STATE OF MINNESOTA
IN COURT OF APPEALS
A11-429

Gregory Seamon,
Appellant,

vs.

Acuity,
Respondent.

Filed December 5, 2011
Reversed and remanded
Kalitowski, Judge

Washington County District Court
File No. 82-CV-10-5331

Andrew T. Jackola, Oakdale, Minnesota (for appellant)

Lawrence M. Rocheford, Vicki A. Hruby, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

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

KALITOWSKI, Judge

In this insurance-coverage dispute, appellant Gregory Seamon contends that the district court erred in awarding summary judgment to respondent Acuity, A Mutual

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Insurance Company (Acuity), on his claims for breach of contract and declaratory judgment because (1) the policy requires Acuity to cover the cost of replacing his entire roof; and (2) in the alternative, there is a genuine issue of material fact as to the availability of appropriate materials for repair. Acuity argues that the district court lacked subject-matter jurisdiction, and in the alternative, the district court properly granted summary judgment. Because there are genuine issues of material fact, we reverse the district court's grant of summary judgment and remand for further proceedings.

D E C I S I O N

In May 2009, a windstorm damaged part of appellant's roof. Appellant filed a claim with Acuity pursuant to his homeowner's insurance policy. An independent claims adjuster determined that the wind caused damage to 25% of the roof, and Acuity disbursed a check to appellant for $4,161.97, the estimated value of damage to 25% of the roof minus a $1,000 deductible. Appellant rejected the check, indicating by letter on July 1, 2009, that Certainteed Hearthstead shingles—the brand and style of his existing shingles—were discontinued and unavailable. Because he could not obtain matching shingles, appellant stated that he could not repair his roof and requested that Acuity pay for the cost of replacing his entire roof.

On July 23, 2009, Acuity notified appellant that it had located a supplier with a limited number of matching shingles in stock. Subsequently, appellant alleged that the supplier was unresponsive to his inquiries about purchasing the shingles. On August 11, 2009, Acuity notified appellant that the supplier's stock of shingles had been sold.

Appellant's homeowner's insurance policy provided a binding appraisal process for the resolution of loss-valuation disputes. Pursuant to the policy, two appraisers and a neutral umpire conducted an appraisal on June 15, 2010, and issued an appraisal award. The award listed "Loss Replacement Cost" and "Loss Actual Cash Value" as $5,161.97. But under the heading "CLARIFICATIONS IF ANY" the award further indicated, "Gross loss. Roof only. We did not determine whether the Hearthstead 4 tab Certainteed shingles are available for repairs of the roof. If replaced, roof replacement is $20,105.90. ACV [actual cash value] is $10,052.95." Following the issuance of the appraisal award, Acuity again issued a check to appellant for $4,161.97, and appellant again rejected the check.

On August 13, 2010, appellant filed this action asserting that coverage of only the 25% loss was a breach of contract and seeking a declaratory judgment that the policy covered full replacement of his roof. Acuity moved for summary judgment, arguing that the nondamaged 75% of the roof was not a loss covered by the policy, and so it was not in breach of the contract. The district court granted Acuity's motion for summary judgment.

In its findings of fact, the district court noted that it was disputed whether identical shingles were available between May and July 2009, but as of August 2009, the shingles were unavailable. Also in its findings of fact, the court stated that the provisions of the policy setting forth exclusions from coverage—specifically exclusions for defective materials, wear and tear, and shrinking—were relevant. Lastly, the court determined that appellant's policy did not contain consequential coverage or replacement coverage

provisions. The district court determined that appellant's policy covered only the 25% loss and did not cover the full replacement cost. It confirmed the appraisal award of $4,161.97 and ordered judgment to be entered accordingly. *See* Minn. Stat. § 572.18 (2010) ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award . . . .").

I.

Acuity first argues that the district court lacked subject-matter jurisdiction because a timely application for modification, correction or vacation under the Uniform Arbitration Act (UAA) was appellant's exclusive remedy for relief from the binding appraisal award. We disagree.

