STATE OF MINNESOTA
IN COURT OF APPEALS
A09-544

Old Republic National Title Insurance Company,
Respondent,

vs.

Minnesota Office Plaza, LLC,
Appellant.

Filed January 19, 2010
Affirmed
Lansing, Judge

Ramsey County District Court
File No. 62-CV-07-4819

Michael E. Keyes, Adam C. Trampe, Oppenheimer Wolff & Donnelly LLP, Minneapolis, Minnesota (for respondent)

Thomas P. Kane, Shushanie E. Kindseth, Hinshaw & Culbertson, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

In this coverage dispute between a property owner and its title insurer, the district court granted summary judgment declaring that Old Republic National Title Insurance Company was not obligated to indemnify Minnesota Office Plaza for the certificate of title's inclusion of a previously extinguished, nonexclusive roadway easement because it did not result in loss or damages. Minnesota Office Plaza appeals the summary judgment and an earlier order denying its motion to amend its counterclaim. Because the district court did not abuse its discretion by denying the motion to amend or err by granting summary judgment in the declaratory action, we affirm.

F A C T S

Minnesota Office Plaza, LLC (Office Plaza) purchased commercial office property in Roseville from State Farm by warranty deed in 1998. The property, which includes Tracts A, B, and C, was part of a larger parcel of property that was previously owned by Rose Building Corporation (Rose). When Office Plaza purchased the property, it also purchased a title insurance policy from Old Republic National Title Insurance Company (Old Republic). It is the provisions of this title insurance policy that are at issue in this appeal.

Rose surveyed and registered the land in Ramsey County in 1955, the same year that State Farm purchased the three tracts that Office Plaza now owns. In the 1955 conveyance to State Farm, Rose granted State Farm a "non-exclusive easement for roadway purposes" over four additional tracts, D, E, H, and G. Six years later, in October

1961, Rose decided to construct a retail building on Tract H. Because Rose's construction plans would obstruct State Farm's Tract H easement, the two businesses worked out an agreement. State Farm conveyed to Rose, by quitclaim deed, all of its interests in Tract H, except the east thirty-three feet. Rose then granted State Farm nonexclusive roadway easements over Tracts D, G, I, and F, to obtain access to County Road B.

The building that Rose constructed on Tract H was leased to Target Stores for its first retail operation. State Farm's conveyance of its interest in Tract H was recorded against the Rose property—now owned by Target Corporation—but it was not recorded against State Farm's property—now owned by Office Plaza.

In 2004 Office Plaza sued Target in an attempt to enforce its Tract H easement claim. *Minn. Office Plaza, LLC v. Target Stores, Inc.*, No. A06-1320, 2007 WL 2363875, *1-2 (Minn. App. Aug. 21, 2007), *review denied* (Minn. Nov. 13, 2007) (*Target*). The district court dismissed Office Plaza's declaratory judgment petition on the ground that State Farm had conveyed its Tract H easement back to Rose in 1961 and the failure to register the conveyance on State Farm's certificate of title did not affect the validity of the conveyance that extinguished State Farm's interest. *Id.* at *3-6 We affirmed the district court's determination that State Farm had not retained an interest in the Tract H easement that had been included on Office Plaza's 1998 certificate of title. *Id.*

Old Republic provided for the representation of Office Plaza under an express reservation of rights in Office Plaza's litigation against Target. Following the 2007

appellate decision, Old Republic brought this action seeking a declaratory judgment that it was not required to indemnify Office Plaza for any loss as a result of the extinguished Tract H easement included in Office Plaza's certificate of title. Office Plaza filed a counterclaim asserting breach of contract and seeking a declaration of coverage for the extinguished easement included in the certificate of title.

The district court, in March 2008, issued its first scheduling order. The order set a June discovery deadline. Following up on its initial discovery, Office Plaza asked Old Republic in April to agree to an amendment to Office Plaza's counterclaim, which would add a misrepresentation claim. Office Plaza's request stated that if Old Republic did not agree to a stipulated amendment, Office Plaza would move to amend. Old Republic declined to stipulate, but Office Plaza did not, at that time, move to amend.

In June, the parties stipulated to extend the June discovery deadline to July 23. Office Plaza did not move to amend during the extended discovery period, but after the expiration of this second deadline, Office Plaza filed a motion to add claims for misrepresentation and negligence. Old Republic opposed the amendment, and the district court denied it. As a basis for its denial, the district court stated that Office Plaza's title-insurance policy with Old Republic precluded coverage for tort claims, that breach-of-contract claims could not be based on negligence, and that Office Plaza had not identified a source for the duty that it claimed Old Republic had breached. The district court further determined that Old Republic would be prejudiced by an amendment because discovery had been closed and reopening it "would only needlessly prolong this litigation."

