

2015 IL App (1st) 143576U

Sixth Division

Filed: September 4, 2015

No. 1-14-3576

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 DISTRICT

CHICAGO TITLE LAND TRUST NO.	)	Appeal from the Circuit Court
800234943; and BROADMOOR	)	of Cook County.
PARTNERS, LLC, an Illinois limited liability	)	
company,	)	
	)	
Plaintiffs/Counterdefendants-Appellants,	)	
	)	
v.	)	No. 12 CH 23003
	)	
	)	
CATLIN SPECIALTY INSURANCE	)	Honorable
COMPANY,	)	Franklin U. Valderamma,
	)	Judge Presiding.
Defendant/Counterplaintiff-Appellee.	)	
	)	

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: Summary judgment for the defendant is affirmed, where the plaintiffs failed, as a matter of law, to establish that they were entitled to coverage under the flood coverage endorsement of the policy issued by the defendant.

¶ 1 The plaintiffs, Chicago Title Land Trust No. 800234943, and Broadmoor Partners, LLC, filed suit against their insurer, Catlin Specialty Insurance Co. (Catlin), after Catlin denied coverage to the plaintiffs for internal water damage to the plaintiffs' building caused by a heavy rainfall. The circuit court entered summary judgment on behalf of Catlin, finding that coverage was unambiguously barred under the water damage exclusion of the policy issued by Catlin, and that the policy's flood coverage endorsement did not apply to the plaintiffs. The plaintiffs now appeal, arguing that they were entitled to coverage under the flood coverage endorsement, and that the endorsement superseded the water damage exclusion. For the reasons that follow, we affirm.

¶ 2 The following facts are taken from the pleadings, depositions and affidavits on file. Chicago Title Land Trust No. 800234943 (the Trust) was the holder of legal title to a building located at 7600 North Bosworth in Chicago (hereinafter Bosworth property or building). The building consisted of approximately 90 apartments with commercial space on the first floor. Broadmoor Partners was the beneficiary of the Trust and a beneficial owner of the building. Dennis Sopcic and Lou Sopcic were the principals and managers of Broadmoor Partners.

¶ 3 On August 4, 2010, the plaintiffs submitted an application for commercial insurance coverage for the Bosworth premises through an insurance wholesaler, USG Insurance Services, Inc. (USG). The application was prepared on the plaintiffs' behalf by Michael Zisook, an insurance agent affiliated with Total Insurance Services, and submitted by Total Insurance to USG. USG subsequently received an offer of coverage or "quote" for the premises from Catlin. After various revisions, the insurance policy offered by Catlin was accepted by the parties. A binder confirmation was prepared for the policy and tendered to the plaintiffs. The binder included the term "Cause of Loss: ISO Special Form (Excluding Flood and Earthquake)." It

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was undisputed by the parties that Total Insurance did not apply for flood or earthquake coverage for the building.

¶ 4 On November 3, 2010, USG sent the complete Catlin policy for the building to Total Insurance which forwarded it to Broadmoor Partners, to the attention of Dennis Sopcic. Coverage under the policy extended from the period of September 28, 2010, through September 28, 2011. The policy was comprised of a series of endorsements, exclusions and forms. It included a "Schedule of Forms and Endorsements" which listed, among various other items, a "Schedule of Sublimits," a "Water Exclusion Endorsement," "Flood Coverage Endorsement," and an "Earthquake and Volcanic Eruption Endorsement" (earthquake endorsement). Each of these endorsements was included in the policy contained in the record on appeal.

¶ 5 The policy contained the following relevant provisions:

A. Coverage. We will pay for direct physical loss of or damage to Covered Property at the premises *described in the Declarations caused by or resulting from any Covered Cause of Loss.* (Emphasis added.)

The Commercial Property Declarations form (declarations) identified the insurer as Catlin, the insureds as the Trust and Broadmoor Partners, and the address of the covered premises as 7600 N. Broadmoor. The declarations contained the following relevant tables:

COVERAGE PROVIDED						
Premises Number	Building Number	Covered Cause of Loss	Limit of Insurance	Coverages	Coinsurance	Valuation
1	1	Special	BUILDING	8,660,000	AA	RC
1	1	Special	BUSINESS INCOME	960,000	AA	ALS
1	1	Special	ORD/LAW A	1,000,000	AA	RC
1	1	Special	ORD/LAW B/C (EACH 1,000,000)	1,000,000	AA	RC

ALL COVERED PROPERTY IN ANY ONE OCCURRENCE	\$
SEE ATTACHED SCHEDULE OF SUB LIMITS IMCP 300	

The Schedule of Sublimits, which specifically referenced the names of the plaintiffs as the insured, the policy number, and the dates of coverage, included the following relevant tables:

FLOOD	
LIMIT OF INSURANCE	
\$ _____	Per Occurrence
\$ _____	Aggregate
Deductible: \$	

ORDINANCE OF LAW COVERAGE A	
LIMIT OF INSURANCE	
\$1,000,000	Per Occurrence
Deductible: \$5,000	

A third limit of insurance table was included for "Earthquake" coverage, which was left blank in the same manner as was that of "Flood" coverage.

¶ 6 The policy contained a "Causes of Loss – Special Form," which stated that, when the term "Special" is shown in the declarations, "covered causes of loss" means risks of direct physical loss unless such loss is "[e]xcluded in Section B." Section B included an exclusion for "Water" damage. The policy also included a separate "Water Exclusion Endorsement" (water exclusion), which amended and expanded upon the exclusion in Section B. The water exclusion stated in pertinent part as follows:

"B. Water

1. Flood, surface water, waves *** overflow of any body of water *** whether or not driven by wind ***;

3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

The water exclusion further stated that "this exclusion applies regardless of whether any of the above *** is caused by an act of nature or is otherwise caused."

¶ 7 Finally, the policy included two identical copies of a Flood Coverage Endorsement (flood endorsement).

The flood endorsement stated, in relevant part, as follows:

"B. This endorsement applies to the Covered Property and Coverages *for which a Flood Limit of Insurance is shown in the Flood Coverage Schedule or in the Declarations.* (Emphasis added).

C. Additional Covered Cause of Loss:

The following is added to the Covered Causes of Loss:

Flood, meaning a general and temporary condition of partial or complete inundation of normally dry land areas due to:

1. The overflow of inland or tidal waters;
2. The unusual or rapid accumulation or runoff of surface waters from any source; or
3. Mudslides or mudflows which are caused by flooding as defined in C.2 above. For the purpose of this Covered Cause Of Loss, a mudslide or mudflow involves a river of liquid and flowing mud on the surface of normally dry land areas as when earth is carried by a current of water and deposited along the path of the current.

All flooding in a continuous or protracted event will constitute a single flood.

D. Exclusions, Limitations And Related Provisions

1. The Exclusions and Limitation(s) sections of the Causes Of Loss Form *** apply to coverage provided under this endorsement except as provided in D.2 *** below.

2. To the extent that a part of the Water Exclusion might conflict with coverage provided under this endorsement, that part of the Water Exclusion does not apply."

¶ 8 On July 30, 2011, flood waters backed up through the drains of the Bosworth property's plumbing system and into the building, causing damage to the offices, retail space and residences on the first and second floors. On August 4, 2011, the plaintiffs made a claim for the damage under the policy, documenting a loss to the subject property in the amount of \$182,367. On November 22, 2011, Joseph Grandys, an adjuster on behalf of Catlin, sent correspondence to the plaintiffs denying coverage for the claim on the basis of the policy's water exclusion. Zisook sent Grandys an email contesting the denial of coverage, and referring Grandys to the flood endorsement. In response, Grandys acknowledged that he was aware of the existence of the flood endorsement, but stated "I have been previously informed that the attached [flood endorsement] form was added to the policy schedule in error and that no flood coverage was intended or extended in this policy." Zisook replied that he had never been made aware of any such error.

¶ 9 On June 14, 2012, the plaintiffs filed suit against Catlin seeking a declaratory judgment that they were entitled to coverage for the damage to the building under the policy's flood endorsement. They also sought damages resulting from Catlin's denial of coverage. In response,

Catlin filed an answer, affirmative defenses and counterclaim, asserting that the policy did not cover any portion of the plaintiffs' claim for the July 30, 2011 occurrence. Catlin argued that the claim was precluded under the water exclusion, and that the two copies of the flood endorsement were included in the policy in error, and no such coverage was ever intended by the plaintiffs or extended to them by Catlin.

