UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 92-2799

EX-IM FREEZERS, J.V. and EX-IM FREEZERS, INC.,

Plaintiffs-Appellants,

VERSUS

APPALACHIAN INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA H-89-4209)

(April 26, 1995)

Before KING, BENAVIDES, Circuit Judges, and LAKE*, District Judge.

BENAVIDES, CIRCUIT JUDGE:[*]

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* District Judge of the Southern District of Texas, sitting by designation.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This appeal involves a dispute with respect to the coverage provided under an insurance policy providing property damage and business interruption coverage. Plaintiffs-Appellants Ex-Im Freezers, J.V. ("Joint Venture") and Ex-Im Freezers, Inc. ("Ex-Im) appeal the district court's judgment in favor of Defendant-Appellee Appalachian Insurance Company ("Appalachian"). We affirm in part, and reverse in part.

FACTS AND PROCEDURAL HISTORY

Ex-Im operated a freezer warehouse, which was owned by the Joint Venture. In July 1989, a tornado struck and damaged the freezer. Ex-Im maintained an insurance policy providing property damage and business interruption coverage from Appalachian. Ex-Im claimed coverage and received payments from Appalachian.

In November 1980, Ex-Im and the Joint Venture, each claiming coverage, sued Appalachian in state court for breach of the insurance contract, alleging that Appalachian's payments under the policy were deficient. Appalachian removed the case to federal court, answered the breach of contract claim, and counterclaimed for a declaratory judgment that it was not liable for any "bad faith" or extracontractual damages. A bench trial ensued, and the district court resolved the dispute, finding that Appalachian had already paid an amount exceeding the covered loss, that Appalachian had not breached the contract, and that Appalachian had not breached any "bad faith" or other extracontractual duties.

Additionally, the district court awarded Appalachian $271,000 in attorney's fees with respect to its declaratory judgment counterclaim. Ex-Im and the Joint Venture appeal the district court judgment, both as to the resolution of its claims for breach of contract and Appalachian's recovery of attorney's fees.

The Award of Attorney's Fees

I

The appellants first contend that the district court erred in awarding Appalachian attorney's fees in connection with Appalachian's declaratory judgment counterclaim, which asked the district court to find that Appalachian "acted in compliance with the terms of the insurance policy and Texas law, and owes no liability to Counter-Defendants for any claim of `bad faith' or extra-contractual damages." Appalachian contends that it is entitled to the attorney's fees under the Texas law with respect to declaratory judgments. The issues raised by Appalachian, however, are not proper in a declaratory judgment action under Texas law. Whether Appalachian acted in compliance with the terms of the insurance policy and Texas law was brought before the district court by the appellants' original suit, and "[i]t is settled law in Texas that the Declaratory Judgments Act is not available to settle disputes currently pending before a court." Housing Authority v. Valdez, 841 S.W.2d 860, 864 (Tex.App.--Corpus Christi 1992, writ

denied). Neither is Appalachian's claim of bad faith or extracontractual damages the proper subject of a declaratory judgment action, as "[t]he declaratory judgment procedure may not be used by a potential defendant to determine potential tort liability." Id. at 865. Accordingly, the district court erred in awarding attorney's fees in connection with Appalachian's declaratory judgment claim, and its award of attorney's fees is reversed.

The Business Interruption Coverage

II

A. Period of Coverage

The appellants attack the district court finding that Ex-Im was entitled to only eight months of business interruption insurance coverage because the policy ended at the time repairs could be completed. The appellants contend that the policy should be read to extend until Ex-Im had reestablished its business operations. In effect, the appellants are arguing that a "phase-in period" should be included in the coverage period. Because this issue concerns contract construction, a question of law, we review the district court's interpretation *de novo*. Strachan Shipping Co. v. Dresser Industries, Inc., 701 F.2d 483, 486 (5th Cir. 1983).

The business interruption clause reads:

This covers loss as herein defined:

(a) Computed from the time of the damage . . . to the time when with due diligence and dispatch the property could be repaired or replaced and made ready for normal operations . . . ;

(b) For such additional time as may be required with the exercise of due diligence and dispatch to restore stock in process to the same state of manufacture in which it stood at the time of interruption;

(c) For such additional time as may be required with the exercise of due diligence and dispatch to replace damaged or destroyed mercantile stock . . . .

The district court refused to extend the time pursuant to subparagraphs (b) and (c), and applied the time to repair or replace and made ready provision of subparagraph (a).

The appellants contend that Ex-Im's operations, which profited from the storage of mercantile stock, fell within the confines of subparagraph (c). The appellants also argue that Texas law provides a strong preference for the rights of the insured, citing National Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552 (Tex. 1991). Under Texas law, we must adopt the construction favoring the insured if the insurance contract has more than one reasonable interpretation, even if the insurer's interpretation is more reasonable or a more accurate reflection of the parties' intent. Id. at 555.

We find no ambiguity in the coverage provision. Subparagraph (c) clearly pertains to an operation that produces mercantile stock, as it provides "additional time . . . to replace damaged or destroyed mercantile stock." Here, there is no mercantile stock to replace because Ex-Im does not produce mercantile stock. Ex-Im only furnishes a warehouse. We note that Ex-Im has not sought to

recover for any mercantile stock that may have been damaged by the storm while in the warehouse, presumably because Ex-Im never owned the mercantile stock and thus did not possess an insurable interest in the mercantile stock. Subparagraph (a), on the other hand, refers "to the time when . . . the property could be repaired or replaced and made ready for normal operations," something that is clearly applicable to Ex-Im's property, the warehouse.

In an attempt to show an ambiguity in the contract provisions, the appellants point out that nothing in subparagraph (c) requires that the insured own the mercantile stock. Even if an ambiguity exists, we find the appellants' interpretation of subparagraph (c) to be unreasonable. Subparagraph (c) clearly applies to merchants who own mercantile stock. As we have indicated, Ex-Im is not a merchant; it is in the warehouse business. It sells warehouse space, and that product is available once repairs have been completed. The district court did not err in computing the time period covered by the business interruption clause.

B. The Rent Payments

The appellants next contend that the trial court erred in not treating their rent payments as either profits or expenses that necessarily continued during the period of suspension of the business operations, thus affecting the amount recoverable under the business interruption coverage.[1] Whether the rent payments

[1] The pertinent provision with respect to the compensation provided by the business interruption coverage provided as follows:

> gross earnings, less all charges and expenses which do not

were profits or expenses that do not necessarily continue are questions of fact, and we review the district court's fact findings under the clearly erroneous standard. Fed.R.Civ.P. 52(a).

The appellants argue that the testimony clearly established that Ex-Im and the Joint Venture were under identical ownership and that the true purpose of the rent payments from Ex-Im to the Joint Venture was to transfer Ex-Im's profits (which would be subject to double taxation if distributed as dividends) to the Joint Venture (which could distribute the profits without adding a layer of taxation). This argument is without merit. Ex-Im treated the payments as rents; it admits using the rents as expenses for purposes of taxation. The district court did not err in failing to treat the rent as the profits of Ex-Im.

Alternatively, Ex-Im argues that the rent payments were expenses that necessarily continued. But the record reveals that Ex-Im had the option to cancel the lease. Yet it did not do so even though the freezer was significantly damaged and for the most part unavailable for use. Under such circumstances, the district court did not err in failing to treat the rent expense as one that necessarily continued. Indeed, the rent continued because Ex-Im wanted it to continue, not because it was necessary.

The appellants' final argument with respect to the rent payments is that the Joint Venture is also insured under the lease contract and that the rent profits are recoverable lost profits to

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necessarily continue during the period of interruption of production or suspension of business operations.

the Joint Venture. Because the policy identified the insured as "Ex-Im Freezers," the appellants argue that this reference is ambiguous, as it could refer to both Ex-Im Freezers, Inc. and Ex-Im Freezers, J.V. The district court, relying on extrinsic evidence because of this ambiguity, agreed with Appalachian that only Ex-Im was covered by the policy. The appellants argue that the district court erred, as any ambiguity must be resolved in favor of coverage.

The Joint Venture does not argue that the extrinsic evidence points to it as the insured, but that the ambiguity requires it to be insured. Clearly, the policy was intended to cover one party. The question is not how many parties are insured, but which party is insured. The district court properly determined that Ex-Im was the insured party.[2]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court, except as to the award of attorney's fees to Appalachian which we **REVERSE**.

[2]We have examined the other arguments the appellants have advanced in this appeal and find them without merit; no error of law or finding of fact was committed by the district court which would require reversal.