[Cite as *State Farm Fire & Cas. Co. v. Ireland Homes, Inc.*, 2009-Ohio-4793.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STATE FARM FIRE & CASUALTY COMPANY	:	Appellate Case No. 2008-CA-44
Plaintiff-Appellant	:	Trial Court Case No. 07-166
v.	:	(Civil Appeal from Common Pleas Court)
IRELAND HOMES, INC.	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 11th day of September, 2009.

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FAIN, J.

{¶ 1} Plaintiff-appellant State Farm Fire & Casualty Company appeals from a summary judgment rendered against it on its claim for damages for breach of contract against defendant-appellee Ireland Homes, Inc. (Ireland). State Farm contends that the trial court should have entered summary judgment in its favor, because there are no genuine issues of material fact with regard to its right to recover.

{¶ 2} We conclude that the trial court did err with regard to its consideration of some parol evidence concerning the contract. However, we further conclude that even without that evidence, the judgment is supported by the record. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In 2002, Ireland entered into a construction contract with William and Joyce Duncanson for the construction of a new home to be built by Ireland. In 2004, the Duncansons, who were experiencing health problems, sold the property to Turner Carson. At that point, only the foundation of the home had been completed. Concurrently, Carson and Ireland entered into a construction agreement to complete construction of the residence. Pertinent to this appeal, the contract between Carson and Ireland provided that Carson would "furnish Property Insurance," and that Ireland would "furnish general liability insurance."

{¶ 4} Prior to the completion of the construction, the house was completely destroyed by fire. The cause of the fire is not clear from the record. At that point,

Ireland had already been paid the sum of $446,614 toward the cost of the house. State Farm paid Carson $446,614, representing the sum he had paid Ireland for construction of the residence. State Farm then initiated this suit asserting that it was subrogated to Carson's potential claims against Ireland for negligence and breach of contract.

{¶ 5} Both parties filed motions for summary judgment. State Farm argued that it was entitled to summary judgment because when it paid Carson it became subrogated to his rights under the construction contract. Specifically, State Farm argued that under the terms of the contract, Ireland was obligated to deliver a completed residence to Carson, and that its failure to do so constituted a breach of the contract.

{¶ 6} In its cross-motion for summary judgment, Ireland asserted that the construction contract contemplated that Carson would procure insurance to protect himself and Ireland from loss. Ireland further contended that this agreement constituted a waiver of any subrogation claims against it, pursuant to this court's holding in *Indiana Ins. Co. v. Carnegie Construction, Inc.* (1995), 104 Ohio App. 3d 219.

{¶ 7} The record contains the deposition testimony of State Farm agent Bill Clement, who testified that he was the agent who dealt with Carson regarding insurance for the residence. Clement testified that Carson purchased a homeowner's policy with a builder's risk endorsement. He testified that a policy like the one issued to Carson by State Farm insures the residence during the course of the construction and then, when the builder's risk endorsement expires, the policy becomes a

homeowner's policy. Clement testified that the "builder's risk policy is no different than a homeowners policy" except that with the builder's risk endorsement, it is contemplated that the residence will be vacant during the construction, whereas with a regular homeowners policy a vacancy of more than thirty days nullifies the coverage for vandalism and "malicious mischief." He also testified that the terms "builder's risk," "homeowners property casualty," and "dwelling under construction" can be used interchangeably. Finally, he testified that Ireland was not an insured under the policy.

{¶ 8} According to the deposition testimony of Melissa Duncan, a State Farm underwriter, the policy issued to Carson was a homeowner's policy with a "dwelling under construction" endorsement. However, before the fire, the builder's risk or "dwelling under construction" endorsement had expired, and Carson did not renew the endorsement. Therefore, at the time of the fire, the policy had already been converted into a standard homeowner's policy.

{¶ 9} Ireland presented the affidavit and deposition testimony of Thomas Chatham, who averred that the policy in effect on the date of the fire was "a combination of a Builder's Risk and Homeowner's policy of insurance." Chatham also testified that this policy would act as a builder's risk policy until the construction was complete and the house was ready for occupancy. He further opined that Carson waived any subrogation rights by agreeing to purchase this insurance.

{¶ 10} Patty Cochran, the mother of the owner of Ireland, also testified by deposition. She testified that she was the salesperson noted on the contract between Duncanson and Carson as well as the salesperson noted on the contract between

Ireland and Carson. She also testified that she filled in the form contract on the Carson contract with Ireland and that it was understood by her and by Carson that the term "Buyer shall furnish Property Insurance" meant that Carson would obtain builder's risk insurance to cover both himself and Ireland. Kurt Cochran, the owner of Ireland, also testified that it was understood and intended that Carson would obtain coverage for both parties. Carson was not able to present any testimony during the course of the proceeding, due to medical problems.

