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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000746-MR

LIBERTY MUTUAL INSURANCE AGENCY — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 14-CI-00034

RAYMOND NELSON INSURANCE AGENCY, INC.; AND JUDY LEDFORD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

ACREE, JUDGE: Liberty Mutual Insurance Agency appeals from a summary judgment entered by the Perry Circuit Court dismissing its complaint for equitable subrogation against Appellees, Raymond Nelson Insurance Agency, Inc., and Judy

Ledford. Weighing the equities, the circuit court found Liberty was not entitled to equitable subrogation. We affirm.

In late 2011, Hall & Sons Trucking, Inc., contacted insurance agent Judy Ledford, an employee of Raymond Nelson, and requested a comprehensive insurance policy for its fleet of vehicles for the upcoming year. Ledford submitted a commercial insurance application to Liberty on Hall & Sons' behalf.[1] Liberty approved the application and issued a Motor Carrier Policy effective from December 15, 2011 through December 15, 2012. The policy provided Hall & Sons a maximum of $1 million in liability insurance coverage per unit (tractors or trailers) for each of the separate units insured under the policy. It also contained the following provision:

> c. While a covered "auto" which is a "trailer" is connected to a power unit, this coverage form's Liability Coverage is:
>
> > (1) Provided on the same basis, either primary or excess, as the liability coverage provided for the power unit if the power unit is a covered "auto".
> >
> > (2) Excess if the power unit is not a covered "auto".

(R. 160).

Liberty required Hall & Sons to identify by schedule all units to be insured under the policy. Hall & Sons faxed its fleet information to Ledford; the list included a 2005 Peterbilt 379 tractor and a 2009 Rhodes trailer. However, the

[1] The application was submitted through Liberty's broker, GMI Insurance.

Peterbilt tractor was not included on the schedule of units submitted to Liberty. In deposition, Ledford acknowledged that she received the list from Hall & Sons, that the Peterbilt tractor was on it, and that she inadvertently failed to include the Peterbilt tractor on the schedule of autos to be covered by the Liberty policy. Except for the Peterbilt tractor, all the other vehicles on the list, including the 2009 Rhodes trailer, were insured under the Liberty motor carrier policy.

An employee of Hall & Sons was involved in an automobile accident with Suel Colwell and Christopher Colwell on March 7, 2012. The employee was driving the uninsured 2005 Peterbilt tractor which was pulling the insured 2009 Rhodes trailer. Again, the trailer was indisputably covered under the Liberty policy. The tractor was not; it was uninsured.

The Colwells filed suit against Hall & Sons and its employee. The parties settled the lawsuit. In fulfillment of the settlement, Liberty paid the sum of $1 million on behalf of Hall & Sons.

Hall & Sons then filed suit against Raymond Nelson, Ledford, and others claiming Ledford's failure to procure insurance on the Peterbilt tractor caused Hall & Sons to suffer economic damages in the form of lost business opportunities and lost profits. Count two of the complaint claimed that Liberty had an independent right of subrogation against Raymond Nelson and Ledford. Liberty moved to be added as a party plaintiff to represent its own interest under count two. The circuit court granted Liberty's motion.

In an amended complaint, Liberty alleged that, as a result of Ledford's failure to insure the Peterbilt tractor, as requested by Hall & Sons, "Liberty's policy on the tractor dropped down to provide coverage for" Hall & Sons; consequently, Liberty "was forced to expend sums in defense and resolution of the action filed by the Colwells." (R. 69). Liberty claimed it was entitled to recover from Raymond Nelson and Ledford the sums paid to settle the Colwell suit by way of equitable subrogation.

Raymond Nelson and Ledford moved for summary judgment, arguing Liberty was not entitled to recover under the doctrine of equitable subrogation. The circuit court agreed and entered findings of fact, conclusions of law, and a judgment against Liberty on April 14, 2015. Liberty appealed.

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

Liberty argues the circuit court erred in summarily granting judgment in favor the Appellees. It claims it is entitled to subrogation from Appellees because they endeavored to procure insurance on behalf of Hall & Sons but failed in that effort. Liberty further asserts that the circuit court erred in concluding that

if the Peterbilt tractor was insured, it would have been insured on the same policy as the trailer. We address Liberty's second argument first.

In its order granting judgment, the circuit court concluded:

> Liberty asserts that the actions of [Raymond Nelson and Ledford] "resulted in Liberty being required to indemnify Hall & Sons, which it would not have had to do absent [Raymond Nelson and Ledford's] negligence." That assertion is incorrect. If the tractor had been insured it would have been insured by Liberty on the same policy that insured the trailer. Liberty insured all of Hall & Sons other units at that time. But, in any event, Liberty was still responsible to its insured Hall & Sons by virtue of insuring the trailer.

(R. 242). Liberty takes issue with this finding, arguing to this Court that the circuit court "had no evidence to support its conclusion that the subject tractor would have been insured by [Liberty]." (Appellant's Brief, p.8). Liberty claims this unsupportable and contested factual finding is grounds for reversal. We disagree.

First, Appellees claimed the following as uncontested facts in their summary judgment motion: (i) Liberty was Hall & Sons' only liability insurer at the time of the accident, (ii) if the tractor had been insured, it would have been insured by Liberty on the same policy that insured the trailer, and (iii) "[t]his is not a case in which [Appellees] would have placed coverage with a different primary carrier and Liberty would only have had duties as an excess carrier so as to avoid a payment obligation." (R. 217). Liberty failed to contest these facts.[2]

[2] Liberty admits it only "contested" the facts by including a footnote in its alternative proposed findings of fact, conclusions of law, and order, submitted upon the completion of briefing, that stated: "this Court finds no evidence in the record for Defendants' contention that Liberty would have been the insurer for the subject tractor had Defendants procured a policy of insurance as requested." (R. 234).

Before the trial court, "[t]he 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" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

Second, and perhaps more importantly, there is evidence in the record to support the circuit court's conclusion. It is found in Liberty's amended complaint. That pleading indicates that the Peterbilt tractor was supposed to be added to the *Liberty policy*. The amended complaint reads:

> 7. In March or April of 2011, [Hall & Sons] purchased [the Peterbilt tractor].
>
> 8. In the fall of 2011, the above-referenced vehicle was able to be placed upon the roads of the Commonwealth.
>
> 9. Later in the fall of 2011, [Hall & Sons'] insurance came up for renewal.
>
> 10. Raymond Nelson procured a new insurance policy for [Hall & Sons] for the year of 2012.
>
> 11. ***The new policy of insurance for 2012 was with Liberty Insurance Underwriters, Inc.***
>
> 12. ***Raymond Nelson failed to place the above-referenced vehicle on the policy for 2012.***

> 13. In February of 2012, [Hall & Sons] discovered that the vehicle was left off the policy.

(R. 66) (emphasis added).

An uncontested fact, as it stood at the time the circuit court entered its judgment, was that Raymond Nelson and Ledford were negligent in failing to include the 2009 Peterbilt tractor on the Liberty motor carrier policy in effect in 2012. We see no issue with the circuit court's decision to include this uncontested fact in its judgment.

Turning to the heart of this case, Liberty claims it is entitled to recover from Appellees the one million dollars it paid in satisfaction of the Colwells' claim pursuant to the doctrine of equitable subrogation. Liberty asserts that the insurance policy on the trailer provided that, in the event of an accident, the policy was excess to any policy in place on the subject tractor. But, because the tractor was uninsured due to Appellees' negligence, Liberty's insurance policy "dropped down" and became primary, thereby requiring Liberty to pay out sums to satisfy the claims stemming from the accident.

While equitable subrogation is commonly recognized and "highly favored" as it relates to the priority of liens, *see Mortgage Electronic Registration Systems, Inc. v. Roberts*, 366 S.W.3d 405, 411 (Ky. 2012), little has been said in this Commonwealth as to its applicability in other contexts. In fact, both parties cite primarily to cases outside this jurisdiction to support their respective positions. We are also mindful that our highest Court once acknowledged that, "[b]ecause of

an increasing tendency to invoke its use as 'a universal remedy for parties who have lost their money,' the doctrine of equitable subrogation has been widely discredited, although it survives in this jurisdiction." *United Pac. Ins. Co. v. First Nat. Bank of Prestonsburg*, 457 S.W.2d 833, 835 (Ky. 1970) (internal citation omitted). The Supreme Court advised that the doctrine should be applied with great caution and restricted in its application. *Id.* We heed that advice today.

"The doctrine of subrogation includes every instance in which one person not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter." *Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co.*, 978 S.W.2d 754, 755 (Ky. App. 1998)). As noted by the Western District of Kentucky, "[i]n its application the doctrine generally works to shift costs from the excess insurer to the primary insurer, because the primary insurer is primarily responsible to defend the insured, and the excess insurer usually has the superior equitable position." *Netherlands Ins. Co. v. Lexington Ins. Co.*, 4:12-CV-00024-JHM, 2013 WL 2120817, at *6 (W.D. Ky. May 15, 2013) (citation omitted).

Equitable subrogation, in particular, is designed "to prevent unjust enrichment at another's expense." *Roberts*, 366 S.W.3d at 411. It "is a creature of equity, and rests upon principles of natural justice." *Wells Fargo Bank, Minnesota, N.A. v. Commonwealth, Finance and Admin., Dept. of Revenue*, 345 S.W.3d 800, 806-07 (Ky. 2011) (citation omitted). "A party seeking to invoke the doctrine of equitable subrogation bears the burden of proving the applicability of

the doctrine." *Id.* "[I]t is not an absolute right, but rather, one that depends on the equities and attending facts and circumstances of each case." *Id.*

The circuit court found, and we fully agree, that equity would not be served if Raymond Nelson and Ledford were required to subrogate Liberty for the entire one million dollars. Ledford admitted she made a mistake. She failed to include the Peterbilt tractor on the schedule of insured vehicles. But the trailer was insured under the Liberty policy. That policy required Liberty to defend Hall & Sons and potentially pay sums on Hall & Sons' behalf.

We fully comprehend Liberty's excess/drop down coverage argument; had the tractor been insured, Liberty would only be responsible for excess liability coverage and it is possible its coverage would not have come into play. Liberty's argument might carry more weight except for the undisputed fact, as previously noted, that the trailer, if insured, would have been insured on the Liberty policy. We think it facially unjust to saddle Raymond Nelson and Ledford with the damages requested when, even absent Ledford's alleged negligence – which would have resulted in the trailer being insured under the Liberty policy at issue – Liberty would still have been required to defend Hall & Sons and to pay up to one million dollars per insured unit.

Ultimately, the circuit court weighed the equities in the context of the specific facts of this case and found Liberty was not entitled to recover from Raymond Nelson and Ledford under the doctrine of equitable subrogation. Liberty has identified nothing which convinces us to disturb the circuit court's decision.

Accordingly, we affirm the Perry Circuit Court's April 14, 2015 Findings of Fact, Conclusions of Law, and Judgment granting summary judgment in favor of Raymond Nelson and Ledford.

ALL CONCUR.

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