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IN THE
COURT OF APPEALS OF INDIANA

AMCO INSURANCE COMPANY and FARM BUREAU INSURANCE COMPANY,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 20A03-0703-CV-147
GLOBAL GROUP, INC., and JAY SHAH,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable James W. Rieckhoff, Judge
Cause No. 20D05-0511-CC-425

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-plaintiffs AMCO Insurance Company and Farm Bureau Insurance Company (collectively, the Insurers) appeal the trial court's grant of summary judgment in favor of appellees-defendants Global Group, Inc. (Global), and Jay Shah (collectively, the appellees). Specifically, the Insurers argue that the trial court erred by granting summary judgment in favor of the appellees because Global breached its lease with Pulp Products (Pulp) by not obtaining fire insurance and, thus, the Insurers should be entitled to assert their subrogation claim against the appellees. Concluding that the lease's subrogation waiver provision supersedes Global's breach and bars the Insurers' claim, we affirm the judgment of the trial court.

FACTS

On January 6, 2003, Global entered into a one-year lease agreement with Pulp for commercial property located in Elkhart (the property). Shah signed the lease as the guarantor. The lease provides, in relevant part:

> 4(d). That [Global] shall procure, maintain, and deliver to [Pulp] in companies to be approved by [Pulp] policies of fire, tornado, hazard, and extended risk insurance in an amount of not less than the full replacement value of the buildings and improvements, now or hereafter situated upon the real estate, which the parties agree to initially be a total of three hundred seventy five thousand Dollars . . . . [Global] shall pay all premiums on said policies as and when the same become due and payable . . . .
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> 6. Waiver of Subrogation. [Pulp and Global], and all parties claiming by, under or through them, hereby mutually release and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance to the extent of such insurance coverage in connection with property on or activities conducted on the Premises regardless of the cause of the damages or loss.
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> 8. Landlord's Right to Cure Defaults. [Pulp] may, but shall not be obligated to, cure at any time after thirty (30) days notice, any default by [Global] under this Lease; and whenever [Pulp] so elects, all costs and expenses incurred . . . shall be paid by [Global] to [Pulp] on demand.

Appellants' App. p. 25, 30.

Global admits that it did not "procure fire insurance on the property." Appellees' Br. p. 3. Pulp sent a letter to Shah in October 2003 informing him that Pulp had purchased insurance from the Insurers and requesting a check for $1,822 as "reimbursement for the insurance." Appellants' App. p. 59. Because Shah believed that Pulp could take the requested amount from Global's $3200 security deposit, he did not write a separate check to cover Pulp's insurance costs.

On November 24, 2003, a fire damaged the property. Ultimately, the Insurers paid Pulp $369,028.32 for the damage. On November 15, 2005, the Insurers filed a subrogation claim against the appellees, asserting that Global negligently caused the fire and that Shah was liable as the guarantor. The Insurers claimed that they were entitled to recover the money that Pulp had received because Global had breached its lease with Pulp by not insuring the property.

The appellees filed a motion for summary judgment on September 7, 2006, arguing that the lease's subrogation waiver provision barred the Insurers from bringing a subrogation claim against the appellees as a matter of law. The trial court held a hearing on November 14, 2006, and granted summary judgment in favor of the appellees on February 20, 2007. The Insurers now appeal.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Tack's Steel Corp. v. ARC Constr. Co., Inc., 821 N.E.2d 883, 888 (Ind. Ct. App. 2005). A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Am. Mgmt., Inc. v. MIF Realty, L.P., 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Although there may be genuine disputes over certain facts, a fact is material when its existence facilitates the resolution of an issue in the case. Id.

When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. Id. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999). We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. Sizemore v. Erie Ins. Exch., 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A

party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. Id. at 1038-39. A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. Bernstein v. Glavin, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000).

It is a court's duty to interpret a contract so as to ascertain the intent of the parties. McLinden v. Coco, 765 N.E.2d 606, 611 (Ind. Ct. App. 2002). When interpreting a written contract, the court will attempt to determine the intent of the parties at the time the contract was made by analyzing the language used in the contract to express the parties' rights and duties. Id. We review the interpretation of an unambiguous contract de novo. Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 100 (Ind. Ct. App. 1999).

II. Subrogation

There is no dispute that Global breached its lease with Pulp when it failed to obtain insurance. Consequently, the Insurers argue that the trial court erred when it granted summary judgment in favor of the appellees because the nature of Global's breach rendered the contract's subrogation waiver unenforceable.

Subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." Black's Law Dictionary 1467 (8th ed. 2004). When an insurer claims a right through subrogation, it stands in the shoes of the insured and takes no rights other than those rights the insured had. Farm Bureau Ins. Co. v. Allstate Ins. Co., 765 N.E.2d 651, 656-57 (Ind. Ct. App. 2002).

Subrogation rights can be waived. Baxter v. I.S.T.A. Ins. Trust, 749 N.E.2d 47, 56 (Ind. Ct. App. 2001).

We have previously held that "negligence and breach of contract do not supersede a waiver of subrogation." S.C. Nestel, Inc., v. Future Constr., Inc., 836 N.E.2d 445, 452 (Ind. Ct. App. 2005). In Nestel, Future—the general contractor—subcontracted with Nestel to build a warehouse. The parties' contract contained a subrogation waiver, which provided that "[Future] and [Nestel] waive all rights against each other . . . for damages caused by fire or other perils to the extent covered by property insurance provided under the General Conditions, except such rights as they may have to proceeds of such insurance." Id. at 448. The contract also provided that Nestel would not subcontract its obligations without Future's written consent.

Without obtaining Future's written consent, Nestel subcontracted with another party to build the warehouse. The warehouse collapsed while the sub-subcontractor was building it and, after obtaining damages from its risk insurance provider, Future reimbursed the warehouse owner. The insurance provider brought a subrogation claim against Nestel, arguing that Nestel's breach superseded the contract's subrogation waiver provision. Although the trial court granted summary judgment in favor of the insurance provider, we reversed on appeal, concluding that "in spite of any breach of contract or negligence by Nestel, the waiver of subrogation clause is controlling . . . ." Id. at 453. In so holding, we noted that "an agreement to insure is an agreement to provide both parties with the benefits of insurance." Id. at 450.

The parties here disagree about Nestel's application to the facts of this case. The appellees argue that "[a]lthough the nature of the breach here is different from the breach in Nestel, the reasoning of that decision still applies . . . ." Appellees' Br. p. 12. Conversely, the Insurers attempt to distinguish Nestel by arguing that Global's failure "to purchase the insurance which the parties anticipated would have covered both of them in case of a loss . . . forecloses its right to assert the waiver of subrogation clause." Appellants' Br. p. 6. Essentially, the Insurers argue that Global's failure to procure insurance renders the subrogation waiver provision unenforceable and that principles of equity demand that the Insurers be allowed to assert their claim.

Alternatively, the Insurers argue that they "had no knowledge of the waiver of subrogation clause and therefore did not have the opportunity to assess the entirety of their risk and bargain for an appropriate premium." Appellants' Br. p. 10. The Insurers did not make this argument to the trial court and cannot raise it for the first time on appeal. Gibson v. Neu, 867 N.E.2d 188, 197 n.2 (Ind. Ct. App. 2007).

The parties agree that Global did not procure insurance pursuant to paragraph 4(d) of the lease, that Pulp contracted with the Insurers to obtain property insurance, which paragraph 8 of the lease permitted, and that the property was subsequently damaged by fire. The subrogation waiver provision provides that Pulp, Global, and the Insurers—who attempt to make a claim through Pulp—"hereby mutually release and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance to the extent of such insurance coverage in connection with property on or

activities conducted on the Premises regardless of the cause of the damage or loss." Appellants' App. p. 30 (emphasis added).

The Insurers do not deny that the property was covered by insurance or that they paid Pulp almost $370,000 in damages pursuant to Pulp's insurance policy. Consequently, we conclude that the conditions of the subrogation waiver provision were satisfied because the Insurers' claim arises from a hazard that occurred on the property that was "covered by insurance." Id. The plain language of the subrogation waiver provision does not state that it only applies to hazards covered by insurance obtained by Global, and, notwithstanding the Insurers' arguments, we decline to read that term into the parties' negotiated lease. Therefore, the lease's subrogation waiver provision supersedes Global's breach and bars the Insurers' claim against the appellees, and the trial court did not err by granting summary judgment in favor of the appellees as a matter of law. While the Insurers invite us to create an exception to the general rule for cases where the breach involves a party's failure to procure insurance, they provide no persuasive authority for that proposition and, therefore, we decline this invitation.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.