

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001634-MR

NORTHERN INSURANCE COMPANY OF NEW YORK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 04-CI-003193

SEVILLE HOMES, INC.; RANDY FREEMAN;
JOHN ASKIN; AND DENISE ASKIN

APPELLEES

OPINION
AFFIRMING

** ** * * *

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

COMBS, CHIEF JUDGE: Northern Insurance Company of New York (Northern) appeals from an order of the Jefferson Circuit Court that denied its request to enforce a settlement agreement as to its insureds, Randy Freeman (Freeman) and Seville Homes, Inc. (Seville). Freeman and Seville asserted a bad faith claim against Northern that arose from complicated litigation involving their alleged liability to John and Denise Askin (the Askins).

Although the Askins dismissed their own bad faith claim against Northern, Freeman and Seville contend that a

confidential settlement agreement between the Askins and Northern did not preclude Freeman and Seville from maintaining their separate bad faith claims against Northern. Northern disagrees and argues that its settlement agreement with the Askins also included any claims asserted by Freeman and Seville against Northern. The court disagreed and refused to enforce the settlement agreement to release Northern from the bad faith claims filed by Freeman and Seville. This appeal followed.

Freeman is the principal shareholder and sole officer of Seville, a homebuilding company. Freeman and Seville constructed a \$400,000 house for John and Denise Askin. Unhappy with the final product, the Askins filed suit for breach of warranty seeking damages for alleged negligence, fraud, breach of contract, and non-compliance with the Kentucky Building Code. They also sued Northern, which was the insurance carrier for Freeman and Seville at the time of the construction, for its alleged wrongful conduct in refusing to settle the Askins' claim in a reasonable manner.

Freeman and Seville were insured by Northern from April 20, 2001, through April 20, 2003. Northern cancelled the policy, and Freeman and Seville obtained insurance from Motorists Insurance Company (Motorists). The policy from Motorists was in effect from June 10, 2003, through June 11,

2004. It was during the coverage period provided by Northern that Freeman and Seville built the home for the Askins.

Northern initially denied that its insurance policy was in effect when the Askins' home was built. It asserted that either Freeman and Seville or Motorists bore responsibility for any alleged liability. Northern's denial of liability and refusal to settle were the basis for the Askins' claim against Northern for bad faith under the terms of Freeman and Seville's policy. Freeman and Seville were represented by two lawyers as each insurance company furnished them separate counsel. Northern hired Douglas Langdon (Langdon) to defend Freeman and Seville from the defective construction allegation; and Motorists hired C.A. Dudley Shanks (Shanks) to defend Freeman and Seville from Northern's claim that its policy was not in effect when the Askins' home was built.

Shanks filed a cross-claim against Northern on October 11, 2004, asserting bad faith and reserving the right to present additional claims. The cross-claim contained a request for complete indemnity from Northern to cover any judgment favorable to the Askins and for the costs expended by Freeman and Seville in defending against the Askins' claims. Because the complaint did not allow negligence personally as to Freeman, he filed a motion to be dismissed from the lawsuit, which the court granted. The trial court had already scheduled the case for

binding arbitration pursuant to the homebuyer's agreement between Freeman and Seville and the Askins. On the day before the arbitration was scheduled to take place, Northern negotiated a settlement with the Askins. Northern agreed to pay an amount to be kept confidential in exchange for the Askins' agreement to drop the bad faith claim against Northern and the defective construction claim against Seville.

Northern contends that it informed Langdon (counsel whom it retained for Freeman and Seville) of the settlement negotiations immediately, but he was not permitted to review the terms until almost two weeks later. In addition to binding Northern and the Askins to the negotiated terms, the settlement agreement recited that Freeman and Seville would relinquish any claims they had against Northern. On March 14, 2005, the day after he received a copy of the proposed settlement, Langdon communicated Freeman's acceptance of all the terms to Northern. Freeman, however, refused to sign the settlement. Northern then filed a motion to enforce the agreement against Freeman and Seville on March 25, 2005.

At a hearing on Northern's motion on May 4, 2005, Shanks (counsel retained by Motorists to represent Freeman and Seville) asserted that Freeman and Seville had had **no representation on any of their own claims** against Northern. The trial court agreed and entered an order on May 10, 2005, denying

Northern's request to enforce the settlement with respect to Freeman and Seville. The order recited the court's finding that Freeman and Seville had had **no legal counsel representing their interests** with regard to their own separate claims that they might assert against Northern and that no such claims had been raised.

Northern filed a motion to alter, amend, or vacate the order pursuant to CR¹ 60.02, claiming that the court's order was based upon a mistake. After Northern filed its CR 60.02 motion, Freeman and Seville hired additional counsel, who filed cross-claims against Northern on their behalf on July 13, 2005. On August 1, 2005, the trial court entered an order dismissing all claims and cross-claims with prejudice. However, the order also stated that the bad faith claims just filed (on behalf of Freeman and Seville against Northern on July 13, 2005) could be pursued in a separate action. It is from this order that Northern appeals, claiming that the trial court erred in refusing to enforce the settlement against Freeman and Seville. Although they were named in the notice of appeal, the Askins have not participated in this appeal.

Northern argues that the trial court erred in finding that Freeman and Seville had not been represented by counsel for the purpose of pursuing a bad faith claim against Northern. It

¹ Kentucky Rules of Civil Procedure.

seeks to characterize the cross-claim previously filed by Shanks seeking indemnity as a comprehensive attempt to assert a bad faith claim against Northern. However, the cross-claim filed by Shanks merely sought to protect Freeman and Seville **and Motorists** from paying any judgment which should have been covered by Northern. We agree with the trial court as to its finding of no representation of Freeman and Seville on their own claims. Northern cannot demonstrate that Freeman and Seville had any legal representation for their own separate claims against Northern **until July 13, 2005** -- subsequent to the May 10, 2005, order of the court refusing to enforce Northern's settlement with respect to Freeman and Seville. The court correctly found that the settlement agreement pertained only to the claims asserted by the Askins.

Northern also argues that Freeman and Seville should be bound by the settlement because Langdon (retained by Northern for Freeman and Seville) had the authority to approve the agreement on their behalf. Northern cites our decision in Ford v. Beasley, 148 S.W.3d 808 (Ky. App. 2004), in support of its contention that Freeman and Seville are bound by Langdon's acceptance of the settlement agreement. In Ford, we upheld a court's decision that a settlement was enforceable:

if the trial court determines that the party seeking to avoid enforcement gave his or her attorney express or actual authority to

enter into a settlement; or, even if no such authority was given, the party seeking enforcement is "substantially and adversely affected" by their reliance on the purported settlement.

Id. at 810.

Northern believes that the filing of a cross-claim by Shanks substantially constituted legal representation for Freeman and Seville with regard to any claims that they might wish to assert against Northern. Although Langdon and Shanks both represented Freeman and Seville in varying capacities, the insurance companies which retained them had interests that were **adverse to one another** arising from Northern's attempts to deny coverage for the Askins' claims. The issue that we are asked to decide is one of the scope of the legal representation provided by the insurance companies to Freeman and Seville. We must examine whether the cross-claim filed by Shanks adequately covered the bad faith claims of Freeman and Seville so as to incorporate them into the settlement agreement negotiated by Langdon. If so, we must determine whether Langdon was authorized to represent Freeman and Seville with respect to the subject matter of Shank's cross-claim.

Although Freeman and Seville appeared to have had an abundance of representation in light of the number of lawyers involved, their claim as to bad faith against their own insurer (Northern) was not directly represented until they retained

separate counsel for the purpose of asserting that very claim on July 13, 2005. Freeman and Seville had authorized **no one** to represent them on this issue until July 2005 -- and no one had undertaken such representation. Northern was fully aware that Freeman declined to execute the settlement agreement.

Therefore, we hold that Northern cannot rely on Ford, supra, and that the court did not err in refusing to dismiss this claim in its order of August 1, 2005.

Northern next argues that the settlement agreement should have been enforced against Freeman and Seville because its commitment to fund the settlement of the Askins' claims adversely affects the insurance company. Clark v. Burden, 917 S.W.2d 574 (Ky., 1996). As a result of its negotiations with the Askins, Northern fully funded the settlement of the Askins' claims against Freeman and Seville as well as the Askins' bad faith claim against it (Northern) as insurance carrier. Northern now claims that it would not have agreed to do so if it had known that it might still face a separate set of bad faith claims from Freeman and Seville.

However, we note that Northern was aware of facts and events that gave it notice of potential problems. Neither Freeman and Seville nor Langdon participated in the negotiations between Northern and the Askins. Langdon was not aware of the terms of the agreement until two weeks after it had been

negotiated. Again, Freeman refused to sign it. Nonetheless, Northern proceeded to consummate the agreement while fully aware of these incongruities. We find no error on this issue as Northern funded the settlement agreement even though it was fully aware of the potential for the adverse consequences that it now raises as a defense.

Northern last argues that the trial court erred in failing to dismiss with prejudice any claims against it after it filed its CR 60.02 motion. That rule provides in relevant part as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Northern contends that the trial court was mistaken in its belief that Freeman and Seville had no legal representation regarding any claims they wished to assert against it. It argues that the cross-claim filed by Shanks established that he

was representing the interests of Freeman and Seville in pursuing a bad faith claim against Northern.

However, at the hearing on Northern's motion to enforce the settlement, Shanks clearly asserted that Freeman and Seville had **no one representing them** on their **potential** bad faith claim. Although Northern characterizes this assertion as false, we do not agree. We have already examined the limited scope of the representation provided to Freeman and Seville by the attorneys retained by Northern and Motorists. We conclude that the trial court correctly assessed the narrow scope of legal representation afforded to Freeman and Seville prior to their hiring of a third attorney to represent this void in their interests. The court did not err in refusing to dismiss the bad faith claims asserted in the cross-claim filed on July 13, 2005.

We affirm the judgment of the Jefferson Circuit Court.

HENRY, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Cornelius E. Coryell, II
Jennifer Starr
Louisville, Kentucky

James J. Hickey
Steven D. Pearson
Chicago, Illinois

BRIEF FOR APPELLEES SEVILLE
HOMES, INC. AND RANDY FREEMAN:

C.A. Dudley Shanks
Louisville, Kentucky