Third District Court of Appeal

State of Florida

Opinion filed October 23, 2019.
Not final until disposition of timely filed motion for rehearing.

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Nos. 3D18-779, 3D18-769
Lower Tribunal No. 16-2262

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Glendys Vazquez,
Appellant/Cross Appellee,

vs.

Citizens Property Insurance Corporation,
Appellee/Cross Appellant.

Appeals from the Circuit Court for Miami-Dade County, Antonio Arzola and David C. Miller, Judges.

Barnard Law Offices, L.P., Andrew C. Barnard, Erik T. Barnard and Garrett William Haakon Clifford, for appellant/cross appellee.

Butler Weihmuller Katz Craig LLP, Anthony J. Russo, J. Pablo Caceres and Mihaela Cabulea (Tampa), for appellee/cross appellant.

Before SALTER, MILLER and GORDO, JJ.

GORDO, J.

Glendys Vazquez appeals the trial court's order granting a motion in limine precluding evidence of matching costs and the Amended Final Judgment in favor of Citizens Property Insurance Corporation on her breach of insurance contract claim.

Citizens cross-appeals the Amended Final Judgment in favor of Ms. Vazquez as to the court directing verdict on a count of declaratory action. We affirm the order on the motion in limine and the trial court's denial of reconsideration based on the trial court's adherence to the plain language of the policy and applicable statute in limiting the evidence. We reverse the trial court's entry of judgment on the breach of contract claim based on procedural error and entry of directed verdict on the declaratory judgment action as the issue was moot.

FACTS & PROCEDURAL HISTORY

In 2014, water intrusion damaged twelve ceramic tiles and one kitchen cabinet in Ms. Vazquez's home. Ms. Vazquez filed a claim under her insurance policy with Citizens. The policy required the insurer to pay the actual cash value of the insured loss.[1] Pursuant to the policy, Citizens paid $33,759.52 based on its assessment of the damages to Ms. Vazquez's tile floor and kitchen cabinet. Ms. Vazquez cashed the check.

[1] The loss settlement provision of the policy reads:

> Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
> . . .
> We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses incurred. . . .

Before beginning repairs, Ms. Vazquez hired her own loss consultant, Robert Moreno, to estimate the damages. The estimate included costs for matching the continuous tile flooring throughout her house and all of her kitchen cabinets.

Ms. Vazquez subsequently sued Citizens for breach of contract claiming that Citizens failed to pay the actual cash value of the loss and alleging she was entitled to recover $84,542.93, including matching costs. Ms. Vazquez also sued for declaratory relief requesting a declaration that "payment by [Citizens] of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the Actual Cash Value of a covered loss."

Prior to trial, Ms. Vazquez filed an affidavit from Mr. Moreno, who planned on testifying that approximately $70,000.00 of his $84,542.93 estimate was for matching costs. Given that Ms. Vazquez's complaint was for actual cash value, Citizens filed a motion in limine asking the court to preclude evidence and testimony related to matching damages from the trial and limit the evidence on damages to direct physical loss.

At the hearing on the motion in limine, Ms. Vazquez asserted she should be able to argue to a jury that actual cash value includes costs for matching her continuous tile flooring and kitchen cabinets. The trial court granted the motion in limine finding that, pursuant to the policy and applicable statute, Citizens was initially required to pay the actual cash value of the property that sustained the direct

physical loss. The court explained that the policy and statutory language required Citizens to pay any remaining amounts only after repairs were made. Because Ms. Vazquez had not performed any repairs, the court found that Ms. Vazquez could only present evidence of the actual cash value of the damaged property. The trial court relied on Ocean View Towers Ass'n, Inc. v. QBE Insurance Corp., to find that matching is not a direct physical loss. No. 11-60447-Civ., 2011 WL 6754063 (S.D. Fla. Dec. 22, 2011). The court noted that Ms. Vazquez had chosen to bring suit based on the actual cash value owed and ruled that, as a matter of law, actual cash value did not include matching. Thus, the court limited the evidence to the actual cash value of the physical damage and excluded evidence of undamaged items. The court clarified that its ruling did not preclude Ms. Vazquez from claiming she was entitled to recover matching costs in a separate lawsuit.