¶ 10 On January 30, 2014, Catlin filed its motion for summary judgment alleging that the plaintiffs' claim for coverage is barred under the water exclusion endorsement. With regard to the flood endorsement, Catlin argued that it is applicable only when a "Flood Limit of Insurance" is shown in the coverage schedule or the declarations. As there was no amount shown, the plaintiffs did not have flood insurance.

¶ 11 In support of its motion, Catlin offered the affidavit of Donna Restaino, one of its underwriters at the time of the policy. Restaino stated that when the plaintiffs applied for insurance on August 4, 2010, their application requested a commercial property policy with coverage for "special" causes of loss, meaning certain risks of direct physical loss, excluding damage caused by flood/water and earthquake/earth movement. The "quote" tendered by Catlin for the Bosworth premises reflected "ISO Special Form (excluding Flood & Earthquake)" coverage. Restaino averred that, after the plaintiffs accepted the quote, a binder confirmation was issued by Catlin containing the same description. According to Restaino, the plaintiffs' policy as issued did not include flood coverage. Although an option existed for modified flood coverage upon application by an insured or its agent, such a process "would be subjected to underwriting review and proper use of the forms."

¶ 12 The plaintiffs filed a cross-motion for summary judgment, contending that they were covered under the flood endorsement and that this endorsement "trumps" the application of the

water exclusion. The plaintiffs maintained that the version of the policy relied upon by Catlin in its summary judgment motion was not the same version of the policy that was issued to the plaintiffs. Specifically, they maintained that the policy they received failed to include, "among other things, a Schedule of Forms and Endorsements, *** [or] a Schedule of Sub-limits."

¶ 13 The plaintiffs' motion was supported by the affidavits of Zisook and Dennis Sopcic. In his affidavit, Zisook stated that he learned during the application process that Catlin did not offer sewer backup service and that the application "identified a form" which excluded flood and earthquake coverage. Zisook was aware that, in some instances, a flood endorsement from the "federal flood insurance program" could provide coverage for damage caused by sewer backups attributable to flooding conditions. However, according to Zisook, after reviewing the subject policy, he saw no need to procure such coverage. Zisook acknowledged that the policy received by Total Insurance from USG on November 3, 2010, consisted of a series of separate forms, endorsements, policy conditions and exclusions; however, neither he nor Total Insurance had any role in compiling the forms. According to Zisook, the "Schedule of Sublimits" was not among the forms included in the policy he received from Catlin. Finally, Zisook acknowledged that, in his experience as an insurance agent, he had "often seen instances in which insurance companies provide endorsements supplementing coverages not specifically requested in the original application, for marketing and other reasons."

¶ 14 According to Sopcic's affidavit, several weeks prior to the incident of July 30, 2011, he had become concerned about coverage for water damage to the Bosworth property because of construction activity taking place on the sidewalk and street just outside of the building. He requested that Zisook confirm the existence of flood coverage for the subject property. In Zisook's affidavit, he averred that he complied with Sopcic's request by "having USG email to

[Zisook] a copy of one of the flood coverage endorsements" on July 25, 2011. Zisook then confirmed the coverage to Dennis.

¶ 15 On June 25, 2014, the circuit court entered an opinion and order that granted summary judgment for Catlin, denied the plaintiffs' summary judgment motion, and dismissed the case. The court found that the water exclusion of the policy unambiguously barred coverage for the damage claimed by the plaintiffs. With regard to the plaintiffs' assertion that they had never been provided with the schedule of sublimits, the court found that the plain language of the policy would have alerted them to that document's existence and importance.

¶ 16 The plaintiffs' subsequently filed a motion for reconsideration under section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2010)), arguing that the circuit court failed to consider an additional provision articulated in the flood endorsement. Specifically, the plaintiffs referred to section G.1, which stated generally that, if a flood limitation of coverage is not shown in the declarations or schedule of limitations, then the "limit applicable to fire also applies to flood." The court denied the motion on its merits, and the instant appeal followed.

