IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2002 Session

GREAT RIVER INSURANCE COMPANY V. EDISON AUTOMATION, INC.

Appeal from the Chancery Court for Davidson County
No. 00-1638III Honorable Ellen Hobbs Lyle, Chancellor

No. M2001-01635-COA-R3-CV - Filed April 23, 2004

The Plaintiff filed suit for Declaratory Judgment seeking the order of the Court declaring that losses suffered by the insured were not covered losses under a general policy of business insurance. At issue is the interpretation of the insurance contract and a determination as to whether insurance coverage existed where the insured expended money and time fabricating parts for a custom project upon the mistaken belief that it had obtained a sub-contract, but where no such agreement existed inasmuch as the purchase order upon which the insured relied was forged by an employee of the insured. Motions for Summary Judgment were filed by each party. The Trial Court granted the insurance company's motion for Summary Judgment, from which the insured appealed. For the reasons stated herein, we affirm the Trial Court, and also determine that Declaratory Judgment should be granted in favor of the insurance company, determining that no coverage exists for the loss suffered by the insured.

Tenn. R. App. P. 3 Appeal of Right; Judgment of the Chancery Court Affirmed

ROBERT E. CORLEW, III, Sp. J., delivered the opinion of the court, in which BEN H. CANTRELL, P. J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Glenn B. Rose and Angela Childress, Harwell, Howard, Hyne, Gabbert & Manner, PC, Nashville, Tennessee, for the Appellant, Edison Automation, Inc.

Randall C. Ferguson, Branstetter, Kilgore, Stranch & Jennings, Nashville, Tennessee, for the Appellee, Great River Insurance Company.

OPINION

Before the Court is an appeal from the Chancery Court of Davidson County, which issued a Declaratory Judgment determining that a general business risk policy of insurance issued by the

Plaintiff to the Defendant does not require payment when an employee of the insured falsely represented that the insured had a contract and the insured constructed an assembly which was not marketable, either as constructed, or as disassembled.

The facts are virtually uncontradicted. The Appellant is a small business engaged in the sale of electrical control and automation products and systems. The Appellee is an insurance carrier which had provided a policy of commercial property insurance to the Appellant. The Appellant learned in late 1998 that the Metropolitan Government of Nashville and Davidson County Water Services was soliciting bids for extensive improvements to its 100-year-old Omohundro water treatment plant. Being a small company, the Appellant was not in a position to bid this project, but identified areas within its expertise in which it sought to sub-contract portions of the project. Shortly before this time, the Appellant had hired a new sales representative, whose name, ironically, was John Law, and Mr. Law became the Appellant's sales representative tasked with contacting the general contractor to whom the bid for the Omohundro project was awarded in an effort to obtain a sub-contract. Law reported to the Appellant that he had secured an agreement with the general contractor on the project, and furnished a signed purchase order, which unbeknownst to the Appellant, was forged.

The Appellant was aware of the prior financial problems Mr. Law had experienced, and at some point during the fabrication process, became aware that Law had been indicted for crimes unrelated to the issues in this cause. Nonetheless, without further verifying the purchase order, the Appellant began to custom build, according to specifications, that portion of the project which it believed it had contracted to build. Because the assembly took place at the Appellant's location, rather than at the job site, the Appellant did not learn that it had no contract until it had incurred labor and material costs totaling some $320,000 and until it had twice invoiced the general contractor with whom indeed it had no contract. Because the work was custom built, the Appellant asserts that it is unable to market its construction to any customer; it is unable to sell disassembled parts for more than a fraction of the new cost; and it has no means of recovering labor cost or otherwise being made whole but for the policy of insurance in effect. The Appellant further asserts that it lost business income it otherwise would have received because it put aside other jobs in order to concentrate on the Omohundro project, and it therefore asserts a further loss of $183,000. Law was indicted for forgery, pled guilty, and was imprisoned.

At issue, then, is whether the loss sustained by the Appellant is a covered loss under the terms of the policy of commercial insurance. The policy of insurance, introduced as Exhibit 1, contains some 140 pages, and provides a variety of property, liability, motor vehicle, and general business coverage. In pertinent part, the policy of insurance provides as follows:

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

Policy of Insurance, Building and Personal Property Coverage Form, at 123. Further, the policy defines: "Covered Causes of Loss" to mean "Risks of Direct Physical Loss," unless an exclusion

or limitation cited subsequently in the policy is applicable. *Id., Causes of Loss-Special Form,* at 134. A number of policy exclusions and limitations are then listed within the policy, excluding coverage for "delay, loss of use or loss of market," *Id*. at 135, and "dishonest or criminal act" of any employee, but the exclusion does not apply to "acts of destruction" by employees. *Id.* The Appellant contends that the loss is a covered loss, that the market exclusion is not applicable, and that the criminal acts of Mr. Law, the Appellant's employee, effectively destroyed the property in question by causing the Appellant to assemble a product which is not marketable, and thus the product and its component parts, having no value, are essentially destroyed. The Appellant further asserts that when it assembled brand new components, then caused an electric current to flow through those components for purposes of testing, though the circuitry was found to function correctly, the act of running current through the components effectively destroyed them for the reason that the components were no longer new and could not be returned to the supplier.

We find that the Trial Court correctly determined that the language of the insurance policy in question provides no coverage for the type of loss suffered by the Appellant. Finding that no coverage exists, we need not address the issues of the application of exclusions to coverage.

Our review of the Trial Court's decision upon Summary Judgment determining questions of law is *de novo* without a presumption of correctness. *Burroughs v. Magee*, 118 S.W.3d 323, 327 (Tenn. 2003); *BellSouth Advertising and Publishing Company v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003).

