Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-2175 & 3D19-0983
Lower Tribunal No. 16-31245

City of Florida City,
Appellant,

vs.

Public Risk Management of Florida, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Rodolfo A. Ruiz, Judge.

Boyle Leonard & Anderson, P.A., and Alexander L. Brockmeyer (Fort Myers), for appellant.

Hinshaw & Culbertson LLP, and James H. Wyman, for appellees.

Before FERNANDEZ, LINDSEY, and MILLER, JJ.

MILLER, J.

Appellant, the City of Florida City, seeks review of two adverse summary judgments.[1] The first, rendered in favor of appellee, Public Risk Management of Florida ("PRM"), determined that a claim predating the City's membership in a self-insured intergovernmental collective risk management program was not subject to errors and omissions coverage. The second, citing a failure to establish contractual privity, declared the City lacked standing to maintain suit against PRM's reinsurer, appellee, Bedivere Insurance Company f/k/a OneBeacon Insurance Company ("OneBeacon"). Discerning no error, we affirm.

FACTUAL BACKGROUND

This dispute finds its genesis in a failed construction venture. Intending to construct a residential community within the boundaries of the City, a developer purchased two dozen tracts of land. A private, non-institutional lender arranged financing through individual two-year, interest-only balloon mortgages. The duration of construction was projected to span several years, thus, pre-construction sales were of paramount importance in ensuring the financial viability of the endeavor.

In early 2002, the City's Director of Housing and Economic Development, Matthew Price, penned a series of letters on official stationery, representing that, in the event of developer default, the City would purchase the property, satisfy any

[1] We hereby consolidate the appeals for purposes of this opinion.

existing liens, and complete the project. Price's supervisor learned of the letters but failed to act.

By late 2005, despite acquiring a significant number of investors, the developer defaulted on several of the outstanding mortgage loans. The investors organized and embarked on efforts to enforce the City's purported guaranty. In 2008, a key investor wrote a letter to the mayor expressing he felt he had been deceived. He urged the City to "step up to the plate," and complete the project. The mayor declined to take any action, and the City denounced the Price letters as fraudulent and unauthorized.

In 2009, the City acquired membership in the intergovernmental risk management program, entitling it to coverage under PRM's policy. In the early part of 2010, the investors filed suit against the City, alleging breach of guaranty and a myriad of claims grounded in tort. The parties subsequently settled.

The City filed the instant suit in the lower tribunal, seeking to invoke coverage under the PRM policy for the damages incurred in the investor-based litigation, and declaratory relief against PRM's excess carrier OneBeacon. The trial court granted the summary judgments under review, and the instant appeals ensued.

STANDARD OF REVIEW

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Volusia Cty. v.

Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citing Menendez v. Palms W. Condo. Ass'n, 736 So. 2d 58 (Fla. 1st DCA 1999)). Thus, we review an order granting summary judgment de novo. Id. Similarly, "[i]nsurance policy construction is a question of law subject to de novo review." Gov't Emps. Ins. Co. v. Macedo, 228 So. 3d 1111, 1113 (Fla. 2017) (citation omitted).

LEGAL ANALYSIS

"Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000) (citation omitted). In interpreting "insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." Id. (citation omitted). "When the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent." Talbott v. First Bank Fla., FSB, 59 So. 3d 243, 245 (Fla. 4th DCA 2011) (citation omitted). However, "[w]hen language in an insurance policy is ambiguous, a court will resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy's language that provides coverage as opposed to the reasonable interpretation that would limit coverage." Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 785-86 (Fla. 2004) (citations omitted).

Here, the insuring agreement is characterized as a "claims-made" policy, "wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term."[2] Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 514 (Fla. 1983) (quoting 7A John A. Appleman, Insurance Law & Practice (Berdal ed. 1979)). The plain language of the policy only obligates PRM to cover "claims made against the [City] during the coverage period." Defined elsewhere in the policy, the term "claim" encompasses "all notices or suits demanding payment of money based on, or arising out of the same wrongful act or series of related wrongful acts by one or more members."

Having carefully examined the summary judgment record, we conclude the City was subject to notice of a monetary demand premised upon Price's fraudulent misrepresentation long before it acquired membership in the collective risk management program. The City, however, alternatively contends the claim did not flow from a wrongful act, therefore it is not excluded from the ambit of coverage. We respectfully disagree.

[2] The liability insurance agreement at issue differs from an occurrence policy, where "the coverage is effective [only] if the negligent act or omission occurs within the policy period, regardless of the date of discovery or the date the claim is made or asserted." Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 514 (Fla. 1983) (citations omitted). "Initially, all professional liability policies were occurrence policies but because of numerous difficulties with this type of coverage, claims-made policies were initiated." Id. (citing Gerald Kroll, The "Claims Made" Dilemma in Professional Liability Insurance, 22 U.C.L.A.L. Rev. 925, 926 (1975)).

As a threshold matter, the policy plainly states that the insurer is required to provide officials' errors and omissions coverage for "all sums for which the [City] is legally liable *by reason of a wrongful act*." (Emphasis added). Thus, the policy does not appear to envision any coverage beyond claims premised upon "wrongful acts." See 5 Corbin on Contracts § 24.28 (2018) ("If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed."); see, e.g., Shumrak v. Broken Sound Club, Inc., 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005) ("It is a fundamental principle of contract construction, known as *expression unius est exclusion alterius*.").

Moreover, the phrase "wrongful act" is expansively defined under the policy as, "any actual or alleged error or miss-statement, omission, act or neglect or breach of duty due to misfeasance, malfeasance, and non-feasance." This broad language encompasses both omissions and affirmative transgressions, and does not distinguish between losses predicated upon tort and losses predicated upon contract. Thus, as was so aptly articulated in Public Risk Management of Florida v. OneBeacon Insurance Co., 569 F. App'x 865, 870 (11th Cir. 2014) (alterations in original), in observing indistinguishable policy language:

> Paragraph 23 of the policy's general coverage provisions defines a wrongful act as "any actual or alleged error or miss-statement, omission, act or neglect or breach of duty due to misfeasance, malfeasance, and non-feasance . . . by the [City]." Nothing in the City's

> policy suggests that a wrongful act cannot be rooted in a duty the City has under a contract. To the contrary, the fact that Paragraph (*l*) in Section IV's exclusions eliminates coverage for "[l]oss arising out of an intentional breach of contract" establishes that unintentional breaches of contract can be covered. [3] Reading the definition of wrongful act as not including breaches of contractual duties would render Paragraph (*l*) superfluous, which would contradict our obligation "to give every provision its full meaning and operative effect." United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 877 (Fla. 2007).

Here, the damages for which the City sought compensation were incurred in defending the investors' lawsuit, sounding primarily in tort. Indeed, the parties do not quarrel that the origins of the underlying claim lay with Price's contended deception. Further, after learning of the fraudulent guaranty, both Price's supervisor and the mayor failed to take any action. Each of these actions and omissions fall under the broad umbrella of "misfeasance, malfeasance, and non-feasance." Consequently, we find no error in the well-reasoned determination below that the claim arose from a wrongful act or a series of wrongful acts.

Concluding the remaining summary judgment is soundly substantiated in both fact and law, we affirm in all respects.[4] See § 626.7492(2)(h), Fla. Stat. ("'Reinsurer' means any person duly licensed in this state pursuant to the applicable

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[3] Likewise, the instant policy excludes coverage for intentional breach of contract.

[4] "Reinsurance provides insurers with the ability to spread the risk that they have assumed, thereby preventing any one insurer from suffering a catastrophic loss . . . While reinsurance technically qualifies as insurance, it is a contract for indemnity rather than liability." 1A Couch on Insurance, The Insurance Industry & Insurance Relationships § 9:1 (3d ed. 2020).

provisions of the Florida Insurance Code as an insurer with the authority to assume reinsurance."); § 624.610(9), Fla. Stat. ("No person, other than the ceding insurer, has any rights against the reinsurer which are not specifically set forth in the contract of reinsurance or in a specific written, signed agreement between the reinsurer and the person."); see also Banco Ficohsa v. Aseguradora Hondurena, S.A., 937 So. 2d 161, 165 (Fla. 3d DCA 2006) ("The reinsurer has no contractual obligation with the original insured and is not liable to [it].") (alteration in original) (citation omitted); McDonough Constr. Corp. v. Pan Am. Sur. Co., 190 So. 2d 617, 618-19 (Fla. 1st DCA 1966) ("An ordinary contract of reinsurance, in the absence of provisions to the contrary, operates solely as between the reinsurer and the reinsured. It creates no privity between the original insured and the reinsurer.").

Affirmed.