STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1765

Mark Kohout,
Appellant,

vs.

Homecomings Financial, LLC, et al.,
Respondents,

and

Mark Kohout,
Appellant,

vs.

Ronald R. Reitz, et al.,
Respondents,

GMAC Mortgage, LLC, a Delaware limited liability company,
Respondent,

International Fidelity Insurance Company,
Respondent.

Filed July 9, 2012
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-10-21556; 27-CV-11-2673

Robert J. Bruno, Robert J. Bruno, Ltd., Burnsville, Minnesota (for appellant)

Donald G. Heeman, Ryan A. Olson, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota (for respondents Homecoming Financial, LLC, Residential Funding Company, LLC, U.S. Bank National Association, and GMAC Mortgage, LLC)

John Degnan, Tara Reese Duginske, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents Ronald R. Reitz, Quality Claims Management Corporation, Citibank National Association, and International Fidelity Insurance Company)

Leatha G. Wolter, Katherine A. McBride, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota, (for respondent Illinois Farmers Insurance Company)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Willis, Judge.*

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Mark Kohout defaulted on a loan secured by a mortgage on his home in Litchfield. The mortgagee, Mortgage Electronic Registration Systems, Inc., purchased the home for $170,000 at a sheriff's sale, but it burned down during the six-month redemption period. Kohout's insurance carrier, Illinois Farmers Insurance Company, had already suspected Kohout of making a fraudulent claim on the policy for an earlier loss. It issued a $170,000 check jointly to Homecomings Financial, LLC, the mortgage subservicer, and Kohout, after Homecomings submitted a claim for the fire loss. Homecomings deposited the check without Kohout's endorsement. A jury later found Kohout guilty of defrauding Farmers on the previous unrelated claim. Kohout brought this suit under various theories seeking payment of the $170,000 insurance proceeds. The district court concluded that

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

the homeowner's policy was void as a matter of law, and it granted summary judgment against Kohout and dismissed all of his claims. Kohout appeals that judgment, arguing that the policy is not void; that Homecomings is not entitled to both payment of its sale bid and title to the property; that the respondents are liable for conversion and Farmers is liable for breach of contract and as drawer of the check; and that his claims are not barred by the period of limitations in the policy. Because the insurance policy is void, we affirm.

FACTS

Mark Kohout owned real property in Litchfield. On September 6, 2006, Kohout obtained a loan from Lendsource, Inc., and he secured the loan with a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS).[1] The loan was later assigned and pooled with other loans in a trust. U.S. Bank National Association (USB) owned the note and mortgage as trustee. Homecomings Financial, LLC acted as the subservicer of the mortgage on behalf of MERS and USB.

The mortgage required that Kohout obtain property insurance against loss by fire and that he name the mortgagee (Homecomings) as the lender or additional loss payee. This provision of the mortgage states as follows:

> [I]f Lender acquires the Property [through foreclosure] . . . , Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the

[1] MERS was originally a defendant in this action but was dismissed by stipulation.

> Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

Kohout insured the property for $299,000 with Illinois Farmers Insurance Company under a Minnesota Standard Fire Insurance Policy. Homecomings was named as the mortgagee on the policy. The policy states:

> 16. *Mortgage Clause.* The word "mortgagee" includes trustee or loss payee. If a mortgagee is named in this policy, a covered loss will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of the mortgagees. If we deny your claim, such denial will not apply to a mortgagee's valid claim if the mortgagee:
> . . . .
> c. submits a signed, sworn statement of loss within 60 days after we notify the mortgagee of your failure to do so.

The general conditions section of the policy includes a void-by-fraud provision: "*Concealment or Fraud.* This entire policy is void if any insured has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to this insurance before or after the loss."

Kohout defaulted on his note in May 2007, still owing $250,310. MERS foreclosed on the mortgage. It purchased the property for $170,000 at the sheriff's sale in December 2007 and later conveyed it to USB. Kohout had a six-month statutory redemption period after the date of the property's sale.

During that period, on February 16, 2008, a fire destroyed the dwelling on the property. Kohout notified Farmers of the loss. Farmers asked Kohout to submit a sworn statement as proof of loss several times. Kohout did not submit one until July 18, 2008.

In his proof-of-loss statement, he claimed personal-property losses of $33,290, but he did not submit a proof-of-loss statement for the dwelling itself.

On June 19, 2008, one day before the redemption period expired, Farmers informed Homecomings that Kohout's claim was under investigation as suspicious and that it had not issued any funds to him. It advised Homecomings that it could file its own claim under the policy's mortgage clause. Homecomings did so on July 1, 2008.

On October 14, 2008, Farmers issued a check for $170,000—the amount of real-property loss claimed by Homecomings. The check was made payable to both Kohout and Homecomings but was delivered by mail to Homecomings. Homecomings asked Farmers to reissue the check payable only to Homecomings, but Farmers refused. In January 2009, Homecomings transferred the claim and check to Quality Claims Management Corporation, a public-insurance adjustor.

Quality Claims's President Ronald Reitz requested that Farmers reissue a check payable only to Homecomings. Farmers again declined. It suggested that Reitz obtain Kohout's signature. Reitz requested that Kohout endorse the check. Kohout agreed to endorse the check but only if Quality Claims paid him $20,000. Quality Claims declined; it deposited the check at Cornerstone Bank, without Kohout's endorsement.

Before the February 2008 fire, Kohout had filed a claim with Farmers in October 2007 alleging that $160,000 in personal property had been stolen from the home. Farmers refused to make any payment on his claim because it found that he had misrepresented the items lost. After Kohout sued in that case, a jury found that he had "misrepresented or concealed a material fact with respect to his insurance claim with the intent to deceive or

defraud [Farmers]," and the district court concluded as a matter of law that "[t]he policy of insurance is voided by [Kohout's] misrepresentation or concealment of a material fact with respect to his insurance claim." Judgment was entered in favor of Farmers on July 23, 2009. Farmers later sent Kohout a letter stating that he had no further basis to submit a claim for the fire because his fraud had voided his policy.

