STATE OF MICHIGAN

COURT OF APPEALS

THOMAS KENNEDY and KRISTIN KENNEDY, Plaintiffs-Appellees/Cross Appellants,	UNPUBLISHED August 4, 2011
v	No. 294955 Marquette Circuit Court LC No. 07-045044-CK
AUTO-OWNERS INSURANCE COMPANY and HOME-OWNERS INSURANCE COMPANY, Defendants-Appellants/Cross Appellees.	

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting plaintiffs' motion for summary disposition under MCR 2.116(C)(10) on the issue of insurance coverage. Plaintiffs cross-appeal from an order granting defendants' motion for summary disposition under MCR 2.116(C)(10) regarding damages. We affirm in part, reverse in part and remand for further proceedings.

Plaintiffs' unoccupied home sustained water damage as a result of two pipes bursting, presumably after freezing and thawing. Plaintiffs' homeowners insurance policy with defendants excluded coverage for losses that occurred in unoccupied dwellings due to leakage from freezing pipes, with exceptions. The relevant portion of the policy exclusion reads as follows:

> Freezing of plumbing, heating, air conditioning or automatic fire protection sprinkler systems or domestic appliances, or by discharge, leakage or overflow from the system or appliance caused by freezing while the building is vacant, unoccupied or in the course of construction unless you take precautions to:
>
> * * *
>
> b. maintain heat in the building.

The trial court found the language requiring plaintiffs to "take precautions" ambiguous because, in the context of the case, the phrase could mean that plaintiffs were required to take either reasonable precautions, successful precautions, or some precautions. On appeal, both

parties argue that the phrase is not ambiguous, but they disagree regarding whether plaintiffs took precautions.

A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* The construction and interpretation of the language in an insurance contract is a question of law that this Court also reviews de novo. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007).

"Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009). Insurance policies are construed utilizing the same contract construction principles that apply to any contract. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). An insurance policy is enforced in accordance with its terms, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004), and contractual terms must be construed in context and in accordance with their commonly used meanings. *Hastings Mut Ins Co*, 286 Mich App at 294. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent. *Id*. at 292. The Court will read the insurance contract as a whole to effectuate the intent of the parties and enforce clear and specific exclusions, however exclusions are strictly construed in favor of the insured. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The Court will not hold an insurance company liable for a risk it did not assume. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. *Royal Prop Group, LLC*, 267 Mich App at 715. A court should not create ambiguity in an insurance policy by contorting the plain meaning of a word or phrase that is specific and well-recognized and giving it some alien construction for the purpose of benefiting an insured. *Citizens Ins Co*, 477 Mich at 82. The fact that a policy does not define a relevant term does not render the policy ambiguous. *Id*. at 82-83. Rather, an undefined term is accorded its commonly understood meaning. *Twichel*, 469 Mich at 534. If an ambiguity in the contract cannot be resolved, it should be strictly construed against the drafter. *Tenneco Inc*, 281 Mich App at 444.

In finding ambiguity, the trial court focused on the extent of the precautions, rather than the meaning of "precautions to maintain heat in the building." This phrase is not ambiguous when given its ordinary meaning. The Court may consult dictionary definitions to ascertain the plain and ordinary meaning of terms as they would appear to a reader of the contract. *Hastings Mut Ins Co*, 286 Mich App at 294. A precaution is defined as "a measure taken in advance to avert possible harm or misfortune." *Random House Webster's College Dictionary* (1997).

Here, plaintiffs were required to take advance measures to maintain heat in the building in order to avert the possible harm of freezing pipes. The trial court found that plaintiffs did take precautions by having several furnaces and utilizing a "winter watchman" temperature monitoring device. In addition, plaintiffs state that they took the precautions of making regular visits to the home and adding extra insulation when the home was built. However, the precautions required by the policy are to maintain heat in the home, which fundamentally requires a heat source. None of the listed precautions *maintained* heat. If the winter watchman system performed ideally, it could, at best, alert an interested party that heat was not maintained in the home. The same is true of the visits. Moreover, these alerts may not have been in advance of the pipes freezing or the temperature falling because they may not have led to the discovery until after the harm had occurred. In addition, having an insulated home with furnaces and a temperature monitoring system, without having any heat in the home or fuel to run the furnaces, would not have been precautions to maintain heat in order to prevent the pipes from freezing. Evidence was presented that plaintiffs ran out of the propane that powered the furnaces and did not have the propane tank refilled. Thus, it could be argued that plaintiffs took precautions to monitor the heat, but did not demonstrate that precautions were taken to maintain heat in the building by actually heating the building. Even though exclusionary provisions are strictly construed against the insurer and in favor of the insured, *Hastings Mut Ins Co*, 286 Mich App at 292, here there was at least a genuine issue of material fact regarding whether plaintiffs took advance measures to maintain heat in the building in order to avert the possible harm of freezing pipes. The trial court thus erred in granting summary disposition to plaintiffs on this issue.

