

No. 1-17-1050

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDMUND LAPA d/b/a POLSKA KSIAZKA,)	Appeal from the Circuit Court
)	of Cook County,
Plaintiff-Appellant,)	
)	
v.)	No. 16 L 007810
)	
SENTINEL INSURANCE COMPANY, LIMITED,)	
)	Honorable
Defendant-Appellee.)	Raymond W. Mitchell,
)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s grant of summary judgment in favor of the insurer is affirmed. The undisputed facts demonstrated that the loss to the insured was caused by sewer backup resulting from the accumulation of surface water which is a “flood” and therefore not covered by the policy.

¶ 2 Plaintiff Edmund Lapa sought a declaration in the circuit court that defendant Sentinel Insurance Company owed coverage to him under his property insurance policy. Mr. Lapa submitted a claim to Sentinel for loss caused by water damage to his bookstore. After investigation, Sentinel denied coverage on the basis that the policy did not cover damage caused by surface water that led to sewer backup. On appeal, Mr. Lapa challenges the circuit court’s

grant of summary judgment in favor of Sentinel. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4

A. The Parties

¶ 5 Mr. Lapa owns a bookstore, Polska Ksiazka, located at 5747 West Irving Park Road. At the time of the loss, Edmund Lapa's son, Cezary Lapa, managed the bookstore. Edmund Lapa will be referred to as Mr. Lapa or as Edmund Lapa when necessary to distinguish him from his son, Cezary. Sentinel provided coverage to Edmund Lapa, as the named insured, under a business owner's special property insurance policy effective from August 3, 2012, through August 3, 2013.

¶ 6

A. The Policy

¶ 7 The business owner's policy included a "stretch endorsement," that provided as follows:

"A. The following changes apply to the Standard Property Coverage Form, Additional Coverages, A.4., or to the Special Property Coverage Form, Additional Coverages, A.5.

* * *

17. Sewer and Drain Back Up

The following Additional Coverage is added:

We will pay for direct physical loss of or physical damage to Covered Property solely caused by water that backs up from a sewer or drain. This coverage is included within the Covered Property Limits of Insurance.

THIS IS NOT FLOOD INSURANCE

We will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood. This applies regardless of the proximity

of the flood to Covered Property. Flood includes the accumulation of surface water, waves, tides, tidal waves, overflow of streams, or other bodies of water, or their spray, all whether driven by wind or not that enters the sewer or drain system.”

B. Procedural Background

¶ 8 On October 25, 2016, Mr. Lapa filed a first amended complaint seeking a declaration that Sentinel owed coverage to him, breached the insurance contract, and violated section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)) for “vexatiously and unreasonably” refusing to provide coverage to him under the insurance policy. Mr. Lapa alleged that, on April 17, 2013, “there was a weather event including storms which backed up the sewer system” and that this caused sewer water to backup into the basement of his bookstore. Mr. Lapa claimed that the sewer water contaminated his personal property, including his inventory of “rare and antique Polish language books” that he sold at the bookstore. Mr. Lapa also claimed the sewer water damaged the heating system, other personal property, caused mold and fungi damage, and resulted in a loss of business income. Mr. Lapa alleged that he submitted a proof of loss statement to Sentinel on May 18, 2013, and that Sentinel denied coverage on November 3, 2014. Mr. Lapa requested indemnification for the loss of the books, the damage to the heating system, and other personal property in excess of \$120,000.

¶ 9 The parties filed cross-motions for summary judgment. Sentinel argued in its motion that Mr. Lapa was not entitled to coverage under the stretch endorsement because the damage to his property was caused by a sewer or drain backup resulting from a flood, and flood damage was explicitly not covered by the endorsement. Sentinel also argued that Mr. Lapa could not claim coverage under the policy because the water damage was not *solely* caused by a sewer backup,

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which was required by the endorsement. In Mr. Lapa's motion, he argued that the water damage was covered under the endorsement because the loss was solely caused by a sewer backup, not a "flood" or "surface water."

¶ 10 In support of their motions for summary judgment, the parties attached depositions and reports from the following individuals: Mr. Lapa's son, Cezary Lapa; Lawrence Hageman, an investigator sent by Sentinel to the bookstore to determine the cause of loss; Sentinel representative Jordan Alton; Pawel Opiola, a plumber retained by Mr. Lapa to "opine *** whether the water damage was caused by flood or sewer and drain backup"; and Dr. Weizhe An, a hydrologist retained as an expert by Mr. Lapa.

¶ 11 In his deposition, Cezary Lapa recounted that a large rainstorm hit the Chicago area around April 17, 2013. Cezary testified that when he opened the bookstore on April 19, 2013, he discovered a large amount of water in the basement, where many valuable books and other things were stored. Cezary reported the incident to Sentinel, and on April 24, 2013, Sentinel sent Larry Hageman to investigate the claim. Cezary testified that he told Mr. Hageman that water came in from the sewer and flooded the basement. Cezary denied making any statements that water seeped in from the front door or any other part of the building.

¶ 12 Lawrence Hageman testified in his deposition that he prepared a report detailing the insurance claim for Sentinel, and that he took photographs of the damage for the report. Mr. Hageman stated that the water line in the basement reached as high as 34 inches in some areas. According to Mr. Hageman's report and testimony, Cezary did tell Mr. Hageman, on the day of the investigation, that some water seeped through the front door and that there was water all over the exit near the exterior basement door. Mr. Hageman testified that "the damage was very heavy on the front door and very heavy at the back door in the basement" and that this led to his

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classification of the damage as being caused by surface water. Mr. Hageman testified that he was not involved in the decision to deny coverage.

¶ 13 Jordan Alton, a property claims supervisor, was designated as Sentinel's representative to testify about the decision to deny Mr. Lapa's claim. Mr. Alton stated that Sentinel reviewed Mr. Hageman's report and photos and conducted its own weather research from which it determined that the Chicago area had 2 inches of rain on April 17, 2013, and 3.5 inches on April 18, 2013. Mr. Alton confirmed that he reviewed the letter from Mr. Opiola that Mr. Lapa had submitted in support of his claim.

¶ 14 In Dr. An's deposition, he stated that the most likely cause of the water damage was a sewer backup. Dr. An stated that, in his opinion, the most likely cause of the backup was "too much rainfall on the street" and the limited capacity of the sewer to carry all of the water away. Dr. An also speculated that a downstream sewer clog could have also contributed to the sewer backup, but stated that he had no actual knowledge of such a clog. Dr. An did not rule out that some water may have come into the basement from other areas besides the sewer, but stated that, in his opinion, such water was likely a small percentage of the amount of water flooding the basement. Dr. An's report said that, based upon the photos taken by the insurance company and Mr. Opiola's report, "I truly believe water came from the sewer backup."

¶ 15 Mr. Opiola stated in his report that "the rainwater from the downspouts (that flowed into the drains) was being pushed back into the property from the sewer main thru [*sic*] the buildings floor drains located in the basement." Mr. Opiola noted that when sewers are at capacity or otherwise clogged, heavy rains can lead to a sewer backup.

¶ 16 On March 23, 2017, the circuit court denied Mr. Lapa's motion for summary judgment and granted summary judgment in favor of Sentinel. The court declared that the loss suffered by

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Mr. Lapa was not covered under the endorsement. The court held that the endorsement's definition of "flood," which was excluded from coverage, involved an accumulation of surface water from heavy rains, which is what the evidence demonstrated caused Mr. Lapa's loss.

¶ 17

II. JURISDICTION

¶ 18 Mr. Lapa timely filed his notice of appeal on April 21, 2017. This court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan 1, 2015).

¶ 19

III. ANALYSIS

¶ 20 This case was decided on cross-motions for summary judgment. "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). Where, as here, the parties have filed cross-motions for summary judgment, "they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28 (2012). "A circuit court's ruling on a motion for summary judgment is reviewed *de novo*." *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 18.

¶ 21 The construction of an insurance policy is also subject to *de novo* review. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292-93 (2001). The primary objective is "to ascertain and give effect to the intentions of the parties as expressed in their agreement." (Internal quotation marks omitted.) *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). "Policy terms that limit an insurer's liability will be liberally construed in favor of coverage, but only if the policy is ambiguous." *Abram v. United Services Automobile*

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Association, 395 Ill. App. 3d 700, 703 (2009).

¶ 22 We construe the policy as a whole, giving effect to every provision and applying unambiguous policy language as written. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362 (2006). “Under general rules of construction, where policy provisions are unambiguous, the court must give the words of the provisions their plain and ordinary meaning.” *Indiana Insurance Co. v. Liaskos*, 297 Ill. App. 3d 569, 573 (1998). “A policy term is not ambiguous simply because a term is not defined within the policy.” *Id.* “Ambiguity exists in an insurance contract if the language is subject to more than one reasonable interpretation, but we will not strain to find an ambiguity where none exists.” *Abram*, 395 Ill. App. 3d 700, 703. Mr. Lapa, as the insured, has the burden to prove that his claim falls within the policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

¶ 23 Mr. Lapa argues that the circuit court erred in denying him coverage because the water that damaged the bookstore was not from a “flood” as that term has been defined by this court. He also argues that the “surface water” that entered the sewer system ceased to be surface water once it left the surface and entered the sewer system.

¶ 24 “Flood” is not a defined term in the policy and Mr. Lapa asks that we define it as “water that escapes from a watercourse in large volumes and flows over adjoining property in no regular channel,” which is how we defined it in *Wallis v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 566, 572 (2000) (citing Black’s Law Dictionary 1585 (7th ed. 1999)). Mr. Lapa argues that the water in his bookstore could not be from a “flood” because there was no body of water at or near the bookstore. But Illinois courts have recognized that a flood does not necessarily involve the overflow from a body of water. For example, in *Whitt v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 658, 662 (2000), we recognized that a flood could also be “an inundation of

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water over land not usually covered by it.” *Id.* (citing Black’s Law Dictionary 640 (6th ed. 1990)).

¶ 25 Moreover, as Mr. Lapa acknowledges, while “flood” is not a defined term under the policy, the endorsement makes clear that a “flood,” for purposes of the endorsement, includes “the accumulation of surface water *** that enters the sewer or drain system.” There can be no doubt that the water that accumulated from the heavy rain in this case and damaged Mr. Lapa’s bookstore was “surface water,” and therefore fell within the term “flood” as it is used in this endorsement.

¶ 26 Illinois courts have defined “surface water” as “water that (1) derives from natural precipitation such as rain or melting snow; (2) flows over or accumulates on the surface of the ground; and (3) does not form a definite body of water or follow a defined watercourse.” *Smith v. Union Automobile Indemnity Co.*, 323 Ill. App. 3d 741, 748 (2001). Mr. Lapa offers the definition of surface water as “water on the surface of the ground without a defined source, of a temporary and limited nature, so as not to constitute a stream.” (citing *Wilson v. National Automobile & Casualty Insurance Company*, 22 Ill. App. 2d 34, 38 (1959)).

¶ 27 Under either of these definitions, the water that entered the sewer system in April 2013 was “surface water.” Jordan Alton testified that Sentinel’s weather research concluded that the Chicago area had 2 inches of rain on April 17, 2013, and 3.5 inches on April 18, 2013. Both of Mr. Lapa’s experts, Dr. An and Mr. Opiola, agreed that the heavy rainfall was the cause of the sewer backup. Dr. An stated that there was “too much rainfall on the street” and that the limited capacity of the sewer led to the backup. Mr. Opiola stated in his report that “the rainwater from the downspouts (that flowed into the drains) was being pushed back into the property from the sewer main thru the buildings floor drains located in the basement.” There was simply no dispute

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that the heavy rains caused surface water that led to the sewer backup and subsequent water damage.

¶ 28 While Dr. An speculated that a downstream sewer clog could have contributed to the sewer backup, he stated that he had no actual knowledge of such a clog. “Mere speculation, conjecture, or guess is insufficient to withstand summary judgment.” *Sorce v. Naperville Jeep Eagle*, 309 Ill. App. 3d 313, 328 (1999) (citing *Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill. App. 3d 872, 874 (1992)). Dr. An’s testimony is simply insufficient to create any factual issue.

¶ 29 Mr. Lapa argues that the “surface water” ceased to be “surface water” once it entered the drainage system. Mr. Lapa cites Couch on Insurance, which says that surface water generally loses its character and is no longer “surface” water once it joins a body of water, is absorbed into the land or flows into a sewer pipe. 11 Couch on Insurance 3d § 153.57 (1995). Thus, an exclusion in an insurance policy for damage from “surface water” would not apply if, for example, the surface water was channeled into an incomplete storm water collection system from which it damaged the insured’s property. *Id.* (citing cases).

¶ 30 However, the stretch endorsement in this case made it expressly clear that there was no coverage if damage was caused by surface water “that enters the sewer or drain system.” Thus, under the policy, the only question is whether the water was “surface water” at the time it entered the sewer system. The rain water that caused the damage to Mr. Lapa’s bookstore was surely surface water at the time it entered the sewer or drain system and it was, accordingly, not covered by the stretch endorsement as water that backs up from a sewer or drain.

¶ 31 As Sentinel points out, even if there were a factual issue as to whether the sewer back up was caused by a “flood,” Mr. Lapa also has the burden of proving that his loss was *solely* caused by sewer backup, because the clear language of the endorsement states that “[w]e will pay for

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direct physical loss of or physical damage to Covered Property *solely* caused by water that backs up from a sewer or drain.” (Emphasis added.) The trial court found it unnecessary to reach this issue, but it is clear that this is an additional reason that Mr. Lapa is not entitled to coverage.

¶ 32 Lawrence Hageman, Sentinel’s claim investigator detailed water damage that appeared to enter the premises from places other than the sewer. In particular, Mr. Hageman testified that “the damage was very heavy on the front door and very heavy at the back door in the basement,” leading him to conclude that the water entered the premises from these points as well. No contrary evidence was presented. Dr. An did not rule out that a small percentage of the water that entered the basement came from sources other than the sewer. While Cezary Lapa denied making any statement to Mr. Hageman that water had entered from sources other than the sewer, Mr. Lapa did not present any evidence to dispute the testimony that water had entered his store from other sources. Thus, we also affirm the circuit court on the alternative basis that the undisputed facts demonstrated the bookstore damage was not caused *solely* by sewer backup.

¶ 33

IV. CONCLUSION

¶ 34 For the reasons stated above, we affirm the circuit court’s order granting summary judgment in favor of Sentinel.

¶ 35 Affirmed.