IN THE COURT OF APPEALS OF IOWA

5

AID INSURANCE COMPANY,
Plaintiff-Appellee,
vs
NORTH IOWA STATE BANK,
Defendant-Appellant.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellee,
vs
NORTH IOWA STATE BANK,
Defendant-Appellant.

Filed March 23, 1988

7-502 / 87-293

Appeal from the Iowa District Court for Wright County (Nos. 19065 & 19137) - Newt Draheim, Judge.

Appellant appeals the trial court's order in declaratory judgment actions that insurers have no duty to defend. AFFIRMED.

Jay M. Shriver and Randall E. Nielsen of Pappajohn, Shriver, Eide & Nicholas, Mason City, for defendant-appellant/cross-appellee.

Marsha Ternus of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for plaintiff-appellee/cross-appellant AID Insurance.

Scott D. Brown of Brown, Kinsey & Funkhouser, Mason City, for plaintiff-appellee/cross-appellant St. Paul Fire.

Robert J Baudino, Jr of Nieman, Nieman, Stone & Spellman, P.C , Des Moines, for defendant Mid-American Woods, Inc

Heard by Oxberger, C J , and Sackett, and Habhab, JJ

SACKETT, J.

This case involves issues of the extent of coverage provided under insurance policies written by Plaintiffs-Appellees Aid Insurance Company and St. Paul Fire and Marine Insurance Company. Defendant-Appellant North Iowa State Bank was the named insured under the policies.

Defendant bank was sued by Mid-American Corp. Mid-American Corp was formed by a group of investors to purchase a corporation known as American Wood Products, Inc. American Wood was indebted to the bank. Defendant bank through its officers allegedly was involved in the negotiations which led to the sale of American Wood to Mid-American. Mid-American was not successful in the operation of the business. The business closed.

Mid-American sued the bank claiming they lost their investment because of the bank's actions. Mid-American's petition included theories of misrepresentation, negligent representation, interference with contractual relations, breach of fiduciary duty and lack of due care in performing duties as a banking institution. Mid-American sought damages as a result of these breaches. The bank tendered the defense to Aid and St. Paul. The insurance companies commenced a declaratory judgment action against the bank seeking a determination of their responsibilities under the policies. The trial court determined the insurance companies were not required under the policies to defend the bank.

The trial court found there was no loss of use of tangible property or other property damage alleged in the petition or indicated by the evidence. The bank contends the trial court erred in holding there had been no loss of use of tangible property or other property damage alleged or indicated by the petition in the underlying litigation.

The Aid policy in relevant part provides:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of
>
> .
>
> Coverage B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the Insured seeking damages on account of such . . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . .

The Aid policy further provides as follows:

> 'occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;
>
> .
>
> 'property damage' means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period;

The St Paul policy in relevant part provides:

> The Company will indemnify the Insured for all sums which the Insured shall become legally obligated to pay as damages . . . on account of
>
> .
>
> 2 Property Damage
>
> .
>
> to which this Policy applies, caused by an occurrence.

The policy goes on to provide as follows:

> The term 'Occurrence' means (1) . . . with respect to property damage, an event, including injurious exposure to conditions, which results during this policy period in . . . property damage neither expected nor intended from the standpoint of the Insured;

***

> The term 'Property Damage' means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom; (2) loss of use of tangible property which has not been physically injured or destroyed provided that such loss of use is caused by an event, including injurious exposure to conditions during this policy period, neither expected nor intended from the standpoint of the Insured."

This case was filed and tried as a law action. Our review is for errors of law. Laing v. State Farm Fire & Casualty Co., 236 N.W.2d 317, 319 (Iowa 1975); Brammer v. Allied Mut. Ins. Co., 182 N.W.2d 169, 172 (Iowa 1970). We must therefore determine whether the trial court's findings are supported by substantial evidence. See McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W 2d 117, 119 (Iowa 1984).

