COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1596 **Cir. Ct. No. 2004CV2313**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARDIE HARTENSTEIN,

PLAINTIFF-APPELLANT,

V.

PEKIN INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Mardie Hartenstein appeals a summary judgment in favor of her insurer, Pekin Insurance Company. Hartenstein claims that Pekin breached its contractual and good-faith duties when it did not pay promptly replacement costs after a fire damaged her house. We affirm.

I.

¶2 In October of 2002, Hartenstein's house was damaged by a fire. Hartenstein had a homeowner's insurance policy with Pekin. The policy provided coverage limits of $103,700 for the value of the house, $62,220 for personal property, and $20,740 for loss of use. The policy also included a Home Guard Endorsement which provided that Pekin would increase Hartenstein's coverage limits if her loss was more than the $103,700 liability limit:

> We will:
>
> 1. Increase the Coverage A limit of liability [the $103,700 limit] to equal the current replacement cost of the dwelling if the amount of loss to the dwelling is more than the limit of liability indicated on the Declarations page;
>
> 2. Also increase by the same percentage applied to Coverage A the limits of liability for Coverages B [other structures], C [personal property] and D [loss of use]. However, we will do this only if the Coverage A limit of liability is increased as a result of a Coverage A loss.

Under the loss-settlement provisions of the policy, Pekin was obligated to pay no more than the actual cash value of the damage unless the actual repair or replacement was complete:

> (4) We will pay no more than the actual cash value of the damage unless:
>
> (a) actual repair or replacement is complete.
>
> ….
>
> (5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability on a replacement cost basis.

¶3 From October of 2002 to June of 2003, Pekin paid Hartenstein $147,816.86 for the actual cash value of her loss: $103,460 for the house, $31,596.35 for personal property, and $12,760.51 for additional living expenses. During that time Hartenstein and Pekin also attempted to resolve their dispute over whether Hartenstein's house should be repaired or replaced.

¶4 In November of 2002, Pekin received a report estimating that Hartenstein's house could be repaired for $115,689.88. Hartenstein's lawyer thus sent a letter to Pekin in February of 2003 demanding replacement of the house:

> As I understand it, your company claims that it is entitled to repair the building. The building is unfit for human habitation and unreasonable to repair in that the cost of repair exceeds the formula set out in Wis. Stat. § 66.0413. Your own estimate of repairs is over $115,000. The assessed value is $75,600, and the fair market value assessment is $100,790.
>
> Therefore, your company is obligated to replace her house under the terms of your policy and Wisconsin law.

Hartenstein's lawyer also informed Pekin that Hartenstein would seek an order to raze the house, and asked it to "confirm that your company will replace [Hartenstein's] premises rather than seek to repair it."

¶5 In March of 2003, Hartenstein sent a sworn proof-of-loss statement and a replacement-cost-estimate to Pekin. In an accompanying letter, Hartenstein's lawyer demanded $347,813.78 in replacement costs: $210,750 for the house, $126,431.04 for personal property, and $10,632.74 for loss of use. The lawyer asked Pekin to "forward us the balance due within 60 days after your receipt of this letter."

¶6 In June of 2003, after Pekin took Hartenstein's statement under oath, Hartenstein's lawyer sent a letter to Pekin explaining that, in his view, two things

were necessary for Hartenstein to "secure the replacement cash value amounts": (1) a raze order, and (2) a "suit over the claims settlement amounts and claims settlement process." The lawyer then offered to settle the case "premised upon the receipt … by July 1, 2003," of $180,000 in "additional payments": $89,000 for the house, $85,000 for personal property, and $6,000 for loss of use. Hartenstein's lawyer also asked Pekin to clarify a June 4 letter, in which Pekin allegedly said that it would make additional payments to Hartenstein if she took certain steps "'within the policy time constraints,'":

> [Pekin]'s letter of June 4 references additional payments that will be made provided that Ms. Hartenstein takes certain steps "within the policy time constrains." There is no reference to the portions of the policy that will allow us to know what "policy time constraints" [the letter] is referring to. Please refer me to the particular language of the policy that [the letter] is relying upon in placing these time limits upon the claim process.[1]

(Footnote added.) As we have seen, however, paragraph 5 of the loss-settlement provisions explicitly provides that an insured could, if he or she wanted, "disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis," and, if this was not satisfactory, "may then make claim within 180 days after loss for any additional liability on a replacement cost basis." Presumably, although Hartenstein does not address this issue one way or the other, this is what she did.

[1] Pekin's letter of June 4 is not in the Record. It is the appellant's burden to ensure that the Record is sufficient to address the issues raised on appeal. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986); *see* WIS. STAT. RULE 809.15(1)(a)9 (The Record on appeal shall include "[e]xhibits material to the appeal whether or not received in evidence.").

¶7 Pekin rejected Hartenstein's settlement offer and exercised its right under the policy to an appraisal:

> **Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the **residence premises** is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

(Bolding in original.) Specifically, Pekin disputed the "amount of the building, contents and additional living expense components."

¶8 On July 9, 2003, pursuant to Hartenstein's request, the Town of Lyndon issued an order to raze what was left of Hartenstein's house. Pekin filed a petition to restrain Hartenstein and Lyndon from razing the house on the grounds that: (1) a dispute remained as to whether the property should be repaired or replaced, and (2) Pekin was not notified of the raze-order request or the hearing at which it was granted. Lyndon subsequently rescinded the raze order.

¶9 In October of 2003, the appraisers and an umpire agreed that it would cost $107,179.22 to repair Hartenstein's house and $172,800 to replace it. They determined that the actual cash value of Hartenstein's loss was $103,063.76: $72,012 for the house, $24,460.72 for personal property, and $6,591.04 for additional living expenses.

¶10 Hartenstein sued Pekin in February of 2004, alleging breach of contract and bad faith. Hartenstein claimed that Pekin "knew or should have known that the amount offered under the terms of the policy was inadequate and insufficient to compensate" Hartenstein, and requested damages for "losses in money due under the contract, and inability to purchase another house, the increase in living expenses, and cost of living, and the necessity to incur attorneys fees, costs and other expenses."

¶11 Pekin answered and moved for summary judgment. It pointed out that under the terms of its policy, it was only required to pay actual cash value until Hartenstein repaired or replaced the house. Pekin thus claimed that it was not liable on contract or bad-faith grounds because it had already paid Hartenstein an actual cash value of $147,816.86, and Hartenstein had not replaced the house.

¶12 The trial court held a hearing, and took Pekin's motion under advisement after Pekin agreed to pay Hartenstein the maximum liability limit under the appraisal award of $172,800 if she rebuilt the house:

> Now what [Hartenstein] has to do, in a timely fashion then, she has to start construction and she has to use the monies that she has been paid, apply that toward the replacement cost and then at such point as she needs additional monies, then the insurance company will indemnify her up to the amount of replacement cost which is $172,800. That is what the parties agreed to.

Pekin did not object to the trial court's characterization of how it was to make replacement payments.

¶13 Hartenstein rebuilt the house in the late summer and early fall of 2004. In October of 2004, Pekin paid Hartenstein the full amount of the appraisal award.

¶14 In March of 2005, Pekin renewed its motion for summary judgment. The trial court concluded that Pekin had not breached its contract or acted in bad faith:

> The doctrine of good faith does not require the insurer to accede to an unreasonable demand. 347 is way high. I think it is at least fairly debatable whether the demand of 347,000 should ever be paid. In fact, it wasn't.
>
> Additionally, when the demand is not accompanied by a recognition that we want to go for a construction loan and we want to build a house and we want the money there when it is done, there was never any scenario like that presented. What was presented was we want the money. That is not what the policy says.
>
> ….
>
> I think under those circumstances it is not bad faith to reject a demand which does not comply with the requirements of the policy.

When asked by Hartenstein's lawyer, the trial court also concluded that Pekin did not have an affirmative duty to tell Hartenstein that it would pay replacement costs if she rebuilt the house: "The language is plain. Payment will be made when replacement is complete. … No, I don't think there is such an affirmative duty under the circumstances of this case. It might be a different situation if she were not represented, but I don't have to decide that case."

II.

¶15 We review a trial court's decision to grant summary judgment *de novo*, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment is warranted when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

¶16 Hartenstein claims that: (1) Pekin breached its insurance contract because it did not pay timely replacement costs, and (2) Pekin acted in bad faith because it did not tell her that it would not pay replacement costs until construction of the house was complete. We address each contention in turn.

A. *Breach of contract.*

¶17 Hartenstein claims that Pekin breached its insurance contract pursuant to WIS. STAT. § 628.46, which requires the timely payment of insurance claims, because it knew by October of 2003 that the cost to replace her house would be $172,000, yet it did not pay replacement costs until October of 2004.[2] We disagree.

---

[2] WISCONSIN STAT. § 628.46 provides, as relevant:

> **Timely payment of claims. (1)** Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any claim is overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. All

(continued)

¶18 Under WIS. STAT. § 628.46(1), "[a]ny payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment." Pekin's policy with Hartenstein is clear. As we have seen, Hartenstein had the choice of seeking actual cash value or, if she determined that was insufficient, "may then make claim within 180 days after loss for any additional liability on a replacement cost basis." Once that was done, however, Pekin was not obligated to pay Hartenstein replacement costs until, as set out in paragraph 4 of the loss-settlement provisions, replacement was complete: "We will pay no more than the actual cash value of the damage unless: (a) actual repair or replacement is complete." *See* ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 631, 665 N.W.2d 857, 864 ("If there is no ambiguity in the language of an insurance policy, it is enforced as written, without resort to rules of construction or applicable principles of case law."). Thus, Pekin was not required to pay replacement costs until it was determined that the house could not be repaired and replacement actually took place. Stated another way, before Pekin was obligated to pay replacement costs, it was entitled to: (1) an appraisal to determine whether the cost of repairing Hartenstein's house exceeded the $103,700 liability limit and, if it did, (2) the submission of proof of construction as it progressed so that Pekin could, as it agreed to at the summary-judgment hearing, pay replacement costs on a pro-rata basis.

