Affirmed and Memorandum Opinion filed August 3, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00472-CV

SOUTHERN VANGUARD INSURANCE COMPANY, Appellant

V.

MICHAEL SILBERSTEIN, Appellee

On Appeal from the County Civil Court at Law Number 2
Harris County, Texas
Trial Court Cause No. 878390

MEMORANDUM OPINION

Appellant, Southern Vanguard Insurance Company, appeals from a final judgment entered following the trial court granting two motions for partial summary judgment filed by appellee, Michael Silberstein. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee was in the business of buying and selling single family residential properties. This appeal relates to two of those properties, one located at 4227 Brookston, the second at 16114 Beckridge.

I. The Brookston Property

In May of 1994, appellee sold the Brookston property to Rubin Eugene and Audrey Cook via a contract for deed. Silberstein was the record legal title owner of the Brookston property while Eugene and Cook were in possession of the premises pursuant to the contract for deed. On April 23, 2006, the Brookston property was destroyed by a fire. Following the fire, Eugene and Cook moved out, voluntarily abandoning their interest in the property, and terminated the contract for deed. Eventually, appellee rebuilt the premises.

II. The Beckridge Property

In October of 1992, appellee sold the Beckridge property to Lover Jimenez via a contract for deed. Silberstein was the record legal title owner of the Beckridge property while Jimenez was in possession of the premises pursuant to the contract for deed. On August 26, 2006, the Beckridge property was destroyed by a fire. Following the fire, Jimenez did not abandon her interest in the property or her obligations under the contract for deed. Once appellee rebuilt the house, Jimenez moved back in.

III. The Contracts for Deed

Each contract for deed addressed insurance. They gave appellee (1) the right to make a claim for any fire loss if not promptly made by the purchaser; and (2) all authority to collect all monies due under the insurance policies and apply the same to the restoration of the property if economically feasible. The contracts for deed also subordinated any right or interest of the purchasers of the two properties to the right of appellee to burden the property by a mortgage or mortgages. In addition, the contracts for deed gave appellee the right to force the purchasers to accept a conveyance to the purchaser coupled with the execution of a note and deed of trust reserving a vendor's lien in appellee.

IV. The Insurance Policies

Appellee purchased standard homeowners fire insurance policies for each property from appellant. The policy limit for each policy was $65,000.00. Appellee disclosed the existence of both contracts for deed, as well as the identity of the purchasers of both properties, to appellant. Appellee was a named insured under both policies while the purchasers of the two properties were not. The Brookston policy named Union Planters Bank as mortgagee.[1] The Beckridge policy named Royal Oaks Bank as mortgagee.[2] Both policies also include an insurable interest clause:

> Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any loss:
>
> a. for an amount greater than the interest of a person insured under this policy; or
>
> b. for more than the applicable limit of liability.

Appellant determined that both fires were covered losses. In addition, appellant determined that the cost to repair each residence exceeded the policy limit of the applicable policy. With respect to both properties, appellant asserted appellee's interest was limited to that of a mortgagee. With respect to the Brookston property, appellant paid appellee $44,497.99, the amount appellant asserted was the unpaid balance on that contract for deed. In addition, appellant paid appellee $35,831.91, the amount appellant asserted was the unpaid balance on the Beckridge contract for deed.

[1] At the time of the fire, appellant was indebted to Union Planters Bank in an amount exceeding $407,107.05. That loan was secured, in part, by the Brookston property pursuant to a deed of trust.

[2] At the time of the fire, appellant was indebted to Royal Oaks Bank in an amount exceeding $224,373.29. That loan was secured, in part, by the Beckridge property pursuant to a deed of trust.

III. Procedural History

Appellant initiated a lawsuit against appellee seeking a declaratory judgment regarding the amount of appellee's insurable interest on the Brookston property. Appellee filed a counterclaim asserting breach of contract and other related causes of action. Eventually, the Beckridge property was added to the lawsuit. Appellee also filed a third-party action against various parties who had served as his insurance agents.