In determining whether coverage exists, we are required to construe the language of the insurance policy. We agree with the Appellant that to the extent that the contract may be subject to more than one meaning, it is our duty to construe the contract strictly against the insurer and in favor of the insured. *Alcazar v. Hayes,* 982 S.W.2d 845, 852 (Tenn. 1998), *Mutual Life Insurance Company v. Walt*, 277 S.W.2d 434, 436 (Tenn. 1955). At the same time, we should construe contracts of insurance so as to provide effect to the intention and express language of the parties. *Harrell v. Minnesota Mutual Life Insurance Company*, 937 S.W.2d 809, 814 (Tenn. 1996); *Warfield v. Lowe,* 75 S.W.3d 923, 924-25 (Tenn. Ct. App. 2002) *perm. app. denied.* The ordinary rules of construction applicable to contracts also apply to insurance policies. *E.g., American Justice Insurance Reciprocal v. Hutchison*, 15 S.W.3d 811, 814 (Tenn. 2000); *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990); *Angus v. Western Heritage Insurance Company*, 48 S.W.3rd 728, 730-731 (Tenn. Ct. App. 2000) *perm. app. denied* (2001). Courts should construe policies of insurance as a whole, in a logical and reasonable manner. *Merrimack Mutual Fire Insurance Company v. Batts*, 59 S.W.3d 142, 148 (Tenn. Ct. App. 2001) *perm. app. denied*; *Standard Fire Insurance Company v. Chester-O'Donley & Associates, Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998) *perm. app. denied.* In construing contracts, courts should interpret a policy of insurance as it is written, and should give terms their usual, natural, ordinary meaning. *Southeastern Fidelity Insurance Company v. Ruggeri*, 506 S.W.2d 944, 945 (Tenn. 1974); *Victoria Insurance Company v. Hawkins*, 31 S.W.3d 578, 580 (Tenn. Ct. App. 2000) *perm. app. denied*. Courts are not at liberty to re-write policies of insurance, even in those cases where the Court does not like the wording of a policy. *Merrimack Mutual Fire Insurance Company v. Batts*, *supra at* 148*; Angus v. Western*

Heritage Insurance Company, supra at 731; *Quintana v. Tennessee Farmers Mutual Insurance Company*, 774 S.W.2d 630, 632 (Tenn. Ct. App. 1989) *perm. app. denied*.

In interpreting the language of the contract, then, we must first consider that coverage is provided for "direct physical loss or damage." Construing this language in its usual and ordinary manner, it is clear to us that there is no coverage under the terms of this contract. The products covered under the terms of the policy suffered no damage, and no physical loss. The products were not destroyed, nor were they damaged. The products were capable of being used in the manner in which the Appellants sought to use them. Thus they were subject to being used in the manner intended by the manufacturer of the component parts, and by the Appellant. The Appellant argues that the product, as assembled, was not marketable. Conceding that issue, such is not the test in order to establish direct physical damage or loss. Employees of the Appellant assembled components in the manner in which the Appellant intended to assemble them. The facts show that the parts were tested by energizing the circuitry. Thus, the new and unused components then were used. While this use prevents the Appellant from returning those components to the manufacturer as new components, this does not show to us that the components were damaged or destroyed. Again, use does not constitute direct physical loss or damage where the product is used in its intended manner and not abused. The fact that the Appellant was then unable to return the parts to the manufacturer does not trigger the provisions of coverage of the policy of insurance.

The Appellant contends that the Trial Court's decision should be reversed because the Trial Court dealt extensively with the loss of market for the custom project. We agree with the Appellant that the record shows that the total project was never completed, and we recognize the theory of the Appellant that the parts themselves were destroyed. When we apply the ordinary meaning to the terms "direct physical loss" and "damage," however, we cannot find the loss to be a covered loss under the terms of the policy in question. The evidence is uncontroverted that, to the extent it was completed when work ceased, the custom assembly worked, and to the extent it was constructed prior to the time the Appellant learned it had no contract to build the system, could have been used in the Omohundro water treatment plant but for the fact that the contractor on that project had asked someone else to build the same system and was unwilling to buy from the Appellant. The partially assembled product then functioned as it was intended by the Appellant, and the only loss of function of the component parts was due to the fact that the Appellant had intentionally assembled a product for which there was no market, and for which there would be no market even upon completion of the product. When we consider the terms of the policy in question, we cannot find that this use of the component parts and labor constitutes "direct physical loss" to the component parts, or the partially constructed project as a whole.

The Appellant contends that the losses it suffered are similar to losses suffered by other Plaintiffs in other states where coverage was found to exist. We have considered the cases cited by the Appellant. We find this case to be factually distinguishable from a situation where a house became uninhabitable, though undamaged, by becoming perched on the edge of a cliff by acts of God or force of nature. Further, we find this case to be distinguishable from a case where food was not fit for consumption because it was treated with a chemical which was not approved by the Food and

Drug Administration though most considered the chemical to be harmless to human beings. In the case before us, the custom project, to the extent it was constructed, remained useful for the purpose intended by the Appellant, but because the Appellant was mistaken in its belief that it had a buyer for the product, it found itself unable to sell the product, and believed it would be unable to sell the product even were it completed in accordance with plans and specifications.

Thus, the loss to the Appellant is not a covered loss under the terms of the policy. Because the principal loss is not covered, the Appellant cannot prevail due to interruption of business during construction of the custom-made assembly. The decision of the Trial Court is affirmed. The case is dismissed. Costs on appeal must be taxed against the Appellant.

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ROBERT E. CORLEW, III, SPECIAL JUDGE