Defendants further argue that the trial court erred when it found immaterial the disputed factual issue of whether plaintiffs ran out of propane to heat the home. However, as discussed above, taking advance measures to maintain heat in the home in order to prevent the pipes from freezing required heat to be in the home. In this case, whether the furnaces of the home were providing heat in order to maintain the temperature of the home was a material question. Therefore, whether there was propane to fuel operation of the furnaces was a material question. The trial court erred in finding that this question was immaterial to whether plaintiffs took precautions to maintain heat.

The trial court correctly determined that there was a factual issue as to whether the home ran out of propane to fuel the heating system. Some witnesses provided testimony that the home was approximately 55 degrees when the frozen pipes were discovered, that the gauges on the propane tanks indicated there was fuel, that if there had not been fuel other pipes would have burst as well, and that there would have been other indicia present if there was no fuel. Conversely, other witnesses indicated that plaintiff may have initially reported that there was no propane. Moreover, the person who serviced the tanks said there was no propane. There was therefore a genuine issue of material fact regarding whether plaintiffs ran out of propane.

On cross-appeal, plaintiffs argue that the trial court erred in granting summary disposition to defendants on the question of consequential damages. We disagree.

Damages recoverable for breach of contract are those that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Insurance contracts are agreements to pay a sum of money upon the occurrence of a

specified event. They are commercial in nature. *Id.* The injury resulting from the breach of a commercial contract is a financial one amenable to accurate estimation. *Id*. at 420. Generally, adequate compensation is provided to a plaintiff for a breach of contract when damages are awarded by reference only to the terms of the contract. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 402; 729 NW2d 277 (2006).

However, Michigan courts have found the general rule limiting damages for breach of a commercial contract inapplicable if there is evidence that the parties contemplated the damages. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 7; 516 NW2d 43 (1994). A party can thus recover consequential damages if the damages were in the contemplation of the parties at the time the contract was formed. For example, the loss of profits which result from a breach may be considered in assessing damages. *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 149-150; 314 NW2d 453 (1981). In determining the foreseeability of contract damages, Michigan courts utilize a flexible approach, but an objective standard. *Lawrence*, 445 Mich at 12-13. Consequential damages have been awarded when the loss resulted directly from the nonperformance of the contract between the parties, but not from the failure of another venture unknown to the defendant. *Parmet Homes, Inc*, 111 Mich App at 150.

Here, plaintiffs had already listed the home for sale at the time it was damaged. They claim they were not able to sell the home due to the unrepaired water damage. Plaintiffs assert that they could not repair the water damage because defendants breached their obligation to pay them the amount of loss suffered from the broken pipes. Plaintiffs argue that they therefore lost any profits that they would have garnered from the sale of their home. The trial court found there was no evidence to show that defendants were aware of these special circumstances and granted defendants' motion for summary disposition, finding that damages were limited to the contract amount and interest under the Unfair Trade Practices Act, MCL 500.2006(4).[1]

Plaintiffs argue that damages from not selling their home naturally arose from the breach of contract and were in the contemplation of the parties when they entered into the insurance contract. Plaintiffs state that defendants should have known that the home was for sale because plaintiffs were insuring two homes. However, there was no evidence presented that defendants knew plaintiffs' home was listed for sale. Further, it cannot be said that the reason plaintiffs' home did not sell was because defendants failed to pay the claim for damages. Plaintiffs' inability to sell their home at a specific time does not naturally follow from defendants' failure to cover the loss to the home caused by water damage. The loss of profits from another venture is within the contemplation of the parties only where parties are both aware that a breach will affect

---

[1] MCL 500.2006(4) provides, in relevant part: "If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance." The purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims. *Angott v Chubb Group Ins*, 270 Mich App 465, 479; 717 NW2d 341 (2006).

the specific collateral enterprise. *Parmet Homes, Inc*, 111 Mich App at 150. The damages suffered by plaintiffs due to defendants' failure to cover the cost of water damage was adequately compensated by the terms of the contract. *Kewin*, 409 Mich at 417. Application of this principle results in a limitation of damages to the monetary value of the contract had defendants fully performed under it. *Id.* at 414-415.

Plaintiffs further argue that the subsequent foreclosure of their home was the result of defendants' refusal to pay benefits. Plaintiffs state that they listed the home for sale knowing that they could afford the payments, but could no longer maintain the mortgage payments "long after [defendants'] wrongful denial" of the claim. Plaintiffs report that the home was sold at a loss at a foreclosure sale and assert that defendants should be responsible for the amount of the loss. Plaintiffs argue that the parties contemplated the foreclosure because the insurance policy identified the mortgage holder as a "second interested party."

There was no evidence presented that demonstrated a link between the foreclosure and the unrepaired water damage. Moreover, defendants could not have anticipated that they were insuring plaintiffs against foreclosure. The purpose of damages for breach of contract is to put plaintiffs in the same position as they would have been in had the defendant kept his contract, and the injured party is not entitled to be placed in a better position than he would have been had the contract not been broken. *Parmet Homes, Inc*, 111 Mich App at 150. The trial court did not err in granting defendants' motion for summary disposition denying consequential damages.[2]

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

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

[2] While the partial dissent indicates the potential for possible consequential damages such as mold, the home in this matter was ultimately foreclosed upon, thereby shutting the door on any potential future consequential damages.

