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IN THE
COURT OF APPEALS OF INDIANA

CELINA INSURANCE COMPANY, as Subrogee of First Church of the Nazarene,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A02-1103-CT-196
INDIANAPOLIS ROOFING AND SHEET	)	

METAL CORP., NAZARETH BUILDING
SERVICES, and CE & M, INC.,)
)
Appellee-Defendants.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael D. Keele, Judge
Cause No. 49D07-0908-CT-40152

September 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Celina Insurance Company appeals from the trial court's order granting the cross-motions for summary judgment of Indianapolis Roofing and Sheet Metal Corporation (Indianapolis Roofing), Nazareth Building Services (NBS), and CE & M, Inc., and denying its motion for partial summary judgment in its subrogation action against them. Celina presents the following restated issues for our review:

1. Do certain waiver of subrogation clauses within various construction contracts preclude Celina from recovering from Indianapolis Roofing, NBS, and CE & M in its subrogation action for damage to its insured's property that was not part of the construction project?

2. Must a plaintiff seeking summary judgment for a breach of warranty submit evidence of causation in order for the defendant to be held liable?

We affirm.

In August of 2006, the First Church of the Nazarene in Kokomo, Indiana (the Church) began a construction project to connect the main church building with the Church's youth

center. The Church entered into a contract with NBS to be the construction manager for the project and entered into a separate contract with CE & M to be the construction project architect. Approximately one year after the construction project began, the Church entered into a contract with Indianapolis Roofing for the construction of a roof to cover the hallway connecting the main church building and the youth center, and the roof would tie-in to both pre-existing roofs. After Indianapolis Roofing had completed its work on the project, but still during the construction phase, water leaks developed at the tie-in between the new roof and the existing roof on the youth center. The youth center and its contents sustained water damage.

Celina issued a Church Protector Insurance Policy (the CPI Policy) to the Church, initially issued on October 18, 2002, with the relevant coverage period from October 18, 2007 to October 18, 2008. The CPI Policy included coverage for commercial property, commercial general liability, business auto, commercial crime, commercial liability umbrella, workers compensation, and the Indiana Second Injury Fund Surcharge. The CPI Policy specifically insured the Church's existing structures including the youth center and its contents. On November 5, 2007, a builder's risk endorsement was added to the CPI Policy for purposes of insuring against direct physical loss or damage to the construction project or work. After the water leak, the Church made a claim for its damages to Celina. Celina made payments to the Church under the CPI Policy for commercial property coverage and not under the builder's risk endorsement.

On August 28, 2009, Celina filed a subrogation action against Indianapolis Roofing alleging that Indianapolis Roofing breached its contract with Celina's insured, the Church,

breached its express warranty to the Church, and failed to perform its work under the contracts in a workmanlike manner. On April 26, 2010, Celina amended its complaint to include NBS and CE & M as non-party defendants. Thereafter, Celina moved for summary judgment as to liability solely against Indianapolis Roofing. Indianapolis Roofing filed a motion for summary judgment and a consolidated brief in opposition to Celina's motion for partial summary judgment and in favor of its own motion for summary judgment.

NBS filed a response to Celina's motion for partial summary judgment and filed a cross-motion for summary judgment against Celina and Indianapolis Roofing. CE & M also filed a response to Celina's motion for partial summary judgment and filed its own motion for summary judgment, thereafter filing a response to Indianapolis Roofing's motion for summary judgment. Ultimately, the trial court held a hearing on all pending motions on January 20, 2011, and granted summary judgment in favor of Indianapolis Roofing, NBS, and CE & M on their motions. As to Celina's motion for partial summary judgment, the trial court concluded that by contract, Celina's subrogation action was waived as to all damages, and that Celina was not entitled to summary judgment as to its breach of warranty claim against Indianapolis Roofing.

Celina now appeals from the trial court's order denying its motion for summary judgment and granting summary judgment in favor of Indianapolis Roofing, NBS, and CE & M. When reviewing a trial court's order granting summary judgment, we apply the same standard as that of the trial court. *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853 (Ind. Ct. App. 2010). Summary judgment is appropriate if the pleadings and designated evidence demonstrate that there are no genuine issues of fact and that the moving

party is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). We construe the pleadings, affidavits, and designated materials in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853. Because a trial court's grant of summary judgment comes to us clothed with a presumption of validity, the appellant must persuade us that error occurred. *Id*. If the trial court's order granting summary judgment can be sustained on any theory or basis in the record, we must affirm. *Id*. We must carefully review a grant of summary judgment in order to ensure that a party was not improperly denied his or her day in court. *Id*.

