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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001097-MR

NORMAN SIMMONS;
BARBARA SIMMONS — APPELLANTS

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 04-CI-00205

COUNTRYWAY INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Norman Simmons and Barbara Simmons appeal from an order of the Breckinridge Circuit Court granting summary judgment to Countryway Insurance Company in a dispute concerning whether an insurance policy covers fire

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

damage sustained to a dwelling owned by the Simmons. We affirm the award of summary judgment, though upon different grounds than relied upon by the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the Simmons, the facts are as follows. In 1978 the Simmons purchased a residence located at 706 Seventh Street, Cloverport, Kentucky. The property was purchased for $21,000.00. On May 17, 1985, the Simmons took out a homeowner's insurance policy with Countryway's predecessor, Agway Insurance. The local agency processing the policy was Auto Insurance Agency, which was later succeeded by Jones Insurance Agency.

Having bought a doublewide trailer and lot, in February 2002, the Simmons moved out of the Seventh Street residence. At this time Norman went to Jones Insurance Agency and acquired insurance on the doublewide property. Norman told an agent at Jones Insurance that he currently had a policy on the Seventh Street property, was purchasing a new place, was getting ready to move, and needed a new policy. A policy was issued on the doublewide property, the Simmons continued to pay (and Countryway continued to accept) premiums on the Seventh Street property, and the Simmons believed that the Seventh Street property remained insured.

The Seventh Street property remained vacant for a short time until, in June 2002, it was leased to renters. The renters moved out in February or March 2003, and the property thereafter remained vacant until the fire. During the period subsequent to

February 2002, the Simmons attempted to sell the property, including to the renters, but were unsuccessful.

After the renters vacated, in connection with the ongoing efforts to sell the realty, Norman undertook some minor improvement efforts, including painting. One of the areas he planned to paint was the bathroom, where the waterheater was located. At some point during this time, Norman relit the waterheater. After relighting the heater, Norman failed to replace the burner chamber cover, thus leaving the pilot light and burner coils exposed to the area outside the heater.

As the first step of his painting plans Norman had begun to strip the old paint on the bathroom door and door frame. The bathroom was adjacent to the kitchen, and in the kitchen area he had stored paint stripper, the paint he planned to use, cleaning chemicals, and, most importantly, a coffee can containing several inches of gasoline. Norman also had a supply of rags he used in his efforts and, as a result, the rags got the foregoing chemicals on them, including the gasoline.

Because the bathroom floor was linoleum, and because the washer and dryer were located there, Norman, oblivious to the danger, piled the rags on the floor of the bathroom in the vicinity of the waterheater.

On August 28, 2003, the burner of the waterheater ignited the rags, the fire spread, and the dwelling suffered substantial damage. In his report, the State Fire Marshal concluded that the fire was accidental.

Following the fire, the Simmons filed a claim with Countryway for damages caused by the fire. Based upon the overall circumstances surrounding the fire, Countryway did not make immediate payment but, instead, undertook an investigation. After various steps had been taken in the investigation, the Simmons demanded payment under the policy, but Countryway continued to balk.

Based upon Countryway's refusal to pay their claim, on August 12, 2004, the Simmons filed a Complaint in Breckinridge Circuit Court.[2] The Complaint alleged, principally, that Countryway had breached the parties' insurance policy contract. The Complaint also alleged, among other things, violation of the Unfair Claims Settlement Practices Act, bad faith, and violation of the Consumer Protection Act.

Following a period of discovery, on October 12, 2005, Countryway filed a motion for summary judgment. The motion alleged that Countryway was entitled to summary judgment because the Simmons had failed to notify the company that they had vacated the home in February 2002, thus voiding the policy; because the Simmons had made financial misrepresentations during the investigation of the claim, thus voiding the policy under the fraud provisions of the policy; and because Norman Simmons had deliberately caused the fire. The motion was supported by an affidavit from a company representative stating that if it had known that the Simmons no longer resided at the property subsequent to February 2002 it would not have continued the insurance policy in force.

[2] A substantially identical amended complaint was filed on January 25, 2005.

The Simmons filed their response to the motion on November 19, 2005, wherein they argued that there were outstanding discovery requests to Countryway, and thus Countryway's motion was premature, and that, on the merits, Countryway was not entitled to summary judgment because there were genuine issues of material fact for resolution at trial. The response was supported by an affidavit by Norman that he had, in fact, specifically advised agents of Countryway that he was moving from the Seventh Street property.[3]

On March 9, 2006, the Simmons filed a motion to compel Countryway to respond to the outstanding discovery requests (which had been propounded in July 2005). On April 6, 2006, the circuit court entered an order giving Countryway 20 days to respond to the outstanding discovery requests. On April 26, 2006, Countryway filed a response captioned as a response to the outstanding discovery requests.

On May 9, 2006, the circuit court entered an order granting Countryway summary judgment. The award of summary judgment was premised upon the Simmons having failed to give Countryway notice of their vacating the Seventh Street residence in February 2007. This appeal followed.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a

[3] Countryway contends that Norman's affidavit is inconsistent with his deposition testimony and, therefore, may not properly be considered to defeat summary judgment. *See Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 736 (2000).

matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S .W.3d 432, 436 (Ky.App.2001), citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." Lewis, 56 S.W.3d at 436. "Because, summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres*, *supra*.

