

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUSTIN BAIR, ET AL.

Plaintiffs-Appellees

VS.

JAMES R. KANDEL, ET AL.

Defendants-Third-Party Plaintiffs-Appellees

VS.

NATIONWIDE PROPERTY &
CASUALTY INSURANCE COMPANY

Third-Party Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 2014CA00072

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Canton Municipal
Court, Case No. 2013-CVF-5050

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

July 6, 2015

APPEARANCES:

For Plaintiffs-Appellees:

For Defendants-Third Party Plaintiffs-Appellees:

JAMES J. COLLUM
4774 Munson St. NW
Suite 401
Canton, OH 44718

STANLEY R. RUBIN
437 Market Ave. N.
Canton, OH 44702

For Third Party Defendant-Appellant:

RALPH DUBLIKAR
TONYA J. ROGERS
400 South Main St.
North Canton, OH 44720

Delaney, J.

{¶1} Third-Party Defendant/Appellant Nationwide Property and Casualty Insurance Company appeals the April 2, 2014 judgment entry of the Canton Municipal Court.

FACTS AND PROCEDURAL HISTORY

{¶2} On May 11, 2013, Plaintiffs Justine and Ashlie Bair ("the Bairs") entered into a lease agreement with Defendants/Third-Party Plaintiffs/Appellees James Kandel and Roger Baker ("Kandel"). The Bairs leased an apartment from Kandel that was located at 1103 North Chapel Street, Louisville, Ohio. 1103 North Chapel Street is a four-unit apartment building owned by Kandel since 1993 ("the Property").

{¶3} The property was insured through a Premier Businessowners Policy No. ACPBPHK 5752989097 issued by Third-Party Defendant/Appellant Nationwide Property and Casualty Insurance Company. The policy was in effect from February 8, 2013 to February 8, 2014. The Premier Businessowners Policy contained two forms relevant to this appeal: (1) Premier Businessowners Property Coverage Form No. PB 00 02 04 11 and (2) Premier Businessowners Liability Coverage Form No. PB 00 06 04 11.

{¶4} Shortly after moving into the apartment, the Bairs discovered the presence of mold throughout the apartment. The Bairs advised Kandel they had discovered mold in the apartment. Kandel hired In-Door Air Quality Consultants to inspect the Property on June 24, 2013. The inspection revealed the presence of toxic mold throughout the Property. The mold was allegedly caused by moisture bleeding in from the elevated and improper grade at the rear of the building and water infiltrating from the rear of the Property.

{¶5} After being informed of the mold damage to the Property, Kandel filed a water and mold claim with Nationwide for his direct loss pursuant to the Premier Businessowners Policy. The date of loss was June 25, 2013.

{¶6} The Bairs vacated the apartment. They had their belongings professionally cleaned, but had to dispose of their couch and mattress due to mold damage. The Bairs filed a claim for their damages with their renter's insurance, but the claim was denied due to an exclusion in their policy for damage caused by "fungi" by exterior water intrusion.

{¶7} On August 5, 2013, the Bairs sent a letter to Kandel under R.C. 5321.07(A) and 5321.07(B), requesting that he remedy the mold defect at the Property.

{¶8} Also on August 5, 2013, Nationwide sent a letter to Kandel stating it had denied his water and mold claim under the terms of the Premier Businessowners Policy. Nationwide stated that pursuant to the Premier Businessowners Property Coverage Form, the loss where no hole was created by a covered peril and water enters through the foundation walls was not a covered loss.

{¶9} On September 20, 2013, the Bairs filed a complaint in the Canton Municipal Court naming Kandel as the defendant. The complaint brought three causes of action alleging fraud/misrepresentation, negligence, and rescission. The Bairs requested compensatory damages of \$15,000.00 and punitive damages.

{¶10} On November 21, 2013, Kandel filed a third-party complaint against Nationwide. The third-party complaint alleged:

1. Plaintiffs have filed against Defendants a Complaint, a copy of which is attached hereto as Exhibit "A".

2. Defendants purchased from Third Party Defendant a policy of insurance which was in full force and effect at all time complained of by Plaintiffs in their Complaint against Defendants which provided Defendants with coverage for matters alleged in Plaintiffs' Complaint, that Defendants timely notified Third Party Defendant of Plaintiffs' Complaint and afforded Third Party Defendant an opportunity to provide Third Party Defendants with representation in the handling of Plaintiffs' Complaint which Third Party Defendant refused to do.

