NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ERIE INSURANCE EXCHANGE v. ROBERT P. HORGOS, JAMES D. SELELYO, STEPHANIE SELELYO AND ALFREDO J. SARARO, III APPEAL OF: ROBERT P. HORGOS	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1386 WDA 2012

Appeal from the Order August 24, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD 11-013062

BEFORE: BOWES, J., SHOGAN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J. FILED: October 3, 2013

Robert P. Horgos appeals from the order of the Court of Common Pleas of Allegheny County, granting Erie Insurance Exchange's motion for judgment on the pleadings. Upon careful review, we affirm.

This declaratory judgment action was filed on July 18, 2011 by Erie Insurance Exchange ("Erie Insurance"). The Honorable Eugene E. Fike, II, set forth the facts of this case as follows:

> In this Declaratory Judgment action, Erie [Insurance] filed a Motion for Judgment on the Pleadings asking the [c]ourt to declare that it has no duty to defend or indemnify Horgos under certain policies of insurance purchased by Horgos from Erie [Insurance].
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> Horgos requested Erie [Insurance] to defend and indemnify him from liability in a suit brought against Horgos by defendants, James D. Selelyo and Stephanie Selelyo ("Selelyos"). In the underlying Complaint, [the] Selelyos allege that defendant,

> Alfredo J. Sararo, III ("Sararo"), approached Horgos at some time prior to December 1, 2005 regarding the purchase of a "mansion" located in the Naples, Florida area.
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> The Complaint avers that Sararo told Horgos that the mansion was to be sold pursuant to a "pre-foreclosure" program of Fifth Third Bank, that provided preferred customers of the Bank with the opportunity to buy properties before foreclosure, that Sararo needed $900,000 to effect the purchase, and that the property could be resold for approximately $1,400,000. According to the Complaint, Horgos told his friends, the Selelyos, about the opportunity, and that, to take advantage of the offer, Horgos needed $450,000 to complete the purchase. The Complaint alleges that Horgos then drafted a written agreement pursuant to which the Selelyos would lend Horgos $450,000, with Horgos to repay the Selelyos $550,000 by February 28, 2006.
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> The Complaint avers further that between December 2005 and January 4, 2006, Selelyos advanced the requested $450,000 to Horgos, and that Horgos deposited the money in an account with Fifth Third Bank. However, according to the Complaint, . . . Sararo had advised Horgos that his payment was late and would be forfeited, but that Horgos could avoid the forfeiture by allowing Sararo to use the funds to buy two other properties in Florida; that Horgos agreed to the plan; and that, as a result, Sararo purchased the other two properties, but that Horgos did not tell Selelyos about the substitute purchase. The Complaint avers that Sararo used the funds advanced by Horgos and the Selelyos to buy the two other properties for $395,000 each; that subsequently, one of the properties was transferred to Sararo, and then to a third party; that the other property was transferred into Horgos' name; and that Horgos has not paid any of the promised $550,000 to [the] Selelyos.
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> The underlying Complaint contains two counts—one for breach of contract, and the other alleging that Horgos was negligent in his handling of the money advanced by Selelyos and in pursuing the transaction for purchase of the "mansion". There is no dispute that a breach of contract claim is not covered by the policies. The issue is whether the negligence claim alleged in the underlying Complaint's second count triggers Erie [Insurance's] duty to defend and indemnify.

Trial Court Opinion, 9/27/12, at 1-3.

On August 27, 2012, the trial court entered an order granting Erie Insurance's motion for judgment on the pleadings. Horgos filed this timely appeal on September 6, 2012, raising the following issues for our review:

> A. Did the [t]rial [c]ourt err when it determined that [Erie Insurance] had no duty to defend and indemnify the insured in the underlying action when:
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> 1. it granted the Motion of the Insurance Company for Judgment on the Pleadings[;]
>
> 2. the [t]rial [c]ourt's finding is contrary to Pennsylvania case law interpreting the duty of insurance carriers to defend and indemnify their insured.
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> B. Did the [t]rial [c]ourt err when it determined the underlying Complaint did not assert damages constituting property loss covered under the insurance policy when the [t]rial [c]ourt failed to interpret the insurance contract in accordance with Commonwealth Law by:
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> 1. failing to interpret ambiguity in the contract terms in favor of the insured[;]
>
> 2. looking outside the scope of the underlying complaint to assess coverage.
>
> C. Did the [t]rial [c]ourt err in determining the complained of conduct did not constitute an occurrence under the policy when:
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> 1. the policy covers loss or damage of property under the insured's protection because this is an occurrence under the policy[;]
>
> 2. the property under the insured's protection was lost through theft and fraud as a result of the insured's alleged negligence in handling and supervising the property under his protection which is an occurrence under the policy.

