

[Cite as *Cooney v. Nationwide Mut. Ins. Co.*, 2011-Ohio-105.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94690

BRENDAN COONEY

PLAINTIFF-APPELLANT

vs.

NATIONWIDE MUTUAL INS. CO., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-678484

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 13, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Brendan Cooney (“Cooney”), appeals the trial court’s decision that granted Nationwide Mutual Insurance Co.’s (“Nationwide”) motion for summary judgment on his claim for breach of contract arising from his insurance claim. Nationwide has submitted a cross-assignment of error alleging the trial court erred by determining that coverage was triggered by the theft of property that was being stored in the insured building. For the reasons that follow, we sustain appellant’s

assignment of error, overrule the cross-assignment of error, and reverse and remand for further proceedings.

{¶ 2} Cooney inherited a warehouse from his father, which contained valuable brass fittings that were sold as part of the family's business. Cooney purchased an insurance policy from Nationwide in 2002 to cover the warehouse; specifically a "Blanket Protector" commercial property policy (the "Policy").¹ At that time, Cooney primarily utilized the warehouse to store equipment but it also contained hydraulic fittings and valving. Cooney testified that he informed his insurance agent that there was inventory, which included copper, brass, and metal fittings, in the warehouse, which he valued at approximately \$100,000.00. It was Cooney's understanding and intent that the Policy provided coverage on both the equipment and inventory that was in the warehouse. Cooney recalled specifically requesting his agent to secure "contents insurance" on the warehouse, he testified:

{¶ 3} "What good is it if the building burns down and everything you have inside is lost? It is like insuring your house and not insuring your personal belongings."

¹Cooney operated his own contracting business out of his home and had secured different insurance policies from Nationwide to cover that enterprise. He also purchased a variety of other insurance policies from Nationwide to cover his home, vehicles, and rental properties. However, none of these policies are at issue in this case.

{¶ 4} Cooney allowed a friend/employee, Thomas Ginley (“Ginley”), to sleep in the warehouse on a few occasions in the winter of 2007. Each time, Cooney merely granted Ginley permission to sleep there and would retrieve the key from him. Ginley’s employment with Cooney had ended by February or March of 2007. In July 2007, however, Ginley was sighted on the warehouse premises, after which Cooney discovered Ginley had stolen valuable brass fittings from the warehouse.

{¶ 5} Cooney testified that Ginley removed the fittings from the warehouse without his permission. Cooney reported the theft to Nationwide and the Cleveland police. The last time Cooney had employed Ginley was around February or March of 2007. Prior to that time, Cooney said he would at times let Ginley have access to the warehouse in order “to get out of the cold.” This would occur for “a single night or a day” and Cooney “would get [the key] back from him.”

{¶ 6} In July of 2007, a maintenance worker contacted Cooney to advise him that Ginley was in the warehouse when “he was not supposed to have any access.” Cooney said, Ginley “was not working for [him] at the time, and [Ginley] went ahead and he must have stole a key.”

{¶ 7} Cooney went to the warehouse and discovered the theft. Cooney acknowledged that he did not know when Ginley began taking the fittings. But, Cooney went to various scrap yards in July and was able to verify that

Ginley had recently sold items from his warehouse. A local scrap yard was able to confirm a recent purchase it had made from Ginley for the fittings. When purchasing the fittings, the scrap yard required Ginley to produce identification; a copy of which the scrap yard had retained. Cooney proceeded to file a claim with Nationwide under the Policy and relating to the brass fittings stolen from the insured warehouse.

{¶ 8} The parties agree as to terms of the policy provisions that are at issue in this case, which define “Covered Property” and the scope of the “dishonesty exclusion.”

“Covered Property” is defined under the policy as:

“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.

“1. Covered Property

“Covered Property, as used in this Coverage Part, means the type of property described in this section, A.1., and limited in A.2 * * *

“* * *

“b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within a 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property - Separation of Coverage form:

- “(1) Furniture and fixtures;
- “(2) Machinery and equipment;
- “(3) ‘Stock’;²
- “(4) All other personal property owned by you and used in your business * * *.”

The “dishonesty exclusion” of the policy provides:

“A. COVERED CAUSES OF LOSS

“When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- “1. Excluded in Section B., Exclusions; or
 - “2. Limited in Section C., Limitations;
- that follow.

“B. EXCLUSIONS

“1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

“* * *

“h. Dishonest or criminal act by you, any of your partners, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose.

- “(1) Acting alone or in collusion with others; or
- “(2) Whether or not occurring during the hours of employment.”