3. Third Party Defendant has breached the terms of the policy of insurance purchased by Defendants.

{¶11} Nationwide filed an answer to the third-party complaint and a counterclaim for declaratory judgment. Nationwide asserted the Premier Businessowners Liability Coverage Form excluded coverage for bodily injury, property damage, or personal injury on third party claims for damages resulting from "fungi or bacteria."

{¶12} Nationwide filed a motion for summary judgment on January 10, 2014. The trial court denied the motion for summary judgment. Nationwide filed a motion for reconsideration. The trial court denied the motion for reconsideration.

{¶13} The trial court held a bench trial on March 31, 2014.

{¶14} During the hearing, Kandel moved to amend the third-party complaint to include Kandel's individual claim for damages for breach of the insurance contract. Nationwide objected to the motion. The trial court overruled the motion.

{¶15} On April 2, 2014, the trial court issued its judgment entry. The trial court found in favor of the Bairs on their complaint against Kandel. The court awarded the

Bairs \$12,261.98 in damages. The trial court next found in favor of Kandel on his third-party complaint against Nationwide. It examined the Premier Businessowners Policy and found the terms of the policy were ambiguous. Based on the ambiguities in the policy, the trial court found Kandel was entitled to coverage for his third-party claim in the amount of \$12,261.98.

{¶16} It is from this decision Nationwide now appeals.

ASSIGNMENT OF ERROR

{¶17} Nationwide raises one Assignment of Error:

{¶18} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE INSURANCE POLICY ISSUED BY NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY TO MARY L. KANDEL, THE PREMIER BUSINESSOWNERS POLICY, PROVIDED COVERAGE FOR THE PLAINTIFFS/APPELLEES' CLAIMS AS THE LOSSES CLAIMED WERE EXPLICITLY EXCLUDED PURSUANT TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE INSURANCE POLICY. (APRIL 2, 2014 JUDGMENT ENTRY, P. 2-3).

ANALYSIS

{¶19} Nationwide argues in its sole Assignment of Error that the trial court erred as a matter of law when it found that Kandel was entitled to coverage under the Premier Businessowners Policy for the Bairs's claim of damages. We agree.

Standard of Review

{¶20} Nationwide does not challenge the findings of fact made by the trial court. Rather, it contends the trial court erred in construing the policy language and applying the facts of the case to the terms of the policy. "The interpretation of a written contract,

such as an insurance policy, is a matter of law that we review de novo. *Shafer v. Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013–Ohio–885, ¶ 10; see also *Hardert v. Neumann*, 4th Dist. Adams No. 13CA977, 2014–Ohio–1770, ¶ 8 (“[W]e conduct a de novo review of a party’s challenges to the trial court’s choice or application of law.”).” *Willis v. Gall*, 4th Dist. Highland No. 14CA9, 2015-Ohio-1696, ¶ 10.

{¶21} The sole issue in this appeal is whether Kandel was entitled to coverage under the Premier Businessowners Policy for the Bairs’s claims of damages due to mold. Nationwide argues the policy language in the applicable Premier Businessowners Liability Coverage Form excludes coverage for third-party claims for property damage or bodily injury due to mold. Kandel argues the Premier Businessowners Policy is ambiguous and therefore should be construed against Nationwide and in favor of coverage.

{¶22} The Ohio Supreme Court in *Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410, reiterated the law as to a court’s interpretation of an insurance policy:

“An insurance policy is a contract whose interpretation is a matter of law.” *Sharonville v. Am. Emp. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6. “[W]ords and phrases used in an insurance policy must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined.” *Gomolka v. State Auto.Mut. Ins. Co.*, 70 Ohio St.2d 166, 167–168, 436 N.E.2d 1347 (1982),

citing *Dealers Dairy Prods. Co. v. Royal Ins. Co.*, 170 Ohio St. 336, 164 N.E.2d 745 (1960), paragraph one of the syllabus.

