

NOT DESIGNATED FOR PUBLICATION

LARRY DACE * **NO. 2010-CA-1384**
VERSUS *
NOVASTAR MORTGAGE, * **COURT OF APPEAL**
INC., MOUNT VERNON FIRE * **FOURTH CIRCUIT**
INSURANCE COMPANY & *
PROCTOR FINANCIAL, INC. * **STATE OF LOUISIANA**
D/B/A PROCTOR FINANCIAL * * * * *
INSURANCE CORPORATION

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-7692, DIVISION “K-5”
Honorable Herbert A. Cade, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

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(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris, Sr., and Judge Paul A. Bonin)

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APRIL 13, 2011

AFFIRMED

Plaintiff, Larry Dace, appeals a trial court judgment in favor of the defendant, Novastar Financial, Inc. (“Novastar”), and dismissing his claims with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2003, Plaintiff became the owner of a single parcel of property in New Orleans, Louisiana, containing two residences: one with the address of 2632-2634 Marais Street, and the other with the address of 1130 Port Street (collectively “the Property”). Novastar held the mortgage on the Property and collected from Plaintiff, and held in escrow, property taxes and fire/hazard insurance premiums for the Property. In August of 2005, the Property sustained significant wind damage from Hurricane Katrina. In August of 2006, Plaintiff filed a petition for damages against Novastar for failure to obtain insurance coverage for the residence located at 1130 Port Street. In the first supplemental and amended petition, Plaintiff added as defendant the Underwriters at Lloyd’s, London (“Lloyd’s”), claiming that it had a homeowners’ insurance policy on the Property. In the

second supplemental and amended petition, Plaintiff alleges the following, in pertinent part:

2.

At all material times herein, Defendant, Certain Underwriters at Lloyd's, London..., had in full force and effect a policy of hazard insurance (Certificate No. MP7001349...) on the Property.

3.

At all material times herein Defendant, Novastar Mortgage, Inc., (hereinafter "Novastar"), had in full force and effect a single mortgage on the entire Property. As part of Mr. Dace's monthly mortgage payment, Novastar collected from Mr. Dace and held in escrow property taxes and fire/hazard insurance premiums for the Property.

4.

In approximately early 2005, Novastar had the Policy placed on the Property. The Policy provided fire/hazard insurance coverage for the entire property covered by Novastar's mortgage (including both residences).

* * *

6.

Mr. Dace submitted a claim under the policy for wind damage sustained to the entire property as a result of Hurricane Katrina. Mr. Dace's claim under the Policy for damages sustained to the Port Street residence was denied because the Policy purportedly did not cover the Port Street residence. Lloyd's claim denial was clearly wrong because Novastar procured the Policy to provide hazard insurance to the entire Property subject to its mortgage – including both residences.

7.

Section 5 of the Mortgage agreement between Novastar and Mr. Dace required "in the event of [a] loss" any property insurance loss proceeds "shall be applied to restoration or repair of the Property."

8.

Novastar had actual knowledge of Lloyd's claim denial for the loss to the Port Street residence. For over two years, however, Novastar did nothing to pursue this claim under the Policy or to otherwise meet its obligation under the mortgage agreement of applying the property loss proceeds to repair the Property. Novastar pursued this course of conduct in bad faith, and with actual knowledge that its actions and inactions were causing harm to Mr. Dace.

9.

Novastar's failure to pursue its claim against Lloyd's caused substantial damage to Mr. Dace. Mr. Dace had previously leased the Port Street residence, and relied on this rental income to pay his Novastar mortgage. While simultaneously refusing to pursue its claim against Lloyd's (thereby preventing Mr. Dace from repairing and generating any rental income from the Port Street residence), Novastar brought foreclosure proceedings against Mr. Dace.

On September 19, 2008, Novastar filed a cross-claim against Lloyd's. In July 2008, the trial court (1) granted Lloyd's motion for summary judgment against Plaintiff, and (2) granted Lloyd's exception of prescription against Novastar and dismissed the claims against it.

After a one day bench trial, the trial court ruled in favor of Novastar and dismissed Plaintiff's claims with prejudice. In its reasons for judgment, the trial court stated, in pertinent part:

Larry Dace brought suit against Novastar for failure to obtain insurance for the garage house located behind the property designated as 2632-34 Marais Street. Novastar was the mortgage holder for Dace.

The court adopts Novastar's Post Trial Memoranda of Law as it sets forth the fact that the mortgage contracts [sic] represents the law between the parties. "That Novastar is under no obligation to purchase any

particular type or amount of coverage”, and that any insurance purchased by Novastar “might or might not protect plaintiff’s interest in the property.”

Further and pursuant to Louisiana Revised Statute 6:1124¹ that no financial institution shall be deemed or implied to be acting as a fiduciary for its customers.

STANDARD OF REVIEW

It is well settled that a court of appeal may not set aside a trial court’s finding of fact in the absence of “manifest error” or unless it is “clearly wrong.” *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review and assessment of the record. *Evans v. Lungrin*, 97-0541 pp.6-7 (La. 2/6/98), 708 So.2d 731, 735. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. In the event we find that the trial court erred in its application of legal principles, this court must conduct a *de novo* review of the record to render an

¹ La. R.S.6:1124 provides:

No financial institution or officer or employee thereof shall be deemed or implied to be acting as a fiduciary, or have a fiduciary obligation or responsibility to its customers or to third parties other than shareholders of the institution, unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary. The fiduciary responsibility and liability of a financial institution or any officer or employee thereof shall be limited solely to performance under such a contract and shall not extend beyond the scope thereof. Any claim for breach of a fiduciary responsibility of a financial institution or any officer or employee thereof may only be asserted within one year of the first occurrence thereof. This Section is not limited to credit agreements and shall apply to all types of relationships to which a financial institution may be a party.

independent judgment applying the correct principles of law. See *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La.2/20/95), 650 So.2d 742.

The facts are not in dispute with respect to this appeal. Therefore, the issue is whether the trial court correctly interpreted and applied the law in finding that Novastar had no duty, either under contract law or tort, to file an insurance claim with Lloyd's. For the following reasons, we agree with the trial court that Novastar owed no duty to Plaintiff to file an insurance claim against Lloyd's.

DISCUSSION

On appeal, Plaintiff alleges that the trial court erred in finding that Novastar did not have a duty to comply with the terms and conditions of the mortgage. Specifically, Plaintiff argues Novastar breached the mortgage by failing to claim and apply insurance proceeds to the repair and restoration of the Property damaged as a result of Hurricane Katrina. Novastar, on the other hand, argues that the trial court was correct in dismissing Plaintiff's claims against it because the mortgage contract fails to create a duty to Plaintiff, and because there is neither a fiduciary duty nor general duty owed by Novastar to plaintiff.

The Novastar mortgage contract expressly obligates Plaintiff to procure and maintain insurance coverage. As Section 5 of the contract of mortgage states:

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage", and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the proceeding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be

exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender *may* obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but *might or might not protect Borrower*, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. ...

* * *

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender *may* make proof of loss if not made promptly by Borrower. ...

According to the mortgage contract, if Plaintiff fails to maintain insurance, Novastar *may* obtain insurance, and in this instance, the insurance obtained by Novastar *may or may not* protect Plaintiff, Plaintiff's equity in the Property, and/or Plaintiff's contents on the Property. Moreover, the mortgage contract does not require Novastar to make a claim under any insurance policy. Further, because there is no written agency or trust agreement between the parties, we find Novastar owed neither a fiduciary duty nor general duty to Plaintiff to file an insurance claim against Lloyd's.

For these reasons, we affirm the judgment of the trial court, which found in favor of Novastar and dismissed Plaintiff's claims with prejudice.

AFFIRMED