Appellant's Brief, at 6-7.

This Court has explained our standard of review regarding motions for judgment on the pleadings:

> Our scope of review on an appeal from the grant of judgment on the pleadings is plenary. Entry of judgment on the pleadings is permitted under Pennsylvania Rule of Civil Procedure 1034, which provides that after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings. A motion for judgment on the pleadings is similar to a demurrer. It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the [trial] court must confine its consideration to the pleadings and relevant documents. On appeal, we accept as true all well-pleaded allegations in the complaint.
>
> On appeal, our task is to determine whether the trial court's ruling was based on a clear error of law or whether there were facts disclosed by the pleadings, which should properly be tried before a jury, or by a judge sitting without a jury.
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> Neither party can be deemed to have admitted either conclusions of law or unjustified inferences. Moreover, in conducting its inquiry, the [trial] court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. It may not consider inadmissible evidence in determining a motion for judgment on the pleadings. Only when the moving party's case is clear and free from doubt such that a trial would prove fruitless will an appellate court affirm a motion for judgment on the pleadings.

Guerra v. Redevelopment Authority of City of Philadelphia, 27 A.3d 1284, 1288-89 (Pa. Super. 2011) (internal citations and quotation marks omitted).

As stated above, the underlying contract claim is not at issue in the instant appeal. However, in order to determine the extent of an insurer's

duty to defend and indemnify, we must compare the insurance contract with the claims made in the underlying suit. As this Court has explained:

> The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint. An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy.
>
> Significantly, [i]t is not the actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend. In making this determination, the factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured.

Penn-Am. Ins. Co. v. Peccadillos, Inc., 27 A.3d 259, 264-65 (Pa. Super. 2011) (internal citations and quotation marks omitted).

Finally, our review of the underlying insurance contract is also plenary. ***Burton v. Republic Ins. Co.***, 845 A.2d 889, 893 (Pa. Super. 2004). In interpreting the terms of an insurance contract, the appellate court examines the contract in its entirety, giving all of the provisions their proper effect. ***Id.*** The court's goal is to determine the intent of the parties as exhibited by the contract provisions. ***Id.*** In furtherance of its goal, the court must accord the contract provisions their accepted meanings, and it cannot distort the plain meaning of the language to find an ambiguity. ***Id.*** Moreover, it will not find a particular provision ambiguous simply because the parties disagree on the proper construction; if possible, it will read the provision to avoid an ambiguity. ***Id.***

In the instant case, Horgos held three insurance policies from Erie Insurance; an "Ultracover Home Protector Policy" ("Home Protector") and two "Personal Catastrophe Policies." The Home Protector policy ran from July 7, 2005 to July 7, 2006, and the Personal Catastrophe policies ran consecutively from March 22, 2005 to March 22, 2006, and from March 22 2006 to March 22, 2007.

The Home Protector policy provided:

> We will pay all sums up to the amount shown on the Declarations which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence during the policy period. We will pay for only bodily injury or property damage covered by this policy.
>
> We may investigate or settle any claim or suit for damages against anyone we protect, at our expense. If anyone we protect is sued for damages because of bodily injury or property damage coved by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true. We are not obligated to pay any claim or judgment or defend any suit if we have already used up the amount of insurance by paying a judgment or settlement.

Action for Declaratory Judgment, 7/18/11, Exhibit B, at 17 (Home Protector Policy, at 14).

The policy defines property damage as:

> 1. physical injury to or destruction of tangible property, including loss of its use. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;
> 2. loss of use of tangible property which is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the occurrence.

Id. at 8 (Home Protector Policy, at 5).

This policy applies: "to property losses as designated in the specific coverage and at the location(s) insured under this policy. In addition, personal property is covered while located anywhere in the world." ***Id.*** The designated property is Horgos' residence as well as other separated structures at his residence. ***Id.*** at 9 (Home Protector Policy, at 6).

