COURT OF APPEALS DECISION DATED AND FILED

May 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2013AP1853

Cir. Ct. No. 2012CV37

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

C.M. BYE, SCOTT LARSON AND CORNELIA LARSON,

PLAINTIFFS,

V.

TREVER SIRE,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

V.

STEWART TITLE GUARANTY COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Trever Sire appeals a summary judgment holding that Stewart Title Guaranty Company had no duty to indemnify or defend Sire in a property dispute involving adverse possession. Sire argues the court erred for several reasons. We agree with Sire that there was arguable coverage for part of the claim, and reverse and remand with directions to grant him summary judgment holding Stewart Title breached its duty to defend.

BACKGROUND

¶2 In May 2011, Sire purchased a forty-acre parcel in St. Croix County. He also purchased a $275,000 title insurance policy on the parcel from Stewart Title. Among other things, the policy insured access to the parcel via Chattanooga Drive, which was an east-west platted road that terminated at the parcel's west boundary. The policy stated: "Access … is insured via Chattanooga Drive in the plat of Glover Station Fifth Addition recorded June 8, 2000 …."

¶3 In January 2012, Sire had the parcel's west line surveyed and hired a crew to install a fence thereon. Scott and Cornelia Larson owned a lot in the Glover Station 5th Addition subdivision west of Sire's parcel. They immediately objected to Sire's partially constructed fence as intruding on their property, which they asserted ran to an existing fence line approximately twenty-three feet to the east. Sire responded that he intended to rely on his survey. The Larsons and C.M. Bye, who claimed the remainder of the disputed strip, then filed a complaint seeking a declaration of interest in property and a temporary injunction prohibiting further activity on the disputed strip, which spanned the entire length of Sire's western boundary. Chattanooga Drive would not reach Sire's parcel if he did not own the strip.

¶4 The complaint alleged the disputed strip was identified as a title issue in 2004 when Bye had the subdivision platted and surveyed. Further, it alleged that various prior and current owners of the land west of Sire's parcel had openly and adversely utilized the land up to the existing fence line, and that Sire's predecessors in interest had acquiesced to the fence line as the boundary. The complaint also alleged that, in 2005, two individuals "filed sworn Affidavits in the Register of Deeds' office for St. Croix County, said Affidavits being attached hereto as Exhibit A, declaring title to the strip of property leading up to the old fence, by adverse possession." Finally, the complaint alleged the Larsons "were deeded the strip of property lying to the east of [their lot] to the existing fence line …."

¶5 Meanwhile, Sire relayed his conversation with the Larsons to Stewart Title. Stewart Title then investigated and discovered the affidavits filed with the Register of Deeds. After Bye and the Larsons filed suit, Sire filed a claim with Stewart Title and demanded indemnification and a defense. Stewart denied the entire claim, but nonetheless elected to provide coverage for the Chattanooga Drive access. It "denie[d] the adverse possession claim as to the approximately 23 feet x 1328.57 feet parcel in dispute, except for the [part] which abuts Chattanooga Drive, measuring approximately 23 feet x 66 feet, which Stewart Title Guaranty Company hereby accepts." Stewart's denial was based on a coverage exclusion for adverse possession claims. Stewart Title valued the strip abutting Chattanooga Drive at $239.25, and offered to pay Sire $750 to settle the claim and be released from its duty to defend pursuant to a policy provision. Stewart Title's settlement letter also informed Sire it was not participating in the litigation and Sire had to retain counsel and pay his own legal fees and costs.

¶6 Sire declined the $750 offer and filed a third-party complaint against Stewart Title, alleging there was coverage for the entire claim and Stewart Title had breached its duties to defend and indemnify him. Stewart Title moved to bifurcate the coverage issue and continued to provide no defense to Sire. Following discovery, Stewart Title moved for summary judgment because the policy excluded coverage for any claims based on adverse possession.[1] After a hearing and further briefing, the circuit court granted Stewart Title's summary judgment motion. The court first determined there was no actual coverage and then concluded there was consequently no duty to defend. Sire now appeals.

DISCUSSION

¶7 Sire argues Stewart Title breached its duty to defend and the circuit court erroneously granted summary judgment to Stewart Title. We review a summary judgment decision de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2] Interpretation of an insurance contract presents a question of law subject to de novo review. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

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[1] Stewart Title also argued there was no coverage for the access claim because Sire had other access to the parcel, but it expressly abandons that argument on appeal.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶8 When interpreting an insurance policy, we seek to determine and give effect to the intent of the contracting parties. ***Id.*** Additionally, policies are to be construed as they would be understood by a reasonable person in the position of the insured. ***Id.*** Title insurance policies are subject to the same rules of construction generally applicable to insurance contracts. ***Laabs v. Chicago Title Ins. Co.***, 72 Wis. 2d 503, 510, 241 N.W.2d 434 (1976). Title insurance is a contract of indemnity that obligates the title insurer to pay loss as defined by the policy. ***First Am. Title Ins. Co. v. Dahlmann***, 2006 WI 65, ¶12, 291 Wis. 2d 156, 715 N.W.2d 609. The purpose of title insurance "is to indemnify the insured for impairment of its interest due to failure of title as guaranteed in the title insurance report." ***Id.***

