FILED
United States Court of Appeals
Tenth Circuit

January 9, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK MOCK; SUSAN MOCK,

Plaintiffs - Appellants,

v.

ALLSTATE INSURANCE COMPANY,

Defendant - Appellee.

No. 18-1407
(D.C. No. 1:17-CV-02592-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **KELLY**, and **LUCERO**, Circuit Judges.

Mark and Susan Mock appeal the district court's grant of summary judgment in favor of Allstate Insurance Company ("Allstate"). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

The Mocks' home in Greenwood Village, Colorado, was built in 1994. It has been insured under an Allstate homeowners' insurance policy ("the Policy") since that time. The Policy provides coverage for "sudden and accidental direct physical loss to property." However, it excludes coverage for:

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

> Planning, Construction or Maintenance, meaning faulty, inadequate or defective:
> a) planning, zoning, development, surveying, sitting;
> b) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> c) materials used in repair, construction, renovation or remodeling; or
> d) maintenance;
> of property whether on or off the residence premises by any person or organization.

Coverage is also excluded if "there are two or more causes of loss to the covered property" and "the predominant cause(s) of the loss is (are) excluded."

On May 25, 2015, a severe storm caused damage to the Mocks' roof and barn. The Mocks reported the damage to Allstate a few days later. An Allstate representative inspected the roof on June 7 and agreed to cover a portion of the roof damage at that time.

In late August, the Mocks discovered additional damage to their home's exterior insulation finish system ("EIFS"). They promptly contacted Allstate to report the damage. After reviewing photographs the Mocks submitted, an Allstate inspector advised them that the damage was not covered by the Policy because it was not sudden and accidental. However, Allstate conducted another inspection on September 24. Allstate indicated that the claim remained under review and hired Rimkus Consulting to inspect the damage.

A report prepared by Rimkus concluded:

> The cause of the damage to the EIFS system was improper design and/or construction exacerbated by inadequate maintenance of sealants. Specifically, the wall system did not provide for drainage of moisture that penetrated the wall through gaps at penetrations. Without diligent and

> thorough maintenance, moisture likely began penetrating the EIFS system as sealants deteriorated within a few years after construction.

Rimkus acknowledged that water likely did not "penetrate the wall system during the period in which the sealants were functioning," but noted that "stains observed on the OSB sheathing were consistent with [retained moisture] and indicated moisture had been penetrating the EIFS for a prolonged period of time." The report further found that "[o]ver the years, precipitation was able to enter the exterior wall system through the gaps at penetrations but it had no means by which to drain out. This issue was common to EIFS designs typical of the 1994 timeframe of this residence's construction." Allstate provided the Rimkus report to the Mocks and reiterated its position that damage to the EIFS was not covered.

The Mocks then hired SBSA, Inc. to inspect the property and review Rimkus' findings. Like the Rimkus report, the SBSA report found that the EIFS damage was "consistent with the effects of water infiltration." However, SBSA noted that Susan Mock reported that the Mocks "regularly maintain the sealant joints around the openings and penetrations" and that the "remaining sealant joints were in good condition." SBSA disagreed with Rimkus about "the presence of original construction defects" because the Mocks' EIFS system "was allowed by the building code at the time of original construction." But the report acknowledged that the Mocks' system would not comply with the building code as revised in September 1997. SBSA further "agree[d] that the water intrusion and resultant damage is the result of an inherent flaw in the barrier EIFS systems" and that the "issue was

common to EIFS designs typical of the 1994 timeframe." The Mocks' general contractor, Greg Teunissen, also agreed that the damage was caused by "[l]ong term water infiltration through the EIFS stucco system."

In March 2016, the Mocks sent Allstate a letter formally seeking coverage of the EIFS damage. The Mocks did not inform Allstate of the SBSA report, instead merely listing the cost of the EIFS repairs. Allstate issued a partial denial letter on April 12, stating the EIFS damage was not covered because it was not "sudden and accidental" and because it fell within the Policy's exclusion for faulty planning, construction, or maintenance. Allstate relied on Rimkus' conclusion that the damage was caused by improper design and/or construction. In response, the Mocks submitted a letter through counsel requesting that Allstate reconsider. Allstate reiterated its denial. In addition to its prior explanation, Allstate cited the exclusion that applies if "the predominant cause(s) of the loss is (are) excluded."

The Mocks filed suit against Allstate in Colorado state court. Allstate removed the case to federal court. After the Mocks informed Allstate about the SBSA report, Rimkus prepared a supplemental report clarifying that it did not opine on whether the EIFS was compliant with building codes. Rather, Rimkus took the position that the manufacturer's design was inherently faulty because the EIFS had no means for moisture to escape and was dependent upon the integrity of sealants. The supplemental report also noted that "[i]t is common and typical for sealants to fail prior to being replaced or repaired" and that the presence of staining and water damage below penetration points indicated the sealants had failed.

SBSA also issued a supplemental report, stating that because the EIFS "was allowed by the building code at the time of construction" and "the original construction appeared to be in general conformance with the original architectural drawings and details," the damages "cannot be considered the result of a design defect." Instead, SBSA characterized the cause of the damage as "an inherent flaw with the use of code compliant barrier EIFS system[s] on wood frame structures." Because homeowners cannot "monitor and maintain sealant joints to be water-tight 100-percent of the time," the water infiltration was caused by "an inherent flaw with the barrier EIFS system and cannot be attributed to inadequate homeowner maintenance."

The district court granted summary judgment in favor of Allstate. It concluded that the EIFS damage was not "sudden and accidental" as required by the Policy. The court stated that the exclusion for faulty design or construction also appeared to apply, but it did not expressly rule on this issue. The Mocks timely appealed.

II

We review the grant of summary judgment de novo. See Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009). A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. Id.

Colorado law governs this diversity case. See Stickley v. State Farm Mut. Auto. Ins. Co., 505 F.3d 1070, 1076 (10th Cir. 2007). Under Colorado law, contractual terms are given their ordinary meanings. Allstate Ins. Co. v. Hulzar, 52

P.3d 816, 819 (Colo. 2002). "[P]olicy provisions should be read as a whole, rather than in isolation." McGowan v. State Farm Fire and Cas. Co., 100 P.3d 521, 523 (Colo. App. 2004). And we construe "the policy so that all provisions are harmonious and none is rendered meaningless." Martinez v. Am. Fam. Mut. Ins. Co., 413 P.3d 201, 203 (Colo. App. 2017). A policy is ambiguous if it is susceptible to two or more reasonable interpretations. Northern Ins. Co. of N.Y. v. Ekstrom, 784 P.2d 320, 323 (Colo. 1989). "Ambiguous language must be construed in favor of the insured and against the insurer who drafted the policy." Hecla Min. Co. v. N.H. Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991).

"We have discretion to affirm on any ground adequately supported by the record." Elkins v. Comfort, 392 F.3d 1159, 1162 (10th Cir. 2004). Although the district court did not rule on the applicability of the faulty construction or design exclusion, the issue was fully briefed below and raised on appeal, and there are no material factual disputes. See id. (identifying these factors as supporting consideration of an alternative ground). Because we affirm based on the faulty construction or design exclusion, we do not address the meaning of "sudden and accidental direct physical loss" in the Policy, which was the basis of the district court's ruling.

The exclusion at issue bars coverage for "faulty, inadequate or defective . . . design . . . [or] construction." Both engineering consultants agree that the cause of the damage was a flaw in the EIFS barrier. Allstate's consultant Rimkus concluded that "the manufacturer's design of the system had inherent conditions that were

faulty," including "[a] lack of means for moisture to escape" and dependence "upon the integrity of sealants at penetrations." The Mocks' consultant SBSA agreed that the damage was due to "an inherent flaw with the barrier EIFS system," that sealant joints "should not be relied upon to prevent water from entering the system," and that because "there are no means to allow release of the water," it "accelerates the climate necessary for the conditions favorable to damages."

SBSA refused to characterize this "inherent flaw" as a design or construction issue because the system met building codes as they existed at the time of construction. But whether the undisputed flaw qualifies as faulty, inadequate, or defective design or construction is a legal issue. The statement of a legal conclusion is insufficient to create a material dispute of fact. See Peck v. Horrocks Eng'rs, Inc., 106 F.3d 949, 956 (10th Cir. 1997).

The undisputed facts show that the manufacturer's design of the EIFS system caused water infiltration and damage. We are not presented with any authority for the proposition that a flawed design does not qualify as "faulty, inadequate or defective" merely because the problem was unknown to drafters of past building codes. And as Allstate notes, Colorado courts use the synonyms "flaw" and "defect" interchangeably. See, e.g., Union Supply Co. v. Pust, 583 P.2d 276, 280 (Colo. 1978) ("A defective product may be equally hazardous to the ultimate user or consumer whether its defect arises from a flaw in manufacture or from a flaw in design."). Applying the plain meaning of the Policy's terms, see Hulzar, 52 P.3d at 819, we conclude that the flawed design of the Mocks' EIFS barrier constitutes

"faulty, inadequate or defective . . . design . . . [or] construction" and thus that coverage is excluded.[1]

Because coverage of the EIFS damage is excluded under the Policy, the Mocks' bad faith claim necessarily fails to the extent it relates to the EIFS barrier. See MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co., 558 F.3d 1184, 1193 (10th Cir. 2009) ("It is settled law in Colorado that a bad faith claim must fail if, as is the case here, coverage was properly denied and the plaintiff's only claimed damages flowed from the denial of coverage."). On appeal, the Mocks also argue that Allstate acted in bad faith by delaying payment and denying certain fees related to roof damage, which is undisputedly covered under the Policy. Although the Mocks devote substantial briefing to these issues on appeal, they devoted only a total of three sentences of argument to these issues below. We have treated such issues as waived under similar circumstances. See Tele-Commc'ns, Inc. v. Comm'r, 104 F.3d 1229, 1233-34 (10th Cir. 1997) (refusing to consider issue because "only a single paragraph" of argument in lower court became "ten pages of argument" on appeal). We do the same here.

[1] The Mocks argue that there is a dispute as to precisely when the water damage began and that some of the EIFS damage may have been caused by May 25 storm. This argument was not advanced before the district court. We generally will not consider arguments raised for the first time on appeal. See Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 722 (10th Cir. 1993). In any event, this issue is immaterial to the question whether the damage was caused by a construction or design defect.

III

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge