

Third District Court of Appeal

State of Florida

Opinion filed September 9, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1955
Lower Tribunal No. 19-3488

People's Trust Insurance Company,
Appellant,

vs.

Diego Alonzo-Pombo,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig,
Judge.

Cole, Scott & Kissane, P.A., and Mark D. Tinker (Tampa); Brett Frankel and
Jonathan Sabghir (Deerfield Beach), for appellant.

Marin, Eljaiek, Lopez, & Martinez, P.L., and Steven E. Gurian, for appellee.

Before EMAS, C.J., and HENDON, and GORDO, JJ.

HENDON, J.

People’s Trust Insurance Company (“PTI”) appeals from a final order dismissing its complaint with prejudice. We affirm that part of the order dismissing the breach of contract count, and reverse that part of the order dismissing the declaratory judgment count and remand for further proceedings.

Factual and Procedural History

Diego Alonzo-Pombo (the “Homeowner”) has a homeowner’s insurance policy with PTI. In exchange for a lower premium to the Homeowner, the policy includes a Preferred Contractor Endorsement that gives PTI the option to repair any covered damage with its preferred contractor, Rapid Response, in lieu of issuing loss payment. On August 16, 2018, the Homeowner experienced a water leak in his home, but he did not immediately notify PTI. Instead, he hired a company, Water Restoration Solution, to perform emergency mitigation and repairs one week after the leak occurred. Six days after that, the Homeowner retained a public adjusting company, 911Claims, to “adjust, appraise, advise and assist in the settlement of the loss” with PTI, agreeing to pay it 10% of any recovery. On September 17, 2018, 911Claims filed a claim with PTI on the Homeowner’s behalf.

Despite some inconsistencies,¹ PTI acknowledged the claim and sent its inspector to evaluate the damage. The inspector assessed the total covered loss to be

¹ For example, the Homeowner’s service agreement with the 911Claims listed a date of loss from one year earlier, September 10, 2017, caused by Hurricane Irma.

\$13,867.40, and PTI timely elected to repair the damage as a covered loss. PTI required the Homeowner to file a sworn proof of loss within sixty days, in order to determine if there were any disagreements between the parties regarding the proposed scope of work. Eighty-four days passed with no response from the Homeowner.

On January 18, 2019, PTI notified the Homeowner that he was in material breach of the contract and on February 4, 2019, PTI filed an action for declaratory judgment and breach of contract. The Homeowner moved to dismiss, or alternatively, to compel appraisal. At the hearing on the Homeowner's motion to dismiss, the trial court dismissed PTI's entire complaint with prejudice because it did not find a "case or controversy or justiciable issues for the court to determine." PTI's timely appeal followed.

Standard of Review

On a motion to dismiss for failure to state a cause of action, the standard of review is de novo. Papunen v. Bay Nat'l Title Co., 271 So. 3d 1108, 1111 (Fla. 3d DCA 2019) (citing Williams Island Ventures, LLC v. de la Mora, 246 So. 3d 471, 475 (Fla. 3d DCA 2018)).

Discussion

1. Breach of contract

The complaint fails to state a cause of action for breach of contract, because PTI fails to identify any actual damages as a result of the alleged breach. The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages. See Grove Isle Ass’n, Inc. v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1094–95 (Fla. 3d DCA 2014) (citing Schiffman v. Schiffman, 47 So. 3d 925, 927 (Fla. 3d DCA 2010)). PTI states that it suffered “material prejudice” as a result of the Homeowner’s failure to provide a sworn proof of loss, but this is not measurable damages. PTI stated in its complaint that “[p]ecuniary damages, whether compensatory or consequential in nature, are unavailable as a matter of law arising from the insured’s material breach of the insuring agreement and election-to-repair (Drew²) contract, and as such, are unavailable to compensate PTI for the material and irreparable harm arising from the insured’s material breach.” Further, PTI stated that it could not “amend the complaint or plead the cause in any other manner.” See Siever v. BWGaskets, Inc., 669 F. Supp. 2d 1286, 1300 (M.D. Fla. 2009) (“Under Florida law, damages are an essential element of an action for breach of contract.”). As PTI has not alleged it has or will suffer any damages, the breach of contract count cannot be sustained. We affirm the trial court’s dismissal of the breach of contract count.

² The new contract formed between the insurer’s preferred and designated contractor under such an endorsement and the insured has been termed a “Drew agreement,” a reference to Drew v. Mobile USA Ins. Co., 920 So. 2d 832 (Fla. 4th DCA 2006).

2. Declaratory relief

PTI's count for declaratory relief alleges that the Homeowner's failure to provide a sworn proof of loss constitutes a breach of the policy justifying forfeiture of coverage. PTI has established the existence of a justiciable controversy cognizable under the Declaratory Judgment Act, chapter 86, Florida Statutes (2007).

“To be entitled to a declaratory judgment, one must demonstrate that (1) a good-faith dispute exists between the parties; (2) one presently has a justiciable question concerning the existence or non-existence of a right or status, or some fact on which such right or status may depend; (3) one is in doubt regarding one's right or status, and (4) a bona-fide, actual, present, and practical need for the declaration exists.” Rhea v. Dist. Bd. of Trs. of Santa Fe Coll., 109 So. 3d 851, 859 (Fla. 1st DCA 2013); see also People's Tr. Ins. Co. v. Franco, 45 Fla. L. Weekly D879 (Fla. 3d DCA Apr. 15, 2020). Where a complaint for declaratory action meets these requirements, it should not be dismissed for failure to state a cause of action. Id.; Travelers Ins. Co. v. Emery, 579 So. 2d 798, 801 (Fla. 1st DCA 1991) (“[Q]uestions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights.”); Transp. Cas. Ins. Co. v. Soil Tech Distributions, Inc., 966 So. 2d 8, 10 (Fla. 4th DCA 2007) (“[a]n insurer may file a declaratory action in order to determine whether an

insurance policy is voidable.”) (citing United Servs. Auto. Ass’n v. Clarke, 757 So. 2d 554, 555 (Fla. 4th DCA 2000)).

The issue before the trial court in this case is whether the language of the policy negates the requirement for a homeowner to submit a sworn proof of loss upon the insurance company’s invocation of the right to repair. Relevant to the declaratory count in this case, in Franco, Fla. L. Weekly D879 (Salter, J.) and again in People’s Trust Ins. Co. v. Valentin, 45 Fla. L. Weekly D754 (Fla. 3d DCA April 1, 2020) (Gordo, J.), PTI sought a declaration of its rights to determine whether it was entitled to rescind the contract or was required to perform the covered repairs, and in response, the Homeowners moved to dismiss. In those cases, as here, the trial court dismissed PTI’s declaratory relief count with prejudice, finding no case or controversy. On appeal, this Court reversed, finding PTI’s count for declaratory relief in both cases was sufficiently pleaded to withstand dismissal.

In the present case, PTI has presented a bona fide disagreement concerning the parties’ rights and obligations under their policy and has requested a declaration of those rights, including its right to void the contract. See United Servs. Auto. Ass’n, 757 So. 2d at 555 (“An insurer may file a declaratory action in order to determine whether an insurance policy is voidable.”). The Homeowner extensively argues the merits, but the merits are not before this court. “A motion to dismiss a complaint for declaratory judgment is not a motion on the merits. Rather, it is a

motion only to determine whether the plaintiff is entitled to a declaration of rights, not to whether it is entitled to a declaration in its favor.” Romo v. Amedex Ins. Co., 930 So. 2d 643, 648 (Fla. 3d DCA 2006) (quoting City of Gainesville v. State, Dep’t of Transp., 778 So. 2d 519, 522 (Fla. 1st DCA 2001)).

Conclusion

Following our de novo review of the complaint and the record on appeal, we affirm the trial court’s order dismissing PTI’s breach of contract count, and reverse the dismissal with prejudice of PTI’s count for declaratory judgment and remand for further proceedings.

Affirmed in part, reversed in part and remanded.