¶19 Here, Pekin promptly paid replacement costs once it received "reasonable proof," *i.e.*, proof of construction, from Hartenstein. It is undisputed that Hartenstein rebuilt the house in the late summer and early fall of 2004. In

---

> overdue payments shall bear simple interest at the rate of 12% per year.

October of 2004, Pekin paid Hartenstein the full amount of the appraisal award. Thus, Pekin fulfilled its obligations under the insurance contract and WIS. STAT. § 628.46. *See* ***RTE Corp. v. Maryland Cas. Co.***, 74 Wis. 2d 614, 634, 247 N.W.2d 171, 181 (1976) (an insured has no right to recover until all conditions precedent have been met).

¶20 Hartenstein claims, however, that a reasonable jury could find that Pekin prevented her from rebuilding her house when it made the appraisal demand and petitioned to restrain Hartenstein from razing the house. We disagree. As we have seen, the parties disputed whether the house should be repaired or replaced. Thus, Pekin had an interest in preventing the destruction of the house pending the appraisal process to determine whether the house should be repaired or replaced. *See* WIS. STAT. § 66.0413(1)(h) ("A person affected by [a raze] order … may within the time provided by s. 893.76 apply to the circuit court for an order restraining the building inspector or other designated officer from razing the building."); ***Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co. of Milwaukee***, 72 Wis. 2d 84, 97, 240 N.W.2d 140, 147 (1976) (fire insurer "affected" by raze order). Pekin was thus entitled to invoke the appraisal clause in its policy and contest the raze order pending the resolution of Hartenstein's claim.

B. *Duty to act in good faith.*

¶21 "[A]n insured may assert a cause of action in tort against an insurer for the bad faith refusal to honor a claim of the insured." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 680, 271 N.W.2d 368, 371 (1978). "To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the

lack of a reasonable basis for denying the claim." ***Id.***, 85 Wis. 2d at 691, 271 N.W.2d at 376.

¶22 An insurer commits the tort of bad faith only when it denies "a claim without a reasonable basis for doing so, that is, when the claim is not fairly debatable." ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 516, 385 N.W.2d 171, 180 (1986). The "fairly debatable" test is an objective test. ***Anderson***, 85 Wis. 2d at 692, 271 N.W.2d at 377. It asks whether a reasonable insurer under similar circumstances would have denied or delayed payment on the claim. ***Ibid.***

¶23 Hartenstein asks us to "infer" from these broad principles that Pekin had a fiduciary duty to tell her that she would have to replace her house before she could recover replacement costs. She contends that summary judgment was inappropriate because a reasonable jury could find that Pekin breached this alleged duty and engaged in "'purposeful conduct … designed to evade payment of the claim,'" *see* ***id.***, 85 Wis. 2d at 690, 271 N.W.2d at 376, when it knew by November of 2002 that Hartenstein's loss exceeded the policy limit and it was notified through "increasingly specific letters" that Hartenstein wanted to replace her house. We disagree.

¶24 As we have seen, the policy language in this case is clear—Pekin was not obligated to pay Hartenstein replacement costs until replacement was complete. Hartenstein points to nothing within the exclusive knowledge of Pekin that created a duty to "disclose" what is clearly set out in the policy. She has also produced no evidence that Pekin misled her as to how the replacement cost provisions applied. Under these circumstances, Pekin did not have an affirmative duty to repeat to Hartenstein what was already clear from the policy; Pekin, as the

trial court recognized, knew that Hartenstein was represented by a lawyer, and had every reason to presume that the clear language of the policy would be acknowledged and complied with. *See* ***Stockinger v. Central Nat'l Ins. Co.***, 24 Wis. 2d 245, 252, 128 N.W.2d 433, 437 (1964) (presumption that contents of signed instrument are understood by signer).

¶25 As we have also seen, Pekin had a reasonable basis for delaying payment of replacement costs because there was a legitimate dispute over whether the house should be repaired or replaced. Hartenstein's initial settlement offers were much higher than the original repair estimate of $115,689.88, and, contrary to the clear language of the insurance contract, Hartenstein demanded up-front cash payments instead of acknowledging that the replacement payments were due after construction was complete. Under these circumstances, Pekin did nothing to "evade payment" of Hartenstein's claim; Pekin promptly paid replacement costs once Hartenstein's house was rebuilt. Hartenstein is entitled to no more.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.