¶ 17 Summary judgment is an appropriate means to dispose of an action where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The construction of an insurance contract and a determination of the parties' rights thereunder are questions of law which are proper for resolution by summary judgment. *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993); *Outboard Marine*, 154 Ill. 2d at 102. On appeal from the grant of summary judgment, this court's function is to determine whether the circuit court correctly found that no genuine issue of material fact existed and that judgment for the moving party was proper as a matter of

law. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993). Our review is *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶ 18 The plaintiffs argue that the court erred in granting summary judgment for Catlin based upon the determination that the policy's water damage exclusion bars coverage for the damage to their building. Rather, they contend that they are entitled to coverage under the flood endorsement, which, by its express terms, supersedes the water exclusion. In response, Catlin argues that the plaintiffs never sought or obtained flood coverage, that the flood endorsement form was included with the policy inadvertently, and that the terms of the policy establish that the flood endorsement is inapplicable to the plaintiffs. We agree with Catlin.

¶ 19 When construing the language of an insurance policy, our primary objective is to ascertain and give effect to the intentions of the parties as expressed by the words of the policy. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007); *Crum and Forster*, 156 Ill. 2d at 391. Because we must assume that each provision was intended to serve a purpose, we construe the policy as a whole, giving effect to every provision. *Id.* We also take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Id.*; *Outboard Marine*, 154 Ill. 2d at 108. If the words used in the policy are clear and unambiguous, they will be afforded their plain and ordinary meaning and enforced as written; we will not search for ambiguity where none exists. *Rich*, 226 Ill. 2d at 371; *Crum and Forster*, 156 Ill. 2d at 391. Where a provision purports to exclude coverage, we read it narrowly and will apply it only where its terms are clear, definite, and specific. An ambiguous policy provision will be construed against the insurer and liberally in favor of coverage; however, this rule comes into play only upon a finding of such ambiguity. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). Finally, we will not interpret an insurance policy in such a

way that any of its terms are rendered meaningless or superfluous. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 466 (2010).

¶ 20 Initially, the parties do not dispute that the occurrence giving rise to the plaintiffs' claim would be encompassed under the policy's water exclusion. The "Causes of Loss – Special Form" clearly states that, where the declarations section of a policy identifies "special" risk coverage, the water exclusion applies to exempt any damage from "flood [and] surface water" or "water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment." In the declarations section of the plaintiffs' policy, the coverage table unequivocally identifies such "special" coverage. There is no dispute that the damage in this case resulted from flood or surface water coming up through the building's drain system. The water exclusion therefore applies to the plaintiffs' claim.

¶ 21 The flood endorsement, by contrast, establishes coverage as an "additional covered cause of loss" for "flood" due to "the unusual or rapid accumulation of surface waters." According to the plaintiffs, this endorsement supersedes the water exclusion based on the following provision: "[t]o the extent that a part of the Water Exclusion might conflict with coverage provided under this endorsement, that part of the Water Exclusion does not apply."

¶ 22 Based upon the language of the flood endorsement, it is clear that, where that endorsement applies, it would prevail over any inconsistent terms in the water exclusion. However, the plaintiffs here have failed to show that the flood endorsement was part of their policy in the first instance. Our supreme court has long held that the burden rests with the insured to prove that its claim falls within the coverage of its policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Once the insured has demonstrated coverage, the burden shifts to the insurer to prove the application of a limitation or exclusion. *Id.* at 453-54; *Erie Insurance*

Exchange v. Compeve Corp., 2015 IL App (1st) 142508, ¶ 18. While there is no Illinois case directly on point, the general rule is that, after the insurer has proven that a valid exclusion to coverage exists, the burden shifts back to the insured to prove that an "exception to [the] exclusion" restores coverage. *Id.* at ¶ 19, citing *Santa's Best Craft, LLC v. St. Paul Fire & Marine Insurance Co.*, 611 F.3d 339, 347 (7th Cir. 2010); see also 17A Steven Plitt et al., *Couch on Insurance* § 254:13 (3d ed. 2014). Here, we are presented with a flood endorsement which, if applicable, provides an exception to the water exclusion. We therefore hold that it was the plaintiffs' burden to establish the applicability of the flood endorsement. They have failed in that burden.