The Personal Catastrophe policy provides:

> We pay the ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage resulting from an occurrence during this policy period. We will pay for only personal injury or property damage covered by this policy. *This applies only to damages in excess of the underlying limit or Self-Insured Retention.*

Action for Declaratory Judgment, 7/18/11, Exhibit C, at 7 (Personal Catastrophe Liability Policy, at 4) (emphasis added).

The Personal Catastrophe policy defines property damage and occurrence as follows:

> "occurrence" means an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage which is neither expected nor intended. Personal injury or property damage arising out of your protection of persons or property is covered.
>
> "property damage" means injury to or destruction of tangible property, including loss of its use, but not the decrease in value of the tangible property due to damage.

Id. at 6 (Personal Catastrophe Liability Policy, at 3).

The Personal Catastrophe policy is supplemental; it pays for loss "in excess of the underlying limit" of qualifying underlying insurance policies.

See id. The underlying policies listed in Horgos' Personal Catastrophe contract were the Home Protector policy discussed above, an Automobile liability policy and an Uninsured/Underinsured Motorists policy, both issued by Erie Insurance, and a Home Owners policy issued by State Farm. ***Id.*** at 2. Of these policies, only the Erie Insurance Home Protector policy is applicable in this case, as the two automobile policies obviously do not apply, and Horgos has made no claim under his State Farm Home Owners policy. Therefore, the Personal Catastrophe policy only applies if the underlying Home Protector policy applies.

While Horgos raises several claims and sub claims, the central issue of his appeal is the interpretation of the Home Protector contractual language cited above, and whether the events in question trigger the provisions of that contract. We first note that the Home Protector policy contains dwelling and other structures coverage, as well as more general personal property coverage. Horgos' residence and separated structures specifically covered by the policy are not involved in this suit, and therefore, only the "Personal Property Coverage" provision of the policy is relevant. This coverage applies to "personal property owned or used by anyone we protect anywhere in the world." Action for Declaratory Judgment, 7/18/11, Exhibit B, at 9 (Home Protector Policy, at 6). It covers "tangible" personal property. ***Id.*** at 8 (Home Protector Policy, at 5).

Horgos argues that we should consider either the Florida mansion or the money intended to purchase the mansion and transferred from the

Selelyos to Horgos as tangible personal property. Appellant's Brief, at 18, 19. Either of these arguments strains the language of the Home Protector policy beyond reason. The relevant claim of the Selelyos' in the underlying suit is that Horgos was negligent in his handling of their money and failure to pay them back with interest, not that they were denied use or possession of the mansion. Indeed, no party to this dispute ever took possession of the mansion.

Similarly, the money was not "lost" as there was no "occurrence" by the terms of the contract. An "occurrence" is defined as "an accident." Action for Declaratory Judgment, 7/18/11, Exhibit B, at 8 (Home Protector Policy, at 5). The undisputed record establishes that Horgos was told he could not purchase the mansion, and so he agreed to purchase two replacement properties. ***See*** Trial Court Opinion, 9/27/12, at 1-3. While this investment may have been unwise, it was not an accident.

The Home Protector policy held by Horgos covered loss from "injury or property damage" and by the definitions of the contract, was intended to indemnify the insured against loss incurred by damage to physical, or "tangible" property, or from injuries occurring on or because of that property. ***See*** Action for Declaratory Judgment, 7/18/11, Exhibits B and C. The only thing that was lost was the opportunity to purchase and then resell the mansion at a profit. This was a speculative investment, and therefore not "tangible" as required by the contract. There are many financial vehicles

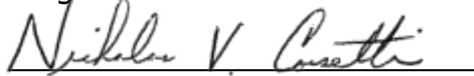
for obtaining an assurance on an investment that Horgos could have obtained, however his Home Protector policy was not one of them.

Construing the language of the insurance contract in Horgos' favor as the insured, there is still no reasonable interpretation of the Home Protector policy that would require Erie Insurance to defend or indemnify the failure of an investment. Because the Personal Catastrophic policy supplements the Home Protector policy, it does not apply either. Accordingly, the trial court did not err in granting Erie Insurance's motion for judgment on the pleadings, and we affirm. ***See Guerra***, 27 A.3d at 1288.

Order affirmed.

SHOGAN, J., concurs in the result.

Judgment Entered.



Deputy Prothonotary

Date: October 3, 2013