Old Republic and Office Plaza filed cross-motions for summary judgment, and two of the policy's exclusions from coverage were identified as the primary focus of the dispute. The first, 3(a), excludes coverage if the insured has accepted or agreed to any adverse claim or defect in the title. The second, 3(c), excludes coverage if the insured has not suffered loss or damages.

The district court granted summary judgment for Old Republic based on exclusion 3(c). It concluded that Office Plaza was not entitled to coverage under the insurance contract because it had never owned an easement on Tract H and could not show that it had suffered any indemnifiable loss or damages. The district court further concluded that none of Office Plaza's access to the property had been lost or obstructed and that its submitted claims for loss were purely speculative and based on appraisal evidence that applied "an inappropriate measurement." In granting summary judgment, the district court did not rely on exclusion 3(a), because it concluded that the evidence raised an issue of material fact of Office Plaza's knowledge about the easement at the time of purchase.

On appeal, Office Plaza challenges the district court's denial of its motion to amend its counterclaim and the district court's grant of summary judgment based on exclusion 3(c). Office Plaza also contends that it is entitled to summary judgment on exclusion 3(a).

D E C I S I O N

I

The district court denied Office Plaza's motion to amend its counterclaim on two grounds: that the amendment would prejudice Old Republic and that Office Plaza's proposed claims were futile. The district court has "wide discretion to grant or deny an amendment, and its action will not be reversed absent a clear abuse of discretion." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Amendments should be freely granted except when they would result in prejudice to the other party. Minn. R. Civ. P. 15.01; *Hempel v. Creek House Trust*, 743 N.W.2d 305, 313 (Minn. App. 2007). When an amendment, if adopted, would modify the district court's scheduling order, "a showing of good cause" is required. *Hempel*, 743 N.W.2d at 313 (quoting Minn. R. Civ. P. 16.02). A party must act with due diligence in attempting to amend its complaint. *Id.* Generally, defending an additional claim is not sufficient prejudice to disallow amendment, but if the amendment will produce significant delay, it may be denied. *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 916 (Minn. App. 2009) (citing *Hughes v. Micka*, 269 Minn. 268, 275-76, 130 N.W.2d 505, 510-11 (1964)).

The basis for Office Plaza's amendment arose early in discovery, when it first sought Old Republic's consent. Nonetheless, Office Plaza did not bring the motion after Old Republic refused to consent. Discovery continued, and the parties extended the discovery deadline. Office Plaza did not bring its motion to amend during the extended discovery period. Only after the July discovery deadline had passed did Office Plaza

seek to add the new grounds for recovery that it had identified at least three months earlier.

When Office Plaza filed its motion to amend in August 2008, Old Republic would have been prejudiced because the discovery period had closed and it would not have had an opportunity to conduct discovery on the new claims. And reopening discovery would have required amending the scheduling order, which requires a showing of good cause. Office Plaza provided no cause for its delay; it knew the basis for its motion in April, when discovery was still open. It was not an abuse of discretion for the district court to deny the motion to amend.

Office Plaza argues that Old Republic was not prejudiced because it had been informed in April that Office Plaza would bring the motion. We are not persuaded that Old Republic should be expected to conduct discovery on claims not yet included in the suit. *See* Minn. R. Civ. P. 26.02 (permitting discovery "relevant to a claim or defense").

Because we conclude that the timing of the motion warranted the district court's denial, we do not address Office Plaza's challenges to the district court's alternative basis for denial—the futility of Office Plaza's additional claims.

II

The district court granted summary judgment, declaring that the title-insurance policy did not obligate Old Republic to indemnify Office Plaza because it had suffered no loss or damages and its claim was therefore excluded under the policy's 3(c) provision. Office Plaza challenges this summary-judgment ruling and also argues that the exclusion in provision 3(a) does not apply as a matter of law, and therefore, the district court erred

by concluding that a fact issue existed that was material to the exclusion.

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). "General principles of contract interpretation apply to insurance policies." *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). Coverage issues and the interpretation of policy language are questions of law, reviewed de novo. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). "When interpreting an insurance contract, words are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured." *Id.*

We begin with exclusion 3(c), the basis for the district court's summary judgment declaring that Old Republic did not have a duty to indemnify Office Plaza. Provision 3(c) excludes coverage for defects or adverse claims "resulting in no loss or damage to the insured." Office Plaza asserts that it suffered loss or damage because it lost its easement rights in Tract H. Because speculative evidence of loss or damages alone is insufficient to withstand summary judgment, the issue in this appeal is whether Office Plaza came forward with sufficient, concrete evidence showing loss or damage under the policy. *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (stating that "[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment").