Kohout commenced this lawsuit seeking the $170,000 in August 2010. The respondents and Kohout moved for summary judgment. The district court granted the respondents' motions and dismissed all of Kohout's claims. The district court held that the respondents were entitled to summary judgment for two reasons: (1) the policy is void because of Kohout's prior fraud and (2) even if the policy were not void, Farmers properly paid the insurance proceeds to Homecomings as the mortgagee because Kohout failed to redeem the property within the redemption period.

Kohout appeals.

D E C I S I O N

Kohout argues that the district court erred by granting summary judgment in favor of the respondents. The district court should grant a motion for summary judgment when the pleadings and evidence show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from the district court's grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court properly applied the law. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Kohout asserts that there are no material factual disputes.

The district court correctly held that Kohout's insurance policy is void. The Farmers policy provides, "This entire policy is void if any insured has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to this insurance before or after the loss." Minnesota Statutes section 65A.01, subdivision 3 (2006), requires that this language be included in all standard fire insurance policies. If the jury properly found that Kohout had "misrepresented or concealed a material fact with respect to his insurance claim with the intent to deceive or defraud [Farmers]" after his claim following an alleged October 2007 theft, the plain language of the void-for-fraud clause renders the policy void.

Kohout argues that the policy is not void because Farmers never provided him with a notice of cancellation. Under Minnesota law, an insurer must give an insured 30 days' notice if it cancels a policy for misrepresentation or fraud. Minn. Stat. § 65A.01, subds. 3a(1)(6), 3c(6) (2006). But Kohout's policy was not cancelled. It was instead deemed void, a disposition framed by a different subdivision of the statute. *See* Minn. Stat. § 65A.01, subd. 3b (2006).

Kohout contends that "void" and "cancel" mean the same thing. He is incorrect. "Cancel" means "[t]o destroy a written instrument by defacing or obliterating it" or "[t]o terminate a promise, obligation, or right." *Black's Law Dictionary* 233–34 (9th ed. 2009). "Void" means "[o]f no legal effect; null." *Id.* at 1709. More significant, the terms "cancelled" and "voided" are contained in two different statutory subdivisions. *See* Minn. Stat. § 65A.01, subds. 3a, 3b. Neither the statute nor the insurance policy provision that

incorporates it suggests that Farmers was required to notify Kohout before his policy became void as a result of his fraud.

Kohout also asserts that voiding the policy required action on behalf of Farmers and did not automatically occur. But this assertion seems to confuse "void" and "voidable." "Void" is a thing that has no effect, while "voidable" is a thing that is "valid until annulled." *Black's Law Dictionary* 1709–10 (9th ed. 2009). In this case, the insurance policy and section 65A.01, subdivision 3, state that the "entire policy shall be *void*," not *voidable*. No initiating action was required by Farmers.

Kohout alternatively argues that Farmers waived its right to claim voidness based on fraud. To establish that Farmers waived its right to assert that the policy was void, Kohout must establish that Farmers voluntarily relinquished its known right. *See Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 311–12, 41 N.W.2d 422, 424 (1950). Kohout offers three bases in support of his waiver argument. None persuades us.

Kohout first contends that, by issuing a check with his name on it, by requesting proof of his claim, by failing to deny his claim or assert the defense during the limitation period, and by issuing the check after knowing of the potential fraud, Farmers waived its right to assert fraud. But Farmers informed Kohout in April 2008, June 2008, and July 2008 that it "expressly reserve[d] all rights and defenses it may have to any and all claims." Farmers included Kohout on the check because the policy states that "[i]f a mortgagee is named in this policy, a covered loss will be paid to the mortgagee and [Kohout], as interests appear." The policy had not yet been declared void at the time of

the check's drafting, so Farmers was required to issue it to both parties. Farmers also noted in its letter accompanying the check, "Please be advised that the claim submitted by the named insured, Mark Kohout, remains under investigation and a decision has not been made with respect to accept[tance] or denial of this claim." And Kohout does not explain why he should benefit from the timing of Farmers knowing that he may have committed fraud before it issued the check. The statutory requirement that persons who commit fraud lose their policies would be undermined if Kohout could successfully demand the insurance proceeds after he defrauded his insurer.

Kohout maintains that Farmers affirmed coverage by failing to request subrogation. This argument fails. Kohout relies on *Phalen Park State Bank v. Reeves*, 312 Minn. 194, 251 N.W.2d 135 (1977). But *Phalen* concerned the subrogation duties between the mortgagee and the insurer, not subrogation claims of the insured. *See id.* at 195–96, 251 N.W.2d at 136–37. *Phalen* has no bearing on whether Farmers waived its right to assert its voidness defense.

We also are not persuaded by Kohout's final waiver argument that Farmers' failure to plead its fraud defense with particularity is grounds to strike the defense. A pleading of fraud must state the allegation with particularity. Minn. R. Civ. P. 9.02. But the fraud at issue here was not in controversy in this case; it was previously proven in Kohout's case arising from his rejected October 2007 insurance claim. Farmers' reference in its answer noting Kohout's prior fraud sufficiently put Kohout on notice of the defenses asserted in this case.

Because a jury found that Kohout intentionally defrauded Farmers on a claim before the fire, his policy with Farmers became void and the district court did not err by granting summary judgment on that basis. Because all of Kohout's theories claiming entitlement to the $170,000 arise from his erroneous presupposition that the policy entitled him to the proceeds and gave him an interest in the $170,000 check, we need not address them further.

Affirmed.