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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001184-MR

BPM LUMBER, LLC; RICHARD STURGILL;
JOHN E. FOLEY; AND J. COOPER HARTLEY — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JUDGE GREGORY A. LAY
ACTION NO. 14-CI-00585

BEGLEY LUMBER COMPANY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: In July of 2012, Begley Lumber Company, Inc. ("Begley" or "appellee") and Pine Mountain Lumber, LLC ("Pine Mountain") formed a joint venture known as BPM Lumber, LLC ("BPM" or "appellant"). As part of that venture, Begley and Pine Mountain agreed to lease or otherwise provide BPM with

needed assets, property, and inventory. One such lease involved a sawmill (the "Property") located in London, Kentucky, which was owned by Begley, but leased to BPM.

In September of 2013, BPM purchased a commercial property policy of insurance (the "Policy") from Lumberman's Underwriting Alliance ("LUA"). BPM acquired said Policy through its agent, Van Meter Insurance Company ("Van Meter"). At the time of issuance, the Policy listed Begley as both a named insured and loss payee.

In November of 2013, BPM purchased substantially all of the assets owned by Begley that had been leased to BPM during the period of the joint venture (the "transaction"). The parties executed a promissory note and an unconditional partial guaranty of payment (collectively referred to as the "Note"), under which BPM was to pay eighty-three (83) equal installments of $115,486.87, as well as one final installment in an amount equal to the unpaid balance, for a total of approximately $11.5 million. The Note was secured by a security agreement, which attached to all past, present, and future assets of BPM without limitation, and several mortgages which secured the real property owned by BPM. The security agreement provided, in pertinent part, as follows:[1]

[1] As used in the security agreement, the terms "Grantor" and "Borrower" refer to BPM, while "Lender" refers to Begley.

> Grantor, at its sole cost and expense, shall maintain in effect through licensed insurance companies reasonably satisfactory to Lender a policy of insurance covering the Collateral for direct risk of physical loss, with full extended coverage, in an amount and value not less than the full replacement value of the Collateral.

Further:

> The insurance policies required of Borrower herein shall name both Lender and Borrower as insured parties. All such policies shall also contain a standard mortgagee endorsement in favor of Begley Lumber or other holder of any mortgage which may at any time be a lien upon the Collateral or any part thereof.

At the time of the parties' transaction, the Policy covering the Property listed Begley as both a named insured and a loss payee/mortgagee. However, shortly after the transaction had occurred, the President of BPM sent Van Meter a copy of the security agreement and asked that they conform the LUA policy to the terms contained in the security agreement. After review of the security agreement, Van Meter removed Begley as a named insured.

On June 23, 2014, a fire destroyed the Property. Upon the purported discovery that they were no longer a named insured under the Policy, Begley sent a notice of default to BPM, giving it a period of ten (10) days to cure the asserted default.

Van Meter would not allow a change in policy after the loss occurred. Thus, BPM was unable to cure. As a result, Begley, pursuant to section 7 of the

security agreement, claimed an "Event of Default" and accelerated the Note, declaring all obligations to be immediately due and payable in full. In addition to invoking the acceleration clause of the security agreement, Begley initiated a foreclosure action in circuit court.

BPM filed an answer and asserted various counterclaims, including claims for the following causes of action: (1) breach of contract for refusing to allow BPM to use the insurance proceeds to "[r]epair, restore, replace the improvements of personal property of the secured interest"; (2) breach of contract for declaring a default and accelerating the balance due under the Note; (3) breach of the implied covenant of good faith and fair dealing; (4) intentional interference with contractual relations; (5) violation of Kentucky Revised Statute ("KRS") 304.12-230, the statute governing unfair claims settlement practices; (6) wrongful use of civil proceedings; and (7) a claim for punitive damages upon the claims therein.

Eventually, Begley's claims against BPM were settled and dismissed. This left only the counterclaims asserted by BPM to be addressed by the circuit court. Upon motion of the appellee, the trial court entered summary judgment in favor of Begley as to all counterclaims of BPM. This appeal followed.

The Court would preface the remainder of its opinion by noting that the appellant's arguments in the matter at hand are not coordinated toward a

defense of its claims in detail and does not generally address why summary judgment was factually improper on each of them individually. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Carty v. Norton Healthcare, Inc.*, 561 S.W.3d 374, 379 (Ky. App. 2018) (quoting *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979)). We will review the matter, however, based on whether summary judgment was appropriate for each of BPM's asserted counterclaims.

Summary judgment is proper 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." CR[2] 56.03. When considering a trial court's grant of summary judgment, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

[2] Kentucky Rules of Civil Procedure.

Because factual findings are not at issue, a trial court's grant of summary judgment is reviewed *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citations omitted). When we engage in *de novo* review, "we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Turning to the merits of the appellant's arguments, we will first address counts five (5), six (6), and seven (7) of BPM's counterclaims, *i.e.*, those claims concerning the appellee's alleged violation of KRS 304.12-230, unlawful use of civil proceedings, and BPM's claimed entitlement to punitive damages, respectively. BPM makes no effort to argue that summary judgment was improper on these issues. Because, as noted, "a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors," *Carty*, 561 S.W.3d at 379, we affirm the circuit court's summary disposition of these claims without analysis.

Count four (4) of the appellant's counterclaim alleged intentional interference with contractual rights. In order to prevail on such a claim, a plaintiff must show: (1) the existence of a contract; (2) a defendant's knowledge of the contract; (3) that defendant intended to cause a breach of that contract; (4) that defendant's actions did indeed cause a breach of said contract; (5) that damage resulted to plaintiff; and (6) that defendant had no privilege or justification to

excuse its conduct. *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5-6 (Ky. App. 2012) (citing *Ventas, Inc. v. Healthcare Property Investors, Inc.*, 635 F. Supp. 2d 612, 619 (W.D. Ky. 2009)). Here, the appellant points to no facts in its brief to support the existence of any of the aforementioned elements. Rather, BPM simply provides in its brief that it believes that it was the appellee's "unwavering demand that it receive the proceeds attributable to the real property loss that gave rise to BPM's claim that Begley ha[d] tortiuously interfered with BPM's rights under the insurance policy[.]" The appellant fails to supply an argument that it had the requisite factual support necessary to survive a motion for summary judgment. Thus, having failed to adequately support its assertion that Begley interfered with its contractual rights, we affirm the award of summary judgment as to count four (4).

Count three (3) of BPM's counterclaim alleged that the appellee had breached the implied covenant of good faith and fair dealing. The duty of good faith and fair dealing only arises where there is an underlying contract. *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.*, 242 S.W.3d 359, 364 (Ky. App. 2007). "Within every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out." *Farmers Bank & Tr. Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) (citing *Ranier*

v. Mount Sterling National Bank, 812 S.W.2d 154, 156 (Ky. 1991). However, "[a]n implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights." *Id.* (citing *Hunt Enterprises, Inc. v. John Deere Indus. Equipment, Co.*, 162 F.3d 1161 (6th Cir. 1998)). Begley had a contractual right, pursuant to section 7 of the security agreement, to accelerate the Note (". . . Lender may declare all of the Obligations to be automatically and immediately due and payable in full, without demand or notice of any kind . . . ."). Likewise, under section 4(H) of the security agreement,[3] the appellee was authorized to request LUA distribute insurance proceeds to itself in the event of damage or destruction to the Property. Furthermore, disregarding the fact that the parties' agreement explicitly provided Begley with the right to take the actions about which BPM complains, the appellant, once again, fails to point to facts in the record that would support the elements of a claim based upon a party's breach of the implied covenant of good faith and fair dealing. Hence, summary judgment is affirmed on BPM's claim that Begley breached any duty arising under the implied covenant, as well.

[3] Section 4(H) of the security agreement provides, in pertinent part, as follows: "In the event of damage or destruction of any of the Collateral covered by such insurance, any proceeds from such insurance shall upon request of Lender, be paid to Lender and, at the option of Lender, be applied either to reduce the Obligations, or endorsed to Grantor and disbursed from time to time by Lender at Grantor's written request but only for the repair and/or replacement of such damaged or destroyed Collateral."

Count two (2) of BPM's claim alleged that the appellee breached the parties' contract by invoking the acceleration clause of the security agreement. In essence, BPM's argument here hinges on its assertion that it was never in default. Because it was not in default, the argument goes, Begley's right to accelerate the debt never arose. Thus, in BPM's view, Begley breached the contract by pursuing a remedy for a default by BPM when BPM actually was not in default.

We earlier recognized that the security agreement expressly authorized Begley to accelerate the debt. However, as alluded to previously, Begley's right to do so could arise only in the "Event of Default." In order to determine whether an "Event of Default" occurred, thereby giving rise to the possibility of an invocation of the acceleration provision of the security agreement, there must be an interpretation and analysis of the security agreement. We hold that the Laurel Circuit Court correctly found that the parties' agreement required that Begley be listed on the insurance policy as both a named insured and as a loss payee and that it was BPM's responsibility to assure that be the case.

The interpretation of a contract is a question of law which this Court reviews *de novo*. *See, e.g., Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). A written instrument is to be strictly enforced according to its terms. *Island Creek Coal Company v. Wells*, 113 S.W.3d 100, 104 (Ky. 2003) (citations omitted). All contracts "must be construed as a whole, giving

effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986).

Section 4(E) of the security agreement requires that the appellee, along with the appellant, be named as "insured parties."[4] As the circuit court noted, that same provision goes on to provide that the policy "shall also contain" a mortgagee endorsement in favor of the appellee. When considering the entirety of section 4(E), it becomes clear that the provision lends itself to no other interpretation than that being named as an insured party, on the one hand, and being named as a loss payee/mortgagee, on the other, are two separate and distinct requirements. If the two concepts were functional equivalents, there would have been no need to provide that, in addition to naming the appellee and the appellant as "insured parties," the policy "shall also contain" a mortgagee endorsement.

Pursuant to Section 4E of the security agreement, BPM was required to provide an insurance policy for the secured interest having both parties as a named insured. There is no factual dispute in regard to that question. The policy did not. Hence, there is no factual question for a trier of fact and summary judgment was appropriate. The failure of BPM to have procured the appropriate

[4] Section 4(E) provides as follows: "The insurance policies required of Grantor herein shall name both Lender and Grantor as insured parties. All such policies shall also contain a standard mortgagee endorsement in favor of Lender or other holder of any mortgage which may at any time be a lien upon the Collateral or any part thereof."

insurance policy is the breach of contract. Why or how that occurred is not relevant to the legal issue at hand. BPM was required to have insurance policies naming both parties as insured parties. It was not doing so. Begley was not in breach when it invoked its right to accelerate the debt when that defect could not be cured but was instead within its contractual rights as prescribed by the agreement. There was no error in the circuit court's grant of summary judgment on the breach of contract claim that appellee wrongly invoked the acceleration clause.

In addition to the above, the appellant, in count one (1), claimed that the appellee breached its contract in receiving those insurance proceeds paid to BPM in order to compensate it for the destruction of the improvements that had been made to real property. BPM argues that the circuit court erred in finding that Begley was entitled to the insurance proceeds derived from destruction of the sawmill. BPM asserts that the insurance proceeds related to the real property improvements were governed by the mortgage and that the circuit court erred in relying on the language contained in the security agreement as opposed to the mortgage. We disagree.

The security agreement provides that "to secure the indebtedness and undertakings and other Obligations of Grantor referred to in Section 2 hereof, Grantor hereby pledges, assigns, transfers, and grants to Lender a continuing

security interest in all property described in **Exhibit A** attached to and made a part of this Agreement." (Emphasis in original.) Exhibit A, termed "Description of Collateral," in turn, provides as follows: "[a]ll assets of Debtor including, without limitation, all accounts, receivables, intangibles, rents, profits, permits, licenses, . . . contract and lease rights, . . . including, without limitation, the following: . . . All accounts receivable of Grantor, whether now existing or hereafter arising, created or acquired by Grantor and all cash or non-cash proceeds of the foregoing, ***including insurance proceeds***, and all ledger sheets, files, computer programs and software and all other records of Grantor relating to any of the foregoing." (Emphasis added.)

The plain, unambiguous terms of the security agreement demonstrate that Begley had a right to all insurance proceeds to apply to the debt, regardless of reason for same. BPM's argument that the security agreement does not apply to insurance proceeds paid to BPM for damage to real property is contradictory to the "Description of Collateral" attached to and incorporated in the security agreement and is thus unpersuasive. We conclude that, by virtue of the broad language contained within the security agreement, Begley was entitled to the proceeds at issue, and that the insistence of the receipt thereof did not constitute a breach of the parties' agreement.

Furthermore, the mortgage agreement is in accord giving Begley broad rights to any insurance proceeds. As the circuit court pointed out, the mortgage at issue, in enveloping language similar to that seen in the security agreement, attaches to "all proceeds (including premium refunds) payable or to be payable under *each policy of insurance* relating to the Property[.]" (Emphasis added.) The mortgage goes on to provide that it attaches to "any proceeds of the foregoing (*including insurance proceeds*), and additions and accessions thereto, and any replacements or renewals of all of the foregoing[.]" (Emphasis added.) Clearly, even if the mortgage was the controlling document as it related to Begley's right – or lack thereof – to receive proceeds paid to BPM for destruction of improvements to the real property, the operative language contained therein is such that it cannot be distinguished from the security agreement which, as explained beforehand, explicitly vests in the appellee a right to **all assets** of BPM, including insurance proceeds. Therefore, our conclusion does not change, regardless of which document controls.

Finally, we must briefly address the issue of equitable estoppel as raised by BPM. BPM argues that the appellee should have been estopped from "initiat[ing] this proceeding" because it "misled" BPM into failing to take action in two ways. First, BPM contends that, because Begley failed to timely object to having been removed as a named insured on the insurance policy, BPM was

precluded from asking Begley whether it would rather have been listed on the policy as a named insured or a loss payee/mortgagee.[5] Secondly, BPM claims that it was misled when it continued to make payments, believing that it had complied with the terms of the parties' agreements. Due to these "misleadings," BPM asserts that the circuit court erred in failing to apply the doctrine of equitable estoppel.

It must be remembered that the issue before the Court is the dismissal of the appellant's claims against the appellee. The appellant made no counterclaim based on equitable estoppel. Because the appellant did not plead a cause of action based on any claim of equitable estoppel, we find no error in the circuit court's failure to apply the doctrine.

The judgment of the Laurel County Circuit Court is AFFIRMED in all respects.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
John P. Brice Lexington, Kentucky	Palmer G. Vance, II Lexington, Kentucky

[5] BPM maintains throughout that LUA refused to allow Begley to be both a named insured and loss payee/mortgagee.