Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1448
Lower Tribunal No. 16-11428

Margarita Brito and Susana Brito,
Appellants,

vs.

Heritage Property & Casualty Insurance Company,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto and Daryl E. Trawick, Judges.

Barnard Law Offices and Garrett William Haakon Clifford, for appellants.

Greenberg Traurig and Brigid F. Cech Samole and Katherine M. Clemente, for appellee.

Before SALTER, LINDSEY and GORDO, JJ.

PER CURIAM.

Margarita and Susana Brito ("Insureds") appeal from (1) an amended final summary judgment entered in favor of Heritage Property & Casualty Insurance

Company ("Insurer") regarding their residential homeowners' policy claims, and (2) an order granting the Insurer's motion for attorney's fees and costs (but as to entitlement only, with amount to be determined subsequently). For the reasons which follow, we reverse the amended final summary judgment and remand for further proceedings. We do not review the order on the Insurer's entitlement to attorney's fees and costs, both because (a) no award amount was fixed, see Diaz v. Citizens Prop. Ins. Corp., 227 So. 3d 736, 736 (Fla. 3d DCA 2017) (provision of a final judgment finding an entitlement to attorney's fees, but not fixing the amount, not ripe for review), and (b) the order is rendered moot following our reversal of the amended final summary judgment.

Partial Assignment—Mold Testing

In September 2015, the Insureds' home was damaged when the roof leaked and allegedly caused losses exceeding $80,000.00. The Insureds' residential insurance policy ("Policy"), originally issued by Citizens Property Insurance Corporation, had been assumed by the Insurer prior to the damage and claim.

The Insureds hired a mold testing company to test for any mold damage resulting from the leakage, and to protect their home from further damage. To pay the $2,495.00 invoice for the mold testing, lab reports, and remediation, the Insureds signed a "Contract for Services, Assignment of Benefits & Direct Payment Authorization" with the mold testing company. The pertinent portion of the

assignment of insurance policy benefits states: "I hereby assign **only the benefits, and proceeds** under any applicable insurance policies to [the mold testing company] **that pertains to the total invoice amount for services performed** by [the mold testing company]." (Emphasis provided).

The Insureds filed a claim for all of the alleged damages with the Insurer about three months after the reported date of loss. About a month later, and after conducting an inspection of the roof and alleged damage, the Insurer denied the claim in its entirety, claiming a coverage exclusion in the Policy for ordinary wear and tear to the roof.

The Insureds filed a lawsuit against the Insurer in the circuit court about eight months after the damage and about six months after the assignment of part of the claim to the mold testing company. The mold testing company filed a separate small claims suit (in its own name) against the Insurer in the county court to collect the $2,495.00 invoice.

The mold testing company's case went to trial in the county court while the Insureds' case against the Insurer in the circuit court was still in pretrial proceedings. The Insureds were not parties to the mold testing company's small claims suit, but they did testify as witnesses. A jury rendered a verdict in favor of the Insurer and against the mold testing company on the assigned invoice claim. The verdict form asked the jury to answer whether the Insureds suffered a loss to their property after

September 22, 2015 (two days before the date of the leak and resulting damage claimed by the Insureds). The jury answered that question, "No," and final judgment was then entered against the mold testing company on its $2,495.00 assigned claim.

The Insurer then filed a motion for summary judgment against the Insureds in the circuit court case, contending that the Insureds' claim was barred by collateral estoppel and res judicata, based on the jury's verdict in the separate mold testing company small claims case. The Insureds opposed the motion, relying on the undisputed fact that they were not parties to the small claims case (even though they testified), and citing legal authority for the inapplicability of the affirmative defenses of collateral estoppel and res judicata. The trial court granted the motion for summary judgment and an amended final judgment in favor of the Insurer.

After the jury verdict and final judgment in the mold testing company small claims case, and just before filing the motion for summary judgment, the Insurer served separate proposals for settlement on each of the Insureds. The Insureds did not respond to the proposals for settlement. After prevailing on its motion for summary judgment, the Insurer moved for attorney's fees and costs pursuant to section 768.79, Florida Statutes (2018) and Florida Rule of Civil Procedure 1.442. The Insureds opposed the motion.

The trial court granted the Insurer's motion as to entitlement to attorney's fees and costs, but deferred ruling on the amount to be awarded. The Insureds appealed

the amended final judgment and the previously-entered order on the Insurer's entitlement to attorney's fees.

Analysis

We review the final summary judgment de novo. See Diaz v. Kosch, 250 So. 3d 156, 163 (Fla. 3d DCA 2018). A finding given res judicata effect is also reviewed de novo. See Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 427 n.6 (Fla. 2013).