{¶ 11} The trial court rendered summary judgment in favor of Ireland. In doing so, the trial court found:

{¶ 12} "[T]he Duncanson-Ireland contract, read with the Carson-Ireland contract, and in consideration of the close business relationship Carson had with Patty Cochran (mother of the owner of Ireland), results in the conclusion that Carson had intended to obtain a Property Insurance Policy insuring both he and Ireland.

{¶ 13} " ***

{¶ 14} "The Court finds, implicit in the construction agreement between Ireland and Carson, that Carson was to purchase insurance for both of them for any loss during construction to the house (Property Insurance). This Carson did when he contracted with State Farm for a policy of insurance. The State Farm policy did not prohibit waiver of subrogation rights by its named insured Carson. It only required the waiver to be in writing.

{¶ 15} "Since State Farm cannot succeed to rights greater than those possessed by Carson, State Farm cannot recover, as a matter of law, against Ireland."

{¶ 16} From this judgment, State Farm appeals.

II

{¶ 17} State Farm's First Assignment of Error states as follows:

{¶ 18} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

{¶ 19} State Farm contends that the trial court erred in finding that Ireland was an insured under its policy of insurance and that Carson had executed a written waiver of its subrogation rights. State Farm further claims that the trial court erred by considering parol evidence in determining the intent of the parties to the Carson-Ireland contract and that it erred by considering the testimony of Chatham. Thus, it contends that the trial court erred by rendering summary judgment in favor of Ireland.

{¶ 20} A decision to grant summary judgment is reviewed de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390. In order to grant a motion for summary judgment, a court must find that, construing the evidence most strongly in favor of the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. A genuine issue of material fact exists unless it is clear that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 151.

{¶ 21} "The construction of a written contract is a matter of law for the court. The purpose of contract construction is to effectuate the intent of the parties, which is

presumed to reside in the language they chose to employ in the agreement. 'Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.' *** Courts will not, in effect, create a new contract by finding an intent not expressed in the clear language the parties employed. *** Where the language of a contract is clear and unambiguous, no issue of fact need be determined, and the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations." *Jae Co. v. Heitmeyer Builder's, Inc.*, Franklin App. No. 08AP-1127, 2009-Ohio-2851, ¶ 12-14, internal citations omitted.

{¶ 22} "Contract terms are ambiguous where the language is susceptible to two or more reasonable interpretations." *Wittelstein v. Wittlestein,* Madison App. No. CA2006-03-013, 2006-Ohio-6707, appeal not allowed, 113 Ohio St.3d 1512, 2007-Ohio-2208, citing *U.S. Fidelity & Guaranty Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45.

{¶ 23} We initially note that, although not stated in its decision, the trial court appears to have concluded that the Carson-Ireland contract is ambiguous with regard to the insurance clause; otherwise, we presume that it would not have considered the testimonial evidence or the Duncanson contract in determining the intent of the Carson contract. See, *Indiana Ins. Co. v. Carnegie Construction, Inc.* (1995), 104 Ohio App. 3d 219, 222 (holding that the intent of the parties to a contract is presumed to be fully revealed in the language of the agreement).

{¶ 24} Certainly, the contract does not define the term "furnish property

insurance." Specifically, it does not state to whom the property insurance is to be furnished or who is to be covered as an insured. Likewise, the contract does not make any mention of subrogation rights and the waiver thereof.

{¶ 25} State Farm and Ireland have advanced different arguments, all centering on the term "property insurance." State Farm claims that the term is clear and unambiguous; however, it does not provide us with any clear insight into the meaning of the term. Indeed, it appears to us that State Farm wishes us to define the term as referring to homeowner's insurance and not to construe it as meaning builder's risk insurance, as urged by Ireland. In any event, it is clear from the record that the parties to the construction contract construed "property insurance" as "builder's risk insurance" while State Farm construed it as homeowners insurance with a builder's risk endorsement.

{¶ 26} Although the parties have briefed and argued the type of insurance contemplated by the Carson-Ireland contract, we conclude that this issue is essentially irrelevant. Regardless of what the Carson-Ireland contract contemplated or required, State Farm in fact provided homeowners insurance with a builder's-risk, or dwelling-under-construction, endorsement that had, by the time of the fire, converted into a homeowners policy, without the builder's-risk endorsement.

{¶ 27} The dispositive issue in this case is whether the parties to the contract intended, by the use of the words "*furnish* property insurance," to require Carson to obtain insurance covering both himself and Ireland (emphasis added). The word "furnish" means "to supply, provide, or equip, for accomplishment of a particular purpose." Black's Law Dictionary (4 Ed. Abr. 1983) 344. However, the contract is

silent on the matter of to whom the insurance is to be furnished. Therefore, we agree with the trial court that the contract is ambiguous in its use of this phrase.

{¶ 28} Since the contract is ambiguous, we conclude that the trial court did not err by considering the parol evidence submitted by Ireland. Specifically, Patty Cochran testified that it was clearly understood, between her and Carson, that the reference to insurance was intended to require Carson to purchase insurance covering both himself and Ireland. Kurt Cochran's testimony corroborated Patty's testimony. State Farm did not present any evidence to refute this claim. Furthermore, the imposition of a contractual undertaking by Carson to insure merely his own interest would have a much less direct benefit to Ireland, the beneficiary of the undertaking. (It would presumably have some benefit to Ireland, since it would reduce the likelihood that Carson might become impecunious before Ireland was paid in full for the construction.) Thus, we conclude that the trial court did not err in finding that the parties to the contract intended for the insurance policy to cover both Ireland and Carson.

{¶ 29} In *Indiana Insurance Co. v. Carnegie Construction, Inc.* (1995), 104 Ohio App. 3d 219, we noted that "where parties to a construction contract each have an insurable interest in the project to protect, an agreement that one party will maintain insurance on a project necessarily means, to the extent of the insurance agreed to be purchased, that the parties have absolved one another of liability for any insured loss, and instead [have] shifted that risk of loss to an insurer. 'With agreements to insure *** neither party intends to assume a potential liability; rather, both are demonstrating "normal" business foresight in avoiding liability [by] allocating

it to an insurer.' By 'expressly imposing the duty to insure against the loss on one of them [the parties expect] that the other will be protected as fully as if he had assumed the duty himself.' " Id. at 224, citations omitted. When there is an agreement to insure, the party purchasing the insurance is deemed to have contractually waived its right to pursue the other party and therefore waives the subrogation rights of the insurance company. Id. at 227. Thus, based upon our holding in *Carnegie*, Carson waived any right to sue Ireland, thereby also waiving State Farm's subrogation rights.

{¶ 30} Furthermore, even had the right of subrogation not been waived, a review of the State Farm policy shows that it only provided coverage for "covered losses," like the fire loss, for example. The policy does not purport to provide coverage for any breach of contract claims that Carson may have held against Ireland. Therefore, State Farm was not obligated to make payment to Carson based upon a claim that Ireland allegedly breached its construction contract with Carson. Any payment made by State Farm based on an alleged breach of contract would be a voluntary payment by State Farm, outside the scope of the insurance policy, for which State Farm would not have a right of subrogation.

{¶ 31} As an aside, despite Ireland's numerous and general assertions to the contrary, we find nothing in the Carson-Ireland contract to support a finding that any portion of the Duncanson-Ireland contract was incorporated into the Carson-Ireland contract. Thus, we conclude that the trial court improperly considered the contents of the Duncanson-Ireland contract when interpreting the Carson-Ireland contract. But this does not affect the outcome of this appeal, because the same result is reached without consideration of the Duncanson-Ireland contract.

{¶ 32} Finally, State Farm claims that the trial court erred in considering the affidavit and deposition of Thomas Chatham, because they contained legal conclusions. State Farm acknowledges that the trial court stated that Chatham had "draw[n] a number of legal conclusions," which the court did not find appropriate for its consideration. However, State Farm contends that because the trial court did not specify which portions of Chatham's affidavit and deposition were improper legal conclusions, it follows that the trial court must have inappropriately considered some of those conclusions.

{¶ 33} Without some affirmative indication in the record to the contrary, an appellate court presumes that a trial court considers only relevant and competent evidence. *Gonzalez v. Spoffard*, Cuyahoga App. No. 85231, 2005-Ohio-3415, ¶43; *State v. Sieng*, Clark App. No. 2003 CA 35, 2003-Ohio-7246, ¶32. In this case, we need not presume. The trial court expressly stated that portions of Chatham's testimony constituted legal conclusions, which were not proper for the trial court's consideration. Furthermore, the trial court could have reached its decision without the Chatham deposition and affidavit, and indeed, did not mention Chatham's testimony or affidavit in its decision.

{¶ 34} State Farm's First Assignment of Error is overruled.

III

{¶ 35} State Farm asserts the following as its Second Assignment of Error:

{¶ 36} "THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT."

{¶ 37} State Farm contends that the trial court should have rendered summary judgment in its favor on its breach of contract claim against Ireland. Given our disposition of the First Assignment of Error, we conclude that this argument is moot because we found that State Farm held no right of subrogation. Accordingly, the Second Assignment of Error is overruled.

IV

{¶ 38} Both of State Farm's Assignments of Error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

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