STATE OF MICHIGAN

COURT OF APPEALS

TORRES HILLSDALE COUNTRY CHEESE, L.L.C.,	UNPUBLISHED October 1, 2013
Plaintiff-Appellant,	
v	No. 308824 Hillsdale Circuit Court
AUTO-OWNERS INSURANCE COMPANY,	LC No. 11-000568-CK
Defendant-Appellee.	

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion for partial summary disposition and granting summary disposition in favor of defendant. This case revolves around the question of whether defendant breached the insurance contract when it failed to pay plaintiff for any of its losses associated with a recall of plaintiff's cheese products. We affirm.

I. BASIC FACTS

Plaintiff was in the business of producing and selling cheese products and was covered under an insurance policy issued by defendant. The insurance policy contained several components, but the one that plaintiff sought recovery under was called "commercial property coverage."

The declarations for the "commercial property coverage" provide that 10 other forms apply to this particular coverage, but the ones relevant to the issues on appeal are Form CP0010, Form 54082, and Form CP0090.

Form CP0010 detailed the basics of the coverage and provided that defendant "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." It stated that "Covered Property" included many items, including "Your Business Personal Property." Among the items included in "Your Business Personal Property" was "Stock," which was further defined as including "merchandise held in storage or for sale."

But not all causes of loss are covered. Under the section, "Covered Causes of Loss," the form refers the reader to the declarations page to see the applicable "Causes of Loss Form." Of

the 10 forms listed for this coverage on the declarations page, only one addresses causes of loss, and that is Form 54082, "Causes of Loss – Special Form."

Form 54082 was entitled "Causes of Loss – Special Form" and provided the following:

> B. EXCLUSIONS
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> * * *
>
> c. Governmental Action
>
> Seizure or destruction of property by order of governmental authority.
>
> * * *
>
> 2. We will not pay for loss or damage caused by or resulting from any of the following:
>
> * * *
>
> b. Delay, loss of use or loss of market.
>
> * * *
>
> 3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the resulting loss or damage.
>
> * * *
>
> b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Form CP0090 contained several additional conditions related to the commercial property coverage. At the top of the form, it stated that "[t]his Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms." Of note, further down under "CONTROL OF PROPERTY," the form provided, in relevant part, that "[a]ny act or neglect of any person other than you beyond your direction or control will not affect this insurance."

In February 2009, random testing of plaintiff's cheese product by the Michigan Department of Agriculture ("MDA") revealed the presence of Listeria, a harmful bacterium. Plaintiff was notified that it was to not ship any product until testing came back negative for Listeria. However, plaintiff did ship some product out. As a result, a recall was issued in March

2009. The recall was later expanded in April 2009 and June 2009 to cover additional types of cheeses produced by plaintiff.

Plaintiff later sought payment under the insurance policy for noncontaminated cheese that was seized and could not be brought back to market. In response, defendant determined that

> the MDA is requiring that approximately 343 cases of cheese product, which tested positive for Listeria contamination, will need to be tagged and disposed of, prohibiting it from being sold. Some of the cheese which has not been tagged has been delayed and will need to be disposed of due to exceeding the expiration date.

Consequently, defendant denied the claim based on exclusions present in Form 54082. Specifically, defendant relied upon the exclusions that defendant will not pay for any loss due to "delay, loss of use or loss of market" and will not pay for any loss due to "[a]cts or decisions, including failure to act or decide, of any person, group, organization or governmental body."

Plaintiff filed suit against defendant, alleging breach of contract and violation of the Michigan Uniform Trade Practices Act, MCL 500.2001 *et seq.* Plaintiff alleged that the exclusions relied upon by defendant did not apply to the losses that plaintiff suffered.

Both parties filed competing motions for summary disposition, and the trial court denied plaintiff's motion and granted defendant's motion. At the hearing, the trial court determined that the endorsement plaintiff relied upon in Form CP0090 was subject to the exclusions defendant relied upon in Form 54082, and therefore the loss was excluded as a covered loss.

II. ANALYSIS

Plaintiff argues that the trial court erred by denying its motion for summary disposition. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Our review of the proper interpretation of an insurance contract is also a matter of law that we review de novo. *Healing Place at N Oakland Med Ctr*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

When interpreting an insurance contract, this Court applies the same contract construction principles that govern any other type of contract. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). "The primary goal in the construction or interpretation of a contract is to honor the intent of the parties." *Id.* (quotation

marks and citations omitted). And the best way to determine the parties' intent is to examine the language of the contract. *Id.*

> Accordingly, an insurance contract should be read as a whole and meaning should be given to all terms. The policy application, declarations page of the policy, and the policy itself construed together constitute the contract. The contractual language is to be given its ordinary and plain meaning. An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. [*Id.* at 715.]

Plaintiff sought recovery for its loss under the commercial property coverage it had through its insurance policy with defendant. On the declarations page, it listed 10 other forms that were "additional forms" to be considered as part of this coverage. Thus, to the extent that defendant relies upon exclusions present in forms that are part of these 10 forms, that reliance is misplaced. Consequently, we will limit our analysis to the applicable commercial property coverage and the associated forms for that coverage. The pertinent ones for the issues on appeal consist of Form CP0090, Form CP0010, and Form 54082.

Form CP0010 provides the basic description of this policy and allows for coverage for "direct physical loss of or damage to Covered Property." Through a series of definitions in the form, it is clear that plaintiff's cheese produced for sale is considered part of the "Covered Property" under the policy. But under the "Covered Causes of Loss" section, the form references the declarations page to see the applicable "Causes of Loss Form." In turn, from the 10 listed forms, only Form 54082 addresses this topic.

Form 54082 provides, in pertinent part, that defendant would not pay for any loss caused by "[s]eizure or destruction of property by order of governmental authority," for any loss caused by "[d]elay, loss of use or loss of market," or for any loss caused by "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body."

Plaintiff claims that the exclusions contained in Form 54082 do not apply in the instant case because they are "trumped" by an endorsement found on Form CP0090. Under the "Control of Property" subheading, Form CP0090 provides that "[a]ny act or neglect of any person other than you beyond your direction or control will not affect this insurance." Plaintiff's position is untenable.

Plaintiff correctly notes that "[e]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails." *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 26; 800 NW2d 93 (2010). This concept is simply another way of expressing the well-established doctrine that specific provisions of a contract will usually override general provisions. *Royal Prop Group*, 267 Mich App at 719. However, this principle only applies to "general policy provisions." The exclusions contained in Form 54082 are anything but general policy provisions. Instead, Form 54082 painstakingly lists numerous, specific, detailed exclusions *to the general policy*, which include, in part, the enforcement of any ordinance or law, earth movement, governmental action, nuclear hazard, off-premises services, war and military

action, water, and fungi. On the other hand, Form CP0090's clause is a very general statement. Therefore, plaintiff's assertion that the endorsements trump the exclusions is suspect.

The provision that plaintiff relies upon in Form CP0090 merely states that the acts of others beyond the insured's control will "not affect" insurance. It does not say that the acts of others beyond the insured's control automatically results in a covered loss. Thus *in general*, an act of another person outside the control of the insured is not a ground to grant coverage and it also is not a reason to deny coverage. As a result, one must look to the terms of the actual policy in order to determine if any particular loss is covered. And here, the exclusions, as part of the policy, clearly deny recovery for any loss caused by the government's seizure as well as any loss caused by a decision of a governmental body.

