Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-962 & 3D19-810
Lower Tribunal No. 16-22331

People's Trust Insurance Company,
Appellant,

vs.

Nakia De Las Mercedes Lavadie, et al.,
Appellees.

Appeals from non-final orders from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

White & Case LLP, and Raoul G. Cantero, Ryan A. Ulloa and Alexandra Hoffman; Brett R. Frankel and Jonathan M. Sabghir (Deerfield Beach), for appellant.

Mintz Truppman, P.A., and Timothy H. Crutchfield, for appellees.

Before SALTER, LINDSEY and MILLER, JJ.

SALTER, J.

People's Trust Insurance Company ("PTIC") appeals two non-final orders relating to the appraisal provisions in a homeowner's insurance policy issued to Nakia, Maria, and Anthony Lavadie (the "Insureds"). In our Case No. 3D19-810, the trial court granted the Insureds' motion for partial summary judgment, determining that a policy term subjecting scope of work disputes to appraisal is invalid because of PTIC's alleged failure to provide a statutory notice of a change in policy terms.

In consolidated Case No. 3D19-962, PTIC appeals a second order granting a motion for partial summary judgment by the Insureds, determining that PTIC waived its right to appraisal because of its failure to comply with a separate statute regarding the availability of mediation under a program administered by the Florida Department of Financial Services ("DFS").

In each case, we conclude that the trial court erred in its interpretation of the statutory texts. We reverse each of the partial summary judgments and remand the case for further proceedings.

I. Facts and Procedural Background

The Insureds obtained a homeowner's insurance policy from PTIC in 2014. In early 2016, PTIC sent the Insureds a renewal package that included a "Notice of Change in Policy Terms." The notice informed the Insureds that the policy would include the enclosed changes if the Insureds chose to renew the policy for another

year. The notice encouraged the Insureds to "carefully review the changes described below along with the enclosed policy." It informed the Insureds that, "Your policy, in its entirety, has changed."

The "Preferred Contractor Endorsement" attached to the proffered policy for the new term began with an all-upper case, all-bold, legend: "**THIS ENDORSEMENT CHANGES YOUR POLICY. PLEASE READ IT CAREFULLY**." The text of the endorsement began, "In consideration of the premium credit shown on [the Declarations Page of the policy] . . . ." The declarations page of the policy for the term commencing in March 2016 ("Policy") included a $200.00 credit, a reduction in the premium amount paid by the Insureds, for acceptance of the endorsement.

The Policy's preferred contractor endorsement specified that, if PTIC invoked its right to repair a covered loss claimed by the Insureds, either party could demand an appraisal to resolve any failure to agree on the scope of repairs to be performed by PTIC's designated contractor(s).[1]

On May 18, 2016, a law firm representing the Insureds reported to PTIC a claim of loss for damage caused on April 18, 2016 by a water leak inside the Insureds' residence. PTIC inspected the damage. In a letter dated June 22, 2016, PTIC acknowledged coverage and notified the Insureds of its election to repair the

[1] The endorsement designated "Rapid Response Team, LLC," to perform that work.

damage. PTIC's letter explained the process for accomplishing the repairs (including the provisions of the endorsement pertaining to an appraisal to resolve any dispute, should one arise, regarding the scope of work). That letter was accompanied by its designated contractor's 19-page, line-item detail[2] of the work to be performed and materials to be used to accomplish the repairs. PTIC's estimate of the cost of these repairs was $65,844.89. PTIC's letter requested the Insureds to provide their sworn proof of loss and additional information required by the Policy.

The Insureds' sworn proof of loss, submitted to PTIC with a letter of July 26, 2016, from the Insureds' attorneys, included a more extensive line item estimate prepared by "Mad River Services" for $172,194.96 in repairs. PTIC responded on August 9, 2016, with a letter entitled "Notice Pursuant to Florida Statute 627.7015," advising the Insureds (through counsel) that mediation was available through DFS, and supplying a pamphlet describing the process.

On August 15, 2016, PTIC acknowledged receipt of the Insureds' proof of loss and demanded appraisal to address these issues. In that letter, PTIC supplied the name and contact information of its designated appraiser, and requested the Insureds to designate their appraiser within twenty days as provided by the Policy.

[2] The estimated scope of work was broken into 271 lines of detail.

On August 19, 2016, the Insureds' attorneys[3] claimed that PTIC's estimate was "severely deficient," refused to proceed with appraisal because of the time and expense to the Insureds, demanded the issuance of a payment for $172,194.96 within ten days, and threatened to seek court intervention if the payment was not forthcoming within that period. The letter raised no statutory objection to the change in policy terms, and the ten-day demand for payment did not suggest amenability to mediation.

A week later, PTIC filed its lawsuit in the circuit court seeking specific performance of the appraisal provisions and declaratory relief. The operative complaint for purposes of this appeal, a second amended complaint, was met with two motions for partial summary judgment by the Insureds seeking to (1) invalidate the notice of policy changes for alleged non-compliance with section 627.43141, Florida Statutes (2016), and (2) determine that PTIC waived any right to appraisal by failing to comply with the statutory procedure for offering mediation, section 627.7015, Florida Statutes (2016).

The trial court granted each of these motions, and PTIC's appeals followed. Because each of the orders determines "the entitlement of a party . . . to an appraisal under an insurance policy," we have jurisdiction. Fla. R. App. P. 9.130(a)(3)(C)(iv).

[3] This letter was signed by a non-attorney legal assistant on the assistant's own law firm letterhead. Below the assistant's signature and name appeared, "Legal assistant to [attorney name]."

II. Analysis

These appeals are from partial summary judgments regarding issues of statutory interpretation. We review the rulings de novo. Ultra Aviation Servs., Inc. v. Clemente, 272 So. 3d 426, 427 (Fla. 3d DCA 2019).

A. Case No. 3D19-810

Section 627.43141 as in effect at the time PTIC provided its Notice of Change in Policy Terms included requirements that were intended to allow policy changes without the initial step of a notice of non-renewal of the policy then in force, but which the insurer sought to amend for the upcoming term. The statute required the insurer to notify the insured and the insured's agent in writing that the policy for the new policy period would be different, but it did not require the insurer to identify every amendment to the form (through, for example, some type of change tracking feature, with underlined additions and strikeouts for deletions, or a short-form narrative for each change).

Nothing precluded the insurer from highlighting one or more individual changes, but neither did anything require the insurer to provide such highlights or a more generic summary of a particular change. At the instance of counsel for the Insureds, the trial court simply engrafted into the disclosure requirement an obligation for the insurer to describe every change in the proffered new policy from the version nearing the expiration of its term.

The text of section 627.43141(2) extant at the time of the "Notice of Change in Policy Terms" at issue here referred to a "change in policy terms." "Change" was singular, while "terms" was plural. The insurer "shall give the named insured advance written notice of the change . . . ," not the "changes." PTIC's notice complied by providing the advance written notice, using the required title ("Notice of Change in Policy Terms"), and sending a copy to the Insureds' agent.

The notice advised the Insureds that the new policy would be changed: "If you choose to accept our renewal offer, you should carefully review the changes described below along with the enclosed policy," and "Receipt by People's Trust Insurance Company (PTIC) of the premium payment for your renewal policy will be deemed acceptance of the new policy terms by the named insured." And as already noted, the Preferred Contractor Endorsement enclosed with, and made a part of, the Policy began with its own all-bold, all-upper-case legend stating that the endorsement "changes your policy" and "Please read it carefully."

In 2018, the Florida Legislature amended section 627.43141(2) to include a requirement that that the insurer give the insured "advance written notice summarizing the change." § 627.43141(2), Fla. Stat. (2018). The amendment took effect upon becoming a law and does not alter our analysis of the text of the statute as the version in effect from 2011 through the 2016 renewal is at issue here.

While we consider the 2016 text sufficient for decision here, there is more. The 2018 bill analysis requiring advance written notice "summarizing" the change, a new requirement, stated the effect of the proposed amendment:

> Under current law, a policy that is being renewed may contain a change in policy terms, in which case the insurer must give the insured advance written "notice" of the change. However, this notice is not explicitly required to contain any summary or explanation of the change. The bill, on the other hand, requires that this notice contain a summary of the changes.

For these reasons, we conclude that the trial court reversibly erred in granting the partial summary judgment invalidating the scope of appraisal terms in PTIC's 2016 Preferred Contractor Endorsement.