¶ 23 As this case is in the procedural posture of summary judgment, we assume that the flood endorsement was included with the policy by Catlin as a matter of course rather than accidentally. Nonetheless, the endorsement states clearly and unambiguously that "[t]his endorsement applies to the Covered Property and Coverages *for which a Flood Limit of Insurance is shown in the Flood coverage Schedule or in the Declarations*" (emphasis added). A similar restriction is found both in the earthquake and "Ordinance or Law" endorsements, which were undisputedly also included with the plaintiffs' policy. However, in the plaintiffs' policy, the declarations coverage table contains no reference to flood coverage, nor does the word "flood" appear in the boxes assigning the respective "limit[s] of insurance." Also, in the policy's schedule of sublimits, the "flood" and "earthquake" tables are left blank, while the "ordinance or law" table designates a \$1,000,000 limit of insurance and a \$5,000 deductible.* A review of the

* The plaintiffs argued in the trial court that the Schedule of Sublimits was not included in the policy they received from Catlin. They appear to have abandoned this position on appeal, and we therefore refrain from addressing it.

"building and personal property coverage form" further demonstrates that, in general, coverage under the policy is restricted to property for which a limit of insurance appears in the declarations. As there is no reference to flood coverage in any of the essential policy documents, and the flood endorsement appears contingent upon some specific reference to such in those documents, we conclude that, as a matter of law, flood protection was neither properly attached to nor contemplated under this policy. It is well-established that an insured has a duty to read its policy and bring any discrepancies in the desired coverage to the insurer's attention upon receipt of the policy. See, *e.g.*, *Garrick v. Mesirow Financial Holdings, Inc.*, 2013 IL App (1st) 122228, ¶ 49. It is insufficient under the facts of this case to presume flood coverage merely because the flood endorsement form was included with the policy. To do so would render meaningless the express representations in the declarations as well as in the schedule of sublimits.

¶ 24 The plaintiffs nonetheless maintain that Sopcic had been assured by USG several weeks before the occurrence that the plaintiffs were insured against flood damage. Sopcic stated in his affidavit that in July of 2011, he had become concerned about potential flooding around the building. According to Zisook's affidavit, Zisook addressed Sopcic's concern by "having USG email to [Zisook] a copy of one of the flood coverage endorsements."

¶ 25 The plaintiffs do not specify who from USG emailed Zisook the copy of the flood endorsement. Regardless, this argument must fail. Zisook presumably received the same endorsement already issued with the policy in November of 2010. It was undisputed that, when the plaintiffs applied for the policy, they did not seek flood coverage. The flood endorsement, by its express terms, was applicable only where flood coverage was designated in the declarations or the limitation of coverage schedule. It could also be confirmed with a simple examination of

the declarations form. Nonetheless, Zisook took no further action to check the declarations to verify the requested coverage.

¶ 26 The plaintiffs finally argue that, as stated in their motion to reconsider, the trial court failed to consider language appearing in section G.1 of the flood exclusion which demonstrates that they were entitled to coverage. That language states as follows:

"G. Limits Of Insurance

1. General Information

Flood Coverage may be written at a Limit of Insurance that is equal to or less than the Limit of Insurance which applies to other Covered Causes of Loss (e.g., Fire) under this Commercial Property Coverage Part.

The Limit of Insurance for Flood is shown in the Flood Coverage Schedule or in the Declarations. *If such Limit is not shown, then the Limit applicable to Fire also applies to Flood.*" (Emphasis added.)

¶ 27 The plaintiffs claim that the plain meaning of this section was that, if no limit of insurance for flood appeared in the declarations or the schedule of sublimits, the limit was not zero, but whatever limited was "applicable to Fire." We disagree.

¶ 28 The above section, which appears near the end of the flood endorsement form, authorizes the establishment of limits of coverage for flood; it does not purport to assign coverage where the endorsement is inapplicable in the first instance. As stated previously, there was no indication whatsoever in the declarations of this policy that the plaintiffs had obtained coverage under the flood endorsement. Further, we agree with the trial court that the declarations fail to designate any limit for loss caused by fire. Therefore, even if the plaintiffs' interpretation of this clause had

merit, there would be no way to ascertain a limit for flood coverage based upon the policy before this court. The plaintiffs' interpretation of the above section is misplaced, and fails to show that they are covered under the flood endorsement.

¶ 29 For the foregoing reasons, we affirm the decision of the circuit court granting summary judgment for Catlin and denying the plaintiffs' motion to reconsider.

¶ 30 Affirmed.