Plaintiff relies on *VanReken v Allstate Ins Co*, 150 Mich App 212; 388 NW2d 287 (1986), for its position that a contract's "acts or neglect" phrase prevails over any competing provision. But, while the *VanReken* Court affirmed the jury's finding that the plaintiffs had an insurable interest in the destroyed property, the Court never relied on the contract's "acts or neglect" phrase in reaching its decision. *Id.* at 220. Rather, the Court stressed that only "the unusual facts presented in the instant case" dictated its decision. *Id.* In addition, the defendant insurance company renewed the at-issue insurance policy *with the knowledge* that the insured was not complying with one of the terms of the policy and was therefore "prevented from denying coverage." *Id.* *VanReken*'s reasoning is consistent with an application of the traditional contract defenses of wavier and estoppel, with waiver being the relinquishment of a known right, *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008), and estoppel involving a party's detrimental reliance on conduct of the other party, *Grix v State*, 304 Mich 269, 275; 8 NW2d 62 (1943). Thus, *VanReken* simply is not applicable to the facts in the instant case.

Plaintiff also relies upon the unpublished Ninth Circuit decision of *Sentience Studio, LLC v Travelers Ins Co*, 102 F App'x 77 (CA 9, 2004). The court in *Sentience Studio* addressed the interaction between the same exclusion and endorsement language at issue in the present case and concluded that "the 'acts or decisions' exclusion may apply only if the act or decision at issue was by 'the Insured' or under the Insured's direction or control." *Id.* at 81. We reject this view. This construction inserts language into the plain language of the exclusion, which is not permitted under Michigan law, *McDonald*, 480 Mich at 199-200, and also impermissibly makes part of the language of the exclusion nugatory, namely the portion dealing with "governmental bod[ies]," *Royal Prop Group*, 267 Mich App at 715.

Plaintiff also argues that the "acts or neglect of another" endorsement from Form CP0090 was not subject to the exclusions located in Form 54082. There are two reasons why plaintiff's argument has no merit. First, as we noted earlier, both the declarations form and the general policy Form CP0010 refer to Form 54082. The declarations page expressly references that Form 54082 is part of the commercial property coverage terms, while Form CP0010 does so by incorporation, where it directs the reader to "See applicable Causes of Loss Form as shown in the Declarations." Second, Form CP0090 itself at the top states that it is "subject to the . . . applicable Loss Conditions." Here, from reading the contract as a whole, it is clear that the applicable loss conditions for this particular coverage are contained in Form 54082.

In its motion for partial summary disposition, plaintiff asserted that its losses were attributable to the government's seizure of cheese product and its order preventing plaintiff from producing any further cheese product. Therefore, because the alleged cause was attributable to a governmental body's actions concerning a recall, any loss was excluded pursuant to Form 54082. Thus, the trial court did not err when it denied plaintiff's motion for partial summary disposition.

Plaintiff next argues that the trial court erred by granting defendant's motion for summary disposition. We disagree.

For the reasons stated above, the exclusions contained in Form 54082 are applicable. But plaintiff asserts that, regardless of the validity of the exclusions, defendant's motion should have been denied because defendant failed to offer any proof that all of the losses were covered under any of those exceptions. This position lacks merit.

In plaintiff's complaint, plaintiff asserted the following:

> 8. In 2009, including the period of March 4, 2009 through August 10, 2009, the Michigan Department of Agriculture ("MDA") and the U.S. Food & Drug Administration ("FDA") confiscated various quantities of the [plaintiff's] cheese product on the basis that the MDA and FDA tested hundreds of samples and confirmed the presence of Listeria monocytogenes in a few samples of the [plaintiff's] Hispanic-style soft cheese and determined that the [plaintiff's] plant conditions and/or manufacturing processes "may have led to possible contamination" of such products.
>
> 9. The MDA and FDA confiscated, disposed of, and required the recall of hundreds of thousands of dollars worth of [plaintiff's] cheese products.
>
> 10. In addition to disposing of [plaintiff's] products, the MDA and FDA ordered [plaintiff] to cease and desist its product of soft and semi-soft cheeses, *both of which events caused* substantial interruption of the [plaintiff's] business and other losses, including the loss of its facilities.
>
> 11. The government product confiscation, product disposal, and cease and desist requirements occurred despite [plaintiff's] correction of each of the facility compliance issues raised by the government.
>
> 12. On or about March 23, 2009, [plaintiff's] manager, Salvador Torres, contacted [defendant] and notified it of the governments' activities and requested insurance coverage under the [defendant] insurance policy. [Emphasis added.]

Similarly, in its motion for partial summary disposition, plaintiff asserted that the MDA and FDA confiscated cheese product and also ordered plaintiff "to cease and desist in the production of soft and semi-soft cheeses." Plaintiff then stated that both the confiscation and the order to cease further production both "caused substantial economic loss."

Here, the documents filed at the trial court show that there was no genuine issue of material fact that plaintiff's losses were attributable to the government's actions, which included

a seizure of product and an order to stop producing any more product. Given the admissions contained in plaintiff's own complaint and motion, defendant did not have to provide any other documentary evidence to establish what plaintiff had already admitted. When plaintiff attempted to raise this issue at the trial court, the following exchange occurred:

> *[Plaintiff's Counsel]:* They have to prove factually that the cheese was lost in a way that is not covered. They haven't done that. . . .
>
> *THE COURT:* So you're saying that the loss wasn't due to a governmental decision?
>
> *[Plaintiff's Counsel]:* No, your Honor, I'm not saying that. I'm saying that they would have to show that it was due to a governmental decision in order to – to prove the exclusion. They'd have to show the amount, they'd have to show – they have to prove, it's their burden to prove the exclusions apply. Not to simply say this is why we denied it and this is – and therefore we get summary disposition.
>
> *THE COURT:* Are you saying, then, that a portion of that cheese was not lost due to a governmental decision?
>
> *[Plaintiff's Counsel]:* It may be, your Honor. It may be. We believe there are probably a couple hundred thousand dollars' worth of cheese that was lost because of the government's orders.
>
> *THE COURT:* How was the rest of it lost?
>
> *[Plaintiff's Counsel]:* Well, there was delay. It's still an outstanding factual issue, your Honor. But I believe – I believe –
>
> *THE COURT:* Well, just – just amuse me. . . . Just how do you think it was lost?
>
> *[Plaintiff's Counsel]:* Well, what – what they contend is that some of it – or some of it may have been lost due to bacteria, the Listeria itself. Some of it may have been –
>
> *THE COURT:* Well, that was the recall.
>
> *[Plaintiff's Counsel]:* Some of it may have been lost due to – your Honor, I'm not arguing that – that it wouldn't – we wouldn't find a substantial, if not most of it, was lost due to government action. That's actually part –
>
> *THE COURT:* So if it wasn't lost to a governmental agency, then you should have been able to sell it. And so why didn't you sell it?

[Plaintiff's Counsel]: A loss due to governmental agency's seizure would not permit us to sell it, because of the governments – the government seized it, so we couldn't sell it.

THE COURT: Okay. So don't mix words with me.

[Plaintiff's Counsel]: I'm sorry.

THE COURT: I mean, essentially you didn't sell it because the government seized it; correct?

[Plaintiff's Counsel]: Correct.

Thus, when plaintiff raised this exact issue at the hearing, counsel was unable to articulate any possible cause for the loss other than what plaintiff already had admitted in its complaint and motion – that the losses were the cause of the government's actions related to the recall. Accordingly, there was no genuine question that the losses were the result of the government's actions.

Further, summary disposition was not premature. "Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003). Mere speculation that additional discovery might produce evidentiary support is not sufficient. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). Here, plaintiff offered nothing but mere speculation that further discovery might produce evidentiary support for its position that something other than governmental action caused its losses. Because it would not have been likely that discovery would have yielded any further information on this topic, the trial court did not err by ruling on defendant's motion for summary disposition.

There was no genuine question that the losses were the result of the government's actions. Because the exclusions in Form 54082 applied, the trial court properly granted defendant's motion for summary disposition.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan