

Third District Court of Appeal

State of Florida

Opinion filed December 1, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-34
Lower Tribunal Nos. 18-21856 CC, 19-74 AP

**General Contractors of Central Florida LLC a/a/o Michael
Concepcion,**
Appellant,

vs.

Heritage Property & Casualty Insurance Company,
Appellee.

An Appeal from the County Court for Miami-Dade County, Christina Marie DiRaimondo, Judge.

Higgs Law, P.A., and Earl I. Higgs, Jr. (Orlando), for appellant.

Link & Rockenbach, P.A., and Kara Rockenbach Link and Daniel M. Schwarz (West Palm Beach), for appellee.

Before FERNANDEZ, C.J., and EMAS and BOKOR, JJ.

EMAS, J.

General Contractors of Central Florida appeals from an order dismissing its one-count breach-of-contract complaint seeking payment for services rendered pursuant to an assignment of benefits under an insurance policy.

According to the allegations of General Contractors' complaint, the home of insured Michael Concepcion sustained damage as a result of a covered peril under a policy issued by Heritage Property & Casualty Insurance Company. General Contractors of Central Florida provided emergency water removal services to Concepcion's home and, in exchange, Concepcion assigned his rights and benefits under the insurance policy to General Contractors.

General Contractors submitted an invoice to Heritage for services rendered and, when Heritage failed or refused to pay for those invoiced services, General Contractors sued Heritage for breach of contract, asserting its rights as an assignee of Concepcion, the insured.

Heritage moved to dismiss the complaint, contending that General Contractors lacked standing to sue because the policy contained a provision requiring that all mortgagees must consent in writing to any post-loss assignment of benefits:

Any person or entity that effectuates repairs to property insured under this policy is not entitled to perform those repairs or receive

compensation for services using an assignment of benefits or any instrument that transfers any post loss rights under the insurance contract without the prior written consent of all “insureds”, all additional insureds and all mortgagee(s) named in the policy.

It is undisputed that only Concepcion executed the assignment of benefits in favor of General Contractors, and that Wells Fargo Bank, the mortgagee named in the insurance policy, did not consent in writing to the assignment of benefits to General Contractors.

Following a hearing, the trial court dismissed the complaint, concluding General Contractors lacked standing to sue. The trial court relied on the Fourth District’s decision in Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., 255 So. 3d 344 (Fla. 4th DCA 2018), which holds that a provision of a property insurance policy requiring the consent of all insureds and the mortgagee before the insureds’ rights may be assigned is enforceable. At the time of the trial court’s decision, this court had not yet expressly determined whether such a policy provision was enforceable.

Since that time, this court has adopted the holding of our sister court in Ark Royal. See Union Restoration, Inc. v. Heritage Prop. & Cas. Ins. Co., 46 Fla. L. Weekly D2238, at *1 (Fla. 3d DCA October 13, 2021) (citing Ark Royal and affirming trial court’s order dismissing the complaint upon a determination the assignment was invalid “because it was not signed by one

of the insureds and the mortgagee, as required by the underlying property insurance policy”). See also All Ins. Restoration Servs., Inc. v. Olympus Ins. Co., 46 Fla. L. Weekly D2093, at *1 (Fla. 3d DCA Sept. 22, 2021) (citing Ark Royal); RM & Assocs. Consulting, Inc. v. Olympus Ins. Co., 322 So. 3d 1209, 1210 (Fla. 3d DCA 2021) (same).

Alternatively, General Contractors contends the trial court erred in failing to consider the existence of an *equitable* assignment. See SourceTrack, LLC v. Ariba, Inc., 958 So. 2d 523, 526 (Fla. 2d DCA 2007) (“A court may find an equitable assignment where necessary to effectuate the parties' plain intent or to avoid injustice.”) (citing Giles v. Sun Bank, N.A., 450 So.2d 258, 260 (Fla. 5th DCA 1984). However, the single-count complaint for breach of contract does not contain a sufficiently pleaded claim for equitable assignment, and there is nothing in the record to suggest General Contractors requested leave to amend to properly allege such a claim.¹ Century 21 Admiral's Port, Inc. v. Walker, 471 So. 2d 544 (Fla. 3d DCA 1985) (failure to seek leave to amend prior to court's order of dismissal with prejudice, or to seek rehearing requesting leave to amend, precludes consideration of the issue for the first time on appeal); Margolis v. Klein, 184

¹ While a hearing was held on Heritage's motion to dismiss, there is no transcript of the hearing. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980).

So. 2d 205, 206 (Fla. 3d DCA 1966) (rejecting appellant's argument on appeal that the trial court should have granted leave to amend where there was nothing in the record to indicate appellant had sought leave to amend the counterclaim: "It is elementary that before a trial judge will be held in error, he must be presented with an opportunity to rule on the matter before him"). We find no merit in the remaining arguments advanced by appellant.

Affirmed.