Jurisdiction is a question of law that is reviewed de novo. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 710 (Minn. 2007). "[L]ack of subject matter jurisdiction may be raised at any time, including for the first time on appeal." *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995), *review denied* (Minn. May 31, 1995); *see also* Minn. R. Civ. P. 12.08(c) (permitting the court to dismiss an action "[w]henever it appears . . . that the court lacks jurisdiction of the subject matter). Appraisal awards are subject to Minn. Stat. §§ 572.08-.30 (2010), Minnesota's codification of the UAA. *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 398 (Minn. App. 2010). "[T]he time limits in the arbitration statute are jurisdictional. . . ." *All Metro Supply, Inc. v. Warner*, 707 N.W.2d 1, 5 (Minn. App. 2005).

Acuity argues that the appraisal award is subject to the UAA and any application to modify, correct or vacate an arbitration or appraisal award must be made within 90 days of receipt of the award. *See* Minn. Stat. § 572.19, subd. 2. But although appellant did not specifically make an application for modification, correction or vacation of the appraisal award, he commenced this action for breach of contract and declaratory judgment within 90 days of the award. Pleadings are to be "liberally and broadly construed," *Midwest Family Mut. Ins. Co. v. Schmitt*, 651 N.W.2d 843, 846 (Minn. App. 2002), and "[n]o technical forms of pleading or motions are required." Minn. R. Civ. P. 8.05(a). Pleadings will be held sufficient if they provide the adverse party with fair notice of the theory on which the claim for relief is based. *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 646 (Minn. App. 2004), *aff'd*, 699 N.W.2d 307 (Minn. 2005).

Because appellant's breach-of-contract and declaratory-judgment claims contended that he was entitled to the cost of replacement, Acuity was on notice that appellant was challenging the appraisal award. Moreover, both Acuity and the district court treated appellant's action as a challenge to the appraisal award, as indicated by Acuity's request for confirmation of the appraisal award pursuant to the UAA, and the district court's confirmation of the award. Accordingly, we conclude that this action was timely filed and the district court did not lack subject-matter jurisdiction.

II.

Appellant argues that the district court erred by granting summary judgment to Acuity because there are genuine issues of material fact. We agree.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 18 (Minn. 2009). The evidence is viewed "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

To resolve an insurance-coverage dispute, we begin by examining the policy language. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). Interpretation of an insurance policy and its application to the facts are questions of law subject to de novo review. *Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 768 N.W.2d 346, 348 (Minn. 2009). "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). Unambiguous language must be given its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986).

Here, the relevant policy language provides that losses to a residence

> [a]re settled at replacement cost without deduction for depreciation, subject to the exceptions, limitation and conditions shown below.

> a. **We** will pay no more than the smallest of the following amounts:
>
> (1) If a loss to the dwelling, the dwelling stated value;
>
> . . .
>
> (3) The replacement cost at the time of loss for equivalent property, construction and use on the same premises; however, the insurance coverage may not be conditioned on replacing or rebuilding the damaged property at its original location on the owner's property if the structure must be relocated because of zoning or land use regulations of state or local government; or
>
> (4) The amount actually and necessarily spent to repair or replace the property.

It is undisputed that the "amount actually and necessarily spent to repair or replace" appellant's roof is lower than the "dwelling stated value" or the "replacement cost at the time of loss for equivalent property, construction and use on the same premises."

The policy also states, "[**W**]**e** may repair or replace any part of the damaged property with like property if **we** give **you** written notice within 30 days after **we** receive **your** signed, sworn proof of loss." Thus, assuming proper notice, pursuant to the policy, Acuity is obligated to cover "the amount actually and necessarily spent to repair or replace" appellant's roof with "like" property.

The phrase "actually and necessarily spent" unambiguously provides that the amount of covered loss requires a factual determination of the amount the insured actually must spend to repair the property, and whether such expenditure is necessary

under the circumstances. *See Estes v. State Farm Fire & Cas. Co.*, 358 N.W.2d 123, 124-25 (Minn. App. 1984) (holding that the phrase "the amount actually and necessarily spent to repair or replace the building" unambiguously limited coverage to the amount the insureds actually spent on repair), *modified on other grounds*, 365 N.W.2d 769 (Minn. 1985). And if it is established that repair is not feasible, replacement is contemplated by the policy. Moreover, the phrase "like property" indicates that the policy requires repair with comparable or similar materials, but does not require the use of identical materials. *See, e.g.*, *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 756 N.W.2d 461, 471 (Wis. Ct. App. 2008) (holding that replacement of "like kind and quality" does not require identical replacement). Whether particular replacement shingles are "like property" also must be determined by the fact-finder.

The appraisal process in appellant's policy was intended to resolve these factual issues. But the appraisal panel failed to do so. Two different amounts are set forth in the panel's award—$5,161.97 and $20,105.90—apparently because the panel did not know whether identical shingles were available. And in confirming the award, the district court did not resolve this issue. But although appellant directed his arguments to the availability of Certainteed Hearthstead shingles, the policy does not require identical materials. "Like" materials are allowed by the policy. Our review of the record indicates that the parties presented no evidence as to the availability and suitability of "like" materials to effectuate repair.

Courts in other jurisdictions have provided guidance in their application of similar policy language to comparable facts. The courts have made the requisite factual

determinations by considering, for example, testimony as to the materials available in the marketplace and whether those materials were sufficiently "like" existing materials, and whether the proposed repair would be effective and would provide an acceptable aesthetic result. *See, e.g.*, *Higginbotham v. New Hampshire Indem. Co.*, 498 So.2d 1149, 1153 (La. Ct. App. 1986) (holding that the insured was entitled to the cost of replacing his entire roof because spot replacement, while possible, would not guarantee a leak-free roof); *Eledge v. Farmers Mut. Home Ins. Co.*, 571 N.W.2d 105, 111-12 (Neb. Ct. App. 1997) ("[W]here a single square of shingles is damaged and matching replacements can be found, and where the repair can be made without damage to the remainder of the roof, . . . the [policy] does not require the replacement of the whole when it is factually shown that the whole can be satisfactorily repaired by replacement of a 'part,' so long as the building is returned to 'like construction and use' as a result."); *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178, 1186 (Pa. Super. Ct. 2007) (holding that, although the exact shingles were not available, the insurer was not required to cover total replacement because trial testimony revealed that shingles of a similar color and texture were available and could have been used to repair the insured's roof).

A determination of loss—the amount actually and necessarily spent to repair or replace the roof with "like" materials—can only be made after evidence is presented as to the feasibility of repair and the availability of materials. We therefore conclude that there are outstanding issues of material fact and summary judgment was inappropriate. Accordingly, we reject the argument that the policy, as a matter of law, requires coverage of a specific percentage of loss. And we need not address appellant's additional

argument that the district court erroneously relied upon disputed facts at the summary judgment stage.

Finally, Acuity argues that appellant is precluded from recovering more than 25% loss because the policy is not a "replacement policy." We disagree. Appellant's policy provides that losses are "settled at *replacement cost without deduction for depreciation*" subject to the exceptions discussed above. This is the hallmark of a replacement value policy. *See* 12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 176:56 (2005) ("[W]hile a standard policy compensating an insured for the actual cash value of damaged or destroyed property makes the insured responsible for bearing the cash difference necessary to replace old property with new property, replacement cost insurance allows recovery for the actual value of property at the time of loss, without deduction for deterioration, obsolescence, and similar depreciation of the property's value.").

III.

Acuity argues that policy exclusions preclude appellant from obtaining coverage for more than the 25% loss caused by wind damage. We disagree.

The policy provides that Acuity does not insure for loss to a residence attributable to an excluded cause, such as wear and tear, shrinkage, and defective materials. Acuity argues that 75% of appellant's roof was damaged by one or more of these excluded causes. But Acuity's argument is inapplicable here. It is undisputed that the 25% damage to appellant's roof was caused by a windstorm and thus was a covered loss. Appellant's claim is not that unrelated damage to 75% of his roof is covered by the

policy. If Acuity is required to replace more than 25% of the shingles, it will be because such replacement was necessary to effectuate repair of the damaged 25% pursuant to the policy terms.

Reversed and remanded.