# STATE OF MICHIGAN

# COURT OF APPEALS

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| HUNTINGTON NATIONAL BANK,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 24, 2012 |
| v | No. 303496<br>Kent Circuit Court |
| FIRST AMERICAN TITLE INSURANCE CO.,<br><br>Defendant-Appellee. | LC No. 10-012227-CK |

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

As security for a loan, plaintiff, Huntington National Bank held a mortgage on property in Kentwood, Michigan. Related to the mortgage, defendant, First American Title Insurance Company issued Huntington a title insurance policy. In an underlying suit, the holders of two construction liens on the property sought foreclosure. Despite its involvement in the underlying litigation, Huntington waited 16 months before informing First American of the lawsuit. When ultimately informed, First American denied coverage and declined to defend. The holders of the construction liens were successful in their suit, and were awarded $579,574 and $103,322, respectively. Following the resolution of the underlying suit, Huntington again sought coverage from First American. When First American denied its request, Huntington filed this suit. Huntington appeals as of right the March 18, 2011, order of Kent Circuit Judge James R. Redford granting First American's motion for summary disposition and finding no cause of action on all claims asserted by Huntington. We affirm.

Appellate review of a motion for summary disposition is de novo. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). First American moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Because the trial court considered more than the pleadings, we will not review the grant of summary disposition under (C)(8). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Moreover, we will not review summary disposition under MCR 2.116(C)(7) because there is no "release" in this case for us to consider. A review of case law suggests that a "release" is a written agreement fairly and knowingly made, *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), not, as First American argues, "prior acts and omissions" constituting a release. Accordingly, we will review the grant of summary disposition only under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) questions the factual support of the plaintiff's claim and should be granted, as a matter of law, where no genuine issue of any

material fact exists to warrant a trial. *Spiek*, 456 Mich at 337. In considering a motion under MCR 2.116(C)(10), the Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

On appeal, Huntington argues that the trial court erred in granting summary disposition on the ground that Huntington failed to provide prompt notice of the lawsuit as required by the policy. The title insurance policy in question expressly required Huntington to provide prompt notice, in writing, of any litigation. Such notice provisions "are construed to require notice within a reasonable time." *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 448; 761 NW2d 846 (2008) (citation omitted). In determining whether notice was given within a reasonable time, "[p]rejudice to the insurer is a material element." *Id.* (citations omitted). An insurer bears the burden of demonstrating prejudice. *Id.* "[A]n insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish *actual prejudice* to its position." *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998) (emphasis added). In this case, both parties acknowledge a delay of 16 months before First American was informed of the litigation. The only issue before this Court is whether First American was actually prejudiced by this delay.

Actual prejudice occurs "when the insured's delay in providing notice materially impairs the insurer's ability to contest its liability to the insured or the liability of the insured to a third party." *Tenneco*, 281 Mich App at 448. Typically, prejudice is a question of fact; however, if the facts are undisputed, prejudice may be a determined by the Court as a matter of law. *Id.* In determining whether prejudice occurred, we consider:

> "[W]hether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (5) to contest its liability to its insured." [*Id.* at 448-449.]

In the present case, First American received notice of the suit before the actual commencement of trial or the entry of any final judgment or determination regarding ultimate liability. However, notice was provided after Huntington stipulated to the entry of two orders that acknowledged the attachment and priority of the construction liens over Huntington's interest. The orders were entered February 7, 2009, almost three weeks before Huntington provided notice of the suit via a February 27, 2009, letter to First American. We note that the stipulated orders did not resolve the ultimate question of liability. Certain issues remained to be litigated including: (1) whether the liens were recorded within 90 days of the last provision of lienable labor, materials, or services, and (2) whether the lien amounts claimed included amounts or items that would cause the entire lien to be deemed invalid. However, the stipulations did admit the attachment and priority of the construction liens over Huntington's mortgage, and the resolution of these major issues "materially impaired" First American's ability to protect their interests. *Id.*

Because the parties agreed to the entry of the orders, the orders functioned as the equivalent of a consent decree. See *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985). "In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). Accordingly, once the stipulated orders were entered, they could only have been set aside on the basis of fraud, mistake, or unconscionable advantage. *Id.* Neither party suggests such factors exist here. On the contrary, Huntington admits that the stipulations "were not capable of being contested." As such, once the stipulated orders were entered, they could not have been undone. They in fact bound the litigants to the proposition that the construction liens had attached and Huntington's mortgage was inferior. The issues of priority and attachment, and any defense based upon priority or attachment, were therefore abandoned by the entry of the orders. See *McLogan v Craig*, 20 Mich App 497, 501; 174 NW2d 166 (1969).

Conceding the inferiority of Huntington's mortgage and acknowledging the attachment of the construction liens certainly would hinder First American's position relative to the holders of the construction liens if First American sought to settle or negotiate the claim. It also eliminated potential avenues of defense before First American even had a chance to consider viable defenses or to investigate the possibility that Huntington had the superior interest. It is irrelevant whether First American could have actually altered the outcome or avoided liability. *Tenneco*, 281 Mich App at 448, 451. First American does not have to establish it would have avoided the stipulations or that it would ultimately have prevailed in the litigation. What is relevant is that the stipulations forever weakened Huntington's claim to an interest in the property and thereby prejudiced First American's position in the litigation. *Wood v Duckworth*, 156 Mich App 160, 163-164; 401 NW2d 258 (1986). Bound by the stipulations, First American faced "almost certain liability" and had "little opportunity to control the direction of the legal proceedings." *Id.*

Based on the uncontested facts, we find, as a matter of law, that Huntington's binding action "materially impaired" First American's ability to protect its interests. *Tenneco*, 281 Mich App at 448-449. As such there is no material question of fact as to prejudice and summary disposition was appropriate under MCR 2.116(C)(10) where notice was not timely given under the terms of the title insurance policy.

We are not persuaded by Huntington's argument that First American caused its own prejudice by failing to promptly enter the suit when notice was eventually provided. We have recognized that an "insurance carrier will not be permitted to benefit by sitting idly by, knowing of the litigation, and watch its insured become prejudiced." *Burgess v American Fidelity Fire Ins Co*, 107 Mich App 625, 630; 310 NW2d 23 (1981). However, we find this statement of law inapplicable to the facts at hand. The stipulations were entered into on February 7, 2009, almost three weeks before Huntington first notified First American of the suit. By the time notice was provided, the harm had already occurred. It is inapposite to suggest that First American sat idly by watching prejudice develop if First American did not yet have knowledge of the suit. Moreover, First American's entry into the lawsuit on February 27, 2009, could not have surmounted the fact that Huntington had already admitted the inferiority of its mortgage. Given Huntington's acknowledgement on appeal that the stipulations "were not capable of being contested," First American could likely not have persuaded a court to set aside the stipulated orders. As such, the orders were prejudice caused by Huntington, which could not be easily

undone by First American's entry into the litigation. *Koski*, 456 Mich at 447. Huntington, not First American, was responsible for the prejudice.

On appeal, Huntington also argues that the trial court erred in granting summary disposition based on Huntington's purported violation of the title policy's no settlement clause. Having decided summary disposition was appropriate on the basis of Huntington's failure to provide prompt notice, we need not address the trial court's additional grounds for granting summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer