[Cite as *Company Wrench, Ltd. v. Andy's Empire Constr., Inc.*, 2010-Ohio-5790.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94959

COMPANY WRENCH, LTD.

PLAINTIFF-APPELLEE

vs.

ANDY'S EMPIRE CONSTRUCTION, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-588856

BEFORE: Kilbane, J., Gallagher, A.J., Jones, J.

RELEASED AND JOURNALIZED: November 24, 2010

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellants, Andy's Empire Construction, Inc. ("Andy's") and Andrew Kiss ("Kiss"), appeal the trial court's grant of summary judgment in favor of appellee, Owners Insurance Company ("Owners"), from liability arising out of damage to a backhoe that was being hauled by N&K Equipment ("N&K"), a subcontractor for Andy's. After reviewing the facts and the pertinent law, we affirm.

{¶ 2} On June 15, 2005, Andy's rented a backhoe for a construction job from Company Wrench, Ltd. ("Company Wrench"), a commercial rental business. Andy's subcontracted with N&K to transport the backhoe to the jobsite. On or about June 27, 2005, while N&K was transporting the backhoe, it collided with a bridge on Interstate 90, causing severe damage to the equipment.

{¶ 3} On April 10, 2006, Company Wrench filed suit against Andy's and Kiss to recover damages for the damaged equipment.

{¶ 4} On August 7, 2006, Andy's and Kiss answered and filed a third-party complaint against N&K and its owners asserting negligence.

{¶ 5} On December 19, 2006, Andy's and Kiss amended their third-party complaint to include Owners, and sought a declaration from the trial court that Owners had a duty to defend and indemnify Andy's against Company Wrench's claims.

{¶ 6} On March 20, 2007, Owners filed its motion for summary judgment against Andy's and Kiss, arguing that it owed no duty to defend or indemnify Andy's and Kiss under the express terms of the insurance policy at Sections I-A 2.b, and I-A 2.j(1).

{¶ 7} On August 6, 2007, after several continuances, Andy's and Kiss filed a joint brief in opposition.

{¶ 8} On November 6, 2007, the trial court granted summary judgment in favor of Owners.

{¶ 9} On November 9, 2007, Andy's and Kiss filed a second amended and supplemented answer and third-party complaint setting forth claims against other parties, excluding Owners. All claims between all remaining parties below were settled thereafter via a consent judgment.

{¶ 10} On July 25, 2008, Andy's and Kiss appealed the trial court's grant of summary judgment in favor of Owners, which was dismissed for lack of a final appealable order since the trial court had not declared the rights and responsibilities of all parties.

{¶ 11} On March 8, 2009, upon remand, the trial court's journal entry read:

> **"The court previously granted third party deft's owners insurance co. motion for summary judgment seeking to declare the rights of the parties. The court granted the motion. In furtherance thereof, section [I - A 2.b,]**

exclusions excludes property rented, loaned or owned by the policy holder from coverage. The backhoe was leased or rented and therefore was not covered and the insurance company had no duty to defend...Final...Notice Issued."

{¶ 12} On April 9, 2010, Andy's and Kiss appealed, asserting a single assignment of error:

"The trial court erred in granting auto Owners [sic] motion for summary judgment."

Summary Judgment Standard of Review

{¶ 13} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs*. (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 14} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *Duganitz v. Ohio Adult Parole Auth*., 77 Ohio St.3d 190, 191, 1996-Ohio-326, 672 N.E.2d 654.

{¶ 15} The moving party carries the initial burden of setting forth specific facts that support the motion for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. If the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Analysis

{¶ 16} As this court recently noted, "[i]nsurance policies are contracts which we construe according to their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Neal-Pettit v. Lahman*, 8th Dist. No. 91551, 2008-Ohio-6653, citing *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212, 216, 259 N.E.2d 123. In *Kincaid v. Erie Ins.*, 183 Ohio App.3d 748, 754, 2009-Ohio-4372, 918 N.E.2d 1036, this court summarized the rules of insurance contract interpretation as follows:

> **"When the language in a contract is reasonably susceptible of more than one interpretation, the meaning of the ambiguous language is a question of fact. If no ambiguity exists, however, the terms of the contract must simply be applied without resorting to methods of construction and interpretation. * * * [I]f a contract is clear and unambiguous, then its interpretation is a matter of law, there is no issue of fact to be determined, and a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." Id. at 754-755 (internal citations omitted.)**

{¶ 17} Andy's and Kiss argue that the provisions of the all-risk policy are ambiguous and, thus, should be interpreted strictly against Owners as Owners drafted the policy. Owners argues that the policy is explicit in its denial of coverage, that no ambiguities exist in the contract, and thus, no questions of fact remain for the grant of summary judgment.

1. Whether Coverage is Excluded Under the Policy

{¶ 18} The parties agree that the relevant portions of the policy state:

"SECTION I-COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

*** * ***

2. Exclusions

*** * ***

b. 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement; or

(2) That the insured would have in the absence of the contract or agreement.

*** * ***

j. 'Property damage' to:

(1) Property you own, rent or occupy;

*** * ***

(3) Property loaned to you;
(4) Personal property in the care, custody or control of the insured[.]"

{¶ 19} Contractual language is considered ambiguous where the meaning of the language cannot be determined from the four corners of the agreement, or where the language is susceptible to two or more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, 784 N.E.2d 186, appeal not allowed, 99 Ohio St.3d 1435, 2003-Ohio-2902, 789 N.E.2d 1117. When we read the plain terms of the contract, we find that it unambiguously excludes coverage for rented property. We are constrained by this language and will not create a new contract where the plain and ordinary language used in the policy is apparent from the contents of the policy. See *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146.

{¶ 20} The trial court did not err in granting summary judgment in Owners' favor. Appellants' sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR