Leamington Co., Appellant, vs. Nonprofits' Insurance Association, an Interinsurance Exchange, Respondent.

C9-98-2056

COURT OF APPEALS OF MINNESOTA

1999 Minn. App. LEXIS 909

July 28, 1999, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Petition for Review Granted October 21, 1999, Reported at: *1999 Minn. LEXIS 692*.

PRIOR HISTORY: Hennepin County District Court. File No. 9712599. Hon. Harry S. Crump.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant building owner challenged a decision of the Hennepin County District Court (Minnesota), that granted summary judgment to respondent insurer and held that appellant's failure to submit written proof of loss within 60 days after respondent's request was a bar to recovery and that it lacked standing to seek reformation of its insurance policy. Appellant also challenged attorney's fees award, while respondent argued it was not enough.

OVERVIEW: Lessee of appellant's building left the building with significant water damage and vandalism. Respondent insurer's corrective endorsements did not cover property damage, but respondent sent appellant a proof-of-loss form and requested that it be submitted in compliance with the policy's terms. Appellant returned it after the policy's 60-day deadline. Coverage was denied, and appellant sued. Respondent's motion for summary judgment was granted based on appellant's failure to submit proof of loss in a timely manner and because appellant lacked standing to seek reformation of the policy. On appeal, the court held that the trial court did not err in finding that appellant's failure to submit written proof of its loss barred recovery because the policy provisions were clear, unambiguous, and authorized by statute. Thus, reformation of the policy was moot because recovery was barred. The award of attorney's fees to respondent was also an abuse of discretion; appellant received no notice that such sanctions were being contemplated until after summary judgment was granted, and there were no unusual circumstances requiring such an award. The order was partly affirmed and reversed.

OUTCOME: Only part of the district court's judgment for respondent insurer, which held that appellant's failure to submit written proof of loss within 60-day deadline was a bar to recovery, was affirmed because policy terms were clear, unambiguous, and authorized by statute. Reformation of the policy was moot because recovery was barred, and the award of attorney's fees was held to be an abuse of discretion and was reversed.

CORE TERMS: proof of loss, coverage, insured, insurance policy, attorney fees, notice, summary judgment, condition precedent, failure to submit, unambiguous, insurer, property-damage, reformation, notice requirement, time limit, prejudiced, endorsements, corrective, policy provided, policy provides, review denied, fire damage, fire insurance, minimum requirements, timely manner, citations omitted, discovery abuses, unusual circumstances, deadline, hazard

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN1] On appeal from summary judgment, the court asks two questions: (1) whether there are any issues of genuine material fact and (2) whether the district court erred in its application of the law. The reviewing court

must also view the evidence in the light most favorable to the party against whom judgment was granted.

Insurance Law > Property Insurance > Obligations > Notice Requirements
[HN2] Minnesota law bars suit unless a party is in compliance with the provisions of a policy providing fire insurance that meets minimum statutory requirements under *Minn. Stat. § 65A.01(3)*. This statute also provides that, at a minimum, an insured must be given 60 days after a loss to submit written proof of loss to the insurance company. And it authorizes insurers to provide additional benefits beyond this minimum under *§ 65A.01(1)* (1996). Further, the court interprets section *§ 65A.01(3)*, to permit an insurer to require submission of written proof of loss within 60 days after request as a condition precedent to recovery.

Insurance Law > Property Insurance > Obligations > Notice Requirements
[HN3] Because the language of an insurance policy is clear and because *Minn. Stat. § 65A.01(3)* bars suit for recovery of any claim unless the insured complies with the provisions of a policy that meets the minimum requirements of the statute, submission of written proof of loss within 60 days after request from an insurer is a condition precedent to recovery.

Insurance Law > Claims & Contracts > Notice to Insurers > Prejudice to Insurer
Insurance Law > Motor Vehicle Insurance > Obligations > Proof of Loss
Insurance Law > Property Insurance > Obligations > Notice Requirements
[HN4] The Minnesota Supreme Court has held that when a time limit in a policy for providing notice of loss is authorized by statute and an insured fails to comply, recovery is barred regardless of whether the insurer was prejudiced.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Unambiguous Terms
Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings
[HN5] Where the provisions of an insurance policy are clear and unambiguous, the rule of construction that submission of written proof of loss should be liberally construed so as not to defeat an insured's claim, has no applicability. Where insurance policy language is clear and unambiguous, the language used must be given its usual and accepted meaning.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN6] A reviewing court must generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN7] The appellate court reviews a district court's award of attorney's fees under an abuse-of-discretion standard.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Civil Procedure > Sanctions > General Overview
[HN8] Because the primary purpose of sanctions is to deter litigation abuse, a party against whom sanctions are contemplated must have fair notice that sanctions are a possibility.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Civil Procedure > Sanctions > General Overview
[HN9] *Minn. Stat. § 549.211(3)* requires notice and reasonable opportunity to respond before sanctions may be imposed. Only in very unusual circumstances will it be permissible for the district court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed.

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Charles J. Noel, Jennifer Kjos Fackler, Charles J. Noel & Associates, P.A., St. Paul, MN; and Patricia E. Kuderer, Hoff, Barry & Kuderer, P.A., Eden Prairie, MN, (for respondent).

JUDGES: Considered and decided by Toussaint, Chief Judge, Willis, Judge, and Norton, Judge. *

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION BY: WILLIS

OPINION

UNPUBLISHED OPINION

WILLIS Judge

Appellant Leamington Co. seeks reversal of summary judgment holding that its failure to submit written proof of loss within 60 days after request from respondent Nonprofits' Insurance Association (NIA) is a bar to recovery and that it lacks standing to seek reformation of the insurance policy at issue. Leamington also challenges the district [*2] court's award of attorney fees, and NIA, by notice of review, challenges the district court's failure to grant in its entirety NIA's motion for attorney fees. We affirm in part and reverse in part.

FACTS

Leamington owns the Drake building in Minneapolis. From 1983 until 1996, Leamington leased the building to People Serving People (PSP) for use as a shelter for the homeless. The lease required PSP to: (1) maintain comprehensive public liability and hazard insurance coverage on the Drake building; (2) include Leamington as a named insured under each property insurance policy; and (3) ensure that each policy provided that the insurer would give Leamington 15 days' written notice before termination, cancellation, or reduction in the scope of the policy. PSP purchased the required insurance from NIA through its agent, Acordia of Minnesota. The policy provided property, general liability, and hazard insurance, including coverage for fire damage, and was, therefore, subject to *Minn. Stat. § 65A.01* (1996) (providing minimum requirements for all insurance policies that include coverage for fire damage). [2]

2 This action is based on an insurance policy issued in 1996; we therefore cite the statute in effect in that year.

[*3] The 1994 NIA insurance policy named PSP as the insured and Leamington as a mortgage holder-loss payee. The 1995 and 1996 policies continued to name PSP as the insured party but omitted references to Leamington.

PSP vacated the Drake building in May 1996. In June 1996, Leamington discovered that the building had suffered significant water damage and had been vandalized by its residents. In July 1996, Leamington sued PSP for property damage. [3] When Leamington orally reported the claim of damage to Acordia, the agent to whom the loss was reported realized that Leamington was no longer named as a mortgage holder-loss payee on the policy. Acordia contacted NIA, and NIA issued corrective endorsements for the 1995 and 1996 policies naming Leamington as an "additional insured." NIA claims that it uses the term "additional insured" only in the context of general liability insurance and, therefore, the corrective endorsements did not provide property-damage coverage to Leamington.

3 The suit between PSP and Leamington was settled in December 1996 for $ 340,000.

[*4] Leamington submitted a written property-damage claim to NIA in August 1996, but NIA responded that the corrective endorsements provided only general liability coverage and Leamington's claim was, therefore, not covered under PSP's policy. Nevertheless, on November 26, 1996, NIA sent Leamington a proof-of-loss form and requested that it be submitted in compliance with the terms of the policy. [4] Leamington did not submit written proof of loss to NIA until February 11, 1997, 15 days after the deadline provided by the policy. NIA did not acknowledge receipt of the proof-of-loss form or respond to Leamington's inquiries about its claim.

4 The letter accompanying the form expressly reserved NIA's right to deny coverage.

Leamington sued NIA for breach of contract and later amended its complaint to include a count seeking reformation of the insurance policy to provide Leamington with property damage, as well as general liability, coverage. NIA moved for summary judgment based on (1) Leamington's alleged failure [*5] to submit written proof of loss in a timely manner; (2) Leamington's lack of standing to seek reformation of the insurance policy; and (3) Leamington's alleged failure to cooperate with NIA's investigation of the claim. The district court granted NIA's motion for summary judgment and subsequently granted NIA $ 20,000 in attorney fees.

DECISION

[HN1] On appeal from summary judgment, this court asks two questions: (1) whether there are any issues of genuine material fact and (2) whether the district court erred in its application of the law. ***State by Cooper v. French****, 460 N.W.2d 2, 4 (Minn. 1990)*. The reviewing court must also view the evidence in the light most favorable to the party against whom judgment was granted. ***Fabio v. Bellomo****, 504 N.W.2d 758, 761 (Minn. 1993)*.

I.

We address first, as did the parties, the district court's determination that Leamington's failure to submit written proof of loss within 60 days after NIA's request bars recovery by Leamington under the insurance policy here. Discussion of this issue necessarily assumes that

Leamington had property-damage coverage under the policy.

Leamington [*6] argues that although it failed to submit written proof of loss to NIA within 60 days after NIA's request, timely filing is not a condition precedent to recovery and NIA must show it was prejudiced by the delay. Leamington relies on two cases from the early part of this century to support its argument: ***Mason v. St. Paul Fire & Marine Ins. Co.**, 82 Minn. 336, 85 N.W. 13 (1901)*, and ***Cash v. Concordia Fire Ins. Co.**, 111 Minn. 162, 126 N.W. 524 (1910)*. Both held that delay on the part of a plaintiff in submitting proof of loss did not affect the right of action on the policy because whether the claim was submitted in a timely manner was not essential to the contract. ***Mason**, 82 Minn. at 338, 85 N.W. at 14*; ***Cash**, 111 Minn. at 166, 126 N.W. at 525*. But ***Mason*** notes that its holding would not apply if "the policy provides a forfeiture, or makes the service of proofs of loss within the time specified therein a condition precedent." *82 Minn. at 338, 85 N.W. at 14*.

Here, the policy unambiguously makes submission of written proof of loss within 60 days after request from NIA a condition [*7] precedent to recovery, and [HN2] Minnesota law bars suit unless a party is in compliance with the provisions of a policy providing fire insurance that meets minimum statutory requirements. ***See** Minn. Stat. § 65A.01, subd. 3* (1996). *Section 65A.01, subdivision 3*, also provides that, at a minimum, an insured must be given 60 days after a loss to submit written proof of loss to the insurance company. ***See id.*** And it authorizes insurers to provide additional benefits beyond this minimum, as NIA did in the policy here by allowing the insured 60 days after request by NIA to submit written proof of loss. ***See id.***, subd. 1 (1996). Further, this court recently interpreted *section 65A.01, subdivision 3* (1996), to permit an insurer to require submission of written proof of loss within 60 days after request as a condition precedent to recovery. ***Nathe Bros. v. American Nat'l Fire Ins. Co.**, 597 N.W.2d 587, 588-89, 1999 WL 540474, at *2-*3 (Minn. App. July 27, 1999)*. The statutory language and our decision in ***Nathe Bros.***, therefore, make ***Mason*** and ***Cash*** inapposite here.

The NIA policy provides:

Duties in The Event [*8] **of Loss or Damage**

a. You must see that the following are done in the event of loss or damage to Covered Property:

* * * *

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

* * * *

Legal Action Against Us

No one may bring a legal action against us * * * unless:

> **1. There has been full compliance with all of the terms of this Coverage part.**

[HN3] **Because the language of the insurance policy is clear and because the statute bars suit for recovery of any claim unless the insured complies with the provisions of a policy that meets the minimum requirements of the statute, submission of written proof of loss within 60 days after request from NIA is a condition precedent to recovery.** *See id.*, subd. 3; ***see also Nathe Bros.**, 597 N.W.2d 587, 588-89, 1999 WL 540474, at *2-*3*.

Leamington further argues that NIA must establish that it was prejudiced by the delay in submission of written proof of loss. But [HN4] the supreme court has held that when a time limit in a policy for providing notice of [*9] loss is authorized by statute and an insured fails to comply, recovery is barred regardless of whether the insurer was prejudiced. ***Terrell v. State Farm Ins. Co.**, 346 N.W.2d 149, 152 (Minn. 1984)* (construing time limits in no-fault automobile insurance act). Leamington contends that the requirement of submission of written proof of loss should be liberally construed so as not to defeat an insured's claim. ***McCullough v. Travelers Cos.**, 424 N.W.2d 542, 544 (Minn. 1988)* (holding fire insurance policy provision requiring insured to submit to examination under oath is condition to recovery not condition precedent to bringing suit). But [HN5] where the provisions of an insurance policy are clear and unambiguous, the rule of construction suggested by Leamington has no applicability. ***Sterling State Bank v. Virginia Surety Comp.**, 285 Minn. 348, 354, 173 N.W.2d 342, 346-47 (1969)* (holding that providing proof of loss within 60-day time limit required by policy was a condition precedent to recovery because language was unambiguous). Here, the 60-day deadline is clear and unambiguous, is authorized by statute, and must, therefore, [*10] be given its literal interpretation. ***Lobeck v. State Farm Mut. Auto. Ins.** 582 N.W.2d 246, 249 (Minn. 1998)* (stating that where insurance policy language is clear and unambiguous, "the language used must be given its usual and accepted meaning") (citations omitted). The district court did not err in concluding that Leamington's failure to submit written proof of loss within 60 days after NIA's request bars recovery, and, therefore, its grant of summary judgment is affirmed.