²“Stock” is defined in the Policy as “merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.”

{¶ 9} Nationwide denied Cooney’s claim reasoning that the brass fittings were not “Covered Property” under the policy and that coverage was excluded because Cooney had “entrusted” the property contained in the warehouse to Ginley because he had given him the key with permission to sleep there on a few occasions in the winter. Nationwide filed a motion for summary judgment on these grounds.

{¶ 10} The trial court found that the brass fittings were “Covered Property” and the theft triggered coverage under the Policy, however, it was the trial court’s “opinion that [Cooney] did entrust his property and thus coverage that might otherwise be available is therefore excluded under the Policy’s terms.” The trial court accordingly granted Nationwide’s motion for summary judgment, from which Cooney appeals.

{¶ 11} In his sole assignment of error, Cooney asserts:

{¶ 12} “The trial court erred by concluding that, as a matter of law, a property owner ‘entrusted’ the entire contents of his warehouse to an individual by allowing him to sleep there on a few occasions months before the same individual returned and took much of the contents.”

{¶ 13} We review the trial court’s grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

{¶ 14} Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C).

{¶ 15} The burden is on the movant to show that no genuine issue of material fact exists. *Id.* Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264; Civ.R. 5(C).

{¶ 16} In *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 49, 2008-Ohio-4838, 896 N.E.2d 666, the Ohio Supreme Court reiterated the following principles that govern insurance law:

{¶ 17} “An insurance policy is a contract whose interpretation is a matter of law. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7

O.O.3d 403, 374 N.E.2d 146, paragraph one of the syllabus. Contract terms are to be given their plain and ordinary meaning. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 436 N.E.2d 1347. If provisions are susceptible of more than one interpretation, they “will be construed strictly against the insurer and liberally in favor of the insured.” *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. Additionally, “an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded.” (Emphasis sic.) *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096. Id. quoting, *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6.”

{¶ 18} “Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Alexander*, 53 Ohio St.2d 241, paragraph two of the syllabus.

{¶ 19} Nationwide believes that the Policy excludes coverage as a matter of law because it argues that Cooney “entrusted” the fittings to Ginley. However, coverage is not precluded under this provision when the evidence is construed in a light most favorable to Cooney, who is the non-movant. There are genuine issues of material fact concerning the applicability of the

dishonesty provision, particularly whether Cooney entrusted the fittings to Ginley for any purpose.

{¶ 20} The term “entrust” is not defined in the policy and therefore must be given its ordinary meaning. The parties both accept the meaning of this term as it has been defined in the Fifth Edition of Black’s Law Dictionary, which is:

{¶ 21} “To give over to another something after a relation of confidence has been established. To deliver something in trust or to commit something to another with a certain confidence regarding his care, use or disposal of it.”

{¶ 22} Cooney testified that he gave Ginley a key to the warehouse on a few occasions, granting him permission to sleep inside in order to get out of the cold. Each time, he took the key back from Ginley. It would seem only logical to infer that Ginley’s access to the warehouse and the contents therein on those occasions where he was given the key would have been limited to lawful purposes.

{¶ 23} However, even if we were to infer that a guest's temporary possession of a key to a structure constitutes entrusting the entire contents therein to the guest, genuine issues of material fact remain as to the applicability of the exclusion in this case. There is no evidence presented that would definitively establish that Ginley stole anything from the warehouse on those occasions. It is without dispute that Ginley did not have

permission to be in the warehouse when he was observed there in July of 2007 and when the thefts were discovered. Further, the testimony indicates that a scrap yard confirmed a recent purchase from Ginley when Cooney investigated the matter in July. Cooney unequivocally testified that Ginley did not have permission to sell the fittings. Construing the evidence in a light most favorable to Cooney, as we must, Nationwide has not established as a matter of law that Cooney had entrusted Ginley with the fittings at the time of the theft.

{¶ 24} Accordingly, Cooney's assignment of error is sustained.

{¶ 25} Nationwide asserts a cross-assignment of error contesting the trial court's determination that the stolen fittings constituted "Covered Property." Finding no error in this determination, we affirm it. Cooney testified that the fittings were inventory from his father's business, which were sold in the course of the business. When Cooney insured the warehouse, he sought coverage for its contents, including the fittings. Cooney intended to sell the fittings at some point. Accordingly, they satisfy the meaning of "Covered Property" and "stock" as defined by the Policy. The cross-assignment of error is overruled.

Judgment reversed and remanded for further proceedings.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR