STATE OF MICHIGAN

COURT OF APPEALS

CLARENCE G. ARCHAMBO III,

Plaintiff-Appellee,

v

LAWYERS TITLE INSURANCE CORPORATION and CHEBOYGAN TITLE COMPANY,

Defendants-Appellants.

UNPUBLISHED
November 19, 1999

No. 202289
Cheboygan Circuit Court
LC No. 95-005318 CK

Before: Griffin, P.J., and McDonald and White, JJ.

White J. (dissenting).

I would affirm.[1]

Defendants asserts that plaintiff had a common law duty and a contractual duty under the title commitment to disclose the existence of the federal tax lien. The majority concludes that while plaintiff had no common-law duty to disclose in this case, he had a contractual duty to do so. I would not reverse on this basis under the circumstances that the issue has heretofore been peripheral to this litigation (defendant relying upon an asserted common-law duty and the policy exclusion for liens "created" or "suffered' by the insured), and that neither the defendant nor the majority has addressed plaintiff's argument on the merits of the issue.

At trial, defendant asserted that plaintiff breached a common-law duty to disclose the existence of the lien, and that the lien was excepted from coverage under a clause of the policy excluding coverage for liens "created, suffered, assumed or agreed to " by the insured. During trial, defense counsel alluded to a provision in the title commitment which states:

> CONDITIONS APPLICABLE TO ALL COMMITMENTS:
>
> This commitment is delivered and accepted upon the understanding that the party to be insured has no personal knowledge or intimation of any defect, objection, lien or encumbrance affecting subject land other than those set forth herein and in the

> title insurance application. Failure to disclose such information shall render this commitment, and any policy issued pursuant thereto, null and void as to such defect, objection, lien or encumbrance.

Plaintiff's counsel responded to this reference by stating that defendant had consistently defended only on the basis that the lien was created, suffered, assumed, or agreed to by plaintiff. Plaintiff's counsel further argued:

> despite the wording in the commitment, that when the policy is issued that the commitment merges into the policy so that any language in the commitment that is limiting in terms of liability is merged into the policy and the type of coverage has to be determined with respect to the policy itself. Mr. Malloy [the major shareholder and president of defendant Cheboygan Title] has admitted that in his cross-examination under my questioning of him and I believe that that is the appropriate statement of the law.

Counsel later presented the court with a citation to *Lawyer's Title Insurance Co v First Federal Savings Bank*, 744 F Supp 778 (E.D. Mich 1990), in support of his assertion that the commitment was merged in the policy. Defendants did not refute this argument below. On appeal, they refer to a single Wisconsin case, *Greenberg v Stewart Title Guaranty Co*, 492 NW2d 147,151 (Ct. App 1992), which is not on point.

The trial court found that the tax lien at issue was recorded in the public records under the exact name as appears in the title policy. Thus, the court determined that exclusion 3(b), which excludes coverage for liens

> not known to the Company, *not recorded in the public records at Date of Policy*, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy [Emphasis added.]

did not apply because the "not recorded" prong of the exclusion was not satisfied.

The policy sets forth specific exclusions from coverage and in this provision purports to state when liens unknown to the company, but known to the insured and not disclosed, are excluded. The policy exclusion excludes such liens from coverage only when not recorded. The title commitment, which purports to void, as to any known and undisclosed lean, not only the commitment, but also any policy actually issued, is inconsistent with the policy because it applies to liens of record as well as to liens that are not of record. The instant policy contains an integration clause that provides:

> This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the company. In interpreting any provision of this policy, this policy shall be construed as a whole.

The terms of the policy therefore control, and the inconsistent provision of the earlier title commitment cannot be relied on to void coverage because the policy itself grants coverage, and does not exclude it where the undisclosed lien is of record. *Lawyer's Title, supra.*

Further, the trial court found that plaintiff never asked defendant to issue the policy. The testimony established that the bank applied for the policy. Application of the title commitment's provision to plaintiff so as to void coverage is problematic under the circumstance that plaintiff did not provide the information in the application.

II

Defendants additionally argue that the trial court erred when it ruled that coverage for the federal lien was not barred under exclusion 3(a), which excludes coverage for liens "created, suffered, assumed or agreed to" by the insured. The trial court did not err when it ruled that plaintiff neither created nor suffered the federal tax lien because he did not voluntarily assent to its placement.

Defendants do not argue that plaintiff assumed or agreed to the federal tax lien. They rely solely on the "created or suffered" language. No Michigan case law has defined the words "created" or "suffered" in relation to this clause, which is standard in many title insurance policies.[2] The clause is addressed in Anno: *Title insurance: exclusion of liability for defects, liens, or encumbrances created, suffered, assumed, or agreed to by the insured*, 87 ALR 3rd 515. That annotation states that generally the provision has not barred coverage for liens that were brought about by the insured's negligence. *Id*., 518, citing *Bourland v Title Ins*, 527 SW2d 567, 571 (Ark, 1982). Conversely, where the lien has resulted from the intentional misconduct of the insured, the clause will bar coverage. *Id*., 523, citing *Ginger, supra*, 29 Mich App 283.

In Words and Phrases under, *Created* and *Suffered*, numerous cases are cited interpreting clauses identical to the one in the instant case. While there are no Michigan cases cited, the rulings from other jurisdictions have specifically addressed the "created and suffered" language in the title policy here. It is appropriate to look to other jurisdictions for guidance when there are no Michigan cases directly on point. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 710; 572 NW2d 216 (1997).

While none of these foreign cases deal with a federal tax lien, other states have consistently held the an insured must intentionally act in order to be deemed to have come within the terms of the exclusion. *Ticor Title Ins v FFCA/IIP*, 898 F Supp 633, 639 (Ind, 1995); *Arizona Title Ins v Smith*, 519 P2d 860, 862 (Ariz App, 1979). The word "suffered" within the exclusion has been deemed to be synonymous with the word "permit" and to imply power to prohibit or prevent. *Arizona Title*, *supra*. An insured is not barred from coverage if he was merely negligent. *Trust Corp v Ford Mall*, 819 F Supp 826, 840 (1992).

Defendants have not controverted the allegations regarding plaintiff's role in the defunct corporation, and the trial court apparently found credible plaintiff's account of the circumstances leading to the imposition of the lien. Not having been in charge of these corporate responsibilities, plaintiff

would not have been in a position to prohibit or prevent the nonpayment of the taxes that gave rise to the lien, and he could not be charged with intentionally failing to make the payments. Therefore, under the uniform interpretation of the clause, the trial court did not err in finding that plaintiff neither created nor suffered the lien. All evidence and testimony regarding the matter establishes that plaintiff had no responsibility for the payment of taxes in the corporation and in no way agreed to the placement of a lien.

I would affirm.

/s/ Helene N. White

[1] Plaintiff purchased a home from Victoria Bonus in 1992. The purchase was financed by First of America Bank. A mortgage assistant at the bank engaged defendant Cheboygan Title, an agency of Lawyers Title Insurance, to prepare a title commitment and a Lawyers Title Insurance title insurance policy on both the property and plaintiff. The purpose of the policy was to assure the bank that its mortgage would have priority over any other liens. The title commitment and policy ordered by the bank insured plaintiff's interest as owner.

While typically title searches are done on property, and not people, the bank wanted to insure that no liens would affect its rights as a first priority holder, so the title company undertook and intended to search under plaintiff's name as well as the property. In ordering the commitment and policy, the bank gave plaintiff's name as Clarence Archambo, rather than Clarence G. Archambo III. Defendant Cheboygan Title Company initially searched under the incorrect name. Had it searched under plaintiff's correct name, it would have discovered a federal tax lien dating from July 1987 in the amount of $101,530.

Liens are filed by the county register of deeds in alphabetical order by surname. Cheboygan Title Company was provided with plaintiff's correct name before it issued the title insurance policy. Apparently, when the second check was done, it was done only for liens recorded after the date of the first check, and the lien was again not discovered.

Plaintiff received a copy of both the title commitment and the title policy that listed him as the insured. Plaintiff testified that he relied on the title policy to mean that the lien was no longer valid. Had plaintiff known of the continued existence of the lien, he claimed, he would not have purchased the Bonus property in his own name.

The lien arose from plaintiff's status as a shareholder in a corporation that had sold solar panels in the 1980s Plaintiff testified that he had no role in the running of the office of the corporation or the accounting of the business. The corporation did not pay its withholding taxes and the IRS therefore issued liens against all the shareholders of the corporation. Plaintiff was aware of the lien in 1987 when it was placed against him. He claimed he had been told by a Mr. Wood, an IRS agent in Alpena, that

the lien would expire at the end of five years; however, he did not receive anything in writing from this IRS agent to confirm that the lien would terminate at the end of five years. In 1993, plaintiff became aware that the lien had been renewed by the IRS.

In approximately 1994, plaintiff sold the house to a Mr. and Mrs. Roberts. In order to transfer good title to his purchasers, plaintiff had to negotiate with the IRS to release the lien. Plaintiff demanded coverage from defendants, both to negotiate with the IRS to release the lien, and to pay the tax liability to remove the lien, but coverage was denied. The IRS agreed to release the lien for $19,084.44 and plaintiff borrowed this sum from First of America in October 1994.

The insurance policy excluded coverage for liens "created, suffered, assumed or agreed to" by the insured. Defendants argued that plaintiff had voluntarily entered into a corporation with two others and that the corporation voluntarily decided not to pay withholding taxes. Therefore, they argued, the lien was self-inflicted and was created or suffered by plaintiff as a member of the corporation. Defendants maintained that the exclusion for liens created or suffered by the insured therefore applied. Further, defendants argued that as an insured, plaintiff was in a fiduciary relationship of good faith with defendants and that fiduciary relationship gave rise to a duty to disclose the lien, and that because plaintiff failed to deal in good faith, the policy was voided.

Plaintiff argued that he did not assume or agree to the lien and that he neither "created" nor "suffered" the lien since he had not voluntarily submitted to the placement of the lien on his assets. Plaintiff reasoned that the lien was therefore not excluded from coverage by the terms of the policy. Plaintiff also argued that he had no duty to inform the insurers of the lien because of his lack of a relationship with them.

The trial court found that a title commitment was made on March 13, 1992; that the commitment did not show the existence of the federal tax lien against plaintiff; that plaintiff never engaged the title company to provide a title commitment or title policy; that the title company checked the wrong name; that the policy was issued in plaintiff's correct full name; that plaintiff knew about the lien and was not "exonerated" from his knowledge by the remarks of an IRS agent in 1987; and that plaintiff was an outside member of the defunct corporation. The court held that plaintiff was not in a relationship with the title company or insurer that would impose a duty to disclose since he did not ask defendants to issue the policy. The court ruled that plaintiff's knowledge of the lien did not disqualify him from recovering under the terms of the policy. The court ruled that the title company had made its own error in searching the wrong name and that the search was done at its own peril.

[2] In *Ginger v American Title Ins Co*, 29 Mich App 279;185 NW2d 54 (1970), similar exclusions were involved but not defined. The Court determined that there was no coverage where the insured was part of a scheme to have the property fraudulent conveyed to him, and then suffered the loss when the conveyance was set aside.