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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1754**

First National Realty of Eagan, Inc.,
Respondent,

vs.

Minnesota FAIR Plan,
Appellant.

**Filed July 17, 2007
Reversed and remanded
Dietzen, Judge**

Hennepin County District Court
File No. 27-CV-05-17141

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Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Dietzen, Judge.

UNPUBLISHED OPINION

DIETZEN, Judge

Appellant challenges the district court's order granting summary judgment in favor of respondent, arguing that the district court erred in concluding that the term "total loss" in the insurance contract was ambiguous and that the building covered by the policy did not sustain a total loss from a February 2005 fire, but that it did sustain a total loss as a result of an April 2005 fire. We reverse and remand.

FACTS

Richard Heggemeyer owns and operates First National Realty of Eagan, Inc., ^[1] which is a real-estate business that purchases residential properties, makes improvements to the buildings, and then resells the properties or leases the space to tenants. Minnesota FAIR Plan (FAIR Plan) is an organization that provides

coverage to properties that cannot otherwise be insured through private insurance companies.

In August 2002, Heggemeyer purchased a property in Minneapolis for \$50,000. The property was vacant and fire-damaged from two previous fires. In September 2002, Heggemeyer met with an insurance agent to discuss insurance for the property. The insurance agent explained to Heggemeyer that because the property was vacant and fire-damaged, the policy needed to be written through FAIR Plan.

Heggemeyer completed a FAIR Plan application for insurance coverage for the property. The application form included a hand-written request for \$100,000 of dwelling coverage. To the right of the hand-written request was the statement "MUST EQUAL THE ACTUAL CASH VALUE OF THE STRUCTURE." The application also stated that the policy provided only non-replacement-cost insurance. The policy was issued in September 2002; it stated that the policy was for \$100,000 in actual cash value coverage. Heggemeyer made substantial repairs to the building, which included a new kitchen and new electrical, plumbing, roofing, and insulation. Heggemeyer had the ability to increase the policy limits for an additional premium. He did not do so.

In 2005, Heggemeyer and his wife went to Arizona to spend the winter. On February 4, 2005, while they were away, the property sustained a fire which caused extensive damage to the three-season porch and smoke and water damage to the rest of the structure. The Minneapolis Police Department concluded that the fire was intentionally set and estimated the damage to the building at \$100,000.

In March 2005, Heggemeyer completed and mailed a proof-of-loss form. It stated, among other things, that the actual cash value of the property was \$175,000, that the loss and damage to the building was \$105,000, and that the amount claimed under the policy was \$100,000. A FAIR Plan adjuster conducted a preliminary estimate of repair costs for the property and concluded that the cost to repair the fire damage minus depreciation exceeded the actual cash value of the structure, and so "the policy limits would be paid."

Subsequently, Heggemeyer elected not to have the City of Minneapolis remove the damaged structure including its foundation, but decided to rebuild the existing structure. On April 7, 2005, Heggemeyer obtained a building permit and began working on the building. When Heggemeyer arrived at the property the next day, the building was again in flames.

By letter dated April 14, 2005, Minnesota FAIR Plan adjusted the February fire loss by enclosing a check to Heggemeyer for \$75,000, which represented 75% of the policy limits, with the remaining \$25,000

being held in escrow as required by the City of Minneapolis for the repair or replacement of the structure pursuant to Minn. Stat. § 65A.50, subd. 2 (2004). Thus, FAIR Plan paid out the policy limits for the February fire loss.

Following the April fire, Heggemeyer submitted another sworn statement and proof of loss estimating the actual cash value of the building at \$80,000, plus loss and damage for other property of \$18,108, for a total claim of \$98,108.

Minnesota FAIR Plan investigated the April fire and, by letter dated June 27, 2005, rejected the claim on the ground that:

The actual cash value of the property prior to the 1st loss was \$100,000 as reflected in the policy limits. The structure was a total loss due to the February 4, 2005 fire and the policy limits were paid. Therefore, there was no additional loss suffered as a result of the April 8, 2005 [fire].

FAIR Plan, however, accepted Heggemeyer's claim for the damage to personal property and, after adjusting for his deductible, issued a check for the damage to personal property totaling \$933.98. Subsequently, the City of Minneapolis demolished the structure, deducted the cost of the cleanup from the \$25,000 payment it received following the first fire, and returned the balance to Heggemeyer.

Heggemeyer commenced legal action against Minnesota FAIR Plan alleging that the February fire did not cause a total loss, that the April fire resulted in a total loss covered by the policy, and that he was entitled to the policy limits of \$100,000 for the April fire.

Following a hearing on the parties' cross motions for summary judgment, the district court filed its order and memorandum granting Heggemeyer's motion for the full amount of his second claim for the policy limits of \$100,000, and denying FAIR Plan's motion for summary judgment and entered judgment. This appeal follows.

DECISION

I.

FAIR Plan argues that the district court erred in its interpretation of the insurance policy and, in particular, challenges its conclusion that the term "total loss" is not defined in the policy and, therefore, is ambiguous. On appeal from summary judgment, this court considers whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4

(Minn. 1990). Interpretation of an insurance policy is a question of law, which this court reviews *de novo*. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006).

If the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). “A contract is ambiguous if it is *reasonably* susceptible to more than one construction.” *City of Virginia v. Northland Office Props. Ltd. P’ship.*, 465 N.W.2d 424, 427 (Minn. App. 1991) (quoting *Blackburn, Nickels, & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985)), *review denied* (Minn. April 18, 1991).

The contract provisions must be interpreted in the context of the entire contract. *See Republic Nat’l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979) (stating that “intent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the . . . contract as a whole”) (quotation omitted); *Boe v. Christlieb*, 399 N.W.2d 131, 133 (Minn. App. 1987) (“Contracts must be construed as a whole, with the parties’ intentions gathered from the entire instrument, not from isolated clauses.”).

Here, the dispute involves the interpretation of several provisions of the insurance policy. Paragraph two of the “Conditions” section of the insurance policy, which is entitled “Insurable Interest and Limit of Liability,” states:

Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

- a. for an amount greater than the interest of a person insured under this policy;
- or
- b. for more than the applicable limit of liability.

Heggemeyer argues that the phrase “in any one loss” means that FAIR Plan is liable for the policy limits for multiple losses during the applicable policy period. FAIR Plan argues that paragraph two is only intended to limit its liability to the applicable policy limits regardless of the number of persons with an insurable interest in the property. The district court concluded that the language “any one loss” opens the door to the possibility of consecutive losses and determined that “[t]o the extent this clause is ambiguous,” it must be resolved in Heggemeyer’s favor.

We read the applicable language to be straightforward and unambiguous. The insurer agrees to pay up

to the policy limits for “any one loss.” We see no language in paragraph two, or any other provision of the policy, that limits the number of losses or claims that may be paid during the applicable policy period.

FAIR Plan next argues that the district court erred in concluding that the term “total loss” was not defined in the insurance policy and, therefore, is ambiguous. Heggemeyer argued that the term “total loss” is not defined in the insurance policy, and, therefore, one must resort to the case of *Nw. Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48, 88 N.W. 265 (Minn. 1901), to define the term. The district court agreed and adopted the definition from *Rochester German* that “[a] building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire.” *Id.* at 48, 88 N.W. 265.

We agree that the insurance policy does not define the term “total loss.” But paragraph 26 under the “Special Provisions” section of the insurance policy states:

Valuation Clause. We agree that in the event of a total loss to a building covered under this policy:

- a. The limit of liability for the building represents the total value of the building; and
- b. No deductible applies to the loss to that building.

This provision clearly states that the limit of the insurer’s liability for a total loss is “the total value of the building.” Thus, the insurer’s liability under the policy cannot exceed “the total value of the building” at the time of the loss.

The other applicable provision of the insurance policy is paragraph five of the “Conditions” section, which provides:

Loss Settlement. Covered property losses are settled at actual cash value at the time of loss, but not more than the amount required to repair or replace the damaged property.

We read paragraph five to require the insurer to pay the actual cash value of the property at the time of the loss, but no more than the cost to repair or replace the damaged property. We see no conflict between paragraphs five and 26. Read together, the provisions obligate the insurer to pay the actual cash value of the building at the time of the loss, but that amount cannot exceed the cost to repair or replace the building that existed at the time of the loss. Thus, both measures of the loss, that is, the value of the building or the cost to repair or

replace the building, are modified by the term “at the time of the loss.”

II.

We turn then to the February and April losses and the application of the policy to those losses. It is undisputed that the February fire caused extensive damage to the three-season porch, and smoke and water damage to the rest of the building. Heggemeyer filed a proof of loss that concluded the building was worth \$175,000 and the loss was \$105,000. Following a preliminary estimate of the cost to repair the building, FAIR Plan sent a letter to Heggemeyer in April 2005 that enclosed a check for the policy limits. The district court concluded that the loss was not “total” and that Heggemeyer was entitled to the \$100,000 payment it received from FAIR Plan.

Heggemeyer argues that the February fire did not result in a total loss. FAIR Plan argues that the cost of repair exceeded \$100,000 and, therefore, it was a total loss. We reject both arguments. Both parties focus on the special provision found in paragraph 26 of the policy, but ignore the application of paragraph five of the “Conditions” portion of the policy. We read paragraph five to obligate FAIR Plan to pay the cost required to repair the building. It is undisputed that the value of the building and the cost to repair or replace it exceeded \$100,000. Thus, we conclude that the district court did not err in concluding that FAIR Plan was required to pay the policy limits for the February loss.

Next we turn to the April fire. Heggemeyer argued and the district court agreed that the loss from the second fire was “total” and that FAIR Plan must pay \$100,000. FAIR Plan argues that it had previously paid the policy limits for the February loss and, therefore, it had no further liability under the policy. We reject both arguments.

On this record, we conclude that genuine issues of material fact regarding the April loss preclude summary judgment. First, the parties dispute the value of the building, or the cost to repair or replace it after the second fire. Although Heggemeyer argues that, based on his experience as a journeyman carpenter and homebuilder, the building was a total loss, the photos in the record show that the entire building was not destroyed. FAIR Plan argues that the remaining structure was not totally destroyed and that it had residual value. More importantly, there is no evidence in the record as to the value of the building before the second fire. We read paragraph 26 as limiting the insurer’s liability to the value of the building before the second loss. Since neither party presented testimony regarding the value of the building before the second fire, or the cost to

repair or replace that building, summary judgment is not appropriate.

Heggemeyer next argues that Minnesota statute requires that FAIR Plan must pay the policy limits under Minn. Stat. § 65A.08, subd. 2 (2004), which provides that:

In the absence of any change increasing the risk, without the consent of the insurer, of which the burden of proof shall be upon it, and in the absence of intentional fraud on the part of the insured, the insurer shall pay the whole amount mentioned in the policy or renewal upon which it receives a premium, in case of total loss, and [2] in case of partial loss, the full amount thereof.

FAIR Plan argues that Heggemeyer made improvements to the building that increased its value to \$175,000 as set forth in his first proof-of-loss statement without increasing the policy limits to correspond to the actual cash value of the building and, therefore, Heggemeyer “increased the risk.” Here, it is undisputed that Heggemeyer’s improvements to the building increased its value from \$100,000 to at least \$175,000 [3] and, arguably, changed the risk to insurer FAIR Plan under the statute. Specifically, Heggemeyer did not notify the insurer of the significant increase in the value of the building or increase the policy limits. Heggemeyer does not argue that a substantial increase in value did not change the risk. On this record, we conclude that the statute does not apply.

Therefore, because there are fact issues with respect to the value of the property before the second fire and the damage caused by the fire, we reverse and remand.

Reversed and remanded.

[1]

Before the district court, the parties referred to First National Realty of Eagan, Inc. as Heggemeyer, who is the sole owner of the corporation. We will do so as well.

[2]

The statute was subsequently amended to specifically allow FAIR Plan to challenge the valuation even in the case of total loss, but the amendment applies to policies renewed after May 24, 2005, and is therefore inapplicable to this case. *See* Minn. Stat. § 65A.08, subd. 2(b) (2006); Laws 2005, c. 66 §§ 1, 2.

[3]

Heggemeyer later alleged that the value of the property was \$180,000, based on an offer to purchase the property that he received from his tenant. Either way, the increase in value is substantial.