B. Case No. 3D19-962

The Insureds contend that PTIC waived its right to demand appraisal because it failed to provide the statutory notice of the Insureds' right to participate in mediation (section 627.7015, Florida Statutes (2016)) at the time the Insureds first filed a claim of loss. Subsection (2) of the statute imposes the duty on the insurer to provide the notice to its insured when "a first-party claim within the scope of this section is filed by the policyholder." Subsection (7) of the statute provides that if an insurer fails to provide a required notice under subsection (2), "the policyholder is not required to submit to or participate in any contractual loss appraisal process of the property loss damage as a precondition to legal action for breach of contract against the insurer . . . ."

But subsection (9) adds clarity to the meaning of "claim," by specifying that the term "refers to any dispute between an insurer and a policyholder relating to a material issue of fact other than [five enumerated categories not pertinent here]."[4] The Insureds persuaded the trial court that "claim" simply meant the Insureds' claim of loss for damage in May 2016, but the record reflects no "dispute" regarding a material issue of fact at that point.

The Insureds candidly admit that the Fourth District has rejected the Insureds' interpretation of "claim," in State Farm Florida Insurance Co. v. Lime Bay Condominium, Inc., 187 So. 3d 932, 936 (Fla. 4th DCA 2016) ("Subsections 627.7015(2) and (9) must be read together."), and that the trial court was required to apply that holding. The Insureds urge us, however, not to apply the Fourth District's conclusion.

The plain meaning of these subsections, however, underscores the correctness of the Fourth District's decision. A mediation notice is irrelevant during the time when an insured makes a "claim" and the adjustment process is underway. If the adjustment process culminates in a payment or repair without rising to the level of a "dispute," the insurer need not send the notice.

[4] The five enumerated categories excluded from the definition of "claim" are disputes listed in sections 627.7015(9)(a) through (9)(e).

A threat of litigation, on the other hand, certainly indicates the matter has ripened into a "dispute" within the meaning of the statutory requirement, and the same seems true when the insured has unequivocally rejected the insurer's demand for an appraisal to resolve a difference of opinions in the required scope of work or the amount of loss. As the record and the chronology in part I of this opinion demonstrate, the mediation notice was sent on August 9, 2016, and the Insureds' rejection of appraisal and demand for a payment more than $100,000 in excess of the Insurers' cost estimate (and including a threat of litigation) were sent on August 16 and 19, 2016.

The trial court stated at the hearing on the Insureds' motion that the Insurer filed its lawsuit precipitously (August 26, 2016).[5] But section 627.7015 does not include a minimum period for an insured's right to seek mediation under the DFS program after receipt of the statutory notice. Also, the record and briefing regarding this issue do not reflect any sign that the Insureds or their counsel actually wanted to mediate their dispute with PTIC. Finally, this is not a case in which the insurer

[5] The trial court suggested that PTIC should have waited 21 days after sending the statutory notice to see if the Insureds would opt for the DFS mediation program. But the 21-day period is found in Florida Administrative Code Rule 69J-166.031(4)(a)(2), for a period after a party makes a request for mediation and before a mediation conference may be scheduled (thus allowing the parties to confer and resolve the dispute before attending a conference with the mediator). Here, no party made a request for mediation and the 21-day period has no applicability whatsoever.

provided the statutory notice regarding mediation after demanding appraisal, as in Kennedy v. First Protective Insurance Co., 271 So. 3d 106 (Fla. 3d DCA 2019).

III. Conclusion

Right-to-repair clauses in residential insurance policies are not a recent creation. See, e.g., Drew v. Mobile USA Ins. Co., 920 So. 2d 832 (Fla. 4th DCA 2006). Nor are appraisal clauses, which seek an efficient mode of damage and repair assessments, generally by persons with experience in claim adjustment, construction cost estimating, and negotiated claims resolution—in lieu of claims resolution by judges or juries.

PTIC's amended provision for the submission of "scope of work" disputes to appraisal is evolutionary, not some major shift in coverages or exclusions. PTIC's statutory notice of a policy change for a new policy term gave the Insureds and their insurance agent the requisite notice. The Insureds accepted the premium credit for the modified policy. Similarly, when the attorneys for the Insureds signified that the means and costs of repair estimated by the parties had ripened into a "dispute," PTIC gave a timely and compliant notice to its Insureds of their right to participate in mediation under the DFS program.

The trial court's partial summary judgment orders reviewed de novo against the plain language of the applicable statutes, the terms of the Policy, and the

uncontroverted summary judgment evidence, are reversed. The cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

Reversed and remanded.