Opinion issued June 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00229-CV

LOADMASTER UNIVERSAL RIGS, INC., Appellant

V.

TWIN CITY FIRE INSURANCE COMPANY, Appellee

On Appeal from County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1111238

MEMORANDUM OPINION

Appellant, Loadmaster Universal Rigs, Inc. (Loadmaster), is appealing the trial court's granting of summary judgment in favor of appellee, Twin City Fire Insurance Company (Twin City). On appeal, Loadmaster argues that the trial court

erred by granting Twin City's summary judgment motion because Twin City cannot recover under the quasi-contract theory of unjust enrichment as a matter of law and because there are questions of material fact with respect to the amount of the unpaid insurance premium owed and the method for calculating the premium, which prohibit summary judgment on Twin City's breach of contract claim. We reverse the trial court's judgment and remand for further proceedings.

Background

On February 14, 2016, Twin City issued a renewed general commercial liability and excess insurance policy to Loadmaster for the policy period of February 14, 2016 to February 14, 2017 (the Policy).

Loadmaster is "responsible for the payment of all premiums" due under the Policy. The Policy's Declarations page states that an "Advance Premium" of $251,490.00 is "adjustable at the end of each Audit Period" pursuant to the Premium Computation Endorsement (PCE). The Policy Period and the Audit Period, which are the same unless otherwise noted in the Policy, is February 14, 2016 to February 14, 2017. In addition to the Advance Premium, the Declarations page states that there is a "Minimum Retained Premium" of $62,873.00 that is "not subject to adjustment in the event of cancellation by [Loadmaster]."[1]

[1] The Declarations page also identifies a $251,490.00 "Minimum Retained Audit Premium." Twin City does not contend that the Minimum Retained Audit Premium

The PCE states that the Advance Premium "is adjustable, and is only an estimated premium for the Audit Period." The PCE further states that the "final earned premium for the Audit Period" will be determined pursuant to section IV(5)(b) of the Commercial General Liability Conditions on the Commercial General Liability Coverage Form (Excess-Broadform) "Premium Audit," and will be calculated using a specified formula that is based on Loadmaster's gross sales. Specifically, the PCE states that Twin City will calculate a "Premium Base" using Loadmaster's gross sales and then will determine the Audit Premium "by applying the Rate of $2.7360 per $1,000 of the Premium Base . . . which consists of 'Gross Sales.'"

Section IV(5) of the Commercial General Liability Conditions on the Commercial General Liability Coverage Form (Excess-Broadform) states:

> 5. Premium Audit
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> a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
>
> b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the "policy period" is greater than the earned premium, we will return the excess to the first Named Insured.

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applies in this case and is only seeking to obtain the smaller Minimum Retained Premium.

> c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

The "Premiums and Premium Audit" amendment adds the following language to that section:

> If the Advance Premium set forth in the applicable Coverage Part Declarations is adjustable, such Advance Premium is an estimated premium for the Audit Period set forth in the Declarations. At the end of such Audit Period, we will compute any applicable Audit Premium. Then:
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> (1) Audit Premium which is greater than the paid Advance Premium is due and payable by the first Named Insured upon notice; or
>
> (2) Paid Advance Premium which is greater than Audit Premium will be refunded to the first Named Insured, subject to any Minimum Retained Audit Premium or Minimum Retained Premium set forth in the Declarations,
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> whichever of (1) or (2) applies.

Section E "Premiums" of the Policy's Common Policy Conditions states: "The first Named Insured shown in the Declarations: 1. Is responsible for the payment of all premiums; and 2. Will be the payee for any return premiums we pay." The "Premiums and Premium Audit" amendment adds the following language to that section: "The Minimum Retained Premium stated in the Declarations shall be considered as fully earned at the inception of the policy . . . . In the event of cancellation by [Loadmaster], [Twin City] shall be entitled to retain any Minimum Retained Premium stated in the applicable Coverage Part Declarations."

The Policy was cancelled on May 27, 2016.[2] In October 2017, Twin City sent Loadmaster a demand letter seeking $62,921.00 in unpaid premiums due under the Policy for the approximate four-month policy period. When Loadmaster did not pay the demand, Twin City filed suit against Loadmaster for suit on a sworn account, unjust enrichment, and breach of contract.[3]

Twin City moved for traditional summary judgment on all its claims and attached the following documents to its motion: the Policy, an affidavit from Michelle Moran, and a Statement of Premium Adjustment and "Breakdown of Billing Activity."[4] Loadmaster responded to the motion and attached an affidavit from its controller, William Betzler, and the demand letter that Twin City sent to Loadmaster.[5] The trial court granted the motion without stating the grounds it relied

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2 There is no summary judgment evidence establishing which party cancelled the Policy. Loadmaster, however, contends that Twin City cancelled the policy.

3 Although described as a cause of action for "Open Book Account," the substance of Twin City's pleading is for suit on a sworn account. *See Charlie Thomas Chevrolet, Ltd. v. Martinez*, 590 S.W.3d 9, 17 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *see also Day Cruises Mar., LLC v. Christus Spohn Health Sys.*, 267 S.W.3d 42, 53 (Tex. App.—Corpus Christi—Edinburg 2008, pet. denied) (setting forth requirements for suit on sworn account); *Worley v. Butler*, 809 S.W.2d 242, 245 (Tex. App.–Corpus Christi—Edinburg 1990, no writ) (same).

4 Twin City also attached an affidavit from its counsel supporting its request for attorney's fees.

5 Loadmaster also attached an affidavit from its counsel supporting its request for attorney's fees.

upon and awarded Twin City $62,921 in damages, plus interest and attorney fees.[6] This appeal followed.

Summary Judgment

Loadmaster argues that the trial court erred by granting Twin City's summary judgment motion because Twin City failed to prove that it was entitled to judgment as a matter of law on any of its claims. Loadmaster further contends that the trial court erred by granting summary judgment on Twin City's breach of contract claim because there are questions of material fact with respect to the amount of the unpaid insurance premium owed and the method for calculating the premium.

A. Standard of Review for Summary Judgment Proceedings

We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a motion for summary judgment, a movant has the burden of proving that he is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). In deciding whether a disputed, material fact issue precludes summary judgment, we take evidence favorable to the non-movant as true, and we indulge every reasonable inference and resolve any doubts in its favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). The mere existence of a fact question cannot

[6] Loadmaster is not separately challenging the award of attorney fees.

preclude summary judgment; the fact must be material to the claims for which summary judgment is sought. *See Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is "material" only if it affects the outcome of the suit under the governing law. *Id.*

Absent ambiguity, contracts are construed as a matter of law. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015); *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). We construe insurance policies "using ordinary rules of contract interpretation." *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017) (quoting *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 831 (Tex. 2009)). When doing so, we must determine the parties' intent "as reflected in the terms of the policy itself." *Id.* at 257–58 (quoting *Tanner*, 289 S.W.3d at 831). We must "examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless." *Id.* at 258 (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010)). No phrase, sentence, or section should be isolated from its setting and considered apart from other contractual provisions. *Id.* (quoting *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994)). Unless the policy itself dictates otherwise, we "give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the

rules of grammar and common usage." *Id.* (quoting *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015)).

Generally, summary judgment is not the proper vehicle for resolving disputes about an ambiguous contract. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003) (summary judgment is proper if no genuine issue of material fact exists); *see also Plains Expl. & Prod. Co.*, 473 S.W.3d at 305. If, however, we determine that an insurance policy is ambiguous, i.e., subject to two or more reasonable interpretations, we must construe the policy against the insurer. *See RSUI Indem. Co.*, 466 S.W.3d at 118 (stating court "must resolve the uncertainty by adopting the construction that most favors the insured"); *see also Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997); *Hodges v. SAFECO Lloyds Ins. Co.*, 438 S.W.3d 698, 700 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

When a trial court does not specify the grounds it relied upon in making its determination, we will affirm a summary-judgment ruling if any of the grounds asserted in the motion are meritorious. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017).

B. Unjust Enrichment

Unjust enrichment is a quasi-contractual theory of recovery that is "predicated on the absence of an express contract controlling the circumstances." *Freeman v.*

Harleton Oil & Gas, Inc., 528 S.W.3d 708, 740 (Tex. App.—Texarkana 2017, pet. denied); *see also Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683 (Tex. 2000) ("Unjust enrichment claims are based on quasi-contract."). Generally, "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory. . . ." *Fortune Prod. Co.*, 52 S.W.3d at 684. Parties should be bound by their express agreements, and "[w]hen a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement." *Id.* Because there is a written policy covering the subject matter of the parties' dispute, Twin City cannot recover on an unjust enrichment theory.

Accordingly, we hold that the trial court erred by granting summary judgment in Twin City's favor on its unjust enrichment claim and we sustain Loadmaster's challenge to the granting of summary judgment on this basis.

C. Breach of Contract[7]

In order to establish its claim for breach of contract, Twin City had to come forward with competent summary judgment proof (1) that there was a valid contract,

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[7] Twin City initially advances the theory that its claim is on a sworn account. The record reflects that Loadmaster filed the sworn declaration of its controller, William Betzler, which challenged the correctness of Twin City's charges, including the premium amount Loadmaster allegedly owed under the Policy and the method Twin City used to calculate that amount. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.). Because Loadmaster filed a sworn written denial, Twin City was not entitled to a summary judgment on its breach of contract claim based only on asserting its pleadings as a

(2) that Twin City had performed under the contract, (3) that Loadmaster breached the contract by not paying the required premium, and (4) that Twin City suffered damages as a result. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP*, 422 S.W.3d 821, 833 (Tex. App.—Dallas 2014, no pet.).

Twin City attached Moran's affidavit to its summary judgment motion as Exhibit A. In her affidavit, Moran averred that Twin City provided insurance services to Loadmaster pursuant to the Policy and that Loadmaster has not paid the amount due under the Policy. The Policy states that the Minimum Retained Premium is $62,873.00, and the Statement of Premium Adjustment and Breakdown of Billing Activity states that the "policy minimum" is $62,873.00 and that the outstanding balance due on the Policy is $62,921.00, which is the Minimum Retained Premium of $62,873.00, plus a $48.00 fee.[8] In its calculations, Twin City used the figure of $12,709,869.00 as Loadmaster's gross sales.

Loadmaster responded to the motion and attached Twin City's demand letter and Betzler's affidavit. In his affidavit, Loadmaster's controller Betzler disputed Twin City's allegation that Loadmaster had $12,709,869.00 in gross sales from February 14, 2016 to May 27, 2016. Betzler averred that based on his calculations,

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sworn account. Instead, Twin City was required to prove its claim with competent summary judgment evidence. *See id.* at 834.

[8] Loadmaster does not dispute the validity of the Policy.

Loadmaster only had $1.8 million in gross sales during this period. Relying on the formula in the PCE, Betzler averred that the full premium actually due under the Policy would be $34,774.20 based on the gross-sales figure used by Twin City, whereas it would be only $4,924.80 based on his calculation of Loadmaster's gross sales. Betzler's affidavit does not address the Minimum Retained Premium clause, which Twin City argues is the dispositive provision. We further note that Betzler does not dispute Moran's affidavit testimony that Twin City provided insurance services to Loadmaster during the relevant Policy Period.

As with any contract interpretation dispute, we begin our analysis by looking to the plain language of the Policy to determine the parties' intent "as reflected in the terms of the policy itself." *Nassar*, 508 S.W.3d at 257–58 (quoting *Tanner*, 289 S.W.3d at 831). In doing so, we must consider the Policy as a whole and "seek to harmonize and give effect to all provisions so that none will be meaningless." *Nassar*, 508 S.W.3d at 258. This requires us to examine every contract provision in context, and not as an isolated component of the contract. *Id.* If, after doing so, the policy is only subject to one reasonable interpretation, the policy is unambiguous, and we construe it as a matter of law. *See id.*

After applying the applicable rules of construction to the Policy, we conclude that the Policy establishes the following procedures for calculating the premiums ultimately due for each Policy Period. Under the terms of the Policy, Loadmaster is

expected to pay an Advance Premium of $251,490.00, which is "only an estimated premium for the Audit Period" and is "[a]djustable at the end of each Audit Period, Per Premium Computation Endorsement." Although the Minimum Retained Premium is "not subject to adjustment in the event of cancellation by [Loadmaster]," no such limitation applies to the Advance Premium. Therefore, under the plain language of the contract, the Advance Premium is always adjustable, regardless of whether the Policy is cancelled and regardless of which party cancels the Policy.

Pursuant to the PCE, Twin City must calculate a "Premium Base" using Loadmaster's gross sales for the shortened Audit Period, which is February 14, 2016 to May 27, 2016 as a result of the cancellation, and then determine the Audit Premium "by applying the Rate of $2.7360 per $1,000 of the Premium Base . . . which consists of 'Gross Sales.'" If the Audit Premium calculated using this formula is greater than the prepaid $251,490.00 Advance Premium, the difference will be due and payable by Loadmaster. If, however, the opposite is true and the Advance Premium is greater than the Audit Premium, then Twin City will refund the difference to Loadmaster, "subject to" the Minimum Retained Premium of $62,873.00.

If Loadmaster cancels the Policy, the Policy's Minimum Retained Premium of $62,873.00 will not be subject to adjustment and "shall be considered as fully earned [by Twin City] at the inception of the policy." Although the agreement does

not expressly state that the Minimum Retained Premium is subject to adjustment in the event the Policy is cancelled by Twin City, this is the only reasonable interpretation of the Policy as a whole because otherwise it would render the Policy language that the Minimum Retained Premium is "not subject to adjustment in the event canceled by [Loadmaster]" superfluous. *See Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 477 (Tex. 2016) ("[W]e strive to construe contracts in a manner that avoids rendering any language superfluous. . . ."); *cf. Thompson v. Geico Ins. Agency, Inc.*, 527 S.W.3d 641, 645 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (discussing maxim of *expressio unius est exclusio alterius* with respect to automobile insurance policy). Therefore, if Twin City cancels the Policy, any refund due to Loadmaster will still be "subject to" the Minimum Retained Premium, but the Minimum Retained Premium may also be subject to adjudgment.

The summary judgment record reflects that, as a result of cancellation by one of the parties, the Audit Period was shortened to run from February 14, 2016 to May 27, 2016, the effective date of the cancellation. There is no evidence, however, indicating which party cancelled the Policy. Because the Policy provides for different methods of calculating the final premium depending upon which party cancelled the Policy, the absence of evidence on this issue presents a material question of fact that precludes summary judgment. *See* TEX. R. CIV. P. 166a(c); *Lampasas*, 988 S.W.2d at 433 (citing *Anderson*, 477 U.S. at 248).

There is also conflicting evidence in the summary judgment record about the amount of Loadmaster's gross sales for the relevant Audit Period, which is the primary component used to determine the Audit Premium. According to Betzler's affidavit, Twin City contends that Loadmaster had $12,709,869.00 in gross sales, whereas Betzler calculated that Loadmaster only had $1.8 million in gross sales during this period. Betzler averred that, based on these gross-sales figures, the premium determined by the PCE would be $34,774.20 (Twin City) or $4,924.80 (Loadmaster). Based on this conflicting evidence, we conclude that there is a question of material fact with respect to the amount of Loadmaster's gross sales, and therefore, summary judgment is also improper on this basis. *See* TEX. R. CIV. P. 166a(c); *Lampasas*, 988 S.W.2d at 433 (citing *Anderson*, 477 U.S. at 248).

Unlike the Advance Premium, the Policy does not provide a formula or an agreed-upon methodology to be used to adjust the Minimum Retained Premium. Neither party has suggested how the Minimum Retained Premium should be adjusted in the event Twin City cancels the Policy. We note that it would not be reasonable to adjust the Minimum Retained Premium using the same formula as the Advance Premium because the amount due and payable to Twin City as a result of that calculation is expressly made "subject to" the Minimum Retained Premium. The omission of any formula to be used to adjust the Minimum Retained Premium creates an ambiguity raising a question of material fact with regard to the parties'

intent that also precludes summary judgment. *See* TEX. R. CIV. P. 166a(c); *Lampasas*, 988 S.W.2d at 433 (citing *Anderson*, 477 U.S. at 248).

Accordingly, we hold that the trial court erred by granting summary judgment in Twin City's favor on its breach of contract claim and we sustain Loadmaster's challenge to the granting of summary judgment on this basis.

Conclusion

We reverse the trial court's judgment and remand for further proceedings.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.