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DISTRICT II

February 3, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1864-FT Rural Mutual Insurance Company and Dandy Veal, LLC
v. Secura Insurance, A Mutual Company (L.C. #2014CV95)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Rural Mutual Insurance Company and Dandy Veal, LLC (collectively, the appellants) appeal from a circuit court judgment granting summary and declaratory judgment in favor of Secura Insurance, A Mutual Company, on the issue of insurance coverage. Pursuant to a presubmission conference and this court's order of September 30, 2015, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2013-14).¹ Upon review of those memoranda and the record, we reverse the judgment of the circuit court and remand for further proceedings.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

In November 2012, Dandy Veal contracted with Forest Construction to build a barn. The contract obligated Forest Construction to obtain a builder's risk insurance policy that would provide coverage for the barn while it was being built. Forest Construction obtained that policy from Secura.

Construction of the barn commenced in December 2012. In June 2013, construction temporarily halted while Dandy Veal sought additional funds to complete it. Both Dandy Veal and Forest Construction expected that Forest Construction would complete its work on the barn once additional funds were secured.

On August 7, 2013, during the temporary suspension of construction activities, a wind storm damaged the unfinished barn. At the time of the storm, Dandy Veal had been using a portion of the barn to house approximately 160 of its cows.² No cows were killed or injured as a result of the storm.

Immediately after the storm, Secura inspected the barn and noticed that Dandy Veal had cows in it. Based on this discovery, Secura claimed that Dandy Veal had violated a provision of its policy prohibiting the occupation of the barn without prior written approval.³ Accordingly, it denied coverage for the loss.

² The barn's planned capacity was for 912 cows.

³ The provision states in relevant part:

1. Occupancy and Use – “We” do not provide coverage under this policy if, without “our” prior written consent, a covered “building or structured” as described under Property Covered is:
 - a. occupied in whole or in part; or
 - b. put to its intended use.

Following Secura's denial of coverage, Dandy Veal turned to its own insurance carrier, Rural Mutual, to pay the cost of repairing the storm-damaged barn. Rural Mutual paid \$224,512.75, and Dandy Veal paid a \$30,000 deductible. They subsequently filed suit against Secura.

In the circuit court, the appellants sought to compel Secura to comply with its policy obligations and indemnify them for the loss incurred. They argued that the occupancy provision relied upon by Secura to deny coverage was unenforceable under WIS. STAT. § 631.11(3). The circuit court disagreed, and granted summary and declaratory judgment in favor of Secura. This appeal follows.

In this case, we are asked to determine whether the circuit court properly granted summary and declaratory judgment in favor of Secura. Whether summary judgment is properly granted presents a question of law, which we review independently. *Olson v. Farrar*, 2012 WI 3, ¶¶22-23, 338 Wis. 2d 215, 809 N.W.2d 1. Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

The grant or denial of a declaratory judgment, meanwhile, is addressed to the circuit court's sound discretion. *Olson*, 338 Wis. 2d 215, ¶24. However, when the exercise of that discretion turns upon a question of law, we review the question independently. *Id.* Here, the circuit court's grant of declaratory judgment turned upon the interpretation of an insurance policy and a statute, which presents questions of law. *Id.*; *American Transmission Co. v. Dane Cty.*, 2009 WI App 126, ¶8 n.5, 321 Wis. 2d 138, 772 N.W.2d 731.

On appeal, the appellants contend that the circuit court erred in granting summary and declaratory judgment in favor of Secura. They assert that Secura's denial of coverage based upon the occupancy provision violates WIS. STAT. § 631.11(3).

WISCONSIN STAT. § 631.11(3) bars an insurer from denying a claim due to an insured's breach of a policy's promissory warranty unless the violation increases the risk or contributes to the loss. It provides in relevant part:

No failure of a condition prior to a loss and no breach of a promissory warranty constitutes grounds for rescission of, or affects an insurer's obligations under, an insurance policy unless it exists at the time of the loss and either increases the risk at the time of the loss or contributes to the loss.

WIS. STAT. § 631.11(3).

The Wisconsin Supreme Court has defined "promissory warranty" as:

"A warranty that facts will continue to be as stated throughout the policy period, such that a failure of the warranty provides the insurer with a defense to a claim under the policy.—Also termed continuing warranty."...[P]romissory warranties refer to conditions subsequent, conditions relevant to the period after an effective policy exists.

Fox v. Catholic Knights Ins. Soc'y, 2003 WI 87, ¶29, 263 Wis. 2d 207, 665 N.W.2d 181 (citation and emphasis omitted).

Reviewing Secura's policy, we conclude that the occupancy provision meets this definition and is a promissory warranty. That is because the provision sets forth conditions subsequent to the policy taking effect (i.e., that the barn not be occupied in whole or in part without Secura's prior written approval).

We also conclude that the failure to comply with this promissory warranty did not end coverage or provide a basis for Secura to deny it. To begin, the policy explicitly provides for

five potential ending points, and occupancy without written approval is not one of them.⁴ Moreover, there is no indication that the presence of Dandy Veal’s cows in the barn increased the risk at the time of the loss or contributed to the loss. *See* WIS. STAT. § 631.11(3).

Finally, we note that the parties disagree as to whether coverage from Secura’s policy is excess to Rural Mutual’s. Because the circuit court did not decide this question, we decline to do so here. The parties can revisit the issue on remand.

For these reasons, we conclude that the circuit court erred in granting summary and declaratory judgment in favor of Secura. Accordingly, we reverse and remand for further proceedings.

Upon the foregoing reasons,

⁴ On the same page following the occupancy provision, Secura sets forth what terminates its policy:

2. When Coverage Ceases—Coverage will end when one of the following first occurs:
 - a. this policy expires or is cancelled;
 - b. a covered “building or structure” is accepted by the purchaser;
 - c. “your” insurable interest in the covered property ceases;
 - d. “you” abandon construction with no intent to complete it; or
 - e. a covered “building or structure” has been completed for more than 90 days.

IT IS ORDERED that the judgment of the circuit court is reversed and the cause is remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals