BENEFICIAL FINANCE COMPANY, PLAINTIFF vs MILLVILLE MUTUAL INSURANCE COMPANY, DEFENDANT

Franklin County branch, Civil Action - Law No. A.D. 1995 - 93

JUDGMENT ON THE PLEADINGS - INSURANCE - CONTRACTS - BANKRUPTCY

Defendant insurer denied plaintiff mortgagee's claim for amounts due under a fire insurance policy. Defendant asserted that plaintiff had breached the policy provisions by failing to notify defendant of a sale, which occurred several months after the fire loss, which sale resulted in conveyance of the property free and clear of the mortgage. The Court held that the notification of change of ownership provision of the policy was not breached by plaintiff because that provision did not apply after notice of an insured loss was timely given. The Court also noted that even if a breach had arguably occurred, defendant's legal position relative to the real estate was not changed by any failure of plaintiff to notify. Plaintiff's motion for judgment on the pleadings was granted.

1. For plaintiff's motion for judgment as a matter of law to be granted, the facts viewed in the light most favorable to the non-moving party must establish that plaintiff did not breach the contract, or that even if the contract was breached that such breach was not material nor prejudicial to defendant's rights under the policy.

2. Where defendant could not assert that its legal position relative to the real estate would have been improved, if it had received notice, from what it was as a result of what actually occurred, plaintiff's failure to notify did not prejudice the defendant.

Donald L. Kornfield, Esquire, Attorney for Plaintiff
Martin A. Durkin, Jr., Esquire, Attorney for Defendant

OPINION AND ORDER

William H. Kaye, J., January 17, 1996:

OPINION

In this proceeding, Beneficial Finance Company ("plaintiff") has filed suit against Millville Mutual Insurance Company ("defendant") under a policy issued by defendant which provided fire insurance on certain premises which will be described subsequently. Plaintiff was mortgagee of the subject real estate, and was designated as loss payee in the insurance contract. Both parties have moved for judgment on the pleadings, and it is those motions that currently are before the Court for resolution following submission of briefs and oral argument. The matter also was scheduled for trial in the January, 1996 term of court, and we previously issued an order granting plaintiff's motion, and denying defendant's without opinion due to the shortness of time prior to the scheduled commencement of trial. We will address

this matter, and will hereafter set forth the facts in the light most favorable to defendant, the party against whom we have ruled.

FACTS

A fire occurred on October 13, 1993 at real estate owned by Robert and Wilhelmina Wasik, located in Peters Township, Franklin County, Pennsylvania, with resultant losses stipulated by the parties to be $49,059.06. The premises were insured at the time of the fire by a policy issued by defendant. The plaintiff was a named mortgagee on the policy, plaintiff having extended a loan secured by a mortgage to the Wasiks for the subject premises. Subsequent to the fire the Wasiks did not obtain any insurance proceeds arising from the insurance coverage described herein.

After the fire, the Wasiks filed for bankruptcy. On January 21, 1994, the United States Bankruptcy Court for the Middle District of Pennsylvania, Docket No. 1-90-00126, ordered the sale of the fire-damaged property for the sum of $10,000, free and clear of all liens and encumbrances. The disposition of the proceeds of the sale were also fixed by the bankruptcy court in its order. On March 10, 1994, the premises were conveyed by the Wasiks to Charles G. Ray and Sharon D. Ray. In compliance with the order of the bankruptcy court, plaintiff marked its mortgage "satisfied". Defendant for the first time learned of the sale of the premises several months later as a result of its own search of court records.

Plaintiff filed a complaint initiating this action on March 6, 1995, for amounts alleged due under the insurance policy. Defendant's position is that the sale which resulted in conveyance of the property free and clear of the mortgage obligation without notice to defendant breached the insurance policy's provisions, and excused it from payment for the losses sustained in the fire.

Subsequent to the completion of discovery and a pre-trial conference, plaintiff submitted a motion for judgment as a matter of law. Defendant filed a response to the motion and therein requested judgment on the pleadings in its favor.

DISCUSSION

In considering a motion for summary judgment on the pleadings, the Court must examine the record in the light most favorable to the party opposing the motion. *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989). "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law." Pa.R.C.P. No. 1035.

Defendant's version of the facts assert that on October 13, 1993, the defendant had a policy of insurance with the subject property owners the Wasiks, i.e. policy number HO-82602, and plaintiff was listed thereon as a "mortgagee." The defendant alleges that the contract required the plaintiff to notify the defendant of a change of ownership of the subject property and plaintiff's failure to notify the defendant of a change of ownership subsequent to a court-ordered bankruptcy sale, which occurred six months after the improvements on the property were destroyed by fire, was a breach of the contract by the plaintiff mortgagee. Defendant alleges that plaintiff's failure to notify it of the sale of the real estate caused prejudice to the defendant in that it precluded defendant from subrogating against its insured for any amount that may have been paid to the plaintiff as a named mortgagee. Prejudice was also alleged in that by marking the mortgage "satisfied," the defendant was precluded from obtaining an assignment of the mortgage and from collecting mortgage payments from its insured.

In order for plaintiff's motion for judgment as a matter of law to be granted, the facts viewed in the light most favorable to the non-moving party must establish that the plaintiff did not breach the contract, or that even if the contract was breached that such breach was not material nor prejudicial to defendant's rights under the policy. See *Siata International U.S.A., Inc. v. Insurance Company of North America*, 362 F.Supp. 1355, 1360 (E.D. Pa.; 1973) rev'd. 498 F.2d 817. (3d Cir., 1974).

The "Mortgage Clause" in the insurance policy states the following:

14. Mortgage Clause

The word "mortgagee" includes trustee.

a. If a mortgagee is named on the Declarations a loss payable under Coverage A or B will be paid to the mortgagee and **you** as interest appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If **we** deny **your** claim, that denial does not apply to a valid claim of the mortgagee, if the mortgagee has:

(1) notified **us** of change of ownership, occupancy or substantial risk of which the mortgagee became aware;

(2) paid the premium due under this policy on demand if an **insured** neglected to pay the premium; and

(3) submitted a signed, sworn proof of loss within sixty (60) days after receiving notice from **us** if and **insured** has failed to do so.

All **terms** of this policy apply to the mortgagee unless changed by this clause.

[Defendant's "Answer and New Matter" ¶17].

Defendant alleges that sub-paragraph 14.a(1) was breached by plaintiff, and thus defendant has a defense to the claim submitted by the plaintiff. The other provisions in the foregoing are not asserted as having been violated.

In examining whether defendant has asserted facts which arguably could constitute a breach of this provision, we must not overlook the essential underlying facts of this case. The insured loss occurred *prior* to the conveyance of the real estate about which defendant claims a lack of notice, and the loss thus was fixed as of the occurrence which gave rise to the loss. Whether the insurer was notified or not notified of this conveyance is not

material as to whether a loss occurred for which a claim may be made under the insurance policy. There is no issue as to whether *notice of an insured loss* was timely given, and it is this which gives rise to defendant's liability under the policy.

The clause in question most fundamentally appears to be written for insurance underwriting purposes, i.e. so that the insurer is timely apprised of any changes that may affect its exposure to risk and thus may result in an adjustment in premiums or even for cancellation of the insurance. However, this issue does not even arise where, as herein, the loss was sustained *before* any change of ownership occurred, and the parties' rights were fixed by that occurrence.

Additionally, the clause cited by defendant does not set forth a time when notice of a change in ownership must be given, nor does it specify that notice be given in advance of a change in ownership. In the instant case, the sale of the insured real estate occurred by order of the Bankruptcy Court, and the release of the lien of plaintiff's mortgage was contemporaneous with the conveyance. Thus, defendant has not pleaded any facts that could even arguably lead to a conclusion that its position was prejudiced as a result of the lack of notice of the sale of the real estate. Had such notice been given by plaintiff, defendant has not asserted - and could not assert - that its legal position relative to the real estate would have been improved in the least from what it is as a result of what actually occurred. The Bankruptcy Court directed the sale of the real estate free and clear of the mortgage lien, and that is what occurred. Had plaintiff notified defendant of the sale contemporaneously with the conveyance, defendant's position relative to the real estate would be precisely where it is. Thus, we concluded that defendant has not asserted that 1/ any breach of the insurance contract was committed by plaintiff or, alternatively, 2/ that even if any breach occurred, such breach did not materially affect defendant's legal position. Therefore, we granted plaintiff's motion for judgment on the pleadings. What defendant is entitled to is to have the lien of the mortgage assigned to the sale proceeds, *8A C.J.S. §215*, and we have formulated the order granting plaintiff's motion to reflect this.

ORDER OF COURT

NOW, January 11, 1996, upon consideration of plaintiff's motion for summary judgment, and upon briefs submitted and oral argument, the motion is hereby GRANTED as it appears there is no material fact in dispute, and plaintiff is entitled to judgment as a matter of law. Upon praecipe of plaintiff, the Prothonotary is directed to enter judgment in favor of plaintiff and against defendant in the principal amount of $49.059.06 less $494.83, being the net proceeds from the bankruptcy sale of the insured real estate, together with interest at the lawful rate and court costs. The Court will rule upon the claim for counsel fees upon recepit of the memoranda of law provided for in the pre-trial conference order. An opinion in support hereof will follow.

As it appears the foregoing resolves the matters which were scheduled for trial, it is further ordered that the matter will be removed from the January, 1996 trial term.