The Insurer successfully argued that the parties in the mold testing company small claims suit and in the circuit court action were "identical" for purposes of res judicata or collateral estoppel, because "[t]here exists a substantive legal relationship between them which amounts to privity." (Citing Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995) and other cases).[1] Under the controlling tests for "privies" for these purposes, however, the assignee (mold testing company) and partial assignor (the Insureds) are not "privies." Stogniew and other applicable cases have concluded that collateral estoppel (also known as estoppel by judgment) requires that there be a mutuality of parties in order for the doctrine to apply. "Thus, unless both parties are bound by the prior judgment, neither may use it in a subsequent action." Id. at 919.

[1] Stogniew addresses the elements of collateral estoppel, but the holding in the case determined that collateral estoppel was not a proper ruling in the judgment under review, based on the doctrine of mutuality.

If the jury had returned a verdict that the Insurer was liable for the mold testing company's invoice, would that have barred any coverage defense by the Insurer in the separate circuit court action by the Insureds? It would not have. The mold testing company sought to collect a limited assignment of the Insureds' policy rights, not a complete assignment of all rights and coverages. The Insureds did not, on this record, participate in the preparation of the form of jury verdict (special interrogatory questions far beyond the usual simple small claims question of whether the Insurer was liable for the liquidated amount of the invoice, $2,495.00).

Other citations in the amended final judgment and Insurer's brief support the argument of the Insureds. In Thews v. Wal-Mart Stores East, LP, 210 So. 3d 723, 725 (Fla. 2d DCA 2017), the privity requirement necessary for res judicata was analyzed as one of the four identities necessary to establish res judicata—"identity of persons and parties to the action." The privity between the Insureds as nonparties in the first action and a party to that action (here, the mold testing company) would be established if:

> (1) the nonparty agreed to be bound by the litigation of others; (2) a substantive legal relationship existed between the person to be bound and a party to the judgment; (3) the nonparty was adequately represented by someone who was a party to the suit; (4) the nonparty assumed control over the litigation in which the judgment was issued; (5) a party attempted to relitigate issues through a proxy; or (6) a statutory scheme foreclosed successive litigation by nonlitigants.

Id. at 725 (quoting Griswold v. Cty. of Hillsborough, 598 F.3d 1289, 1292 (11th Cir. 2010)).

Here, the Insureds filed an affidavit of the attorney for the mold testing company in opposition to the Insurer's motion for summary judgment in the separate case brought by the Insureds. The affidavit, which was not rebutted in any respect, established that: the mold testing company and its counsel did not represent the Insureds; the Insureds were not notified regarding the mold testing company's small claims action before it was filed; the Insureds had no hand in the mold testing company's litigation strategy or preparation of the verdict form; and the Insureds were not present for the entire trial.

The coverage claims under the Policy were also different; the mold testing company's claim was subject to an "Additional Coverages" provision, which had a $10,000.00 limit. The Insureds' claim exceeding $80,000.00 for the entire amount of their alleged loss (other than the assigned mold testing claim) was part of "Coverage A—Dwelling," with a $364,000.00 ceiling. On this record, then, the mold testing company and the Insureds were not "privies" for purposes of the res judicata "identity of parties" requirement.

The Insurer's argument that an assignor and its assignee are "privies" (as a matter of law) also fails in this case, for two reasons. First, the mold testing company acquired its limited rights before either lawsuit was filed, such that the Insureds

could have been impleaded as parties by the Insurer (but were not) to the mold testing company suit.[2] The argument and case law advanced by the Insurer may be applicable in a case in which the assignee acquires its interests after the judgment in the first suit has been entered. See Allstate Ins. Co. v. Warren, 125 So. 2d 886, 888-89 (Fla. 3d DCA 1961); Barnett Bank of Clearwater, N.A. v. Rompon, 359 So. 2d 571, 572 (Fla. 2d DCA 1978).

Second, the assignment to the mold testing company by the Insureds was unambiguously limited in extent (the single invoice for $2,495.00), as opposed to an assignment of all rights of the Insureds under the Policy and any and all proceeds payable on their claims of loss. We agree with the analysis of the Second District on this point in a nearly identical case, see Nicon Constr., Inc. v. Homeowners Choice Prop. & Cas. Ins. Co., 249 So. 3d 681 (Fla. 2d DCA 2018).

Our reversal of the amended final judgment moots the Insureds' attempted appeal from the order finding that the Insurer is entitled to attorney's fees under section 768.79 and Rule 1.442. As noted at the outset of this opinion, that issue was not ripe for our review in any event, as the order did not fix the amount of the award.

Reversed and remanded for further proceedings.

[2] Joinder of the Insureds could also have been accomplished by the Insurer (but was not) by obtaining the consolidation of the two cases.