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Page 1

Not Reported in S.W.3d, 2006 WL 853177 (Tex.App.-Hous. (1 Dist.))
 (Cite as: Not Reported in S.W.3d)

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Pin Oak Centre, Ltd. v. Travelers Lloyds Ins. Co.
 Tex.App.-Houston [1 Dist.],2006.

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MEMORANDUM OPINION

Court of Appeals of Texas,Houston (1st Dist.).
PIN OAK CENTRE, LTD., Appellant

v.

The **TRAVELERS LLOYDS INSURANCE CO.**,
 Appellee.

No. 01-05-00530-CV.

March 30, 2006.

Background: Insured brought action against insurer, alleging that insurer breached its contractual obligation under commercial general liability policy to provide insured with a defense in former tenant's action, and insurer counterclaimed for declaratory judgment that it had no duty to defend. The District Court, Harris County, granted insurer summary judgment. Insured appealed.

Holding: The Houston Court of Appeals, First District, Laura Carter Higley, J., held that insurer had no duty to defend insured.

Affirmed.

West Headnotes

Insurance 217 ⇨ **2278(29)**

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(25) Property of Insured

217k2278(29) k. Personal

Property in Care, Custody or Control. Most Cited Cases

Commercial general liability insurer had no duty to

defend insured in action brought by bankrupt former tenant, alleging wrongful seizure of property under the Bankruptcy code, failure to turn over property to the bankruptcy estate, breach of contract, and tortious interference with prospective contractual relations; the allegations within tenant's complaint fell within the care, custody, or control exclusion of policy, which excluded coverage for property damage to personal property in the care, custody, or control of the insured.

On Appeal from the 11th District Court, Harris County, Texas, Trial Court Cause No.2004-26962.

Charles Littleton Fridge III, for Pin Oak Centre, Ltd.
 Nicholas E. Zito, Jack McKinley, for the Travelers Lloyds Insurance Co.

Panel consists of Justices TAFT, HIGLEY, and BLAND.

MEMORANDUM OPINION

LAURA CARTER HIGLEY, Justice.

*1 This liability insurance coverage dispute was resolved in the trial court on cross-motions for summary judgment in favor of The Travelers Lloyds Insurance Company against its insured, Pin Oak Centre, Ltd. In two issues, Pin Oak contends that Travelers had a duty to defend it under a commercial general liability (CGL) policy in a bankruptcy court adversary proceeding brought by Pin Oak's former tenant, Voyager Toys, Inc. Because we agree with Travelers that the CGL policy's "care, custody, and control" exclusion applies to Voyager's claims on which Pin Oak bases its right to a defense, we hold that the trial court properly granted Travelers's motion for summary judgment and denied that of Pin Oak.^{FN1}

FN1. Freeway Properties, Inc. was also a party in the trial court. Though it was aligned with Pin Oak in the trial court,

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Not Reported in S.W.3d

Page 2

Not Reported in S.W.3d, 2006 WL 853177 (Tex.App.-Hous. (1 Dist.))
 (Cite as: Not Reported in S.W.3d)

Freeway Properties is not a party to this appeal.

We affirm.

Factual and Procedural Background

Voyager, a retailer of collectible toys, leased space in a shopping center from Pin Oak. Midway through its term, Voyager abandoned the lease and moved its business and inventory to a nearby location. After discovering that Voyager had abandoned the lease, Pin Oak sought and obtained a distress warrant to seize Voyager's property in satisfaction of the rent monies owed.

Harris County constables executed the warrant by seizing Voyager's inventory and equipment. On that same day, Voyager filed for Chapter 11 bankruptcy and notified the constables and Pin Oak of the filing. Despite the bankruptcy filing, Pin Oak refused to return Voyager's inventory and equipment until nearly five months later. Upon the property's return, Voyager discovered that much of it was either damaged or missing.

Voyager filed an adversary proceeding in bankruptcy court against Pin Oak. In its complaint, Voyager asserted claims for wrongful seizure under the Bankruptcy Code, failure to turn over the property of the bankruptcy estate, breach of contract, tortious interference with prospective contractual relations, and violation of Texas Business and Commerce Code section 9.207. Voyager sought compensation for the damaged and missing property and for loss of earnings.

Pin Oak requested that Travelers provide it with a defense against Voyager's claims under a CGL policy issued by Travelers to Pin Oak. After Travelers declined coverage, Pin Oak sued Travelers, asserting that the insurer had breached its contractual obligation to provide a defense. In turn, Travelers counterclaimed, seeking a declaratory judgment that it had no duty to defend or to indemnify Pin Oak under the policy. Travelers then moved for summary judgment, arguing that the allegations in Voyager's complaint did not

constitute an "occurrence" as required for coverage under the policy. Travelers also argued that the damage alleged by Voyager was excepted from coverage under the policy's "care, custody, and control" exclusion. Pin Oak moved for partial summary judgment, asserting that it was entitled to a defense because Voyager's allegations constituted an "occurrence" as defined in the policy and that the cited exclusion did not apply. Each party asserted that its interpretation of the pertinent policy language was correct as a matter of law.

*2 The trial court granted Travelers's motion for summary judgment on its declaratory-judgment counterclaim and denied Pin Oak's motion for partial summary judgment. Pin Oak brings this appeal to challenge the trial court's ruling on the respective motions for summary judgment.

Standard of Review

We review a summary judgment under a de novo standard. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex.2003). The well-settled principles governing the review of summary judgments apply in insurance coverage cases. *Hanson v. Republic Ins. Co.*, 5 S.W.3d 324, 327 (Tex.App.-Houston [1st Dist.] 1999, pet. denied). That is, a traditional summary-judgment movant must establish its right to summary judgment on the issues presented to the trial court by conclusively proving all elements of the movant's claim or defense as a matter of law. Tex.R. Civ. P. 166a(c); *Havlen v. McDougall*, 22 S.W.3d 343, 345 (Tex.2000). If both sides move for summary judgment and the trial court grants one motion and denies the other, we review both sides' summary-judgment evidence and determine all questions presented. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex.2000). If, as here, a trial court's order granting summary judgment does not specify the grounds on which the court relied, then the reviewing court must affirm the summary judgment if any of the summary-judgment grounds is meritorious. See *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex.1995).

Not Reported in S.W.3d

Page 3

Not Reported in S.W.3d, 2006 WL 853177 (Tex.App.-Hous. (1 Dist.))
 (Cite as: Not Reported in S.W.3d)

Principles Governing Duty to Defend

It is well-established that a liability insurer's duty to defend is determined by the factual allegations of the pleadings, considered in light of the policy provisions and without reference to the truth or falsity of the allegations. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex.1997); *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex.1965). This test, generally known as the "eight-corners rule," limits review to the four corners of the insurance policy and the four corners of the plaintiff's petition in the underlying suit. *Merchants Fast Motor Lines*, 939 S.W.2d at 141; see *Saint Paul Surplus Lines Ins. Co. v. Geo Pipe Co.*, 25 S.W.3d 900, 903 (Tex.App.-Houston [1st Dist.] 2000, no pet.).

If a petition does not allege facts within the scope of coverage, then an insurer is not legally required to defend a suit against its insured. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex.2002). If a petition alleges facts that, if taken as true, potentially state a cause of action within the terms of the policy, then the insurer has a duty to defend. See *Merchants Fast Motor Lines*, 939 S.W.2d at 141 (citing *Heyden*, 387 S.W.2d at 26). Concomitantly, an insurer has no duty to defend if a petition against an insured alleges facts excluded by the policy. *Fidelity & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex.1982).

*3 When applying the eight-corners rule, we give the allegations in the petition a liberal interpretation, focus on the factual allegations that show the origin of the damages, rather than on the legal theories alleged, and resolve all doubts concerning the duty to defend in favor of the insured. *Merchants Fast Motor Lines*, 939 S.W.2d at 141. "It is not the cause of action alleged which determines coverage but the facts giving rise to the alleged actionable conduct." *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex.App.-Houston [14th Dist.] 1993, writ denied). Thus, in determining the applicability of an exclusion, our focus must be on the origin of the damages, not on the legal theory asserted for recovery. *Continental Cas. Co. v. Hall*, 761 S.W.2d

54, 56 (Tex.App.-Houston [14th Dist.] 1988, writ denied).

If the underlying petition "alleges facts that, prima facie, exclude the insured from coverage, [then] the insurer has no duty to defend." *Adamo*, 853 S.W.2d at 677. Stated differently, there is no duty to defend when the plaintiff's petition makes allegations that, if proved, place the plaintiff's claims within a policy exclusion. *McManus*, 633 S.W.2d at 788.

Care, Custody, or Control Exclusion

Pin Oak frames its first issue as follows: "The trial court erred when it denied [Pin Oak's] Motion for Summary Judgment because the policy of insurance unambiguously provided coverage for defense of the underlying lawsuit." FN2 One of Pin Oak's arguments in support of this issue is that Travelers did not prove that the policy's care, custody, or control exclusion applied to preclude coverage.

FN2. A challenge that Travelers had a duty to indemnify Pin Oak is not asserted by Pin Oak.

The CGL policy specifically excluded from coverage "property damage" to "personal property in the care, custody or control of the insured." FN3 Pin Oak and Travelers disagree regarding whether Voyager's allegations brought Voyager's claims within the policy exclusion; that is, Pin Oak disagrees with Travelers's summary-judgment assertion that the complaint alleged that the damage to Voyager's property occurred while the property was in the care, custody, or control of Pin Oak.

FN3. The policy defined "property damage," in relevant part, as "physical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured."

In support of its summary-judgment ground that the care, custody, or control exclusion precluded

Not Reported in S.W.3d

Page 4

Not Reported in S.W.3d, 2006 WL 853177 (Tex.App.-Hous. (1 Dist.))
(Cite as: Not Reported in S.W.3d)

coverage, Travelers cited the following allegations from Voyager's complaint:

Paragraph 10. Despite actual knowledge of the filing of the above captioned bankruptcy proceeding, Pin Oak refused to cease and desist in moving [Voyager's] property from the premises and *continued to take, attach and hold Debtor's [Voyager's] property until all or substantially all of that was removed from the premises.*

Paragraph 23. Pin Oak seized [Voyager's] inventory and equipment, by and through its agent. Pin Oak *remained in possession of the [sic] Voyager's property for approximately five months until it was turned over.*

Paragraph 24. Defendant [Pin Oak] lost, or otherwise allowed a portion of the inventory and equipment *in its possession* to go to waste, without [Voyager's] knowledge, or authorization.

*4 Paragraph 39. Despite actual notice of the bankruptcy filing and repeated demands for immediate turnover of [Voyager's] inventory and equipment, Pin Oak *continued to exercise dominion and control of property rightfully belonging to the Estate.*

Paragraph 40. Pin Oak's *failure to turn over to the Debtor [Voyager] the property of the estate* was the direct and proximate cause of substantial damages incurred by [Voyager].

Paragraph 51. Pin Oak's *seizure of inventory and equipment of the Debtor [Voyager]* materially damaged [Voyager's] ability to reorganize and conduct business. Specifically, Pin Oak's seizure of Debtor's [Voyager's] inventory impaired not only [Voyager's] ability to sell the seized merchandise, but the loss of critical equipment, such as computers, software, and other data, effectively compromised [Voyager's] ability to operate his [sic] business.

(Emphasis added.)

Citing the legal precept that a duty to defend is determined by the facts alleged and not the legal theories advanced, Pin Oak asserts that Voyager's complaint did not allege "facts" that Pin Oak exercised care, custody, or control over Voyager's property. Pin Oak contends that the only relevant "fact" alleged in this regard was that the constables "took control" of Voyager's property pursuant to the

distress warrant. Pin Oak argues that Voyager made no factual allegations that the constable's office was acting as Pin Oak's agent when the property was seized.^{FN4}

FN4. In its summary-judgment response, Pin Oak acknowledged that Voyager alleged in paragraph 23 of its complaint that "Pin Oak seized [Voyager's] inventory and equipment, by and through its *agent*," but characterizes this allegation as having been "baseless" and "a legal conclusion." (Emphasis added.)

Pin Oak's focus is misplaced. Regardless of whether the complaint alleged that the constable acted as Pin Oak's agent, Voyager's allegations cited by Travelers and set out above alleged facts that, if proven, placed Voyager's claims within the care, custody, or control exclusion. Specifically, Voyager claimed that it suffered damages because Pin Oak had seized its property, refused to return it, kept it for five months, and damaged or lost it during that time. Pin Oak appears to discount these allegations by contending that they do not contain factual allegations, but, rather, are merely legal theories or inference made by Voyager. Though some of the passages from the complaint cited by Travelers advanced Voyager's legal theories, they also contained factual allegations supporting those theories, which fit squarely within the exclusion. *See, e.g., Mid-Continent Cas. Co. v. Third Coast Packaging Co., Inc.*, 342 F.Supp.2d 626, 631 (S.D.Tex.2004) (holding that care, custody or control exclusion barred coverage because underlying petitions alleged that property was "in possession" or in "care, custody, and control" of insured when it was damaged). Therefore, Travelers proved, as a matter of law, that it had no duty to defend Pin Oak in the underlying litigation. For this reason, we hold that the trial court properly granted Travelers's motion for summary judgment and properly denied that of Pin Oak.

We overrule Pin Oak's first issue.^{FN5}

FN5. Because the care, custody, or control

Not Reported in S.W.3d

Page 5

Not Reported in S.W.3d, 2006 WL 853177 (Tex.App.-Hous. (1 Dist.))
(Cite as: Not Reported in S.W.3d)

exclusion bars coverage, we need not determine whether Voyager's complaint alleged an "occurrence," as Pin Oak also contends in its first issue. We also do not reach Pin Oak's second issue, which further attacks other possible grounds for the trial court's summary-judgment ruling.

Conclusion

*5 We affirm the judgment of the trial court.

Tex.App.-Houston [1 Dist.],2006.
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