The easement at issue is included in the 1955 warranty deed by which Rose initially conveyed Tract C to State Farm. The warranty deed conveys Tract C, together

with a "non-exclusive easement for roadway purposes" over several tracts, including Tract H. State Farm's certificate of title at that time also included this language in its property description, with a cross-reference to the warranty deed's document number. State Farm's 1998 warranty deed to Office Plaza similarly included the easement in its description of the property being conveyed, again by a cross-reference to the 1955 document. The 1998 title-insurance policy that Old Republic issued to Office Plaza included the easement with its document number in the description of the covered property. The easement, however, had been extinguished in 1961, when State Farm conveyed it back to Rose and was, therefore, no longer a valid easement. *See Target*, 2007 WL 2363875 at *4-5 (concluding that title to easement did not vest with Office Plaza even though it was included in description of property conveyed).

The title-insurance policy issued by Old Republic to Office Plaza indemnifies Office Plaza for "actual monetary loss or damage." Thus the question is whether Office Plaza has provided concrete evidence of "actual monetary loss or damage" sufficient to overcome Old Republic's motion for summary judgment.

We conclude that the district court correctly ruled that Office Plaza did not. It is undisputed that Office Plaza could not have used the easement for roadway purposes when it bought the property in 1998, because Tract H ran through the middle of a large Target store. Office Plaza admitted that it did not allocate any of the purchase price to the value of roadway access across the easement. Additionally, it did not use any part of the easement for roadway purposes or suggest that it intended to use any part of the easement for roadway purposes before the litigation with Target in 2004. Nor did Office

Plaza make improvements to its property in reliance on roadway access across the easement. Significantly, Office Plaza has not lost its nonexclusive access; it currently has more east-west roadway access across Target's property than it did in 1998. Although its current roadway access does not lie precisely on Tract H, Office Plaza has not offered any proof that the different configuration of the greater, nonexclusive roadway access is of any consequence. Office Plaza has failed to show that it is entitled to indemnification for nonexclusive roadway access that it did not specifically pay for, has never used, and has not shown that it actually would have used at any specific time.

The proof of damages and loss that Office Plaza points to does not alter this conclusion. Office Plaza's expert testimony provides ample speculation about value the easement might have had, unrelated to nonexclusive use for roadway purposes. Office Plaza's appraisal suggests that the easement could make future development of the Office Plaza property more valuable than the development without such an easement. The appraisal also speculates that the easement could provide an income stream for Office Plaza if it extracted rent from Target, based on Target's current store resting partially on Tract H. Not only has Office Plaza not shown that it made expenditures pursuing these possibilities, it offered no proof that it had ever considered these speculative uses when it purchased the property. Its principals stated that the easement created a valuable stakeholder interest in overall redevelopment of the area, but they offered no concrete evidence that the stakeholder interest depended to any extent on nonexclusive roadway access across tract H. It has not shown that its property lost overall value or income because of the easement.

Instead of concrete evidence of actual loss, Office Plaza has relied on the argument that an easement is a property interest that, as a matter of law, has value. The value of property, however, is a question of fact, not a question of law. *See Metro. Fed. Sav. & Loan Ass'n v. Adams*, 356 N.W.2d 415, 421 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985) (stating that value of condominium was question of fact). A party survives summary judgment on a fact question by providing evidence. *Bob Useldinger & Sons, Inc.*, 505 N.W.2d at 328. Office Plaza has not provided the necessary evidence to show more than a speculative loss. Old Republic, on the other hand, provided an expert appraisal that concludes what Office Plaza argues is impossible: it found that the easement added no value to the Office Plaza property because of ample roadway access across several other tracts. Unlike Office Plaza's appraisal, Old Republic's appraisal did not assess hypothetical uses for the easement but valued it based on its actual purpose, namely, as a nonexclusive easement for roadway purposes.

Office Plaza also argued that its attorneys' fees in this litigation are losses under the policy. Because we agree with the district court's assessment that no other losses have been shown, we conclude that litigation expenses, standing alone, are not sufficient to defeat exclusion 3(c). Indeed, if that were the case, an insured would always avoid a no-loss-or-damage exclusion simply by incurring legal expenses. We therefore address the issue as the district court did, as a motion for costs and fees incurred during litigation. Costs and fees may be recovered in a declaratory action to establish an insurer's duty to defend and indemnify. *See Indep. Sch. Dist. No. 697, Eveleth v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 576, 581 (Minn. 1994) (allowing attorneys' fees). But the

determination is left to the sound discretion of the district court. *Peterson v. City of Elk River*, 312 N.W.2d 243, 246 (Minn. 1981). Because the district court correctly concluded that Old Republic had no duty to indemnify Office Plaza, its decision that each party should bear its own expenses in this litigation was not abuse of discretion. *See, e.g.*, *City of Savage v. Formanek*, 459 N.W.2d 173, 177 (Minn. App. 1990) (affirming denial of fees when claims of party seeking fees were defeated in litigation).

Office Plaza has not come forward with evidence of loss or damages related to the nonexclusive roadway easement, and the district court properly granted summary judgment based on exclusion 3(c). Because provision 3(c) excludes coverage, it is not necessary to address Office Plaza's further claim that the district court should have determined as a matter of law that provision 3(a) did not provide a basis for exclusion.

Affirmed.