

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1469

Handwritten initials: BJK, PJP, TMH

SERVICE ONE CABLE T.V., INC.

VERSUS

SCOTTSDALE INSURANCE COMPANY AND
JUANITA M. LOCKHART

Judgment Rendered: February 10, 2012.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 581,790

The Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

The plaintiff, Service One Cable T.V., Inc., challenges the trial court's grant of partial summary judgment in favor of Scottsdale Insurance Company and dismissal of Service One's claim for remuneration under the terms of its commercial property insurance policy. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Service One owns and operates a cable television company in Plaquemine, Louisiana. The company currently has two employees. James M. Kazmir handles technical operations, and Susan Dupont Simpson handles administrative matters. The company plant consists of two buildings, an administrative building and a headend building. The headend building houses electronic equipment that gathers and processes cable signals. The signals are delivered to customers through an approximately 49-mile coaxial cable system. The coaxial cable system originates at, and is connected to, the headend building, then strung on a network of utility poles, which are not owned by Service One. The coaxial cable, through a system of trunk and feed lines, ultimately is connected to customers' residences or businesses.

Service One acquired commercial property insurance for its assets, as well as business interruption insurance, from Scottsdale through independent insurance agent Juanita Lockhart. The first policy was issued in 2001, and coverage remained relatively unchanged through the annual renewals, without any further inquiry as to the amount or scope of coverage until, at the earliest, a couple of days before Hurricane Gustav struck on September 1, 2008.

Hurricane Gustav damaged Service One's administrative and headend buildings, as well as its 49-mile coaxial cable distribution system. According to Simpson, Scottsdale advanced \$15,000 to Service One for the interruption of business; Scottsdale later claimed the advance represented an overpayment of \$7,000. The administrative and headend buildings were operational almost immediately after the hurricane; however, without the cable distribution system in place, cable service could not be delivered to customers. Service One contracted with Duane Noel of Fiber Vision Cable Services to assist with restoration of the coaxial cable line system. Within thirty days of Gustav, almost all of Service One's customers were back on line with access to cable television programming.

Allegedly, Service One began repairs with agent Lockhart's assurances that the costs of reconstruction would be covered under the Scottsdale policy. However, it is undisputed that Scottsdale never told Service One that repairs to the coaxial cable line system would be covered. To the contrary, Scottsdale informed Service One that the coaxial cable repairs were not covered expenses under the policy.

Service One filed this suit, naming Scottsdale and Lockhart as defendants.¹ In response, Scottsdale filed a motion for summary judgment, alleging the commercial property insurance policy did not provide coverage for damage to the 49-mile coaxial cable system. The trial court granted Scottsdale's motion, and Service One appeals, alleging two assignments of error: (1) the trial court erred in determining Service One's cable distribution system, which is hard wired to the headend building, was not an

¹ Juanita M. Lockhart also successfully moved for partial summary judgment. Service One separately appeals that judgment in docket number 2011 CA 1470.

outdoor fixture or equipment of the covered building; and (2) the trial court erred in concluding that repair of the cable distribution system was not covered as an “extra expense” necessary for the restoration of normal business operations.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. *All Crane Rental of Georgia, Inc. v. Vincent*, 10-0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, *writ denied*, 10-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966B. Summary judgment is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. Proc. Ann. art. 966A(2).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court’s determination of whether summary judgment is appropriate. *All Crane*, 47 So. 3d at 1027. On a motion for summary judgment, the burden of proof is on the mover. La. Code Civ. Proc. Ann. art. 966C(2). If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover’s burden does not require that all essential elements of the adverse party’s claim, action, or defense be negated. *Id.* Instead, the mover must point out to the court that there is an absence of factual support for one or more elements

essential to the adverse party's claim, action, or defense. *Id.* Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. *Id.* If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966C(2); *All Crane*, 47 So. 3d at 1027.

In ruling on a motion for summary judgment, the court's role is not to evaluate the weight of the evidence or to determine the truth of the matter. *All Crane*, 47 So. 3d at 1027. Instead, it is to determine whether there is a genuine issue of triable fact. *Id.* A court cannot make credibility decisions on a motion for summary judgment. *Id.* In deciding a motion for summary judgment, the court must assume that all of the witnesses are credible. *Id.* Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Id.*

The issue of whether an insurance policy, as a matter of law, provides or precludes coverage is a dispute that can be resolved properly within the framework of a motion for summary judgment. *Id.* at 1027-28. Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *Id.* at 1028.

