground surface" does not encompass only naturally occurring water, but may include water originating from an artificial source like a water main. See *Buttelworth v Westfield Ins Co*, 41 Ohio App 3d 288, 288-289; 535 NE2d 320 (1987) (examining a nearly identical exclusionary clause and finding that "[t]he exclusion clearly and unambiguously indicates that damage from any water below the surface which seeps through a foundation is not covered by the policy, regardless of whether the source is natural or artificial").

[3] Plaintiff contends that the black mold, which contributed to its loss, is a "pollutant" for purposes of the insurance policy.

provisions or the exceptions to the pollutant exclusion. The policy clearly excludes plaintiff's losses, and summary disposition was therefore proper. In light of our disposition of this matter, we need not address any alternative grounds for affirmance.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder