RENDERED: OCTOBER 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000848-MR

SASAN PASHA
and MAREN SCHULKE — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CI-04036

COMMONWEALTH LAND
TITLE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

MOORE, JUDGE: Sasan Pasha and Maren Schulke filed a breach of contract claim and coverage dispute in Fayette Circuit Court against their title insurance provider, appellee Commonwealth Land Title Insurance Company

("Commonwealth"). The circuit court entered summary judgment in favor of Commonwealth, and Pasha and Schulke now appeal. Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The litigation forming the basis of this appeal stems from a September 2003 real estate transaction in which Kimco Lexington 140, Inc. ("Kimco") transferred its right, title, and interest in two adjacent, approximately one-acre, rectangular parcels situated in Lexington, Kentucky (hereinafter, parcels "2-A" and "2-B") to Energy Insurance Agency, Inc. ("Energy Insurance"). Originally, the parcels were part of a larger tract owned by Kimco. Kimco also had concerns about how Energy Insurance and its successors and assigns might use the two parcels because both parcels neighbored what remained of Kimco's tract, in a location where Kimco had constructed a shopping center, and Kimco did not want any use of parcels 2-A and 2-B to interfere with its desire to "maintain the character" of its shopping center "as an independent retail center."[1]

Thus, as an incident of the conveyance, Kimco and Energy Insurance executed an agreement which essentially prohibited Energy Insurance, along with its successors and assigns, from building anything on parcels 2-A and 2-B other

[1] These statements are taken directly from the preamble of the September 2003 agreement between Kimco and Energy Insurance.

than two one-story office buildings less than or equal to twenty-four feet in height.[2] Their agreement was also filed and recorded with the Fayette County Clerk.

Only parcel 2-A is relevant in this matter. It remained an unimproved lot and changed ownership a number of times over the course of the next few years. On or about May 8, 2009, Steve and Mary Ann Simmons conveyed the parcel to its current owners, appellants Sasan Pasha and Maren Schulke. Pasha and Schulke had decided to purchase the parcel because it had been zoned with a "B-6P" classification. As a general matter, a "B-6P" zoning classification would have permitted developing the parcel for many purposes that the September 2003 agreement nevertheless prohibited. Needless to say, Pasha and Schulke were not

[2] This language derives from "Exhibit 'C'" to the September 2003 agreement. In full, "Exhibit 'C'" provides:

> The Property shall be used for general office purposes. Up to two (2) one-story office buildings (one on parcel 2-A and one on Parcel 2-B), with each building not to exceed twenty-four feet (24') in height, may be constructed on the Property. No portion of the Property shall be used: (i) for any retail purposes, (ii) in violation of any of the provisions attached hereto as Exhibit "C-1", or (iii) for any of the following, all of which are expressly prohibited: (a) any use which is a public or private nuisance; (b) any use which produces noise or sound that is objectionable due to intermittence, high frequency shrillness or loudness; (c) any use which produces obnoxious odors; (d) any use which produces noxious, toxic, caustic or corrosive fumes, fuel or gas; (e) any use which produces dust, dirt or fly ash in excessive quantities; (f) any use which produces fire, explosion or other damaging or dangerous hazard, including the storage, display or sale of explosives or fireworks); (g) a warehouse; (h) any assembling, manufacturing, industrial, distilling, refining, smelting, agriculture or mining operation; (i) a dry cleaning plant; (j) living quarters, sleeping apartment or lodging rooms; (k) a massage, tattoo, or piercing parlor; (l) any establishment with a business, the principal purpose of which is selling, renting, or displaying of pornographic or "adult" materials, including, without limitation, magazines, books, movies, videos, and photographs; (m) a mortuary, funeral home or crematorium; (n) a flea market; (o) a carnival, amusement park or circus; (p) a facility for the sale or display of new or used motor vehicles, trailers or mobile homes; (q) a tire, battery, automotive, or gasoline fueling facility; (r) meeting hall, auditorium, or place of public assembly.

actually aware of the agreement and its restrictions when they purchased parcel 2-A; nor, for that matter, were they aware of it when they began developing the property for uses that the agreement prohibited.[3]

When they eventually found out about the agreement, and also that Kimco was unwilling to rescind it, Pasha and Schulke filed a claim with their title insurance provider, appellee Commonwealth Land Title Insurance Company ("Commonwealth"). Their claim asked for the difference between the value of parcel 2-A with and without the restrictions. After a claim adjustment period, however, Commonwealth denied coverage. Commonwealth concluded in a November 17, 2010 letter to Pasha and Schulke that the prohibitions specified in the September 2003 agreement did not decrease the value of parcel 2-A, and it accordingly cited section 3(c) of the title insurance policy's exclusions, which stipulated that there was no coverage for "Defects, liens, encumbrances, adverse claims or other matters . . . Resulting in no loss or damage to the Insured Claimant."

Aside from that, Commonwealth's November 17, 2010 letter concluded by stating:

> Please note that, although the provisions of the Policy cited herein provide a sufficient basis for [Commonwealth] to deny coverage for this claim, additional terms and conditions of the Policy may be applicable based upon the facts as presented. Reference to any particular provision of the Policy in this letter,

[3] Pasha and Schulke were attempting to construct a three-story office building consisting of 5,000 square feet of retail space and 16,000 square feet of professional office space.

> therefore, shall not be construed as a waiver of any other term or provision. . . .

This "non-waiver" language was not unique to Commonwealth's November 17, 2010 letter. Over the course of the claim adjustment period, Commonwealth had also included the "non-waiver" language (or language to similar effect) in its other correspondence to Pasha and Schulke whenever the subject of the correspondence was Commonwealth's potential liability for providing coverage under the terms of the title insurance policy.[4]

However, this "non-waiver" language became important several months after Pasha and Schulke eventually filed suit in Fayette Circuit Court against Commonwealth for breach of contract and bad faith in denying their claim. This is because Commonwealth did not seek to dismiss Pasha's and Schulke's

[4] For example, in a letter dated December 21, 2009, Commonwealth concluded by stating:

> [Commonwealth] reserves its right to continue its independent investigation of this matter and reserves the right to assert any defense, which though not apparent at this time, becomes apparent at a later date. If at some point in the future the Company concludes that it has no actual or potential obligation under the Policy to indemnify the Insured in this matter, [Commonwealth] expressly reserves the right to deny indemnification. The Company also reserves the right to seek a judicial declaration determining that it has no obligation to indemnify the Insured in this matter. Reference to any particular provision of the Policy in this letter shall not be construed as a waiver of any other term or provision. The Company reserves the right to supplement this letter based on additional grounds that may be developed through receipt of new facts or further investigation.

Also, in a letter dated February 12, 2010, Commonwealth stated:

> Commonwealth Land Title Company ("Company") has many options under the Policy and *we have reserved our rights under the Policy* as to those options. As to the measure of loss, I would again direct your attention to the terms of the Company's liability under the Policy. The measure of the liability of the Company under the Policy is not based on how much it would cost to secure new zoning or the loss in value of the property from one zoning category to another. Liability, *if there is any under the Policy*, is going to be based on the difference in value as of the date of loss of the property with the restriction against your title versus the value of the Property without the restriction. . . . *[O]ur coverage position as provided in my December 21, 2009 letter remains*. (Emphasis added.)

claims on the basis of the "no loss or damage to the Insured Claimant" exception. Instead, it based its motion for summary judgment—and the circuit court granted Commonwealth summary judgment—upon "Schedule B," subsection "(b)" of the title insurance policy, a completely separate provision that excluded coverage for "Any easements or servitudes appearing in the public records."

This appeal followed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. 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. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App.1996). Because summary judgment involves only questions of law and

not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

Likewise, the issues in this case involve the interpretation and meaning of certain terms in statutes and contracts. The interpretation of a contract or statute is a question of law for the courts and is subject to *de novo* review. *Cumberland Valley Contrs., Inc. v. Bell County Coal Corp.,* 238 S.W.3d 644, 647 (Ky. 2007).

ANALYSIS

As noted, this is a dispute over whether a policy of insurance provides coverage under the circumstances presented. Therefore, we will begin our analysis by noting that under Kentucky law, the party seeking to establish coverage bears the burden of establishing that the incident at issue was within the scope of the policy. *North American Acc. Ins. Co. v. White*, 258 Ky. 513, 80 S.W.2d 577, 578 (1935). The burden is on the insurer to establish that an exclusion bars coverage. *See,* 17A Couch on Insurance 3d § 254:12; *see also Inter-Ocean Ins. Co. v. Engler*, 632 S.W.2d 459, 461 (Ky. App. 1982) (holding insurer had burden to prove insured's covered disease manifested within specified exclusion period).

As to how an insurance policy should be interpreted, "(1) the contract should be liberally construed and all doubts resolved in favor of the insureds; and, (2) exceptions and exclusions should be strictly construed to make insurance effective." *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164,

166 (Ky. 1992) (quotation marks and citations omitted). However, this does not mean that every doubt must be resolved against the insurer; rather,

> the policy must receive a reasonable interpretation consistent with the parties' object and intent or narrowly expressed in the plain meaning and/or language of the contract. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. . . . courts should not rewrite an insurance contract to enlarge the risk to the insurer.

St. Paul Fire & Marine Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 226-27 (Ky. 1994); *see also Stone v. Kentucky Farm Bureau Mutual Ins. Co.*, 34 S.W.3d 809, 811 (Ky. App. 2000) ("the terms should be interpreted in light of the usage and understanding of the average person"). Finally, in construing an insurance policy, the policy should be read as a whole. *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S.W. 668 (1900).