The insured bears the burden of proving the existence of a policy and coverage. *Mateu v. State Farm Mutual Automobile Insurance Co.*, 08-1208 (La. App. 5 Cir. 4/28/09), 13 So. 3d 196, 198; *Doerr v. Mobil Oil Corp.*, 00-

0947 (La. 12/19/00), 774 So. 2d 119, 124, *corrected on rehearing*, 00-0947 (La. 3/16/01), 782 So. 2d 573. Therefore, Service One has the ultimate burden of establishing that it will be able to satisfy its evidentiary burden of proof at trial that the insurance policy covers repairs to the approximately 49-mile coaxial cable system. *See* La. Code Civ. Proc. Ann. art. 966C(2); *All Crane*, 47 So. 3d at 1031.

INSURANCE POLICY INTERPRETATION

An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. *All Crane*, 47 So. 3d at 1028. In interpreting insurance contracts, courts are to determine the parties' common intent. *See* La. Civ. Code Ann. art. 2045. Words and phrases used in a policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning. *All Crane*, 47 So. 3d at 1028; *see* La. Civ. Code Ann. art. 2047. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. *All Crane*, 47 So. 3d at 1028; *see* La. Civ. Code Ann. art. 2046. "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made a part of the policy." La. Rev. Stat. Ann. § 22:881. The court should not strain to find ambiguity where none exists. *All Crane*, 47 So. 3d at 1028. Whether a contract is ambiguous is a question of law. *Id.*

DISCUSSION

Commercial Property Coverage

Commercial property insurance policy #CPS0910996 was in effect for the policy period March 5, 2008, through March 5, 2009. The Building and Personal Property Coverage Form provides that Scottsdale “will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations” if caused by a covered cause or loss. The designated premises are buildings located at 58085 Fort Street and at 58130 Chinn Street, both in Plaquemine, Louisiana. The 49-mile coaxial cable system for which Service One seeks coverage is not specifically mentioned on the Declarations page; therefore, it must be determined whether the coaxial cable system is part of one of the described premises. “Building” is defined by the policy as follows:

- a. **Building**, meaning the building or structure described in the Declarations, including:
 - (1) Completed additions;
 - (2) Fixtures, including outdoor fixtures;
 - (3) Permanently installed:
 - (a) Machinery and
 - (b) Equipment[.]

Service One maintains that the cable system qualifies as covered property because it is either an “outdoor fixture” or “permanently installed equipment.” In response, Scottsdale offers that the prevailing meaning of the term “fixture” does not encompass an item that is predominantly outside of and far removed from the building. Further, Scottsdale maintains the cable system is not *permanently* attached to the headend building.

The term “fixture” is undefined in the policy; however, this fact alone does not make the term ambiguous. *See American Deposit Ins. Co. v.*

Myles, 00-2457 (La. 4/25/01), 783 So. 2d 1282, 1287. Instead, undefined terms are to be given their generally prevailing meanings. La. Civ. Code Ann. art. 2047; *American Deposit*, 783 So. 2d at 1287. Dictionaries, treatises, and jurisprudence can be used to ascertain a term's generally prevailing meaning. See *Cadwallader v. Allstate Ins. Co.*, 02-1637 (La. 6/27/03), 848 So. 2d 577, 581-83. Additionally, legislation can provide definitions for undefined, unambiguous terms used in insurance policies. See *Leger v. St. Landry Aerial Applicators, Inc.*, 399 So. 2d 760, 761-62 (La. App. 3d Cir. 1981) (referencing Louisiana Civil Code article 465, now Article 463, to determine whether standing crops are "property in or upon the field," as used in an insurance policy exclusion).

Courts applying Louisiana law have equated the term "fixture" with the term "component part," as used in the Louisiana Civil Code. See *Prytania Park Hotel, Ltd. v. General Star Indemnity Co.*, 179 F.3d 169, 178-79 (5th Cir. 1999) (construction of insurance policy terms); *Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax Com'm*, 04-0473 (La. 4/1/05), 903 So. 2d 1071, 1078-79 (applying property law concepts in the tax context). Louisiana Revised Statutes section 10:9-102(a)(41) defines "fixtures" as "goods, other than consumer goods and manufactured homes, that after placement on or incorporation in an immovable have become a component part of such immovable as provided in Civil Code Articles 463, 465, and 466, or that have been declared to be a component part of an immovable under Civil Code Article 467." Component parts are defined in Louisiana Civil Code article 465 as things incorporated into a building "so as to become an integral part of it, such as building materials." Louisiana

Civil Code article 466 further explains that “[o]ther things are component parts of a building . . . if they are attached to such a degree that they cannot be removed without substantial damage to themselves or to the building.”²

[M]ovable property becomes a fixture when it becomes so attached to immovable property as to become a “component part” thereof as defined by the Louisiana Civil Code. The determination of whether a movable has become a “fixture,” i.e., a component part of an immovable, will continue to be made by the relevant provisions of the Louisiana Civil Code.

Peter S. Title, 1 La. Prac. Real Est. § 1:20 (2d ed.).

Courts lack the authority to alter the terms of an insurance contract under the guise of contractual interpretation when the policy’s provisions are couched in unambiguous terms. *Cadwallader*, 848 So. 2d at 580. The term “fixture” as used in the commercial property insurance policy is unambiguous within the context of the facts of this case. Accordingly, the contractual language will be enforced as written, and the determination of whether the 49-mile coaxial cable system is a “fixture” will be made with reference to the relevant provisions of the Louisiana Civil Code.

Kazmir explained that “[t]he outside plant leaves the administrative building on a single signal cable.” According to Kazmir, the signal gathering and processing, which takes place at the headend building, and the outside physical plant (the system of coaxial cable that originates at the headend and is strung on poles throughout Plaquemine) are “physically connected.” “There are no gaps or wireless connections.” Kazmir also explained how the coaxial cable is connected to the headend building.

² Article 466 was last amended by Act 632, section 1 of the 2008 legislative session, with an effective date of July 1, 2008. Pertinent to this discussion is the last paragraph of Article 466, which sets forth the substantial damage test. The law applicable to the substantial damage test was unchanged by the 2008 amendment. *See* 2008 Revision Comments, cmt. (b).

[T]he headend building . . . [is] a large funnel; it goes through a constriction, and then it disseminates again. All signals that customers receive are received through that big funnel at the headend through various dishes, antennas. . . . It's all processed into one cohesive signal and is disseminated through coax through the city and then, hence, to the customers It disseminates from the headend, yes [The coaxial cable is] connected inside [the headend building].

According to Kazmir, the coaxial cable that leaves the headend building remains in the same form throughout the utility pole network, and if the coaxial connection with the headend building is cut, the cable transmission to customers is shut down.

Service One established that the coaxial cable originates at the headend building and, through a system of trunk lines and feed lines, ultimately reaches individual customers. Service One also established that cutting the coaxial cable disrupts cable service to customers. However, Service One failed to offer any evidence that the coaxial cable is permanently installed or that removal of the coaxial cable line from the headend building would cause "substantial damage" to either the headend building or to the coaxial cable. Accordingly, Service One failed to meet its burden on the motion for summary judgment, specifically, that it will be able to prove at trial that the coaxial cable system is a fixture or permanent installation of the headend building, such that damage to the coaxial cable system is a covered loss under this provision of the commercial insurance policy.

This assignment of error has no merit.

Business Income (and Extra Expense) & Computer Coverage

The Business Income (and Extra Expense) Coverage and Computer Coverage provide coverage for extra expenses associated with the repair of

property to the extent such payment reduces the amount of loss otherwise payable. Service One reasons that because it is in the business of processing and distributing an electronic computer signal, cable services could not have been delivered to its customers without repairs to the 49-mile cable distribution system. Service One maintains that Scottsdale has waived its right to challenge whether there is coverage for repair of the cable distribution system because Scottsdale advanced to Service One \$15,000 for loss of business income that, according to Service One, was caused by damage to the cable distribution system and not by damage to the described premises. Service One concludes that “Scottsdale necessarily determined that the loss of income was caused by a covered loss caused by a covered peril.”

Waiver is generally understood to be the intentional relinquishment of a known right, power, or privilege. *Emery v. Progressive Cas. Ins. Co.*, 10-0327 (La. App. 1 Cir. 9/10/10), 49 So. 3d 17, 21; *Steptore v. Masco Construction, Co.*, 93-2064 (La. 8/18/94), 643 So. 2d 1213, 1216. Waiver occurs when there is an existing right, knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. *Emery*, 49 So. 3d at 21; *Steptore*, 643 So. 2d at 1216. A waiver may apply to any provision of an insurance contract, even though this may have the effect of bringing within coverage risks originally excluded or not covered. *Emery*, 49 So. 3d at 21; *Steptore*, 643 So. 2d at 1216.

Service One’s loss of business income from the hurricane is not attributed solely to the damage to the cable distribution system; the insured

buildings also suffered damage, including a collapsed roof and water damage. Further, Service One employee Simpson, stated: "Scottsdale told us from the get-go [repair to the cable lines] wasn't covered, about a month after the claim." Scottsdale's initial payment and its express denial of coverage for the coaxial cable system repairs cannot be construed as a waiver of its coverage defenses.

This assignment of error has no merit.

CONCLUSION

Based on the clear and unambiguous language of the policy, Service One failed to establish that this policy afforded coverage to Service One for the damages at issue herein. For the foregoing reasons, we affirm the trial court's grant of Scottsdale's motion for summary judgment. Costs of this appeal are assessed to the plaintiff, Service One Cable T.V., Inc.

AFFIRMED.