¶9 An insurer has a duty to defend a suit where the complaint alleges facts which, if proven at trial, would give rise to the insurer's liability under the terms of the policy. ***Doyle v. Engelke***, 219 Wis. 2d 277, 284-85, 580 N.W.2d 245 (1998). An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. The duty is triggered by the allegations contained within the four corners of the complaint. ***Id.*** It is the nature of the alleged claim that is controlling, even though the suit may be groundless, false, or fraudulent. ***Id.*** "The insurer's duty to defend is therefore broader than its duty to indemnify insofar as the former implicates arguable, as opposed to actual, coverage." ***Id.*** Courts liberally construe the allegations in the complaint and assume all reasonable inferences, and any ambiguity in the coverage terms will be construed against the insurer. ***Id.***, ¶21.

¶10 In determining whether there is a duty to defend, we first consider whether the insuring agreement makes an initial grant of coverage. ***Id.***, ¶22. The Stewart Title policy insures "against loss or damage … sustained or incurred by the Insured by reason of: … 2. Any defect in or lien or encumbrance on the Title. … 4. No right of access to and from the Land." An encumbrance is a claim or liability that is attached to property that may lessen its value. ***Dahlmann***, 291 Wis. 2d 156, ¶15. A title defect is a claim or interest that is inconsistent with the title purportedly transferred. ***Id.***, ¶14.

¶11 Stewart Title does not dispute that there was an initial grant of coverage under its policy. Instead, it argues there is no arguable coverage because the complaint only alleged adverse possession, and all adverse possession claims are excluded from coverage. On the other hand, Sire argues coverage was fairly debatable under the complaint because it alleged that part of the disputed strip was deeded to the Larsons, and that the recorded affidavits set forth a claim to the entire strip.

¶12 We agree with Sire that the Larsons' alleged deed constitutes a defect or encumbrance that gives rise to arguable coverage under the policy. The complaint alleges: "[The] Larson[s] are the owners of Lot 99, Glover Station 5th Addition, and were deeded the strip of property lying to the east of Lot 99 to the existing fence line, and claim an interest in the strip of property described in paragraph [11](c) above."[3] The Larsons' claim arises directly from their deed. Therefore, their claim is not excluded under the adverse possession exclusion.

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[3] Paragraph 11(c) of the complaint sets forth a legal description of a .23 acre parcel abutting lot 99.

¶13 Stewart Title argues the Larsons' deed cannot give rise to coverage because the document itself refers to adverse possession and because it was not recorded against Sire's parcel. This argument fails because the deed was not attached to the complaint. Any reference to adverse possession in the deed is therefore beyond the four corners of the complaint and irrelevant to the duty-to-defend inquiry. *See* ***Sustache***, 311 Wis. 2d 548, ¶20. Stewart Title's proffered affidavit asserting that the deed (and the affidavits of adverse possession) was not recorded against Sire's parcel is likewise beyond the scope of inquiry.[4] Had Stewart Title wished to rely on facts beyond those alleged in the complaint, it should have accepted defense of the matter and then moved to intervene and bifurcate the coverage issue. *See* ***id.***, ¶¶25, 29.

¶14 When an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶21, 261 Wis. 2d 4, 660 N.W.2d 666. Because there is arguable coverage for the Larsons' deed-based claim, we need not determine whether Bye's claims based on the recorded affidavits of adverse possession are excluded risks under the general exclusion for "loss or damage … which arise by reason of … [a]ny claim of adverse possession …."[5] We also need not reach Sire's argument that, by accepting his claim for access to Chattanooga Drive, Stewart Title became obligated to defend the entire case even though it tendered payment for that loss.

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[4] Regardless, Stewart Title's argument that a public-record exclusion would apply fails on the merits. The policy defines "public records," and that definition does not require that the public record be recorded in the insured parcel's tract index.

[5] Sire argues the complaint also alleges a claim of acquiescence, which is distinct from adverse possession and therefore not excluded from coverage.

¶15 The circuit court erred when it determined the issue of actual coverage, instead of restricting its inquiry to whether there was arguable coverage under the four-corners rule. Applying that rule, we determine the complaint gave rise to arguable coverage under the Stewart Title policy. Accordingly, we reverse and remand with directions to grant Sire summary judgment holding Stewart Title breached its duty to defend.[6]

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] *See* WIS. STAT. § 802.08(6) ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.").