With that said, Pasha and Schulke argue that any devaluation of parcel 2-A due to the restrictions imposed upon it virtue of the September 2003 agreement was a covered loss under their title insurance policy with Commonwealth, in light of the following provision in the policy:

COVERED RISKS

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the

> Amount of Insurance, sustained or incurred by the Insured by reason of:
>
> > 1. Title being vested other than as stated in Schedule A.
> > 2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes *but is not limited to* insurance against loss from . . .

(Emphasis added.)

As subpart "2" implies, the Commonwealth policy proceeds to include a broad and non-exhaustive list of various encumbrances. In light of this broad and non-exhaustive list, Pasha and Schulke contend that the restrictions imposed by the September 2003 agreement qualify as "Any defect in or lien or encumbrance on" their title to parcel 2-A, and, therefore, that coverage is mandated.

However, this argument ignores the conspicuous language that all coverage under the policy was "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B. . ." Moreover, we find no error in the circuit court's determination that Schedule B, subpart (b) of the policy, which excludes coverage for "[a]ny easements or servitudes appearing in the public records," precluded coverage under the circumstances. The word "servitude" is not defined by the policy itself, but the plain meaning of the word in this context, interpreted in light of the usage and

understanding of the average person,[5, 6] is "a right by which something (as a piece of land) owned by one person *is subject to a specified use* or enjoyment by another[.]" *See* MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2005), page 1138 (emphasis added). And, this definition certainly applies to what resulted from the September 2003 agreement; by virtue of that agreement, another individual (*i.e.*, Kimco) acquired a right to *subject* parcel 2-A, now owned by Pasha and Schulke, to a narrow range of *specified uses*. As an aside, the classification of use restrictions as "servitudes," or as something in the nature of a "servitude," is also consistent with Kentucky law. *See, e.g., McFarland v. Hanley*, 258 S.W.2d 3, 4 (Ky. 1953); *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75, 77 (Ky. 1954); *McCurdy v. Standard Realty Corp.*, 295 Ky. 587, 175 S.W.2d 28, 30 (1943).

In rebuttal, Pasha and Schulke argue that even if the above-described "easements or servitudes" exclusion precludes coverage—and it does—Commonwealth nevertheless waived it. Stated differently, their argument is that some evidence of record demonstrates Commonwealth, through a course of

[5] Pasha and Schulke note that Commonwealth has a website, that its website includes a list of word definitions, and that its website offers a definition of the word "servitude." However, the policy does not reference Commonwealth's website, much less incorporate any of the definitions from it by reference; therefore, Commonwealth's website is irrelevant for the purpose of this appeal.

[6] On a somewhat related note, Pasha and Schulke also argue that they are entitled to coverage based upon the "doctrine of reasonable expectations." The upshot of their argument is that the exclusion's use of the word "servitude" is ambiguous, and that the exclusion, therefore, cannot apply. However, the doctrine of reasonable expectations has no application where no ambiguity exists in the policy language. *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003). And, as discussed, the word "servitude" plainly and unambiguously encompasses the restrictions specified in the September 2003 agreement. As such, this argument has no merit.

conduct, voluntarily and intentionally surrendered or relinquished its right to invoke the exclusion.[7] *See, e.g., Barker v. Stearns Coal & Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466, 470 (1942) ("The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon."). Pasha's and Schulke's theory of waiver relies entirely upon the fact that the only specific basis Commonwealth cited in its above-referenced December 21, 2009, February 12, 2010, and November 17, 2010 letters for denying coverage was the "no loss or damage to the Insured Claimant" exception to the policy.

However, as discussed above, all three of those letters contained explicit *reservations* of rights. Thus, by their own terms, they indicate Commonwealth had no intention to relinquish any of its rights at any time, and thus undermine Pasha's and Schulke's waiver argument.

Lastly, Pasha and Schulke have devoted a considerable portion of their appellate brief to an equitable estoppel argument that appears to be based upon alleged conduct and representations of a number of attorneys and other agents of Commonwealth which, Pasha and Schulke assert, led them to believe that coverage existed under their title insurance policy. We will not address their equitable estoppel argument, however, because they raised it below and for the

[7] To be clear, Pasha and Schulke are not arguing and have never argued that Commonwealth waived its right to assert this exclusion as an affirmative defense to their claim under the Kentucky Civil Rules.

first time in a post-judgment Kentucky Rule of Civil Procedure (CR) 59.05 motion, and thus failed to preserve it. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997) ("A party cannot invoke CR 59.05 to raise arguments and introduce evidence that could and should have been presented during the proceedings before the entry of the judgment.").

CONCLUSION

In light of the foregoing, we AFFIRM.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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