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS KENNEDY and KRISTIN KENNEDY, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED August 4, 2011
v	No. 294955 Marquette Circuit Court
AUTO-OWNERS INSURANCE COMPANY and HOME-OWNERS INSURANCE COMPANY, Defendants-Appellants/Cross-Appellees.	LC No. 07-045044-CK

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

RONAYNE KRAUSE, P.J. *(concurring in part and dissenting in part).*

I concur entirely with the majority's determination that there is a genuine question of fact as to whether plaintiffs actually ran out of propane. I also agree that the insurance policy is unambiguous, and plaintiffs' failure to sell the house was properly excluded as potential consequential damages. However, I respectfully believe that the majority misreads the insurance policy, and I respectfully conclude that the denial of consequential damages altogether is overly broad.

To summarize the situation, plaintiffs had two houses, one of which (hereinafter, "the house") they kept vacant but habitable, with the thermostat set at 55 degrees. Two water pipes nevertheless burst and caused extensive damage. The house's redundant furnaces were fuelled by propane, and as the majority excellently explains, there is a genuine question of fact whether plaintiffs' propane tanks ran out of propane. Furthermore, again as the majority explains, the trial court erred in concluding that this factual question was immaterial. Plaintiffs had the house listed for sale, but they were unable to sell it and it eventually went into foreclosure. The majority properly explains that the failure to sell and subsequent foreclosure lack a sufficient link to the water damage to be considered consequential damages.

In reverse order, however, I would not preclude *any* possibility of plaintiffs recovering consequential damages. Plaintiffs' inability to repair the damage from the burst pipes because of defendants' denial of their insurance claim *could* itself cause further damage to the house over time. For example, mold, deterioration of the structure from exposure to environmental stresses, or the inevitable decay of any structure that sets in if it is not lived in, all would certainly be

within the contemplation of the parties. It is obvious and well-known that unresolved problems only get worse over time, never better, particularly when water damage is involved. Furthermore, this would be a loss directly from the nonperformance of the contract, assuming a jury ultimately finds in plaintiffs' favor regarding the sufficiency of their precautions or their propane levels. I agree that the failure to sell the house and the foreclosure are not consequential damages, but I cannot agree with the implication that there are not, at least theoretically, other consequential damages potentially available.

More significantly, the insurance policy at issue required plaintiffs to "take precautions to . . . maintain heat in the building." Both parties assert that this is unambiguous, although ambiguity is a question of law, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003), to which parties may not stipulate. Naturally, plaintiffs assert that only *some* precautions need to be taken, whereas defendants assert that *reasonable* precautions must be taken. I note with some interest that the specific policy endorsement explicitly deleted a requirement that the insured *actually* maintain heat in the building, replacing it with the requirement of "taking precautions." The precautions unambiguously do not necessarily have to be successful—therefore, the policy exclusion would not be triggered even if plaintiffs did in fact run out of propane.

I agree with the majority that the contract itself is not ambiguous. As they state, a precaution is defined by the dictionary as "a measure taken in advance to avert possible harm or misfortune" or "caution employed beforehand; prudent foresight." The plain language of the contract does not specify whether a *de minimus* amount of precaution will suffice or whether some quantum of care beyond that is called for. I think that if this Court recognizes that "prudent foresight" is part of the definition, the policy calls for the latter. Therefore, the plaintiffs need not take *successful* precautions to maintain heat in the building, but they must take *reasonable* precautions. In any event, allowing merely "some" precautions could lead to an absurd result, such as satisfying the policy requirements if plaintiffs had merely lit a candle somewhere in the basement—that would be a precaution, but obviously a blatantly unreasonable one. This must be a jury question.

The majority concludes that "the precautions required by the policy are to maintain heat in the home, which fundamentally requires a heat source." I cannot find any support for this conclusion in the policy, case law, dictionary, or any other reference or authority. Plaintiffs had redundant heat sources, and they also had redundant mechanisms to monitor the heat—both of which were calculated to facilitate the maintenance of heat in the home. The fact that the monitoring systems would require human intervention at some point might arguably make them poor or unreliable precautions, but that goes purely to evaluating *how reasonable* the precaution is, not what it was designed to accomplish. Again, the reasonableness would be for the jury to decide.

In summary, I agree that there is a genuine question of material fact as to whether plaintiffs ran out of propane, and I agree that plaintiffs' inability to sell the house and foreclosure are not permissible items of consequential damages. However, I would hold that the insurance policy requires reasonable precautions to maintain heat, which may or may not be directly heat-generating acts, and I would further hold that there may possibly be items of consequential damages *directly* caused by the unrepaired water damages.

/s/ Amy Ronayne Krause