Federal summary judgment procedure requires summary judgment to be granted against a party who fails to establish an essential element of that party's case as to which that party bears the burden of proof at trial. *Cole v. Gohmann*, 727 N.E.2d 1111 (Ind. Ct. App. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Under Indiana procedure, on the other hand, the party moving for summary judgment has the burden of establishing that no genuine issue of material fact exists. *Schmidt v. Am. Trailer Court, Inc.*, 721 N.E.2d 1251 (Ind. Ct. App. 1999) (citing *Jarboe v. Landmark Cmty. Newspapers*, 644 N.E.2d 118 (Ind. 1994)). A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853. Only after the moving party has met this burden with a prima facie showing that no genuine issue of material fact exists does

the burden shift to the non-moving party to establish that a genuine issue of material fact does exist. *Id.*

1.[1]

Celina challenges the trial court's interpretation of various provisions of the contracts between the Church, and Indianapolis Roofing, NBS, and CE & M. Our review of the trial court's decision where it is asked to construe the terms of a contract has been described as follows:

> The construction of a contract and an action for its breach are matters of judicial determination. Construction of a written contract is generally a question of law for which summary judgment is particularly appropriate. Our standard of review in such cases is de novo. The elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages. When construing a contract, unambiguous contractual language is conclusive upon the parties and the courts. If an instrument's language is unambiguous, the parties' intent is determined from the four corners of the instrument.
>
> If, however, a contract is ambiguous or uncertain, its meaning is determined by extrinsic evidence and its construction is a matter for the factfinder. When interpreting a written contract, the court should attempt to determine the parties' intent at the time the contract was made, which is ascertained by the language used to express their rights and duties. The contract is to be read as a whole when trying to determine the parties' intent. The court will make every attempt to construe the contractual language such that no words, phrases, or terms are rendered ineffective or meaningless. The court must accept an interpretation of the contract that harmonizes its provisions as opposed to one that causes its provisions to conflict.

[1] Celina filed a motion to strike portions of the appellees' brief, arguing that Indianapolis Roofing and NBS had cited to unpublished federal decisions and that such was disingenuous and misleading to this court. The appellees filed a response to the motion. The motions panel of this court held the matter in abeyance, leaving the resolution of this issue to the writing panel. We note that the appellees indicated in their table of authorities that such decisions were unpublished and used them to support their argument in the brief. We recognize that the questioned authorities have no precedential value and do not consider them in reaching our decision. We do not believe, however, that the appellees' use of those cases in its brief before this court warrants a sanction here, and we deny Celina's motion to strike under a separate order.

Niezer v. Todd Realty, Inc., 913 N.E.2d 211, 215-16 (Ind. Ct. App. 2009) (internal citations omitted), *trans. denied.*

Regarding the concept of subrogation, we have stated the following:

> Subrogation has been defined as the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its right, remedies, or securities. The right of subrogation has consistently been defined as follows: The right of subrogation is not founded upon contract, expressed or implied, but upon principles of equity and justice, and includes every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which, in good conscience, should have been paid by the latter. When an insurer claims a right through subrogation, it stands in the shoes of the insured and takes no rights other than those which the insured had.

Farm Bureau Ins. Co. v. Allstate Ins. Co., 765 N.E.2d 651, 656-7 (Ind. Ct. App. 2002) (internal quotations and citations omitted). The subrogation claim is subject to the same defenses that could have been asserted against the insured. *Cutter v. Classic Fire & Marine Ins. Co.*, 926 N.E.2d 1067 (Ind. Ct. App. 2010).

Each of the contracts entered into between the Church, Indianapolis Roofing, NBS, and CE & M incorporated the American Institute of Architects Document A201, concerning the General Conditions of the Contract for Construction. The following provisions are relevant to this appeal:

> 11.3 PROPERTY INSURANCE
>
> 11.3.1 Unless otherwise provided, the [Church] shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all

persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person other than the Owner has an insurable interest in the property required by this paragraph 11.3 to be covered, whichever is earlier. This insurance shall include interests of the [Church], the Contractor, Subcontractors, and Sub-subcontractors in the Work.

11.3.1.1 Property insurance shall be on an "all-risk" policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false work, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for the Construction Manager, Engineer, and Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

* * *

11.3.5 If during the construction period the [Church] insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the Construction period, the [Church] shall waive all rights in accordance with Paragraph 11.3.7 for damages caused by fire or other perils covered by this separate insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

* * *

11.3.7 Waivers of Subrogation. The [Church] and Contractor waive all rights against each other and against the Construction Manager, Architect, [the Church's] other Contractors and own forces described in Article 6, if any, and the subcontractors, sub-subcontractors, consultants, agents and employees of any of them, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this paragraph 11.3 or other property insurance applicable to the Work, except such rights as the [Church] and Contractor may have to the proceeds of such insurance held by the [Church] as a fiduciary. The [Church] or Contractor, as appropriate, shall require of the Construction Manager, Construction Manager's consultants, [Church's] separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar

> waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

Appellant's Appendix at 562-63.

