



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00164-CV

Melissa **WALLACE** and Top Drawer Property Solutions, LLC,
Appellants/Cross-Appellees

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Appellee/Cross-Appellant

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI17915
Honorable Aaron Haas, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Beth Watkins, Justice
Liza A. Rodriguez, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: August 24, 2022

REVERSED AND RENDERED

This dispute concerns the alleged breach of a title insurance policy. The trial court found appellee breached the contract and awarded damages. On appeal, appellants assert the trial court calculated damages incorrectly and failed to award attorney's fees. In its cross-appeal, appellee asserts one appellant lacks standing and that there is legally and factually insufficient evidence appellee breached the contract. Finding legally insufficient evidence of a breach of the title insurance policy, we reverse and render a take nothing judgment in favor of appellee.

BACKGROUND

On May 23, 2006, Guy March and Sandra March, during their marriage, acquired real property in San Antonio, Texas (the “property”). On May 31, 2017, Sandra March died intestate. Appellant Melissa Wallace—Sandra March’s daughter from a previous marriage—served as Sandra March’s independent administrator in heirship proceedings. On July 27, 2017, the probate court signed an heirship judgment declaring Guy March and Wallace each owned a 50% interest in the property.

On August 2, 2017, an escrow officer emailed appellee Fidelity National Title Insurance Company’s (“Fidelity”) title commitment to Wallace’s lawyer. The title commitment identified Guy March as owning full fee simple title. Later that day, Wallace’s lawyer responded to the email, attaching the heirship judgment and probate documents evidencing Wallace’s independent administration of Sandra March’s estate.

On August 14, 2017, Guy March purported to convey the entire property to appellant Top Drawer Property Solutions, LLC (“Top Drawer”) by warranty deed. As part of the sale, Guy March obtained a mortgage payoff statement indicating a payoff in the amount of \$341,783.84. The sale price of the property was \$350,000. Funds from the sale of the property were used to pay off the prior mortgage, which encumbered the entire property, outstanding HOA dues, outstanding county taxes, and agent commissions. Guy March received \$5,694.29 from the sale of the property, and Wallace received nothing from the sale.

Top Drawer received a title policy from Fidelity dated August 16, 2017 insuring fee simple title to the entire property. In September 2017, Top Drawer filed a claim with Fidelity asserting Top Drawer did not have fee simple title to the property as insured by Fidelity because of Wallace’s 50% outstanding interest in the property. Fidelity accepted the claim.

In November 2017, Top Drawer demanded that Fidelity pay Wallace \$200,000 to remove her interest in the property, and Fidelity did not pay the demand. In March 2018, Fidelity retained an attorney to file suit against Wallace for partition, equitable subrogation, and breach of warranty against Guy March.

On April 11, 2018, Wallace and Top Drawer entered an assignment of claims wherein Wallace conveyed her interest in the property to Top Drawer in exchange for Top Drawer's assignment of its claims, if any, against Fidelity. The agreement between Top Drawer and Wallace transferred Wallace's 50% interest in the property to Top Drawer, which then vested 100% fee simple interest in the property to Top Drawer.

On July 23, 2018, Wallace, as assignee of Top Drawer's claims against Fidelity, filed the underlying proceeding asserting Fidelity breached its title insurance policy. In its answer, Fidelity asserted Wallace lacked standing and capacity to pursue her claim. Wallace thereafter amended her petition to add the insured, Top Drawer, as a contingent plaintiff "in the unlikely event the assignment of claims against [Fidelity] are ruled to be invalid or void."

On June 9, 2020, the trial court held a bench trial. The trial court thereafter issued findings of fact and conclusions of law. The trial court determined Wallace had standing pursuant to Top Drawer's assignment of claims. The trial court calculated the "Actual Loss," as defined in the title policy, as being the difference between the value of the land without the covered title risk¹ and the value of the land with the covered title risk², or \$175,000. However, the trial court limited damages pursuant to a limitation of liability provision in the title policy that provided, "If you do anything to affect any right of recovery or defense you may have, we can subtract from our liability the amount by which you reduced the value of that right or defense. But we must add back to our

¹ \$350,000, being the value of the fee simple interest.