We have stated that “an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.” (Emphasis sic.) *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992). Furthermore, “[i]f provisions are susceptible of more than one interpretation, they ‘will be construed strictly against the insurer and liberally in favor of the insured.’ ” *Sharonville* at ¶ 6, quoting *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

Id. at ¶¶ 10-11.

First-Party Coverage vs. Third-Party Coverage

{¶23} Nationwide argues the trial court erroneously interpreted the applicable terms of the Premier Businessowners Policy. Nationwide states the evidence demonstrates the Premier Businessowners Policy insuring the Property provided two forms of insurance coverage: first-party coverage and third-party coverage. In first-party coverage, the insured seeks coverage for his or her own losses and expenses pursuant to the terms of the insurance contract between the insured and the insurer. Third-party coverage provides liability coverage for damages the insured is legally obligated to pay to a third party. See *Blake v. Thornton*, 182 Ohio App.3d 716, 2009-Ohio-2487, 914 N.E.2d 1102, ¶ 17 (8th Dist.).

{¶24} A review of the Premier Businessowners Policy submitted at trial shows that it provides two forms of coverage for Kandel as the insured. The Premier

Businessowners Property Coverage Form No. PB 00 02 04 11 limits coverage as follows:

A. COVERAGES

We will pay for direct physical loss of or damage to Covered Property at the described premises in the Declarations caused by or resulting from any Covered Cause of Loss.

1. COVERED PROPERTY

Covered Property includes Buildings, * * *, Business Personal Property, * * *, or both * * *.

{¶25} The Premier Businessowners Liability Coverage Form No. PB 00 06 04 11 limits coverage as follows:

1. COVERAGES

A. COVERAGE A -- BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. INSURING AGREEMENT

a. We will pay those sums up to the applicable Limit of Insurance that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insurance against any "suit" seeking those damages for which there is coverage under this policy.

HOWEVER, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

* * *

Third-Party Liability Coverage Applies Based on the Pleadings

{¶26} Nationwide argues that based on the pleadings in this case, the issue of coverage must be determined by examining the terms of the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11. The Bairs filed a complaint against Kandel alleging property damage based on the presence of mold at the Property. Kandel filed a third-party complaint against Nationwide based on the Bairs's complaint. The third-party complaint alleged:

1. Plaintiffs have filed against Defendants a Complaint, a copy of which is attached hereto as Exhibit "A".
2. Defendants purchased from Third Party Defendant a policy of insurance which was in full force and effect at all time complained of by Plaintiffs in their Complaint against Defendants which provided Defendants with coverage for matters alleged in Plaintiffs' Complaint, that Defendants timely notified Third Party Defendant of Plaintiffs' Complaint and afforded Third Party Defendant an opportunity to provide Third Party Defendants with representation in the handling of Plaintiffs' Complaint which Third Party Defendant refused to do.
3. Third Party Defendant has breached the terms of the policy of insurance purchased by Defendants.

{¶27} A third-party complaint is a vehicle through which defendants are permitted to assert claims against non-parties of a type specified under Civ.R. 14(A) without leave of court:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than fourteen days after he serves his original answer.

{¶28} The third-party complaint will not meet the requirements of Civ.R. 14(A) if the party asserts an independent cause of action, even when a third-party claim arises out of the same transaction or occurrence as the primary claim. *HSBC Bank, USA v. Maust*, 5th Dist. Fairfield No. 13 CA 82, 2014-Ohio-3170, ¶ 59 citing *Franklin Cty. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003–Ohio–1331, 787 N.E.2d 59, ¶ 16 (10th Dist.); *State Farm Mut. Auto Ins. Co. v. Charlton*, 41 Ohio App.2d 107, 109, 322 N.E.2d 333 (10th Dist.1974). “[T]he alleged right of the defendant to recover, or the duty allegedly breached by the third-party defendant, must arise from the plaintiff's successful prosecution of the main action against defendant.” *Renacci v. Martell*, 91 Ohio App.3d 217, 221, 632 N.E.2d 536 (9th Dist.1993). As recognized by the Ninth District Court of Appeals in *Renacci*, a third-party complaint must assert a claim of derivative liability:

In order for a claim to be appropriately brought pursuant to Civ.R. 14(A), it must be “derivative of the outcome of the main claim.” *United States v. Joe Grasso & Son, Inc.* (C.A.5, 1967), 380 F.2d 749, 751. The third-party defendant must be “secondarily liable” or “liable over.” *Id.* “[I]t is clear that

impleader under Rule 14 requires that the liability of the third party be dependent upon the outcome of the main claim."