In the Church's contract with NBS, the following paragraph appears:

> 10.4 Waivers of Subrogation. The [Church] and [NBS] waive all rights against each other and against the Contractors, Architect, consultants, agents and employees of any of them, for damages, but only to the extent covered by property insurance during the construction, except such rights as they may have to the proceeds of such insurance as set forth in the edition of AIA Document A201/CMa, General Conditions of the Contract for Construction, Construction Manager-Adviser Edition, current as of the date of this Agreement. The [Church] and [NBS] shall require similar waivers from their Contractors, Architect, consultants, agents and persons or entities awarded separate contracts administered under the [Church's] own forces.

Id. at 584. In addition, the Church's contract with CE & M contains the following provision:

> 9.4 To the extent damages are covered by property insurance during construction, the [Church] and Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement. The [Church] or the Architect, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

Id. at 600.

Celina argues that the trial court erred by finding and concluding that by way of contract the Church, waived all subrogation rights as to all damages covered by property insurance. The trial court found that the damages claimed by Celina were either to work,

subject to the terms of Section 11.3.7, or to adjoining or adjacent property, under Section 11.3.5. The trial court granted summary judgment in favor of Indianapolis Roofing, NBS, and CE & M because it concluded there were no categories of claimed damages that were not covered by 11.3.5 or 11.3.7. We agree with the trial court.

The unambiguous terms of the contracts at issue expressly provide for waivers of subrogation rights. Celina, who stands in the shoes of its insured, the Church, is entitled to nothing more than to which the Church would have been entitled. The Church expressly waived its rights to damages from work or damages to adjoining or adjacent property, each covered by property insurance. Moreover, the uncontroverted evidence establishes that the damage occurred during construction. Because the Church expressly waived its rights to recover from the defendants for those damages, Celina, as subrogee of the Church, cannot recover from any of the defendants for money it paid to the Church as its insured.

We agree with the trial court that whether the damages were from work, or the damages were to adjoining or adjacent property, the key is that subrogation rights were waived for real or personal property covered by property insurance. The contracts reflect an intent by the parties to place the risk of loss on insurance and not on the individual assets of the parties. Such was the case here, and Celina cannot recover against any of the defendants as a matter of law.

Our holding is consistent with earlier caselaw. Had Celina paid the Church under the builder's risk endorsement, a subrogation claim would be barred. For example, in *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284 (Ind. Ct. App. 1979), an action alleging negligent construction was brought against a lumber company. The construction agreement called for

the plaintiff to carry fire and windstorm insurance and for the lumber company to carry compensation and liability insurance. While acknowledging that there was a lack of unanimity of opinion on the issue in the authorities from other jurisdictions, we concluded that an agreement to provide insurance constitutes an agreement to limit the recourse of the party acquiring the insurance policy only to the proceeds under the policy even though the loss may be caused by the negligence of the other party to the agreement.

We adhered to that reasoning in *South Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc.*, 395 N.E.2d 320 (Ind. Ct. App. 1979). In *Shambaugh*, a school building sustained damage in a gas explosion and fire during the construction phase. The insurer paid the insured pursuant to its builder's risk insurance and then brought a subrogation claim against a subcontractor alleging negligence and seeking damages for the losses sustained by the insured. We held that by the terms of the contract, the school was limited in recovery for property damage to the proceeds of the insurance required to be carried under the contract, and not the individual assets of a negligent defendant.

Here, it is uncontroverted that Celina satisfied the Church's claims under the original CPI Policy. Thus, a subrogation action was barred by contract, under 11.3.5, as it was covered by separate insurance to adjoining and adjacent property, and would have been barred under 11.3.7, as it would have been covered by the builder's risk endorsement, also issued by Celina. And since the damages occurred during construction to property covered by property insurance, the subrogation action was also barred by contract under 9.4 as to CE & M, and under 10.4 as to NBS.

In addition, Celina challenges the portion of the trial court's order denying its motion for partial summary judgment instead ruling in favor of Indianapolis Roofing, NBS, and CE & M, upon finding that Celina had failed to offer any evidence demonstrating a breach of warranty through expert testimony or otherwise. The trial court found that the mere fact that the roof leaked did not support the inference that the cause of the leak was defective workmanship.

In order to establish a breach of warranty claim, a party must show (1) the existence of the warranty; (2) breach; (3) causation; and (4) damages. *Peltz Const. Co. v. Dunham*, 436 N.E.2d 892 (Ind. Ct. App. 1982). There is no dispute that Indianapolis Roofing provided a warranty for its work, and it is uncontroverted that the youth center and its contents sustained water damage. In support of its claim, Celina designated the affidavit of the Church's pastor in which he stated that there was a water leak at the location where the new roof connected with the existing roof of the youth center.

The trial court noted in its findings and conclusions that "[t]he mere fact that a roof leaks does not give rise to an inference that the cause of the leaks is defective workmanship." *Appellant's Appendix* at 12. Because there was a genuine issue of material fact regarding the cause of the leaks, which could have been caused by any number of reasons, the entry of summary judgment in favor of Celina would have been inappropriate. Summary judgment on this issue was entered in favor of Indianapolis Roofing because the claim was barred by the waiver of subrogation language contained in the contracts. The trial court did not err.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.