United States Court of Appeals for the Fifth Circuit

No. 23-30436
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 7, 2024
Lyle W. Cayce
Clerk

KINSALE INSURANCE COMPANY,

Plaintiff—Appellee,

versus

SEA BROOK MARINE, L.L.C.; SEABROOK HARBOR, L.L.C.; CD MANAGEMENT OF NEW ORLEANS, INCORPORATED, *doing business as* SEABROOK HARBOR and MARINE,

Defendants—Appellants,

versus

CENTRAL MONITORING, INCORPORATED, *doing business as* ALARM PROTECTION SERVICES, INCORPORATED; UNIDENTIFIED PARTY; VICTOR ARROYO,

Third Party Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:23-CV-736

Before DAVIS, WILLETT, and OLDHAM, *Circuit Judges*.

W. EUGENE DAVIS, Circuit Judge: [*]

Plaintiff-Appellee, Kinsale Insurance Company ("Kinsale"), filed this declaratory judgment action against Defendants-Appellants, CD Management of New Orleans, Inc., doing business as Sea Brook Harbor and Marine, Sea Brook Marine, LLC, and Seabrook Harbor, LLC (collectively "Seabrook"). Kinsale argued that Seabrook failed to comply with a condition precedent in the insurance policy it issued to Seabrook and that consequently there was no coverage for a fire occurring at Seabrook's facility. The district court granted summary judgment in favor of Kinsale, declaring that the policy provided no coverage for the fire. We AFFIRM.

I. BACKGROUND

The insurance policy Kinsale issued to Seabrook contained a "Protective Safeguards Endorsement," requiring "[a]s a condition of th[e] insurance," that Seabrook maintain an "**Automatic Fire Alarm**, protecting the entire building, that is: **a.** Connected to a central station; or **b.** Reporting to a public or private fire alarm station." The summary judgment evidence established that, although Seabrook had a security and theft monitoring system, it did not have a fire monitoring system. Because it was undisputed that Seabrook failed to comply with the condition, Kinsale moved for summary judgment in its favor.

In opposing Kinsale's motion for summary judgment, Seabrook contended that it "had a good faith belief that the property was covered by a centrally monitored fire alarm system, which included hardwired smoke detectors." Seabrook argued that the language of the Kinsale insurance policy was ambiguous in light of prevailing Louisiana statutory law; that

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Kinsale's interpretation of the policy led to absurd consequences after applying Louisiana jurisprudence; that the proper legal standard for determining compliance with the policy's requirement under Louisiana law was whether Seabrook exercised "due diligence with no intent to deceive" and that, under that standard, there were genuine issues of material fact making summary judgment inappropriate.

Seabrook further argued that Kinsale either waived its right to exercise the protective safeguards endorsement or should be estopped from using it to deny coverage because the absence of a centrally monitored fire alarm system did not increase the "moral or physical hazard" under the policy. Specifically, Seabrook argued that "a centrally monitored [fire] alarm would not have alerted the New Orleans Fire Department any sooner in battling this conflagration" because "this fire's origin was outside of the Seabrook office building and the wind driven fire would have started on the office building's exterior in the same area as the alarm monitoring equipment."[1]

The district court determined that Seabrook's maintenance of a centrally monitored, automatic fire alarm was a condition precedent to insurance coverage under the policy; it was undisputed that Seabrook did not satisfy that condition; and the Louisiana statutes upon which Seabrook relied did not support Seabrook. It consequently granted summary judgment in favor of Kinsale that the insurance policy it issued to Seabrook provided no coverage for the fire occurring at Seabrook's facility.[2] Seabrook filed a timely notice of appeal.

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[1] Although not clearly explained, presumably Seabrook was arguing that this fire would have rendered the alarm monitoring equipment inoperable at the outset of the fire.

[2] The district court also denied Seabrook's Rule 56(d) motion for continuance to allow time for further discovery and granted Kinsale's motion to strike Seabrook's third-

II. DISCUSSION

We review the district court's grant of summary judgment de novo, applying the same standards as the district court.[3] Under Rule 56, a party is entitled to summary judgment when it demonstrates that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law.[4] "A genuine dispute of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[5]

Under Louisiana law,[6] an insurance policy is a contract and is construed using the general principles for contract interpretation.[7] The parties' intent, as reflected by the words of the policy, determines the extent of coverage.[8] If the words of the policy are clear and unambiguous, it must be enforced as written.[9]

On appeal, Seabrook reasserts its argument that the policy is ambiguous and argues that the district court erred in failing to engage in a "proper multi-step legal analysis mandated by La. R.S. 22:860 and La. R.S. 22:1314." Although Seabrook's argument is not entirely clear, Seabrook

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party demand against Central Monitoring, Inc., doing business as Alarm Protection Services, Inc., et al.

[3] *Central Crude, Inc. v. Liberty Mut. Ins. Co.*, 51 F.4th 648, 652 (5th Cir. 2022) (citation omitted).

[4] FED. R. CIV. P. 56(a).

[5] *Central Crude, Inc.*, 51 F.4th at 652 (citation omitted).

[6] When jurisdiction is based on diversity, this Court must apply the substantive law of the forum state, here Louisiana. *Holt v. State Farm Fire & Cas. Co.,* 627 F.3d 188, 191 (5th Cir. 2010) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

[7] *Central Crude, Inc.*, 51 F.4th at 653 (citation omitted).

[8] *Id.*

[9] *Id.* (citation omitted).

appears to be asserting that Kinsale has no right to deny coverage for the fire unless it proves that Seabrook misrepresented information to Kinsale with the intent to deceive.

We disagree. First, contrary to Seabrook's contentions, and as the district court concluded, the policy provisions at issue in this case are not ambiguous. The Protective Safeguards Endorsement clearly provides that, "[a]s a condition of th[e] insurance," Seabrook was required to maintain an automatic fire alarm that was either connected to a central station or reporting to a public or private fire alarm station. The policy reiterates the consequence of noncompliance in its exclusions: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to comply with any condition . . . as respects any Protective Safeguards listed" in the endorsement.

When the words of an insurance policy are clear and unambiguous, the words must be enforced as written.[10] These provisions make clear that when the insured has not maintained an automatic fire alarm connected to a central station or reporting to a public or private fire alarm station, the policy provides no coverage for the fire. Because Seabrook had not maintained such an alarm, whether viewed as a condition of the policy or as an exclusion, at the time of the fire, coverage for the fire was precluded.[11]

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[10] *Id.* at 653 (citation omitted).

[11] *Scottsdale Ins. Co. v. Logansport Gaming, L.L.C.*, 556 F. App'x 356, 359 (5th Cir. 2014) (per curiam) (unpublished) (holding, in a case involving similar language, that insured did not comply with the policy when it conceded that its fire suppression system did not work on the day of the fire and that "diligence alone [wa]s not enough"). Unpublished opinions issued on or after January 1, 1996, are not biding precedent, but they may be persuasive authority. *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006); 5TH CIR. R. 47.5.4.

Second, Kinsale is not required to prove that Seabrook misrepresented information with an intent to deceive in order to deny coverage in this case. The Louisiana statute upon which Seabrook relies, La. R.S. § 22:860, "governs an insurer's ability to deny coverage based upon a misrepresentation in the policy application."[12] It provides that "no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured . . . shall be deemed material or defeat or void the contract . . . unless the misrepresentation or warranty is made with the intent to deceive."[13] Here, Kinsale does *not* contend that Seabrook misrepresented information in its insurance application or in negotiating with Kinsale, and it does not seek to void or rescind its policy based on any such misrepresentation. Instead, Kinsale argues that it is entitled to deny Seabrook's fire insurance claim because a condition precedent was not met and/or an exclusion applies.[14] Therefore, as the district court determined, La. R.S. § 22:860 is inapplicable here.

The other statute upon which Seabrook relies, La. R.S. § 22:1314 provides that an insurer may not avoid liability based on the insurer's "breach of any . . . condition contained in [the] policy" unless the breach "exists at the time of the loss, and be such a breach as would increase either the moral or physical hazard under the policy."[15] It is undisputed that Seabrook did not have a centrally monitored fire alarm at the time of the fire.

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[12] *Zydeco's II, LLC v. Certain Underwriters at Lloyd's, London*, 356 So.3d 345, 372 (La. App. 5th Cir. 2021).

[13] La. R.S. § 22:860(A).

[14] *See Zydeco's II, LLC*, 356 So.3d at 375 (explaining the difference between a "case concerning damages caused by an unlawful recission of the policy" and a case concerning "obligation to pay or not pay policy limits under the terms, conditions, and exclusions of the policy").

[15] La. R.S. § 22:1314(A).

And, as the district court found, the absence of such an alarm undoubtedly increased the physical hazard under the policy. Specifically, by not having a centrally monitored fire alarm, the risk of a fire occurring with no automatic notice to fire responders increased the hazard of a fire spreading and causing further damage because either fire responders would receive no notice or delayed notice of the fire.[16]

Seabrook argues that the lack of such an alarm did not increase the physical hazard in *this* case because "due to the nature and location of the origin of the fire and the location of the fire alarm equipment inside its office building, the building would have sustained catastrophic fire damage even if Seabrook had complied with the condition." Seabrook submits that a centrally monitored fire alarm consequently would not have alerted the local fire department any sooner in this case.

The language of La. R.S. § 22:1314, however, does not focus on the specific loss at issue; rather, it states that the insurer can avoid liability based on the insured's breach of a policy condition if the breach "would increase either the moral or physical hazard under the policy."[17] Under the prior version of this statute which contained substantially the same language as the current statute, the Louisiana Supreme Court noted that "our jurisprudence has held than an insurer is not required by the statute to show a causal relation between a breach of a warranty and a loss to avail itself of a warranty defense under a fire insurance policy."[18]

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[16] *Cf. Doucette v. La. Citizens Coastal Plan*, 96 So.3d 1236, 1240 (La. App. 5th Cir. 2012) (holding that "breach of occupancy clause clearly increased the hazard of fire" and affirming summary judgment in favor of the insurer).

[17] *Id.*

[18] *Rodriguez v. Northwestern Nat. Ins. Co.*, 358 So.2d 1237, 1240 (La. 1978) (citations omitted).

As the district court concluded, there can be no doubt that the lack of such an alarm increased the physical hazard of a fire spreading and causing further damage, as the lack of an alarm would result in either no notice or delayed notice to fire responders.[19]

Based on the foregoing, the district court's judgment is AFFIRMED.[20]

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[19] *Cf. Terwilliger v. Union Fire, Accident & General Ins. Co.*, 185 So. 43, 45 (La. App. Orl. 1938) (concluding "that an unoccupied and unprotected building is more likely to be set on fire by third persons than one which is inhabited" is "a fact within the common knowledge of all persons as it is too plain for discussion").

[20] Although Seabrook lastly argues that the district court erred in denying it a continuance under Rule 56(d) to allow Seabrook time to conduct discovery, Seabrook does not describe the "necessary and adequate discovery" it sought to obtain. In any event, assuming the discovery sought was directed to the issues lacking merit discussed above, the district court did not err in denying Seabrook's Rule 56(d) motion.