In an action for declaratory judgment involving the construction of an insurance contract we look to the pleadings and all other admissible and relevant facts to resolve the issue of the insurer's duty to defend. Id.; Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443, 445 (Iowa 1970). An insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case. McAndrews, 349 N.W.2d at 119 In assessing a duty to defend we look at facts as they appeared prior to trial not as they later developed. Id.

The bank argues there is a potential claim against it for damage to and loss of use of tangible personal property. The bank points to the fact Mid-American contends as a result of the bank's action Mid-American has unsold inventory still located on their premises and the inventory has little value because the company is unable to meet contracts. The bank also argues Mid-American claims to have lost orders and to have lost use of their accounts receivable, their machinery, equipment, inventory, structures and real property.

The insurance companies argue there was no damage to Mid-American accounts receivable, equipment, inventory, structures and real property; that Mid-American at all times had access to the property, and nothing physical prevented or precluded them from using it. The insurers contend Mid-American simply made an economic decision to quit doing business. The insurers' position is economic losses such as loss of profits, loss of the anticipated benefit of a bargain, and loss of goodwill are not tangible property.

The bank cites no Iowa cases holding damages as specified in Mid-American's petition meet the policy definition of tangible personal property. We agree with the insurers' argument the damages are not equivalent to the loss of or loss of use of tangible property. Diminution in value is not property damage when that term is defined as either physical injury to tangible property or as loss of use of tangible property. Federated Mut. Ins. Co. v. Concrete Units, Inc., 363 N.W.2d 751, 756 (Minn. 1985). Moreover, strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy. Giddings v. Industrial Indem Co., 169 Cal. Rptr. 278, 281 (Cal. Ct. App. 1980). A complaint seeking to recover damages of this nature from an insured falls within the scope of the insurance coverage only where these intangible economic losses provide a measure of damages to physical property which is within the policy's coverage. Id.

A claim property purchased was worth less than expected and there were unexpected moving expenses had been held not to be an allegation of the loss of use of tangible property. General Ins. Co. v. Western Am. Dev. Co., 603 P.2d 1245, 1247 (Or. Ct. App. 1979). Loss of reputation and business standing is not an injury to or destruction of tangible property. Johnston v. Tally Ho

Inc., 303 A.2d 677, 679 (Del. Super. Ct. 1973). Property damage is a limiting term, designed to exclude from its province all property that is not tangible. Johnston, 303 A.2d at 679. Investments, anticipated profits and financial interests in business ventures are intangibles. Hartford Accident & Indem. Co. v. Case Found. Co., 294 N.E.2d 7, 13-14 (Ill. Ct. App. 1973). A policy which covered injury to or destruction of property provided no coverage for a customer's loss of profits and goodwill. See Liberty Mut. Ins. Co. v. Consolidated Milk Producers' Ass'n, 354 F.Supp. 879, 882 (D.N.H. 1973); Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co., 334 P.2d 881, 885 (Cal. 1959).

Investments, anticipated profits and financial interests in business ventures are intangibles and not property. Old Republic Ins. v. West Flagler Assocs., 419 So.2d 1174, 1177 (Fla. Ct. App. 1982). Economic losses such as loss of profits, loss of goodwill or loss of benefits are not damage or injury to tangible property. Western Exterminating Co. v. Hartford Accident & Indem. Co., 479 A.2d 872, 875 (D.C. 1984). See also Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co., 508 F.2d 417, 418-19 (7th Cir. 1975) (plaintiff claimed the insured provided them with defective tennis rackets; held, the fact that plaintiff's supply of tennis rackets was not sufficient for it to satisfy the demand for rackets and it was required to refund the purchase price for the defective rackets, and damage to plaintiff's reputation in the tennis racket market was not property damage).

Having agreed with the trial court's determination there was no loss of use of tangible personal property or other property damage alleged in the petition, we find it unnecessary to address the bank's other contentions.

AFFIRMED.