DISCUSSION

Before us, the Simmons argue that the circuit court erred in awarding summary judgment to Countryway. We disagree, though upon a different basis than relied upon by the circuit court.

The Definitions section of the insurance policy states, in relevant part, as follows:

> 4. "Insured location" means:
>
> a. The "residence premises";
> . . . .
>
> 8. "Residence premises" means:
>
> a. The one family dwelling, other structures and grounds; or
>
> b. That part of any other building;
>
> **where you reside** and which is shown as the "residence premises" in the Declarations. (Emphasis added).

The "Section I - Property Coverages" section of the policy provides, in relevant part, as follows:

> COVERAGE A - Dwelling
>
> We cover:
>
> 1. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling;
> . . . .

The interpretation and construction of an insurance contract is a matter of law for the court. *See Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 810

(Ky.App. 2000). In the absence of ambiguities that call the meaning of the policy into question or a statute to the contrary, the terms of a policy of insurance are to be enforced as written. *Goodman v. Horace Mann Ins. Co.*, 100 S.W.3d 769, 772 (Ky.App. 2003). Unless the terms employed in the policy have acquired a technical meaning in law, they are to be interpreted "according to the usage of the average man and as they would be read and understood by him in light of the prevailing rule that uncertainties must be resolved in favor of the insured." *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986).

The policy provisions set forth above provide that coverage under the policy is limited to the "residence premises." The residence premises, in turn, is defined as (1) the property shown as the "residence premises" on the declarations page, **and (2) where the policy applicant resides.** The Seventh Street property is, as would be expected, listed on the declarations page as the residence premises; however, when the Simmons moved from the Seventh Street property in February 2002, the property ceased to meet the second condition to qualify as a "residence premises" under the policy. As such, by its own terms, the policy no longer covered the Seventh Street property when the Simmons ceased to reside there.

The rule of interpretation known as the "reasonable expectations doctrine" resolves an insurance policy ambiguity in favor of the insured's reasonable expectations. *True v. Raines*, 99 S.W.3d 439, 443 (Ky.2003); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 837 (Ky. 2005). However, we do not believe the terms of the policy are

ambiguous in defining the covered property as being limited to where the applicant resides.

Hence, pursuant to the unambiguous terms of the policy, the policy elapsed upon the Simmons' vacating of the property. *See Anderson v. Kentucky Growers Ins. Co.,* 105 S.W.3d 462 (Ky.App. 2003) (Provision in fire and casualty insurance policy declaring it to be void upon the filing of foreclosure suit enforceable).

The Simmons contend, however, that Norman informed an agent at Jones Insurance Agency that they were vacating the property and by the agent remaining silent in the face of this information Countryway is now estopped from denying coverage under the policy pursuant to the doctrine of equitable estoppel.[4] The essential elements of equitable estoppel are:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: **(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question**; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a

[4] We agree with the Simmons that for summary judgment purposes notice of their intent to vacate the Seventh Street residence was given to Countryway. In his deposition Norman testified as follows: "I told the [Jones Insurance Company representative] . . . I currently had a policy on my current home, I was **purchasing a new place, was getting ready to move** and I need a new policy." (Emphasis added). Norman Simmons deposition, pg. 13. There are no formal notification procedures contained in the policy, and a jury could conclude that the foregoing reasonably notified an agent of Countryway of the pending vacating of the Seventh Street residence.

> character as to change his position prejudicially. (Emphasis added).

Gosney v. Glenn, 163 S.W.3d 894, 899 (Ky.App. 2005).

The Simmons' assertion of equitable estoppel fails because, at minimum, they did not lack knowledge of or, else, had the means of obtaining knowledge of, the truth as to the fact in question (whether the insurance policy covered a residence after it had been vacated). The truth of the fact in question was contained in the provisions of the insurance policy.[5]

The only other issue we need address is whether the circuit court erroneously granted summary judgment before the completion of discovery. We conclude that it did not. After Countryway had filed its motion for summary judgment and the Simmons had filed there response thereto, on March 9, 2006, the Simmons filed a motion to compel Countryway to respond to the outstanding discovery requests (which had been propounded in July 2005). On April 6, 2006, the circuit court entered an order giving Countryway 20 days to respond to the outstanding discovery requests. On April 26, 2006, Countryway filed a response captioned as a response to outstanding discovery requests. The Simmons have otherwise failed to explain their position on this issue, or

[5] Under the facts at bar, it appears that the doctrine of waiver would have been the more applicable theory under which to challenge Countryway's silence in the face of being informed that the property was to be vacated. *See Bates v. Grain Dealers Nat. Mut. Fire Ins. Co.*, 283 S.W.2d 3 (Ky. 1955) ("Waiver" is defined as an intentional relinquishment of a known right); *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995) ("Waiver" differs from estoppel in that it does not require proof that the other party was misled; thus, waiver is essentially unilateral resulting as legal consequence from some act of conduct of party against whom it operates, and no act of party in whose favor it is made is necessary to complete it). However, as the Simmons have not raised this doctrine either before the circuit court or us, we will not consider its potential applicability.

how any undiscovered information would have a bearing upon their case. In any event, it is not necessary to show that the nonmovant has actually completed discovery, but only that they had an opportunity to do so. *See Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App. 1979). We are persuaded that the Simmons' had an opportunity to complete discovery.

CONCLUSION

Based upon our disposition of the case, the remaining issues raised by the Simmons are moot.

For the foregoing reasons the judgment of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

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