RENDERED: JANUARY 25, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001282-MR

MONTICELLO INSURANCE COMPANY APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 06-CI-90031

ONE BEACON INSURANCE COMPANY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Monticello Insurance Company is appealing from an order of the Rowan Circuit Court granting One Beacon Insurance Company summary judgment and denying its motion for summary judgment. The case revolves around the interpretation of an insurance contract. We find that the trial court erred in granting summary judgment in favor of One Beacon. We also find that

summary judgment should have been granted in favor of Monticello as a matter of law.

In 2000, Paxson Communications wanted to build a broadcast tower in Rowan County, Kentucky. Central Tower, Inc. contracted with Paxson to build the tower. Central Tower manufactured the steel components of the tower. Ryan Construction, Inc. was hired to assemble the steel components and stack the assembled tower sections. Ryan Construction was insured by One Beacon. Ryan Construction subcontracted to Broadcast Development Group, Inc. the stacking responsibility. This responsibility also included securing the sections with guy wires attached to concrete anchors in the ground each night after work was completed. Broadcast Development was insured by Monticello.

On or about March 4, 2000, before work had started for the day, a portion of the tower collapsed. An officer of Broadcast Development alerted Monticello of the accident and the possibility that a claim could be made for damages. On March 30, 2000, after some investigation, Monticello informed Broadcast Development by letter that there was no coverage of the collapse due to certain exclusions listed in the insurance contract.

Ryan Construction turned to its own carrier, which had issued an "all-risk policy" through One Beacon and submitted a claim for damages resulting from the tower collapse. One Beacon paid its insured approximately $325,000 under the coverage. It then filed suit in the U.S. District Court for the Eastern District of Kentucky, Lexington Division, against Broadcast Development seeking to recover

this payout. One Beacon claimed it was Broadcast Development's negligence in stacking the steel components that caused the collapse of the tower. Broadcast Development then filed a third-party complaint against Central Tower. Broadcast Development alleged that Central Tower negligently manufactured the steel components.

Monticello retained counsel on behalf of Broadcast Development. Monticello notified Broadcast Development that it was defending under a reservation of rights, meaning that even though Monticello did not think it owed coverage to Broadcast Development, it would still defend the company in the suit. After the suit was brought, Monticello twice informed Broadcast Development that it would be defending the suit under a reservation of rights.

The federal case proceeded to trial and a jury found that Central Tower was 75% at fault and Broadcast Development was 25% at fault. Monticello continued to deny that it owed coverage for the tower collapse. One Beacon then brought the current action against Monticello.[1] It sought a declaration that Monticello was required to pay the underlying judgment in favor of One Beacon. The complaint also alleged bad faith pursuant to both common law and the Kentucky Unfair Claims Settlement Practices Act.

After some discovery, both parties submitted motions for summary judgment. The trial court granted summary judgment in favor of One Beacon on the declaratory issue only. The trial court found that Monticello was liable to

[1] Prior to bringing the underlying suit, One Beacon discovered that Broadcast Development no longer existed and had been dissolved.

provide coverage to satisfy the judgment One Beacon had obtained against Broadcast Development. The trial court entered no findings of fact or conclusions of law. This appeal followed.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03 . . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes,* Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Monticello first argues that One Beacon does not have standing to contest its decision to deny coverage. Monticello claims that a non-party to an insurance contract cannot seek a declaration of rights. This is incorrect. Insurance companies can seek declaratory judgments against one another. *Dodson v. Key*, 508 S.W.2d 586 (Ky. 1974). Generally, an injured person, or Monticello in this case, cannot sue an insurance company in an original action against the insured. *Cuppy v. General Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629 (Ky. 1964). This general rule does not apply to cases of insolvency or bankruptcy of the insured. *Id.*

In the case at bar, Broadcast Development had declared bankruptcy and no longer existed, permitting a direct action against the carrier. This rule has been cited with approval many times. *See Ford v. Ratliff*, 183 S.W.3d 199 (Ky. App. 2006); *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006); *Progressive Northern Ins. Co. v. Corder*, 15 S.W.3d 381 (Ky. 2000). One Beacon has standing to bring its case against Monticello.

Monticello next argues that its policy excludes coverage for the damages incurred in this case. Monticello brings our attention to two exclusions. We will call them the J5 and J6 exclusions. The insurance contract at issue is a Commercial General Liability (CGL) policy. The J5 and J6 exclusions are what are known as business risk exclusions. One Beacon claims that both exclusions are ambiguous and therefore unenforceable. We find that the J5 exclusion is ambiguous, but the J6 exclusion is not; therefore, Monticello is not liable for the damages to the tower under the policy.

"As a general rule, the construction and legal effect of an insurance contract is a matter of law for the court." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007). The J6 exclusion states that the insurance policy does not apply to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

> The purpose of the business risk exclusions in CGL policies is to allocate the risk between the insured and insurer as it relates to damages arising out of the

> insured's business. The business risk exclusions are intended to distinguish between contract liability and tort liability. These exclusions "are based on the apparently simple premise that [a CGL policy] is not intended as a guarantee of the quality of an insured's work product." Thus, the risk that the product provided or the work performed will not meet contract requirements is a risk not covered under the policy.

Id. at 640 (citations omitted). In essence, CGL policies cover bodily injury and damage to other property and do not cover faulty workmanship. *See Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877 (Minn. 2002); *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74 (Mo. 1998); *Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.*, 972 S.W.2d 1 (Tenn. App. 1998).

Here, exclusion J6 clearly applies. One Beacon claims Broadcast Development failed to properly secure the tower with the guy wires, which contributed to the tower collapse. This same conclusion was reached by the jury in the federal court case. Securing the tower at the end of the day was part of Broadcast Development's job. Any part of the tower that needed to be repaired or replaced due to the tower collapse resulting from the failure to properly perform that job is not covered under the insurance policy. Exclusion J6 is not ambiguous and clearly applies.

One Beacon argues that even if one of the exclusions applies, Monticello waived its right to challenge coverage when it failed to properly reserve its right to deny coverage. An insurance company can defend its insured without recognizing coverage pursuant to the policy if it does so under a reservation of

rights. "In order to prevent the waiver from taking effect, it is necessary that the insurer promptly give unequivocal notice that it is defending the action under a reservation of all defenses which it may have by reason of the policy provisions." *Western Farm Bureau Mut. Ins. Co. v. Danville Const. Co.*, 463 S.W.2d 125, 127 (Ky. 1971) (citation omitted).

Here, Monticello sent Broadcast Development a reservation of rights letter twenty-six days after the tower collapsed. The letter stated that Monticello had been made aware of the tower collapse. It then stated: "This letter is to advise you that we are accepting this claim subject to the following partial disclaimer of coverage as there was potentially no coverage for some of the claims . . . ." The letter then set out the J5 and J6 exclusions. It went on to state: "Due to the coverage issues raised in this letter [we] will be handling this claim under a reservation of rights." Monticello has always contended there was no coverage for the damage to the tower. It put its insured, Broadcast Development, on notice of this less than a month after the collapse and two years before litigation began. Monticello did not waive its right to challenge coverage in this case.

In this case, there are no genuine issues of material fact. The legal effect of an insurance contract is a matter of law. As stated above, we find that the J6 exclusion applies in this case. We, therefore, reverse the summary judgment in favor of One Beacon and remand this case to the trial court with directions to enter summary judgment in favor of Monticello.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Elizabeth S. Feamster
Matthew D. Ellison
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert P. Johnson
Cincinnati, Ohio