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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001875-MR

AUTO-OWNERS INSURANCE COMPANY APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 03-CI-00198

RANDALL SMITH MOBILE HOMES
CORPORATION AND GREENPOINT
CREDIT, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Auto-Owners Insurance Company appeals from a summary judgment of the Laurel Circuit Court requiring the insurer to defend and to indemnify its insured. After our review of the facts of this case and the pertinent law, we find no error. Thus, we affirm.

The appellant, Auto-Owners, is a Michigan insurance company licensed and authorized to do business in the Commonwealth of Kentucky. From June 17, 1999, until June 17, 2000, it provided a commercial liability insurance policy to Randall Smith Mobile Homes Corporation (Smith Mobile Homes or Smith), a retail merchant of manufactured homes doing business in southeast Kentucky.

Since most of these sales were financed transactions, the company also maintained a close business relationship with Greenpoint Credit, LLC, a consumer finance company. Greenpoint's predecessor in interest (Security Pacific Financial Services) had signed a formal agreement in 1993 in which it agreed to purchase installment sale contracts for consumer mobile homes from Smith Mobile Homes. In exchange, Smith Mobile Homes agreed to provide repossession services for Greenpoint upon the default of a mobile home purchaser in the performance of the installment sale contract.

Representatives of Smith Mobile Homes undertook such a repossession on April 1, 2000, on behalf of Greenpoint. They encountered problems in removing the mobile home from its location that required extra assistance from an independent contractor. Because the unexpected delays meant that the repossessed mobile home could not be transported to Smith's property before nightfall, it was parked overnight at an

intermediate location. During the night, the mobile home burned, resulting in a total loss. Smith promptly notified Auto-Owners of a potential claim.

On May 29, 2001, Greenpoint filed an action against Smith Mobile Homes in Clay Circuit Court seeking to recover approximately $44,400.00 for the loss of its collateral. Upon being served with a copy of the summons and complaint, Smith Mobile Homes forwarded the documents to Auto-Owners along with a request that Auto-Owners acknowledge its duty to defend its insured in the action.

When Auto-Owners failed to respond to the correspondence or to answer Greenpoint's complaint by June 20, 2001, Smith Mobile Homes asked its general counsel, Brown & Hill, PLLC, to file an answer on the company's behalf. At about the same time, without Smith's knowledge, Auto-Owners undertook the defense of the action by engaging Kenneth Gilliam as defense counsel. Gilliam also filed an answer.

Thus, by June 29, 2001, Greenpoint's counsel, Glenn E. Algie, had received two separate and independent answers to his complaint. In a single letter forwarded both to Brown & Hill and to Gilliam, Algie expressed his understandable confusion. Asking to be advised as to which of the attorneys would represent Smith, he enclosed comprehensive written discovery requests -- including numerous requests for admissions.

Robert L. Brown III of Brown & Hill consulted with Auto-Owners and Gilliam directly and then sent a letter to Gilliam on July 12, 2001. In this correspondence, he described the role of Brown & Hill as general counsel to Smith Mobile Homes and explained that it had made an appearance in the Clay Circuit Court action only to prevent entry of a default judgment against the company. Brown & Hill acknowledged that it would <u>not</u> continue to serve as counsel to Smith in this matter and requested that Gilliam advise the Clay Circuit Court accordingly. Brown & Hill confirmed that Smith Mobile Homes was relying solely and unconditionally upon the representation provided by Auto-Owners through Gilliam. Finally, Brown & Hill provided a synopsis of the facts surrounding the loss as related by Smith personnel. Brown & Hill requested that Gilliam keep it "posted as to the status of the case" by copying it on pleadings and reports. However, Gilliam never forwarded any reports or pleadings in the case to Brown & Hill.

Some six months later, in January 2002, Brown & Hill received another letter from Algie, counsel for Greenpoint. Algie's letter explained that since he had received no response to his discovery requests of June 29, 2001, he was forwarding his motion for summary judgment on behalf of the plaintiff to both attorneys who had appeared for Smith Mobile Homes. The basis of the motion was Gilliam's failure to make a timely

response to Greenpoint's motion, including the requests for admissions that were now to be deemed admitted for failure to file timely answers or objections. CR[1] 36.01(2).

Upon receipt of Algie's correspondence and the summary judgment motion, Brown & Hill contacted Gilliam, who once again confirmed that he was providing the defense for Smith Mobile Homes. Although he admitted that the discovery requests had not been timely answered, he assured Brown & Hill that he would handle the matter at the hearing on the motion for summary judgment.

In correspondence dated March 5, 2002, Brown & Hill outlined this history directly to Auto-Owners. Brown & Hill identified itself as general counsel to Smith Mobile Homes and emphasized that the correspondence sought to confirm that Smith was indeed being represented by counsel hired by Auto-Owners, reminding Auto-Owners "that the duty to defend this matter" rests entirely with the carrier. Brown and Hill advised as follows:

> In the event the Plaintiff's [summary judgment] motion is granted, [Smith Mobile Homes] will expect to be completely indemnified from liability in this matter. . . .
>
> If this is not correct, I will expect to be notified immediately, so I can take steps to

[1] Kentucky Rules of Civil Procedure.

> protect [Smith Mobile Homes's] best interests.

Both Gilliam and Auto-Owners directly confirmed that Smith Mobile Homes could continue to expect to be defended by the carrier.

On March 14, 2002, attorney Algie advised Brown & Hill and Gilliam that he intended to file a motion to compel on behalf of Greenpoint, seeking responses to discovery and recovery of attorney's fees from Smith Mobile Homes. Brown & Hill again promptly corresponded with Auto-Owners.

The firm reiterated that it was acting only as the insured's general counsel and that it had no intention of defending Smith in the lawsuit brought by Greenpoint. Brown & Hill once more requested confirmation that Gilliam was defending and would continue to defend the action. As general counsel, Brown & Hill again requested that Auto-Owners report to it as general counsel to keep it apprised of developments in the case. Correspondence from the field claims representative for Auto-Owners confirmed in response that in no uncertain terms the carrier was defending Smith Mobile Homes in the litigation against it.

On December 31, 2002, some eighteen months after Auto-Owners had undertaken the defense of the action, its field claims representative notified Smith that exclusions included in

the liability policy meant that the outstanding claim was not covered after all. This notice was addressed to Smith Mobile Homes directly -- not to Brown & Hill. Auto-Owners then offered to continue to provide a defense against Greenpoint's claim "because we did not advise you of the coverage issue sooner . . . ." However, it stated that "there will be no coverage for this loss if a judgment is granted against you." In closing, Auto-Owners announced its intention to file a declaratory judgment action against Smith Mobile Homes.

Accordingly, on February 28, 2003, Auto-Owners instituted this declaratory judgment action in Laurel Circuit Court against Smith Mobile Homes, its insured, and Greenpoint. In its complaint, Auto-Owners contended that the terms of its insurance policy excluded from coverage property damage to any personal property in the care, custody, or control of the insured. Consequently, Auto-Owners claimed that it was not liable for the loss of the mobile home. Auto-Owners also alleged that it had undertaken the defense of Smith Mobile Homes under a reservation of rights. Auto-Owners sought a declaration that it was under no obligation either to defend or to indemnify Smith Mobile Homes in connection with the loss of Greenpoint's collateral. Auto-Owners also sought its costs and attorney's fees.

In its answer, Smith Mobile Homes denied that its insurer had ever defended the action under a reservation of rights. Smith contended that Auto-Owners had waived the defense of denying coverage; in the alternative, it argued that Auto-Owners should be estopped from asserting such a defense.

On April 23, 2003, Auto-Owners filed a motion for summary judgment, asserting that there was no coverage under the insurance policy for the claim brought by Greenpoint against its insured. It sought a judgment declaring that Auto-Owners had no obligation to defend or to indemnify Smith Mobile Homes with respect to the proceedings in Clay Circuit Court. On May 9, 2003, Smith responded to the motion, requesting that the trial court order Auto-Owners both to provide coverage and to continue its defense of its insured since it had undertaken the defense without a reservation of rights and had thereby prejudiced Smith's ability to defend itself.

On June 13, 2003, in an order denying Auto-Owners' motion for summary judgment, the trial court nonetheless entered summary judgment in favor of Smith Mobile Homes. Concluding that there were no genuine issues of material fact, the court held that Smith Mobile Homes was entitled to judgment as a matter of law since Auto-Owners was estopped by its conduct from denying liability under the insurance policy. Auto-Owners'

motion to alter, amend, or vacate was denied, and this appeal followed.

The issue on appeal is whether the trial court correctly concluded that Auto-Owners is precluded from asserting that the loss was not covered by its policy since it had represented that it was defending the action against Smith Mobile Homes without first securing a reservation of rights. As the question presented to the trial court was a matter of law, our review is de novo. Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). After examining the record and the insurer's conduct over the course of these proceedings, we agree that the trial court was correct in holding that Auto-Owners is precluded from disclaiming coverage.

The rule applicable in this case is widely accepted and has long been the law in our Commonwealth. Generally, an insurer's unconditional defense of an action brought against its insured constitutes a waiver of the policy provisions and an estoppel as to the insurer to disclaim liability. 44 Am.Jur.2d Insurance §1413 (2003). Whenever waiver or estoppel is found, an insurer is barred from asserting what otherwise might be a legitimate exclusion of coverage under its policy. Id.

In American Casualty Co. of Reading, Pa. v. Shely, 314 Ky. 80, 234 S.W.2d 303 (1950), Kentucky's highest Court squarely addressed the legal effect of American Casualty's decision to

defend its insured for nearly a year without a reservation of rights. Consulting numerous sources, the court cited directly from 45 C.J.S., Insurance, §714, page 684:

> Broadly speaking an insurance company which undertakes or continues the defense of an action against insured with knowledge or means of knowledge of grounds for avoiding its liability to insured, and without due notice to insured of its disclaimer of liability, will on principles of waiver and estoppel be precluded from thereafter avoiding liability under the policy . . . .

American Casualty, supra at 305. The Court observed that a basic element of an estoppel is "that the person claiming it must have been prejudiced by the action of the person against whom it is asserted." Id. More recent cases have reiterated the fifty-four-year-old holding of American Casualty – - with none departing from its reasoning. See also Hood v. Coldway Carriers Inc., Ky. App., 405 S.W.2d 672 (1965); Universal Underwriters Ins. Co. v. The Travelers Ins. Co., Ky. App., 451 S.W.2d 616 (1970); The Western Casualty & Surety Co. v. Frankfort, Ky. App., 516 S.W.2d 859 (1974). The American Casualty Court continued in language most significant to the case before us to hold that "where an insurance company undertakes the defense of an accident case, *the loss of the right by the insured to control and manage the case is itself prejudice*." Id. (Emphasis added).

Auto-Owners attempts to circumvent this rule by arguing that Smith failed to show that it had detrimentally relied upon Auto-Owners or that it had been prejudiced by its insurer's handling of the defense. Auto-Owners denies that its insured was harmed in any manner by its actions and contends that Smith Mobile Homes would be unable to produce affirmative evidence of actual prejudice. It claims that its withdrawal at this juncture has not deprived Smith of an adequate opportunity to defend against the action. We heartily disagree.

The appellant's argument fails to account for the critical importance of the eighteen-month period during which it had exclusive and total control over the defense of the underlying action. This time-frame encompassed a series of issues and events crucial to a proper defense of the lawsuit. By its reliance on Auto-Owners' purported defense, Smith Mobile Homes suffered a series of detrimental results that prejudiced its position. Among these losses were the opportunities: to conduct a proper investigation of the facts surrounding the loss; to participate in meaningful settlement negotiations; to engage in good-faith cooperation for discovery; and otherwise to manage the litigation on its own behalf and in its best interests. By the very terms of the policy that it now seeks to avoid, Auto-Owners alone was entrusted and entitled to investigate, to defend, and to settle any claim in an action

seeking damages against its insured. Having been required by the terms of the policy to turn over its defense to Auto-Owners, Smith Mobile Homes retained the sole recourse of having its general counsel monitor the course of the proceedings against it.

Many months before it attempted to claim a reservation of rights, Auto-Owners was made aware of the facts and circumstances as to which it now seeks to avoid liability. Nevertheless, and despite an obvious potential for an ethical conflict of interest, the company repeatedly misrepresented to Smith Mobile Homes that Auto-Owners was defending the action and that it would continue to do so. Smith unequivocally and repeatedly notified Auto-Owners that it was relying on these representations that extended over the considerable period of eighteen months. Undoubtedly Smith so relied to its clear and undeniable detriment. The resulting prejudice to Smith Mobile Homes is manifest.

Auto-Owners could have easily avoided any prejudice by explicitly reserving its right to contest coverage within a reasonable time after it had assumed the defense of its insured. However, it elected not to do so. Its election had critical consequences both for itself and its insured. We hold that

Auto-Owners’ entire pattern of conduct constitutes a legally sufficient showing of prejudice in this case to warrant summary judgment in favor or Smith.

Auto-Owners has also raised the procedural point that Smith Mobile Homes never requested that summary judgment be entered in its favor. The trial court not only rejected the motion for summary judgment filed by Auto-Owners but instead used its motion as a vehicle to grant summary judgment to its adversaries, who had not filed cross-motions seeking such relief. Auto-Owners argues that the trial court erred by granting summary judgment when legal issues had not been properly submitted for determination. We disagree.

In responding to Auto-Owners’ motion for summary judgment, Smith Mobile Homes asked that the trial court order Auto-Owners both to provide coverage and to continue to defend since it had undertaken the defense without a reservation of rights to the prejudice of Smith’s ability to defend against the action. This response did not constitute a cross-motion or request for summary judgment. Nonetheless, trial courts are empowered to grant such relief under particular circumstances.

If all of the pertinent legal issues are before the court at the time the matter is submitted, and if resolution of the motion filed by the movant necessarily requires a determination that the non-movant is entitled to relief, the

movant cannot be heard to complain if summary judgment is granted against him rather than for him as he had contemplated. Storer Communications v. Oldham Co., Ky. App., 850 S.W.2d 340 (1993). In this case, in considering the motion of Auto-Owners claiming that it had no obligation to defend or to indemnify Smith under the policy, the court was necessarily required to resolve the waiver and estoppel arguments of Smith Mobile Homes. Smith sufficiently demonstrated that Auto-Owners embarked upon an unalterable course of conduct and misrepresentation that prejudiced Smith's ability to control the defense of the underlying action.

All pertinent issues were before the court. Upon determining that the insurer was precluded from denying coverage, the court correctly concluded that Smith Mobile Homes -- albeit the non-movant -- was undeniably entitled to relief. Auto-Owners suffered no legitimate prejudice. The trial court did not err by granting Smith's request for relief that translated into a judgment in its favor under these unusual circumstances.

We affirm the judgment of the Laurel Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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ORAL ARGUMENT FOR APPELLANT:

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