IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-501

No. COA21-427

Filed 19 July 2022

Dare County, No. 20-CVS-355

FOUR ROSES, LLC, Plaintiff,

v.

FIRST PROTECTIVE INSURANCE COMPANY, Defendant.

Appeal by Plaintiff from Order entered 28 April 2021 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 9 March 2022.

Robinson, Bradshaw & Hinson, P.A. by R. Steven DeGeorge and Spencer T. Wiles, and Anderson Kill, P.C. by Marshall Gilinsky admitted pro hac vice, for Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal and J.D. Keister, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Four Roses, LLC (Plaintiff) appeals from an Order entered pursuant to North Carolina Rule of Civil Procedure 12(b)(6) dismissing Plaintiff's Complaint against First Protective Insurance Company (Defendant) seeking to recoup monies allegedly owed under an insurance policy issued by Defendant covering Plaintiff's residential

rental property for financial losses incurred by Plaintiff as a result of a prohibition imposed by Dare County on entry to the county by non-resident visitors related to the COVID-19 pandemic. For the reasons explained below, we affirm the trial court's decision.

¶ 2 The Record before this Court reflects the following:

¶ 3 On 21 August 2020, Plaintiff filed its Complaint in Dare County Superior Court asserting a claim for breach of contract by Defendant. The Complaint alleged:

> 1. [Plaintiff] is a North Carolina limited liability company that owns a residential property in Kill Devil Hills, North Carolina that [Plaintiff] rents to vacationers . . .
>
> 2. [Defendant] sells property insurance to its customers nationally, including in North Carolina. At all times relevant to this action, the Insured Property was insured under [Defendant's] Insurance Policy . . .
>
> . . .
>
> 3. Unless expressly excluded, [Defendant's] policy covers any loss resulting from any "physical injury to, destruction of, or loss of use of" the Insured Property. The [Defendant's] Policy provides additional "loss of use" coverage where circumstances make the property "not fit to live in" and/or where a governmental entity prohibits use of the Property under certain circumstances.
>
> 4. Beginning in or around March 2020, COVID-19 and associated restrictions, including those mandated by

> governmental entities caused injury to and loss of use of the Insured Property, which in turn caused [Plaintiff] to suffer loss covered by the [Policy].
>
> 5. On or about March 17, 2020, Dare County prohibited use of the Insured Property by physically closing roads that provide access to the Insured Property by persons that had contracted with [Plaintiff] to rent the Property. This caused [Plaintiff] to suffer financial losses covered by the [Policy] in the forms of lost rental revenues . . . and return of pre-paid amounts . . . received from prospective renters[.]"
>
> 6. On May 15, 2020, [Plaintiff] submitted a timely claim for coverage under [Defendant's] Policy of the losses described in paragraphs 4 and 5 above in the amount of $12,523.68 . . .
>
> 7. By letter dated June 30, 2020 . . ., [Defendant] unjustifiably denied coverage . . .

¶ 4 On 2 November 2020, Defendant filed a Motion to Dismiss and Answer to Plaintiff's Complaint. In the Motion to Dismiss, Defendant averred Plaintiff's Complaint failed to state a claim upon which relief can be granted because the policy pleaded by Plaintiff "does not provide coverage for the damages or the type of incident complained of." Defendant's Motion to Dismiss was heard on 15 March 2021. In support of their respective arguments, both parties submitted copies of the relevant insurance policy (the Policy). On 28 April 2021, the trial court entered its Order granting Defendant's Motion to Dismiss under Rule 12(b)(6) and dismissing this

matter with prejudice. Plaintiff timely filed written Notice of Appeal from this Order on 20 May 2021.

Issue

¶ 5 The dispositive issue on appeal is whether the trial court erred in granting the Motion to Dismiss under Rule 12(b)(6) based on the allegations in the Complaint and the provisions of the insurance policy referenced therein.

Analysis

¶ 6 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). "[A] motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff's cause of action or provide a remedy for the alleged [cause of action]." *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). A Rule 12(b)(6) dismissal is proper where "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

¶ 7 On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "a de novo review of the pleadings to determine their legal sufficiency and to determine whether

the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 -74 (2003); *see also Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). As such, this Court also views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

¶ 8 Moreover, documents attached to and incorporated into a complaint are properly considered as part of a Rule 12(b)(6) motion to dismiss. *Holton v. Holton*, 258 N.C. App. 408, 418–19, 813 S.E.2d 649, 657 (2018) (citing *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004)). "Additionally, a document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment." *Id.*; *see also Oberlin Capital, L.P. v. Slavin*, 147 N.C.

App. 52, 60, 554 S.E.2d 840, 847 (2001) ("a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing[.]").

¶ 9 Here, both parties submitted the Policy to the trial court as an exhibit in support of their respective arguments on the Motion to Dismiss. Defendant contended in its Rule 12(b)(6) Motion to Dismiss below and, again, contends in this Court that the Policy as pleaded by Plaintiff in the Complaint by its contractual terms does not provide coverage for Plaintiff's alleged losses, and as such, Plaintiff's Complaint failed to state a claim upon which relief could be granted. Plaintiff contends it alleged sufficient facts to trigger coverage under the terms of the Policy or, at least, survive dismissal under Rule 12(b)(6). Specifically, Plaintiff argues several provisions of the Policy should be interpreted to provide coverage based on the facts alleged in the Complaint including coverages for the dwelling against direct physical loss and loss of use of the Property.

¶ 10 "The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 816-17 (1999). "First of all, the policy is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation." *Id.* "In such cases, the policy must be construed in favor of coverage and against the insurer;

however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written." *Id.* "Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language." *Id.* "Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning." *Id.*

A. Dwelling Coverage

¶ 11 First, Plaintiff argues the facts alleged in the Complaint give rise to coverage under the Policy provisions providing coverage of the dwelling against direct physical loss. The Policy provides, in relevant part:

> **SECTION I – PROPERTY COVERAGES**
> **A. Coverage A – Dwelling**
>
> 1. We cover:
> a. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling[.][1]

With respect to Coverage A, the Policy further provides:

> **SECTION I – PERILS INSURED AGAINST**
> **A. Coverage A – Dwelling And Coverage B – Other Structures**

[1] "Residence premises" is a defined term under the Policy including "The one-family dwelling where you reside[.]" It "also includes other structures and grounds at that location." Whether Plaintiff's property constitutes a "residence premises" is not at issue here.

> 1. We insure against direct physical loss to property described in Coverages **A** and **B.**

Read together and by their plain terms, these provisions provide coverage against direct physical loss to the dwelling (and other structures) on Plaintiff's property.

¶ 12 In this case, however, Plaintiff has not alleged any direct physical loss to the dwelling on the Insured Property. Rather, Plaintiff alleged only: "Beginning in or around March 2020, COVID-19 and associated restrictions, including those mandated by governmental entities caused injury to and loss of use of the Insured Property, which in turn caused [Plaintiff] to suffer loss covered by the [Policy]." Specifically, Plaintiff alleged this "injury" occurred when:

> On or about March 17, 2020, Dare County prohibited use of the Insured Property by physically closing roads that provide access to the Insured Property by persons that had contracted with [Plaintiff] to rent the Property. This caused [Plaintiff] to suffer financial losses covered by the [Policy] in the forms of lost rental revenues . . . and return of pre-paid amounts . . . received from prospective renters[.]"

Plaintiff argues the term "direct physical loss"—not a defined term in the Policy—should be broadly construed to include economic losses incurred as a result of the lack of, or limited access to, the property. However, even if this were so, Plaintiff's Complaint still fails to allege any such "direct physical loss" to the dwelling itself as required by the plain and unambiguous terms of the Policy. To the contrary, the Complaint alleges only that the roads accessing Plaintiff's property were physically

closed.[2] *Cf. Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C. App. 698, 702, 486 S.E.2d 249, 251 (1997) (no business interruption coverage where plaintiff "neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm.").

¶ 13 Therefore, the allegations in the Complaint fail to allege facts giving rise to any claim for coverage under the dwelling coverage provisions of the Policy. Thus, Plaintiff's Complaint fails to state a claim for breach of contract for any failure by Defendant to provide coverage under the Policy for direct physical loss to the dwelling. Consequently, the trial court did not err in granting Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) on this basis.

B. Loss of Use Coverage

¶ 14 Second, Plaintiff argues the Complaint alleges facts within the scope of Policy provisions providing coverage for loss of use of the Plaintiff's property both for loss of

[2] To the extent Plaintiff may rely on the allegations of suffering loss "covered by the [Policy]", as noted above this constitutes a conclusion of law, which may properly be disregarded at a Rule 12(b)(6) motion to dismiss. *Oberlin Cap., L.P.*, 147 N.C. App. at 56, 554 S.E.2d at 844 (In ruling on a Rule 12(b)(6) motion "the court is not required to accept as true any conclusions of law or unwarranted deductions of fact.").

fair rental value and where a civil authority prohibits use of the property. In this respect, Coverage D of the Policy provides in relevant part:

> **SECTION I – PROPERTY COVERAGES**
>
> . . . .
>
> **D. COVERAGE D — Loss of Use**
>
> . . .
>
> **2. Fair Rental Value**
>
> If a loss covered under Section **I** makes that part of the "residence premises" rented to others or held for rental by you not fit to live in, we cover the fair rental value of such premises . . . [.]
>
> **3. Civil Authority Prohibits Use**
>
> If a civil authority prohibits you from use of the "residence premises" as a result of direct damage to neighboring premises by a Peril Insured Against, we cover the loss . . . [.]

Under the plain terms of these provisions of Coverage D, which Plaintiff contends are applicable, losses triggering coverage for loss of use of Plaintiff's property are those that make that part of the property rented to others or held for rental by Plaintiffs "not fit to live in" or where the civil authority prohibits use of the property as a result of direct damage to neighboring premises.

¶ 15 Again, however, Plaintiff's Complaint fails to allege facts that giving rise to coverage for loss of use for either lost fair rental value or where a civil authority prohibits use of the property. Plaintiff's Complaint makes no allegation Dare

County's road closures rendered their property itself not fit to live in. Further, the Complaint makes no allegation Dare County prohibited Plaintiff from using its property or did so as the result of any direct damage to any neighboring premises.

¶ 16 Therefore, the allegations in the Complaint fail to allege facts giving rise to any claim for coverage under the loss of use provisions of the Policy. Thus, Plaintiff's Complaint fails to state a claim for breach of contract for any failure by Defendant to provide coverage under the Policy for loss of use of their property. Consequently, the trial court did not err in granting Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) on this basis.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Defendant's Motion to Dismiss.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).