NEBRASKA SUPREME COURT

Rent-A-Roofer, Inc. v. Farm Bureau Property & Casualty Insurance Company

291 Neb. 786 (2015) · No. S-14-895 · Decided September 11, 2015

SUMMARY

The Nebraska Supreme Court held that an insurer must show prejudice to avoid liability or a duty to defend based on breaches of notice and voluntary payments provisions. Prejudice may be established as a matter of law when an insured fails to notify the insurer until after completing the defense and entering a binding settlement, depriving the insurer of any opportunity to investigate, defend, or participate in settlement discussions. The court affirmed summary judgment for Farm Bureau.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	McCormack, J.; Heavican, C.J.; Wright, J.; Connolly, J.; Miller-Lerman, J.; Cassel, J.
JURISDICTION	Nebraska
DECIDED	September 11, 2015
DOCKET	S-14-895
DISPOSITION	affirmed
PROCEDURAL POSTURE	Rent-A-Roofer appealed the Lancaster County District Court's grant of summary judgment to Farm Bureau in an action alleging breach of contract and bad faith after Farm Bureau denied coverage. The Nebraska Supreme Court affirmed.
STANDARD OF REVIEW	Summary judgment is reviewed by viewing the evidence in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences. Questions of law are reviewed independently.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Rent-A-Roofer, Inc., doing business as A-J Roofing & Waterproofing v. Farm Bureau Property & Casualty Insurance Company

TOPICS

duty to defend · insurance coverage · breach of contract · summary judgment · appellate procedure

PRACTICE AREAS

insurance law · contracts · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether an insurer must demonstrate prejudice before denying coverage based on an insured's breach of a voluntary-payments provision.
2. Whether an insurer is relieved of its duty to defend when the insured gives notice only after the defense has concluded and the insured has entered into a binding settlement.
3. Whether Farm Bureau waived Rent-A-Roofer's notice obligation by denying coverage for a prior claim.
4. Whether Rent-A-Roofer was entitled to recover its defense costs.

HOLDINGS

1. An insurer seeking to avoid liability under a voluntary-payments provision must show that the insured's breach prejudiced the insurer.
2. Prejudice may be established as a matter of law when the insured's settlement deprives the insurer of any opportunity to protect its interests in the litigation or participate in settlement discussions.
3. Farm Bureau was not liable for Rent-A-Roofer's defense costs because Rent-A-Roofer did not notify Farm Bureau until after the NRC defense and binding settlement were complete.
4. An insurer's denial of a prior claim does not waive notice of a subsequent claim when the claims involve different parties, complaints, and occurrences.

KEY QUOTATIONS

> *"We conclude that, as a matter of law, an insurer is not liable for defense costs where defense of the claim concluded before the insured brought the suit to the attention of the insurer and after the parties entered into the final settlement agreement, because this complete lack of an opportunity to engage in the defense is prejudicial to the insurer."* (793)

> *"We conclude that prejudice may be shown as a matter of law where the insured's settlement deprived the insurer of the opportunity to protect its interests in litigation or participate in the litigation and settlement discussions."* (796)

> *"An insurer cannot fail in defending a suit that it has no knowledge of."* (796)

FACTUAL BACKGROUND

Rent-A-Roofer held a commercial general liability policy issued by Farm Bureau. After the State of Nebraska sued Rent-A-Roofer over allegedly defective roofing work, Farm Bureau denied coverage based on the policy's faulty-workmanship and occurrence provisions, and Rent-A-Roofer defended the matter with its own counsel. When the National Research Corporation later sued Rent-A-Roofer and others over similar alleged construction deficiencies, Rent-A-Roofer did not notify Farm Bureau, retained its own counsel, and settled after mediation. Rent-A-Roofer notified Farm Bureau only after entering the binding settlement agreement and then sought defense costs under the policy.

PROCEDURAL HISTORY

After Rent-A-Roofer settled an underlying construction-defect lawsuit without notifying Farm Bureau until after the settlement, Farm Bureau denied coverage based on the policy's notice and voluntary-payments provisions. Rent-A-Roofer sued for coverage, indemnity, defense costs, and bad faith. The district court held that Farm Bureau had established prejudice as a matter of law and granted summary judgment; the Nebraska Supreme Court affirmed as to the requested defense costs.

DISPOSITION

affirmed

CASES CITED

- Herman Bros. v. Great West Cas. Co., 255 Neb. 88, 582 N.W.2d 328 (1998)
- Dutton-Lainson Co. v. Continental Ins. Co., 271 Neb. 810, 716 N.W.2d 87 (2006)
- Marcovitz v. Rogers, 276 Neb. 199, 752 N.W.2d 605 (2008)
- Shada v. Farmers Ins. Exch., 286 Neb. 444, 840 N.W.2d 856 (2013)
- Durre v. Wilkinson Development, 285 Neb. 880, 830 N.W.2d 72 (2013)
- West Bend Mut. Ins. Co. v. Arbor Homes LLC, 703 F.3d 1092 (7th Cir. 2013)
- Gerrard Realty Corp. v. American States Ins. Co., 89 Wis. 2d 130, 277 N.W.2d 863 (1979)
- Thomas Kilpatrick & Co. v. London Guarantee & Accident Co., 121 Neb. 354, 237 N.W. 162 (1931)
- Otteman v. Interstate Fire & Casualty Co., Inc., 172 Neb. 574, 111 N.W.2d 97 (1961)