On the morning of trial, Ms. Vazquez moved for reconsideration of the limine order before the successor judge, which was denied. Thereafter, the trial court entered judgment in favor of Citizens on the breach of insurance contract claim. The trial court concluded, based on the order on the motion in limine and Mr. Moreno's affidavit, that Citizens substantially overpaid the actual cash value owed to Ms. Vazquez and she could take nothing by the action.

Ms. Vazquez also moved for directed verdict on the declaratory action relying upon this Court's opinion in Servando Vazquez v. Southern Fidelity Property &

Casualty, Inc., which was released during the pendency of Ms. Vazquez's case below. 230 So. 3d 1242 (Fla. 3d DCA 2017). In Servando, this Court held: "Section 627.7011(3) requires payment of actual cash value—not merely the insurance company's estimate of actual cash value." Id. at 1243. Pursuant to Servando, the trial court entered judgment in favor of Ms. Vazquez and made the following declaration: "The payment by CITIZENS of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the actual cash value of the covered loss."

The final judgment was later amended. These appeals followed.

ANALYSIS

1) Motion in Limine Regarding Actual Cash Value & Entry of Judgment on the Breach of Contract Claim

Generally, "[t]he standard of review of a trial court's ruling on a motion in limine is abuse of discretion. Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an 'erroneous view of the law . . . .'" Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012) (citations omitted). However, where the trial court's order presents questions of insurance policy interpretation and statutory construction, our review is de novo. Trinidad v. Fla. Peninsula Ins. Co., 121 So. 3d 433, 437 (Fla. 2013).

"When 'interpreting an insurance contract,' this Court is 'bound by the plain meaning of the contract's text.'" Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147, 157 (Fla. 2013) (quoting State Farm Mut. Auto. Ins. Co. v. Menendez, 70 So. 3d 566, 569 (Fla. 2011)). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." Id. (quoting Menendez, 70 So. 3d at 569–70). Similarly, "[w]hen construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning." Trinidad, 121 So. 3d at 439.

The coverage provision of Ms. Vazquez's policy reads: "We insure against risk of direct loss to property . . . only if that loss is a physical loss to property." The loss settlement provision states: "We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses incurred. . . ." This loss settlement provision directly mirrors the language of section 627.7011(3)(a), which provides:

> In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any

> remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.

§ 627.7011(3)(a), Fla. Stat. (2019).

The plain language of the insurance policy explicitly covers loss that is "direct loss to property . . . only if that loss is a physical loss." This Court has previously interpreted the meaning of this language: "A 'loss' is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, Black's Law Dictionary (10th ed. 2014). 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual." Homeowners Choice Prop. & Cas. v. Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017).

Consistent with this plain meaning, the trial court determined that the "insured loss" is the property that was actually damaged. As the contractual and statutory language required Citizens to "initially pay the actual cash value of the insured loss," the trial court was bound to limit evidence of actual cash value to the property that was actually damaged. While Ms. Vazquez sought to introduce expert testimony of estimated costs in order to match undamaged items, the trial court determined such evidence was irrelevant to Ms. Vazquez's suit for actual cash value. See § 90.401, Fla. Stat. (2019) ("Relevant evidence is evidence tending to prove or disprove a material fact.").

Ms. Vazquez argues that matching costs are part of actual cash value. In reliance on Trinidad, Ms. Vazquez lures this Court to conclude that actual cash value

includes all costs "reasonably necessary to do the repairs"[2] minus depreciation. In Trinidad, the Florida Supreme Court defined "actual cash value . . . as 'fair market value' or '[r]eplacement cost minus normal depreciation.'" 121 So. 3d at 438 (quoting Black's Law Dictionary 506, 1690 (9th ed. 2009)). In an attempt to fit within this definition, Ms. Vazquez asserts that matching is a "replacement cost," ignoring the plain text of the statute. Notably, Trinidad does not discuss matching.

Moreover, the replacement cost analysis does not control here as Trinidad involved the interpretation of the 2008 version of section 627.7011, which provided: "In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the *insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property*." 121 So. 3d at 439 (emphasis in original). In Trinidad, the Court held: "Because section 627.7011, Florida Statutes (2008), and the replacement cost policy in this case, did not require the insured to actually repair the property as a condition precedent to the insurer's obligation to make payment, the insurer was not authorized to withhold, pending actual repair, its payment for replacement costs . . . ." Id. at 436.

Critically, the current version of the statute has been changed and the

[2] Oral Argument at 5:11, https://www.3dca.flcourts.org/Oral-Arguments/Video-Oral-Argument-Archives.

provision requiring payment of replacement cost "whether or not the insured replaces or repairs the dwelling or property" has been omitted. Section 627.7011 presently reads: "The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred." The explicit reference to the repairs and expenses being performed and incurred in the past tense means that work has to begin before the obligation to pay any remaining amounts begins.

Ms. Vazquez's interpretation disregards the plain text of the matching statute, which provides:

> Unless otherwise provided by the policy, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:
> . . .
> (2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas . . . .

§ 626.9744, Fla. Stat. (2019). This statute clearly defers to the policy as controlling, with the plain language "[u]nless otherwise provided by the policy . . ." Additionally, subsection (2) refers to the "replaced items"—past tense—not matching. Thus, despite Ms. Vazquez's argument, the plain language of the statutes and the policy clearly require the insurer to pay any remaining amounts once the repairs are made.

We must adhere to the plain language of the policy and statute limiting initial

payment of actual cash value to the direct physical loss, i.e. actual damage, to the property. In accordance with the terms of the contract and the Legislature's intent, the trial court declined to permit evidence of matching costs before Ms. Vazquez began making repairs. Accordingly, we affirm the trial court's order and approve the successor judge's denial of the motion for reconsideration.

While we affirm the court's rulings in part, we reverse the entry of judgment as to the breach of contract action. Neither party moved for summary judgment following the denial of reconsideration of the motion in limine order, yet the court summarily concluded that Ms. Vazquez could not recover for breach of contract. The court then entered final judgment based on the legal rulings in the motion in limine order and an expert affidavit filed on behalf of Ms. Vazquez. This was procedural error. See Fla. R. Civ. P. 1.510(c) (prescribing motion and notice requirements that must be met before a movant is entitled to summary judgment); Otero v. Gomez, 143 So. 3d 1089, 1092 (Fla. 3d DCA 2014) (reversing the trial court's entry of final judgment where the motion in limine was used as a vehicle to grant summary judgment without affording the required notice); Connell v. Capital City Partners, LLC, 932 So. 2d 442, 444 (Fla. 3d DAC 2006) ("[T]he granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process.").

2) Directed Verdict on Declaratory Action

Ms. Vazquez moved for a directed verdict and requested a declaration that payment by Citizens of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the actual cash value owed. She attached this Court's decision in Servando to her motion and asserted that our opinion resolved the issue in her favor. 230 So. 3d 1242. Indeed, in Servando, we specifically held there is no presumption that the insurance company's estimate of actual cash value satisfied their obligation under the policy. Id. at 1243.

As our decision in Servando settled the question of law, the declaration requested was rendered moot. "The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1192 (Fla. 1995) (citing Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991)). A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." Ashe v. City of Boca Raton, 133 So. 2d 122, 124 (Fla. 2d DCA 1961). See Ready v. Safeway Rock Co., 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring specially) ("It is well settled that a proceeding for a declaratory judgment must be based upon an actual controversy. . . . No proceeding lies under the declaratory

judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question.") (citations omitted).

Moreover, we note that the trial court exceeded its procedural authority in directing verdict before the commencement of trial. See Fla. R. Civ. P. 1.480; Thompson v. Fla. Cemeteries, Inc., 866 So. 2d 767, 768 (Fla. 2d DCA 2004) ("A motion for directed verdict is not a surrogate summary judgment procedure.") (citing Azar v. Richardson Greenshields Sec., Inc., 528 So. 2d 1266, 1269 (Fla. 2d DCA 1988)). Accordingly, we reverse.

CONCLUSION

Based on the record before us, we find the predecessor judge adhered to the plain language of the policy and Florida law in granting Citizens' motion in limine to preclude matching costs. However, the trial court erred in entering judgment on the breach of contract claim on the morning of trial and issuing a declaration on a settled question of law. Therefore, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part.