² \$175,000, being Wallace's one-half interest in the property.

liability any amount by which our expenses are reduced as a result of your action.” Pursuant to this provision, the trial court (1) valued Fidelity’s equitable subrogation defense at \$172,153; (2) determined the value of the defense was reduced to zero because of Top Drawer’s settlement with Wallace; and (3) subtracted the lost value of the equitable subrogation defense³ from the Actual Loss,⁴ resulting in a reduction of Fidelity’s liability under the limitation of liability provision to \$2,847. However, the trial court then determined that Fidelity’s valuation of the case at \$20,000 for settlement purposes must be re-added to this amount pursuant to the add back term in the limitation of liability provision. Accordingly, the trial court assessed Wallace’s damages for breach of the title policy at \$22,847. The trial court also determined Wallace failed to present her claims and, therefore, could not recover attorney’s fees. On January 28, 2021, the trial court entered a final judgment awarding \$22,847 in damages for breach of contract, costs, and pre- and post-judgment interest.

Appellants appealed, and Fidelity cross-appealed. In six issues, appellants assert the trial court erred in (1) calculating the Actual Loss as \$175,000; (2) finding Fidelity established an equitable subrogation defense; (3) finding Top Drawer did not give Fidelity a reasonable opportunity to clear title (i.e. file suit against Wallace) prior to engaging in self-help (i.e. assigning its claims to Wallace); (4) reducing damages under the limitation of liability provision; (5) finding Top Drawer failed to present its claims for attorney’s fees; and (6) failing to grant appellants leave to amend their petition to plead presentment. In its cross appeal, Fidelity asserts (1) the trial court erred in concluding Wallace had standing to sue for breach of the title policy between Top Drawer and Fidelity and (2) the trial court erroneously concluded Fidelity breached the contract because

³ \$172,153.

⁴ \$175,000.

the conclusion is not supported by any finding of fact as to how Fidelity breached the contract nor any legally or factually sufficient evidence of same.

STANDING

Because Fidelity's first cross-issue, standing, implicates this court's subject matter jurisdiction, we address it first. Fidelity asserts that Wallace lacks standing because (1) the assignment of claims violates the title policy's anti-assignment provision and (2) the assignment of claims violates public policy.

Standard of Review

Standing is a threshold requirement to maintaining a lawsuit. *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). We review questions of standing de novo. *Id.*

Anti-Assignment Provision

The insurance policy defines Top Drawer as the insured. The policy's "Continuation of Coverage" provision states, "We insure your [Top Drawer's] transferee only as follows: (a) a person who inherits the original named insured's title on the original insured's death; (b) the original named insured's spouse who receives title in a dissolution of marriage with the original named insured; (c) the trustee or successor of a trust established by the original named insured to whom the original named insured transfers title after the date of the policy; or (d) the beneficiaries of a trust described by Subdivision (c) on the death of the original named insured." Fidelity refers to this provision as an anti-assignment provision and asserts Wallace lacks standing because the provision prohibits Top Drawer from assigning its claims to Wallace.

We reject Fidelity's argument based on the plain language of the provision. Although Fidelity refers to the provision as an anti-assignment provision, we think the plain language provides otherwise. By its plain terms, the "Continuation of Coverage" provision provides for *continued coverage* for Top Drawer's transferee or assignee ("We insure your transferee only as

follows. . .”). But Wallace is not a transferee or assignee of the property or insurance policy. Instead, by the assignment of claims, Top Drawer “assigns and conveys all its *claims* against Fidelity” to Wallace attributable to Top Drawer’s purchase of the property. *See John H. Carney & Assocs. v. Tex. Prop. & Cas. Ins. Guar. Ass’n*, 354 S.W.3d 843, 849–50 (Tex. App.—Austin 2011, pet. denied) (“[T]he insurance policy itself was not assigned to Carney and Carney is not otherwise a named insured thereunder. However, the general rule is that the right to sue for money damages is a chose in action, which is a property right that can be assigned unless assignment is prohibited by statute or is contrary to public policy.”) (citing *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996)).

