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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002060-MR

TRI-VALLEY PLASTICS, INC. — APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CI-00269

HAMILTON MUTUAL INSURANCE COMPANY and
SAM PALMER — APPELLEES

AND NO. 2002-CA-002061-MR

TRI-VALLEY PLASTICS, INC. — APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CI-00270

HAMILTON MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Tri-Valley Plastics, Inc., appeals from two judgments of the Webster Circuit Court in favor of Hamilton Mutual Insurance Company. The judgments were rendered in separate cases, and appeals were taken from each judgment. The two appeals have been consolidated. We affirm in part, reverse in part, and remand.

On December 27, 1998, a manufacturing building and office owned by Tri-Valley was damaged but not totally destroyed by fire. It was insured under a Business Protection Policy issued by Hamilton Mutual Insurance Company. The limit of insurance was $168,730.

Hamilton paid Tri-Valley $126,800.13 to settle the claim. However, Tri-Valley contended that it was owed more money under the terms of the policy. Hamilton refused to pay, and Tri-Valley filed separate lawsuits against Hamilton in the Webster Circuit Court.

In one suit Tri-Valley sought a declaration of rights concerning the amount of money to which it believed it was entitled under the policy. In the other suit Tri-Valley alleged that Hamilton had breached the insurance policy, breached the policy’s implied duties of good faith and fair dealing, violated the Unfair Claims Settlement Practices Act, and violated the Consumer Protection Act.

Pursuant to policy provisions and to agreed orders entered into by the parties, an umpire was appointed to determine the "actual cash value" of the property at the time of loss and the "amount of loss." An amended agreed order provided that each party could file exceptions to the report to the extent either party believed the umpire had not followed Kentucky law and/or policy provisions in making his determinations. The amended agreed order also stated that "[o]ther applicable additional coverages under the policy are not excluded by the findings under this Order."

In February 2002, the umpire rendered a report to the circuit court. The umpire determined the "actual cash value" of the property immediately before the fire to be $197,000. The umpire determined the fair market value of the property after the fire to be $78,800 and the "amount of loss" to be $118,200 ($197,000 minus $78,800). Thus, the umpire gave an award based on a loss to the building of $118,200 less a $500 deductible for a total of $117,700. Because Hamilton had already paid Tri-Valley $126,800.13, the effect of the award was that Hamilton did not owe additional amounts to Tri-Valley. The umpire also found that the total cost of repairs would be $365,000, and the total replacement cost would be $602,000.

Tri-Valley filed exceptions to the umpire's report. Noting that the umpire had found the total cost of repairs to be

$365,000 and the total replacement cost to be $602,000, Tri-Valley argued that the umpire erred in awarding it only $117,700 "when the building is a total loss and cannot be repaired for the total Limit of Insurance." Further, Tri-Valley argued that it was entitled to recover the cost of debris removal under the terms of the policy. The umpire's award did not address the issue of debris removal costs. The circuit court rejected Tri-Valley's exceptions and adopted the umpire's report. An appeal by Tri-Valley followed.

As for Tri-Valley's separate suit alleging bad faith by Hamilton and other causes of action, Hamilton moved the court to award it summary judgment following the umpire's report. The court granted summary judgment in favor of Hamilton and dismissed Tri-Valley's claims. The basis for the court's ruling was that Hamilton had already paid Tri-Valley more money than it was actually due under the terms of the policy. In light of such fact, the court apparently reasoned that Tri-Valley's claims could have no merit. Tri-Valley also appealed from this judgment.

Tri-Valley's first argument is that the umpire's determination of "amount of loss" was contrary to the terms of the policy and that the circuit court erred in adopting the umpire's report. As we have noted, the umpire determined the fair market value of the property before the fire to be

$197,000, the fair market value of the property after the fire to be $78,800, and the amount of loss to be $118,200. Tri-Valley does not dispute the umpire's determination of the fair market value of the property before the fire at $197,000. Rather, Tri-Valley maintains that the umpire erred in the manner he determined the amount of loss.

Under the terms of the policy, Hamilton had the option of (1) paying the value of lost or damaged property, (2) paying the cost of repairing or replacing the lost or damaged property, (3) taking all or any part of the property at an agreed or appraised value, or (4) repairing, rebuilding, or replacing the property with other property of like kind and quality. Tri-Valley did not have "replacement cost" coverage.

Tri-Valley argues that the umpire "went outside the scope of his assignment" when he determined the amount of loss in accordance with a formula based on the fair market value of the property before the fire and the fair market value of the property after the fire. Tri-Valley argues that this formula is contrary to the terms of the policy. We agree.

In arriving at the amount of $118,200 as the amount of loss, the umpire used the cost of repairs figure of $365,000 and divided it by the total replacement cost of $602,000, yielding a percentage of approximately 60%. In other words, the umpire apparently reasoned that it would cost $602,000 to replace the

building but only $365,000 to repair the damage from the fire and that the ratio of the two figures should be used to determine the amount of loss. The umpire then multiplied the fair market value of the building before the fire of $197,000 times 60% and arrived at the amount of $118,200 as the amount of loss. Further, the umpire accepted the testimony of Hamilton's appraiser that "the most accurate method of valuation would be market value and to look at the reduction in market value of the building before the loss to after the date of loss."

However, none of the four options for paying loss under the policy gave Hamilton the option of paying the value of the loss as computed in that manner. The second option called for payment for the cost of repairing or replacing the lost or damaged property. The umpire found the cost of repairing the property to be $365,000 and the cost of replacing it to be $602,000. Hamilton did not choose that option. The third option allowed Hamilton to take the property at an agreed or appraised value. Likewise, Hamilton did not elect to exercise this option. The fourth option stated that Hamilton could repair, rebuild, or replace the property with other property of like kind and quality. Again, Hamilton did not select this option. Instead, Hamilton selected to pay Tri-Valley under the first option.

The first option under the policy stated that Hamilton could "[p]ay the value of lost or damaged property." Because the fire did not result in a total loss of the building, Hamilton contends that the umpire properly determined that value to be the difference in the fair market value of the building before the loss and the fair market value of the building after the loss.

That formula for determining the loss to be paid for a partially damaged structure might be proper, except for the fact that the first option under this policy did not provide for payment in that manner. Rather, the option allowed Hamilton to pay the value of the property that was lost or damaged. That amount was determined by the umpire to be $197,000. Thus, payment by Hamilton under the first option would be $168,730, the limit of insurance.

It is understandable that Hamilton would contend that it should only pay the "amount of loss" as determined by the value of the building before the fire and after the fire. However, its policy did not provide it with that option. Rather, the policy basically gave it the option to pay the repair costs (second option) or to pay the value of the building (first option). In short, we conclude the umpire and the court erred in determining the amount payable under the policy. Thus,

we reverse and remand for the entry of a judgment against Hamilton for the additional amount owed to Tri-Valley.

Tri-Valley's second argument is that the circuit court erred in failing to award it a recovery for debris removal. Under the terms of the policy, Tri-Valley had additional coverage for expenses incurred in removing debris caused by or resulting from a covered cause of loss. The policy also stated that the most Hamilton would pay for debris removal was 25% of the amount paid for direct physical loss or damage to the property plus the deductible, unless the loss was equal to or in excess of the policy limits. In that event, the policy paid up to an additional $10,000 for debris removal. There was obviously debris to be removed in this case since the building was only partially destroyed by fire and Tri-Valley continued to conduct business from it.

Hamilton argues that Tri-Valley "waived this error before the trial court." It states that Tri-Valley's initial petition for declaration of rights was silent regarding any claim for debris removal and that the agreed orders outlining the umpire's responsibilities did not specifically direct the umpire to award damages for debris removal. Thus, Hamilton contends that the court did not err in refusing to award amounts for debris removal.

In its initial petition for declaration of rights, Tri-Valley asserted that it was entitled to the limit of insurance as well as debris removal, although it did not specifically include such a claim in its claim for relief.[1] However, in the cross-petition filed by Hamilton, it requested the court to declare the rights of the parties as to **all** coverage. Furthermore, the amended agreed order outlining the umpire's responsibilities stated in paragraph six that "[o]ther applicable additional coverages under the policy are not excluded by the findings under this Order." Also, Tri-Valley raised the issue of debris removal in its exceptions to the umpire's report. We conclude that the issue was raised before the court and that the court erred in not awarding an amount for debris removal. This portion of the judgment is reversed and remanded for such an award.[2]

Finally, Tri-Valley argues that the court erred in granting summary judgment against it on its claims against

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[1] Tri-Valley's assertion that it was entitled to recover for debris removal was stated in the factual background portion of its petition.

[2] Hamilton also argues that the issue of debris removal should not be considered by this court because Tri-Valley did not comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) which requires that the portion of a brief containing arguments must begin with a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner. Although Tri-Valley's brief may have been lacking in this respect, we nonetheless exercised our discretion and reviewed the issue on the merits. See Kentucky Farm Bureau Mut. Ins. Co. v. Burton, Ky. App., 922 S.W.2d 385, 387 (1996). See also Cornette v. Holiday Inn Express, Ky. App., 32 S.W.3d 106, 109 (2000).

Hamilton for breach of the insurance contract, breach of duty of good faith and fair dealing, violation of the Unfair Claims Settlement Practices Act, and violation of the Consumer Protection Act. As we have noted, the court apparently reasoned that Hamilton was entitled to summary judgment on these claims because it had already paid Tri-Valley an amount in excess of the umpire's award. Because we have reversed and remanded as to amounts owed by Hamilton under the policy in the first case, we likewise reverse the summary judgment in its favor and remand in the second case. See CR 56.03. Since Hamilton paid Tri-Valley only $126,800.13, fact issues remain to be determined.

However, we agree that summary judgment dismissing Tri-Valley's claim under the Consumer Protection Act was proper. KRS[3] 367.220(1) sets forth the class of individuals who may bring actions for recovery of money or property under the Consumer Protection Act. In order "[t]o maintain an action alleging a violation of the Act, however, an individual must fit within the protected class of persons defined in KRS 367.220." Skilcraft Sheetmetal, Inc. v. Kentucky Mach., Inc., Ky. App., 836 S.W.2d 907, 909 (1992). Tri-Valley does not fit within the protected class of persons who may file claims under the act. See Gooch v. E.I. DuPont de Nemours & Co., 40 F. Supp. 2d 857, 862 (W.D.Ky. 1998), citing Aud v. Illinois Cent. R.R. Co., 955 F.

[3] Kentucky Revised Statutes.

Supp. 757, 759 (W.D.Ky. 1997). Thus, we affirm that portion of the summary judgment.

The judgments of the Webster Circuit Court are affirmed in part, reversed in part, and remanded for further proceedings.

ALL CONCUR.

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