Id. at 751–752. *Renacci* at 220, 632 N.E.2d 536.

{¶29} Kandel filed a claim of direct loss with Nationwide for the mold damage to the Property and Nationwide denied the claim. The Bairs filed a complaint against Kandel seeking damages for injuries due to mold at the Property. Kandel filed a third-party complaint that alleged Nationwide breached the terms of the insurance contract in relation to "coverage for the matters alleged in the Plaintiff's Complaint." Kandel, however, did not file an independent cause of action against Nationwide alleging breach of the insurance contract in relation to the direct physical loss or damage to the Property. Kandel attempted at trial to amend his third-party complaint to include an independent cause of action against Nationwide, but the trial court overruled the motion.

{¶30} A review of the Premier Businessowners Policy shows that the terms of the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11 state that it "will pay those sums up to the applicable Limit of Insurance that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Pursuant to the plain language of the Premier Businessowners Policy, Kandel's claim in his third-party complaint falls under the insurance coverage provided by the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11.

Terms of Premier Businessowners Liability Coverage Form No. PB 00 06 04 11

{¶31} Having found that Kandel's third-party complaint falls within the purview of the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11, we next examine the terms of the policy to determine whether Kandel is entitled to coverage.

{¶32} The trial court found there were ambiguities within the four corners of the policy and interpreted the policy against the insurer and for the insured to find coverage for the allegations in the third-party complaint. A review of the trial record shows that Kandel relied on the terms of the Premier Businessowners Property Coverage Form No. PB 00 02 04 11 to demonstrate ambiguities existed with the policy language. We have determined that the Premier Businessowners Property Coverage Form No. PB 00 02 04 11 is not applicable to Kandel's third-party claims. As such, we examine the terms of the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11 to determine whether the language of the contract is clear and unambiguous to exclude third-party coverage for mold, or whether it is susceptible of more than one interpretation.

{¶33} Nationwide states the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11 includes an attached Endorsement that was in effect at the time the mold damage occurred to the Property. The Endorsement states:

**EXCLUSION – FUNGI OR BACTERIA
WITH LIMITED PROPERTY COVERAGE)**

This endorsement modifies insurance provided under the following:

PREMIER BUSINESSOWNERS LIABILITY COVERAGE FORM

A. In Section I, COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, under paragraph 2. EXCLUSIONS, the following exclusions are added:

This insurance, including any duty we have to defend “suits”, does not apply to:

Fungi or Bacteria

A. “Bodily Injury” or “property damage: which would not have occurred, in whole or in part, but for:

1) The actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents; or

2) The failure to warn or to disclose the presence of “fungi” or bacteria; regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity.

* * *

C. In Section V. DEFINITIONS the following definition is added:

"Fungi" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or byproducts produced or released by fungi.

{¶34} Nationwide asserts the exclusion in the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11 related to property damage caused by fungi or bacteria precludes recovery for third-party liability damages for mold. There is no factual dispute in this case that the mold found in the Property was the basis of the Bairs's complaint for damages against Kandel. The mold was allegedly caused by moisture bleeding in from the elevated and improper grade at the rear of the building and water infiltrating from the rear of the Property.

{¶35} Based on the plain language of the exclusion for fungi or bacteria included in the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11, third-party coverage is not provided for any bodily injury or property damage due to mold. The trial court erred when it found ambiguities in the language of the Premier Businessowners Property Coverage Form No. PB 00 02 04 11 required Nationwide to provide coverage for third-party claims for mold damage under the Premier Businessowners Liability Coverage Form No. PB 00 06 04 11.

{¶36} Nationwide's sole Assignment of Error is sustained.

CONCLUSION

{¶37} The April 2, 2014 judgment of the Canton Municipal Court as it pertains to Third-Party Defendant/Appellant Nationwide Property and Casualty Insurance Company is REVERSED. The matter is remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J.,

Gwin, P.J. and

Farmer, J., concur.