Moreover, read in context, the terms “transferee” and “assignee” in the title policy refer to transferees or assignees of *title* to the property. Here, Top Drawer—not Wallace—acquired title to the property pursuant to the assignment of claims. To this end, we agree with Fidelity’s assertion that “Top Drawer’s rights under the title policy do not extend to Wallace by virtue of an assignment of claims.” We therefore hold the continuation of coverage provision did not prohibit Top Drawer’s assignment of its breach of contract cause of action to Wallace and reject Fidelity’s argument that Wallace lacked standing on the basis of an express anti-assignment provision.

Public Policy Arguments

Fidelity next asserts public policy prohibited Top Drawer’s assignment to Wallace. According to Fidelity, the assignment is invalid because (1) it prejudices Fidelity’s defense and ability to prosecute a claim against Wallace and (2) it is a Mary Carter agreement.

Our review of the record and relevant authorities does not support invalidation of the assignment on its first public policy ground. *See, e.g., Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 670 (Tex. 2017) (remanding for new trial in the interest of justice when judgment was procured absent a fully adversarial proceeding because settlement agreement prohibited

meaningful incentive for insured to contest claims). Under the facts of this case, we are not convinced the assignment of claims prohibited a meaningful adversarial proceeding.

We next turn to Fidelity's second public policy argument—that the assignment of claims was an impermissible Mary Carter agreement. Under Texas law, a Mary Carter agreement exists “when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial.” *Elbaor v. Smith*, 845 S.W.2d 240, 247–48 (Tex. 1992). Texas public policy abhors Mary Carter agreements because they “create[] a tremendous incentive for the settling defendant to ensure that the plaintiff succeeds in obtaining a sizable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case.” *Id.* “Indeed, Mary Carter agreements generally, but not always, contain a clause requiring the settling defendant to participate in the trial on the plaintiff's behalf.” *Id.* “Although the agreements do secure the partial settlement of a lawsuit, they nevertheless nearly always ensure a trial against the non-settling defendant.” *Id.* Instead, “Mary Carter agreements frequently make litigation inevitable, because they grant the settling defendant veto power over any proposed settlement between the plaintiff and any remaining defendant.” *Id.* In short, rather than promoting compromise and discouraging litigation, Mary Carter agreements “plainly do just the opposite.” *Id.*

Although the assignment of claims bears some indicia of a Mary Carter agreement, it is not one. Importantly, Top Drawer did not guarantee Wallace any minimum payment—a defining feature of Mary Carter agreements. We reject Fidelity's assertion that the assignment of claims constituted a void Mary Carter Agreement, and we accordingly overrule Fidelity's first cross-issue.

BREACH OF CONTRACT

In Fidelity's second cross-issue, Fidelity asserts there is no legally or factually sufficient evidence that Fidelity breached the title insurance policy.

Standard of Review

When a party appeals a judgment rendered after a bench trial, as here, we review the trial court's findings for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing evidence supporting a jury's answer. *S. States Transp., Inc. v. State*, 774 S.W.2d 639, 640 (Tex. 1989). We apply a sufficiency of the evidence review to the trial court's factual findings and review its conclusions of law de novo. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

We only sustain a challenge to the legal sufficiency of the evidence in four circumstances: (1) where there is a complete absence of evidence of a vital fact; (2) where the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) where the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) where the evidence establishes conclusively the opposite of the vital fact. *Dallas Nat'l Ins. Co. v. De La Cruz*, 470 S.W.3d 56, 57 (Tex. 2015). We credit evidence that supports the judgment if a reasonable factfinder could have done so and disregard contrary evidence unless a reasonable factfinder could not have done so. *Id.*

When reviewing the factual sufficiency of evidence, we examine all the evidence and set aside a finding only if it is so contrary to the evidence as to be clearly wrong and unjust. *Cameron v. Cameron*, 158 S.W.3d 680, 683 (Tex. App.—Dallas 2005, pet. denied).

Analysis

A breach of contract claim requires proof of (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the

defendant; and (4) damages sustained as a result of the breach. *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 27 (Tex. App.—San Antonio 2004, no pet.). In its second cross-issue, Fidelity asserts there is no legally or factually sufficient evidence of the third element. We agree.

The trial court concluded, “Defendant [Fidelity] breached the contract with Plaintiff Top Drawer.” We review this conclusion de novo. Importantly, the trial court does not identify *how* Fidelity breached the contract with Top Drawer. Read liberally, the findings of fact establish Guy March breached his warranty in conveying only a 50% interest in the property to Top Drawer, but *that* breach is legally distinguishable from Fidelity’s purported breach of the title insurance policy. In other words, Guy March’s breach of warranty of title does not automatically result in Fidelity’s breach of the insurance policy. Rather, we must look to the terms of the policy to assess whether *it* was breached. *See Mid-Continent Cas. Co. v. Castagna*, 410 S.W.3d 445, 456 (Tex. App.—Dallas 2013, pet. denied) (“Insurance policies are controlled by rules of interpretation and construction applicable to contracts generally.”).

The parties stipulated (1) Top Drawer filed a claim under the title policy for failure of 50% of the title due to Wallace’s outstanding interest in the property; (2) Fidelity accepted the claim; (3) Fidelity retained an attorney to file suit against Wallace; (4) Fidelity sent an engagement letter to Top Drawer; (5) Top Drawer never returned the engagement letter; (6) in March 2018, Fidelity sought Top Drawer’s authority to sue Wallace for partition, equitable subrogation, and breach of warranty against Guy March; and (7) in April 2018, Wallace and Top Drawer entered into the assignment of claims.

Under the title policy, Fidelity has several options once a claim is made. One option is to pay the claim. But, contrary to Wallace’s implication, that was not Fidelity’s only option. Rather, the policy expressly and unambiguously provides that Fidelity could choose to “[p]rosecute or

defend a court case related to the claim.” The parties’ stipulations and evidence at trial establish Fidelity sought to do just that after Fidelity accepted Top Drawer’s claim. However, as recognized by the trial court’s findings relating to the equitable subrogation defense, Fidelity was prevented from fully prosecuting and defending the claim because Wallace and Top Drawer settled their claims shortly after Top Drawer received an engagement letter seeking to prosecute Top Drawer’s claims. In other words, the stipulations of fact and evidence adduced at trial conclusively establish the opposite of a breach by Fidelity. *See Dall. Nat’l Ins. Co.*, 470 S.W.3d at 57. Accordingly, we hold there is no legally sufficient evidence that Fidelity breached the title insurance policy.

Our holding that there is no legally sufficient evidence of a breach of contract by Fidelity comports with a federal district court’s application of identical language in *Lawler v. Fid. Nat. Title Ins. Co.*:

When plaintiff submitted her claim to defendant, the applicable Policy language required defendant to take some action: pay the claim, negotiate a settlement, prosecute or defend a court case on the claim, or pay the Policy amount, among other options. The Policy expressly authorized defendant to determine which option to pursue. It is undisputed that defendant engaged counsel to prosecute a court case related to the claim, as expressly authorized by the Policy, and that counsel continued to prosecute the case at the time defendant filed its summary judgment motion. Because defendant acted pursuant to the terms of the Policy, no breach occurred.

No. 4:11-CV-477-A, 2011 WL 5221261, at *3 (N.D. Tex. Oct. 31, 2011).

CONCLUSION

Having sustained Fidelity’s second cross-issue, we need not reach Wallace’s issues on appeal because they are contingent upon a valid breach of contract claim. *See* TEX. R. APP. P. 47.1. We accordingly reverse the judgment of the trial court and render a take-nothing judgment in favor of Fidelity.

Lori I. Valenzuela, Justice