Appellee filed a motion for interlocutory summary judgment on appellant's declaratory judgment suit asking the trial court to declare his interest in the Brookston property to be more than that of a mortgagee and that he is entitled to recover the $65,000.00 policy limits. In response, appellant moved for summary judgment on its declaratory judgment claims related to both the Brookston and Beckridge properties. The trial court granted appellee's motion and entered an order declaring the following: (1) the Brookston property was, as of April 23, 2006, subject to a contract for deed; (2) as of April 23, 2006, the contract for deed was a future conveyance and not a present conveyance; (3) as of April 23, 2006, appellee was the legal title owner of the Brookston property; (4) as a result of the April 23, 2006 fire, appellee was entitled to the actual cash value of the fire damage to the Brookston property subject only to the $65,000.00 policy limits; and (5) the actual cash value of appellee's claim exceeded the $65,000.00 policy limit.

Following the trial court's granting of appellee's motion for interlocutory summary judgment, appellee filed a second motion for interlocutory summary judgment on his breach of contract actions related to both the Brookston and Beckridge properties. The trial court granted this motion as well. After the trial court granted his second motion for interlocutory summary judgment, appellee non-suited his claims against the various third-party defendants. The parties then filed a Rule 11 agreement which included an Unopposed Motion for Entry of Final Summary Judgment covering both the Brookston

and Beckridge properties. The trial court signed the final order of summary judgment awarding appellee damages and attorney's fees. This appeal followed.

DISCUSSION

In a single issue on appeal, appellant asserts the trial court erred when it granted appellee's motions for interlocutory summary judgment. Appellant contends the trial court erroneously determined that appellee retained an insurable interest in the full insured value of the two properties. Appellant then asks this court to reverse the trial court's judgment and remand this matter back to the trial court for further proceedings.

I. The standard of review.

The movant for summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). If there is no genuine issue of material fact, summary judgment should issue as a matter of law. *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001). We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

II. Did the trial court err when it granted appellees' motions for summary judgment?

A contract for deed is an agreement by a seller to deliver a deed to property once certain conditions have been met. *Graves v. Diehl*, 958 S.W.2d 468, 470 (Tex. App.—Houston [14th Dist.] 1997, no writ). These contracts typically provide that, upon the making of a down payment, the purchaser is entitled to immediate possession of the property, however, title remains in the seller until the purchase price is paid in full. *Id.* at 471. Under a contract for deed, the purchase price is usually paid in installments over a course of years. *Id.*

Appellant does not dispute that the Brookston and Beckridge transactions involve contracts for deed. Instead, the dispute focuses on what effect does that undisputed fact have on appellee's insurable interest in the two properties. Appellant takes the position that a purchaser under a contract for deed "has an equitable ownership interest in the property." Then, citing the *Bucher* case, appellant asserts that the legal effect to be given to a contract for deed is the same as that to be given to a transaction involving a deed with a retained vendor's lien and that the rights and obligations of the parties are substantially the same. *See Bucher v. Employer's Cas. Co.*, 409 S.W.2d 583, 585 (Tex. App.—Fort Worth 1966, no writ) (stating that because equitable title passed when the purchaser under a contract for deed takes possession of the property, the risk of loss is borne by the purchaser). Appellant then concludes by arguing that the only remaining insurable interest held by appellee was that of a mortgagee and therefore he can only recover a mortgagee's interest: the outstanding balance on the contract for deed. We disagree.

A. The Brookston property.

The issue with respect to the Brookston property, which the purchasers abandoned following the fire, is resolved by an unreported case from the Dallas Court of Appeals: *American Nat'l Property and Casualty Co. v. Patty*, No. 05-00-01171-CV, 2001 WL 914990 (Tex. App.—Dallas August 15, 2001, pet. denied) (not designated for publication). In *Patty*, a case with facts remarkably similar to those of the Brookston property, the insurance company made the same argument appellant advances here: the seller under the contract for deed should be treated as a mortgagee. The court disagreed as it determined that the purchasers extinguished whatever interest they had in the property when they returned the keys and held that the seller was entitled to recover the full amount of the policy minus the deductible. *Id.* at *3. While the opinion has no precedential value we are persuaded by the Dallas Court of Appeals' reasoning and adopt it here and affirm the trial court's judgment with respect to the Brookston property.

B. The Beckridge property.

As noted in *Graves*, there has been a conflict in Texas case law as to whether a purchaser under a contract for deed obtains equitable title or only an equitable right to complete the contract. *See Graves*, 958 S.W.2d at 472 (stating that a purchaser under a contract for deed has either equitable title to the property or an equitable interest in the property in the form of a right to full performance of the contract for deed but declining to resolve which as it was unnecessary to do so to resolve the issue in that appeal). This conflict has its origins in two cases decided by the Texas Commission of Appeals. *Id.* at 471. The earliest is *Leeson v. City of Houston*, 243 S.W. 485 (Tex. Comm'n App. 1922, judgm't adopted), the case the Fort Worth Court of Appeals relied on in deciding *Bucher*. In *Leeson* the Commission determined that a purchaser under a contract for deed obtains equitable title to the property when the contract is made or, at the latest, when the purchaser takes possession of the property. *Id.* at 490. The second case is *Johnson v. Wood*, 138 Tex. 106, 157 S.W.2d 146 (Tex. Comm'n App. 1941, opinion adopted). In *Johnson*, the court held that a purchaser under a contract for deed possesses only an equitable right to complete the contract. *Id.* at 148.

While we did not need to resolve the conflict in *Graves*, we later did so in a trespass to try title suit. In *Cullins v. Foster*, we stated

> [e]quitable title may be shown when the plaintiff proves that he has paid the purchase price and fully performed the obligations under the contract. Upon such performance, he becomes vested with an equitable title to the property which is sufficient to allow him to maintain his action in trespass to try title.

Cullins v. Foster, 171 S.W.3d 521, 533 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (quoting *White v. Hughs*, 867 S.W.2d 846, 849 (Tex. App.—Texarkana 1993, no writ) (citing the *Johnson* opinion)). Therefore, we conclude the purchaser under the Beckridge contract for deed did not obtain equitable title to the property but only an equitable right to complete the contract. *Id.* Because the Beckridge purchaser did not

obtain equitable title when she entered into the contract for deed, we conclude the *Bucher* case is distinguishable and does not determine the outcome here. Instead, for the reasons discussed below, we conclude that appellee is entitled to recover the full policy limits for the Beckridge property.

Beyond the *Bucher* case, appellant has not cited any legal authority holding that a contract for deed is the equivalent of a mortgage. Instead, both the Texas Supreme Court and the Texas Property Code indicate that contracts for deed and mortgages are two distinct methods to finance the purchase of a residence. First, the Texas Supreme Court has pointed out that contracts for deed and mortgages are different in part because a contract for deed, unlike a mortgage, allows a seller to retain title to the property until the purchaser has paid for the property. *Flores v. Millenium Interests, Ltd.*, 185 SW.3d 427, 429 (Tex. 2005). Retaining this difference is necessitated in part because, under a contract for deed, unlike a mortgage, a purchaser has the right to rescind the contract and walk away from the property with no further liability. *See* Tex. Prop. Code Ann. § 5.074 (Vernon 2004). Another key difference between a mortgage and a contract for deed is found in section 5.078 of the Property Code which provides that, as the seller, appellee is required to use insurance proceeds to rebuild the property, an obligation a mortgagee does not have. *Id.* at § 5.078(c). Finally, section 5.081 of the Property Code provides a method for a purchaser under a contract for deed to convert the contract into a standard mortgage with a promissory note and deed of trust. *Id.* at § 5.081. This conversion right would not be necessary if there was no difference between a contract for deed and a mortgage.

Appellant's reliance on the language of the insurance policy to support its argument that appellee should be treated as a mortgagee is misplaced. First, the policy lists Royal Oaks Bank as the mortgagee, not appellee. In addition, the insurable interest and limit of liability clause, which appellant cites in support of its argument that appellee should be treated as a mortgagee, instead supports appellee's recovery of the policy limit. A policy of property insurance is a personal contract indemnifying the insurable interest possessed

by the insured at the time of the issuance of the policy as well as at the time of the loss. *Highlands Ins. Co. v. City of Galveston*, 721 S.W.2d 469, 471 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). The general rule relative to payment of the limit of liability is that policy proceeds should be applied to indemnify the insured up to the amount of the policy, fulfilling the objective that the insured should neither reap economic gain, nor incur a loss, if adequately insured. *Coats v. Farmers Ins. Exchange*, 230 S.W.3d 215, 219 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Here, appellee is the sole insured under the insurance policy possessing any title to the Beckridge property. It is undisputed that the Beckridge fire was a loss covered by the insurance policy. It is also undisputed that the loss exceeded the policy limit. Therefore, the insurable interest and limit of liability clause, far from limiting appellant's recovery to that of a mortgagee, actually dictates that appellant is liable for the full amount of the policy, $65,000.00. *Id.* We affirm the trial court's judgment with respect to the Beckridge property and overrule appellant's sole issue on appeal.

CONCLUSION

Having overruled appellant's only issue on appeal, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.