COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2074 **Cir. Ct. No. 2008CV562**

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

FONTANA BUILDERS, INC.,

PLAINTIFF-RESPONDENT,

V.

ASSURANCE COMPANY OF AMERICA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 REILLY, J. Assurance Company of America appeals a jury verdict awarding Fontana Builders, Inc. $1.39 million in damages for compensatory losses stemming from a builder's risk policy issued to Fontana, and $1.21 million for Assurance's bad faith denial of coverage. We reverse, as we hold that the circuit

court erred when it found *as a matter of law* that the builder's risk policy provided coverage. Given the policy language contained in the builder's risk policy, the question of whether coverage existed on the day a fire consumed a house that Fontana was building is a question of fact for the jury.

BACKGROUND

¶2 This case involves the interpretation of a builder's risk policy. A builder's risk policy is ordinarily issued to a contractor for the purpose of insuring the builder against loss during the construction of a building. Jay M. Zitter, Annotation, *Insurance: subrogation of the insurer compensating owner or contractor for loss under "builder's risk" policy against allegedly negligent contractor or subcontractor*, 22 A.L.R. 4th 701, § 2[a] (2011). Builder's risk insurance is a temporary form of insurance that is designed to terminate upon the occurrence of certain events, such as the completion of construction and/or the owner or tenant moving into the property and using the building for its intended purpose. *See* ***Hendrix v. New Amsterdam Cas. Co.***, 390 F.2d 299, 302-03 (10th Cir. 1968); ***American & Foreign Ins. Co. v. Allied Plumbing & Heating Co.***, 194 N.W.2d 158, 161 (Mich. Ct. App. 1971).

¶3 The particular facts of this case are unique. James Accola is the owner and president of Fontana, a residential homebuilding company. In 2005, Fontana began construction on a house in Lake Geneva that is the subject of this lawsuit. On April 19, 2007, when the house was nearing completion, Fontana purchased a builder's risk insurance policy from Assurance that carried a $1.495 million policy limit. On May 30, 2007, Accola obtained a thirty-day temporary occupancy permit and moved his family and more than $500,000 worth of their personal property into the house. The Accolas did not purchase the house from

Fontana, nor was any formal written rental or lease agreement entered into between the Accolas and Fontana.

¶4 Shortly after the Accolas moved into the house, they purchased a personal homeowner's insurance policy from Chubb Insurance Co. The Chubb homeowner's policy carried a $2 million limit for the house and a $1 million limit for the contents (personal property) in the house. On June 28, 2007—one week after the Chubb homeowner's policy became effective—a fire damaged the house. Chubb paid the Accolas $1.5 million under the homeowner's policy.

¶5 Fontana filed a claim with Assurance for losses under the builder's risk policy. Assurance denied coverage, and Fontana sued for breach of contract and bad faith.[1] Assurance filed a motion for summary judgment based on three grounds: (1) the Assurance policy terminated when the Accolas purchased homeowner's insurance from Chubb; (2) the "other insurance" clause in the Assurance policy rendered its coverage excess to the Chubb policy; and (3) in the event that there was coverage, the Assurance policy only provided coverage for construction activity that occurred *after* Fontana purchased the policy, an amount that Assurance estimated at $159,000.

¶6 The circuit court denied Assurance's motion for summary judgment. The court ruled that the Assurance builder's risk policy did not terminate when the Accolas obtained homeowner's insurance, as the house was still being built, the house "had not been turned over unconditionally," and the Accolas did not yet

[1] The Accolas also personally sued Fontana and its liability carrier for losses the Accolas sustained as a result of the alleged negligence by Fontana in causing the fire. *See* ***Accola v. Fontana Builders, Inc.***, 2010 WI App 143, 330 Wis. 2d 41, 792 N.W.2d 635.

have their name on the title to the property. Additionally, the court rejected Assurance's argument that the "other insurance" clause applied, as the court found that the loss sustained by the Accolas was not the same loss sustained by Fontana. The circuit court did not address Assurance's argument that its policy only provided coverage for construction activity that occurred after Fontana purchased the policy. The circuit court precluded the jury from learning that the Accolas had purchased homeowner's insurance from Chubb, and that Chubb paid the Accolas $1.5 million for losses caused by the fire.

¶7 The trial was bifurcated into a damages phase and a bad faith phase. The jury awarded Fontana $1.39 million in damages for losses sustained from the fire and $1.21 million for Assurance's bad faith denial of coverage.

STANDARD OF REVIEW

¶8 We interpret insurance contracts the same way we interpret other contracts. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997). While the interpretation of a contract is normally a matter of law for the court to decide, when the words or terms in the contract must be construed using extrinsic evidence, the question is one for the trier of fact. ***Central Auto Co. v. Reichert***, 87 Wis. 2d 9, 19, 273 N.W.2d 360 (Ct. App. 1978).

DISCUSSION

Did Coverage Under the Assurance Builder's Risk Policy Terminate When the Accolas Purchased Homeowner's Insurance from Chubb?

¶9 The Assurance builder's risk policy expressly provides in Section E.3 of the "additional conditions" portion of the policy that coverage will terminate when certain events occur:

> 3. WHEN COVERAGE BEGINS AND ENDS
>
> We will cover risk of *loss* from the time when you are legally responsible for the Covered Property on or after the effective date of this policy if all other conditions are met. Coverage will end at the earliest of the following:
>
> a. Once [Fontana's] interest in the Covered Property ceases;
>
> b. Ninety days after initial occupancy of the Covered Property unless:
>
> (1) that building is being used as a Model Home;
>
> (2) that building is being remodeled and is a single family dwelling; or
>
> (3) that building is being used as a *Model Home Leaseback.*
>
> c. When the Covered Property is leased or rented to others
>
> (1) for a single family dwelling, when the building is leased or rented to others;
>
> ….
>
> d. When [Fontana] abandon[s] the reported location with no intention to complete it;
>
> e. At the end of 12 months ….
>
> f. When permanent property insurance applies; or
>
> g. Once the Covered Property is accepted by the owner or buyer.

Assurance argues—pursuant to subsection f—that its builder's risk policy with Fontana terminated when the Accolas purchased homeowner's insurance from Chubb, as the homeowner's policy constitutes "permanent property insurance." The circuit court rejected this argument as it found that the house was still being built, that the house "had not been turned over unconditionally," and that the Accolas did not yet have their name on the title to the property. Whether construction on the house was completed is not listed as a coverage termination condition in the builder's risk policy. The court thus made a legal conclusion using an incorrect test.

¶10 Given the policy language, and the dispute over its application to the extremely unique facts presented here, the issue of whether the builder's risk policy ended because "permanent property insurance applies" under subsection f is not a question of law for the court, but rather a question of fact for the jury. To determine whether permanent property insurance applied before the fire occurred requires the submittal of extrinsic evidence.[2]

[2] Assurance has not claimed that any of the other events set forth is Section E.3 occurred prior to the fire.

¶11 The Chubb policy issued to the Accolas provided coverage for "your home," yet at the time of the fire Fontana owned the home, not the Accolas.[3] Despite the fact that the Accolas did not own the home, Chubb paid them $1.5 million for the losses incurred in the fire. The parties dispute what losses were covered by the $1.5 million Chubb payment. We therefore reverse the circuit court's decision that the Assurance builder's risk policy provided coverage as a matter of law. On remand, the jury will have to determine whether permanent property insurance applied at the time of the fire.[4] The circuit court may not preclude the jury from considering the Chubb policy or any other extrinsic evidence that is relevant to Section E.3 of the policy.

Does the "Other Insurance" Clause Render the Assurance Policy Excess to the Chubb Policy?

¶12 Assurance alternatively argues that its policy is excess to the coverage provided by the Chubb policy. Assurance points to the "other insurance"

[3] An insured may only recover insurance proceeds if he or she had an insurable interest when the contract was entered into and at the time of the loss. 44 AM. JUR. 2D *Insurance* § 932 (2011). An insured has an insurable interest in a property when he or she "will derive a pecuniary benefit or advantage from its preservation, or will suffer a pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against." 44 C.J.S. *Insurance* § 318 (2011). The Chubb policy provides that Chubb would not pay for any loss to property in which the insured did not have an insurable interest, and that if more than one person had an insurable interest in covered property, Chubb would not pay for an amount greater than the insured's interest. Issues relating to insurable interests are determined by the facts of each case. ***Gustavson v. O'Brien***, 87 Wis. 2d 193, 202, 274 N.W.2d 627 (1979). The record also indicates that the Accolas had renter's insurance through Pekin Insurance. Given the circuit court's ruling that the Assurance policy covered the Accolas loss as a matter of law, and given the court's corresponding ruling precluding the introduction of evidence of the Chubb policy and payments made pursuant to it, the record is not developed as to the facts of these policies and payments made under them. All of these facts may be relevant to the jury's determination as to whether events made Section E.3 of the Assurance policy applicable.

[4] If Assurance believes that any provision other than subsection f is applicable, it will have to address that to the circuit court.

clause in its builder's risk policy that provides: "If there is other insurance covering the same loss or damage … we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance …." The circuit court rejected this argument as it found that the loss sustained by the Accolas was not the same as the loss sustained by Fontana.

¶13 The issue of whether an "other insurance" clause applies is a question of law subject to de novo review. *See* ***Oelhafen v. Tower Ins. Co.***, 171 Wis. 2d 532, 535, 492 N.W.2d 321 (Ct. App. 1992). The answer to this question, however, must await the jury's decision as to whether coverage under the builder's risk policy was still in effect at the time of the fire. Given the circuit court's ruling prohibiting the admission of evidence relating to the Chubb policy and the losses paid by Chubb, the record is not developed such that we can answer whether Fontana was seeking coverage only for losses that were not covered by the Chubb policy.

Is Assurance Only Liable for Construction Work Done After Fontana Purchased the Builder's Risk Policy?

¶14 Assurance's third argument is that its policy only provided coverage for construction activity that occurred after the builder's risk policy took effect, an amount that Assurance estimates at $159,000. In support of this argument, Assurance notes that the "builder's risk coverage form" provides that: "covered property does not include: … existing building or structure to which an addition, alteration, improvement, or repair is being made, unless specifically endorsed." Assuming that it is liable, Assurance argues that the maximum amount of its liability is $159,000.

¶15 The circuit court did not address this argument and neither will we. At first blush, we are concerned with Assurance's position; Fontana paid a premium for a builder's risk policy that provided coverage for $1.495 million. For Assurance to assert that its coverage is limited to $159,000 is a questionable argument, but the issue is not ripe until a jury first determines whether the builder's risk policy was in effect at the time of the fire.

Bad Faith Judgment

¶16 Finally, as an insured must first establish a breach of the insurance contract before proceeding with a bad faith claim against the insurance company, we reverse Fontana's $1.21 million bad faith judgment. *See* ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶¶5, 65, 334 Wis. 2d 23, 798 N.W.2d 467. A jury must first make a finding as to whether any of the events set forth in Section E.3 of the builder's risk policy occurred before it can reach the issue of bad faith. If the Assurance policy did provide coverage, and Fontana subsequently shows that Assurance lacked a reasonable basis for denying the claim and that Assurance either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether a reasonable basis existed, then a bad faith claim may exist. *See* ***id.***, ¶¶49, 54.

CONCLUSION

¶17 We reverse. On remand, the jury must first determine whether events made Section E.3 of the Assurance builder's risk policy applicable prior to the fire. If Assurance's policy was in force, then Fontana must prove up its losses.

By the Court.—Judgment reversed and cause remanded with directions.

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