II.

Leamington also appeals from the district court's determination that it does not have standing to seek reformation of the insurance policy to provide it with property-damage coverage. But the issue is moot in light of our conclusion that, assuming Leamington had such coverage, its failure to timely submit written proof of loss bars recovery.

III.

Leamington also argues that its claim is not barred because NIA failed to comply with its statutory obligations under *Minn. Stat. § 72A.201, subd. 4* (1998) (describing standards for claim filing and handling). This claim was not presented to nor considered by the district court and is therefore not properly before [*11] the court. ***Thiele v. Stich**, 425 N.W.2d 580, 582 (Minn. 1988)* (providing that "[[HN6] a] reviewing court must generally consider 'only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it'") (citations omitted).

IV.

[HN7] We review a district court's award of attorney fees under an abuse-of-discretion standard. ***Radloff v. First Am. Nat'l Bank**, 470 N.W.2d 154, 156 (Minn. App. 1991)*, ***review denied*** (Minn. July 24, 1991). Following summary judgment, NIA moved for more than $ 192,000 in attorney fees under *Minn. Stat. § 549.211* (1998), arguing that Leamington's lawsuit was "fraudulent and frivolous." The district court awarded NIA $ 20,000 in attorney fees, although the basis for the award is unclear. The court found that NIA's allegations of fraud were unsubstantiated and suggested in its memorandum that discovery abuses by Leamington were the basis for the award. But sanctions for discovery abuses cannot be imposed under *section 549.211*, and the court characterized the attorney fees awarded as the reasonable and necessary fees NIA incurred from the beginning [*12] of the case to argument on the motion for summary judgment, not as fees it incurred in compelling discovery.

In any event, Leamington claims that the award of attorney fees to NIA was an abuse of the district court's discretion, and, by notice of review, NIA claims that the district court abused its discretion by failing to grant all of the attorney fees NIA sought.

[HN8] Because the primary purpose of sanctions is to deter litigation abuse, a party against whom sanctions are contemplated must have fair notice that sanctions are a possibility. ***Uselman v. Uselman**, 464 N.W.2d 130, 143 (Minn. 1990)*; ***see also*** *Minn. Stat. § 549.211, subd. 4* (requiring party to serve motion for sanctions 21 days before it is filed with or presented to court, affording nonmoving party opportunity to withdraw or correct offensive pleadings). NIA argues that a party need not give explicit notice under *section 549.211* before seeking fees, citing ***Faribo Oil Co. v. Tatge Oil Co.**, 501 N.W.2d 699 (Minn. App. 1993)*, ***review denied*** (Minn. Aug. 24, 1993). But ***Faribo*** interprets a predecessor statute, *Minn. Stat. § 549.21* (1990), that did not [*13] contain a notice requirement. *501 N.W.2d at 702*; ***see also*** 1986 Minn. Laws ch. 455, § 83 (deleting notice requirement of *section 549.21*). By contrast, ***Uselman*** considered *Minn. Stat. § 549.21* (1982), which required notice, and interpreted Minn. R. Civ. P. 11 to require notice. ***Uselman**, 464 N.W.2d at 140-43*. Because the statute at issue, *Minn. Stat. § 549.211* (1998), has a notice requirement, we find the reasoning of ***Uselman*** applicable here. ***See*** [HN9] *Minn. Stat. § 549.211, subd. 3* (requiring notice and reasonable opportunity to respond before sanctions may be imposed). The supreme court in ***Uselman*** concluded that only in very unusual circumstances will it be permissible for the [district] court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed.

464 N.W.2d at 143.

The record shows that Leamington did not receive notice that sanctions were contemplated until after the district court had granted summary judgment, when NIA requested a stay of entry of judgment to allow it to bring a motion for attorney fees; NIA served the motion [*14] nearly two months later. Furthermore, nothing in the record suggests that there were present here any "unusual circumstances," which ***Uselman*** requires for an award of posttrial sanctions. ***See id.*** We therefore conclude that the award of attorney fees to NIA was an abuse of discretion, and we reverse that award.

Affirmed in part and reversed in part.