

STATE OF MICHIGAN
COURT OF APPEALS

NEW FALLS CORPORATION,

Plaintiff-Appellant,

UNPUBLISHED
May 10, 2011

v

FIRST AMERICAN TITLE INSURANCE
COMPANY,

No. 296877
Oakland Circuit Court
LC No. 2008-091641-CK

Defendant-Appellee.

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

In this title insurance case, plaintiff, New Falls Corporation, appeals as of right the trial court's order granting summary disposition in favor of defendant, First American Title Insurance Company. On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant because the trial court relied on the wrong contract in making its ruling and defendant was precluded from arguing that the mortgage was not timely recorded by its failure to raise this defense in its claim denial letter. Because we conclude that the trial court properly granted summary disposition to defendant, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

The mortgage at issue concerns a property located at 2244 West Avon Road in Rochester Hills, which was purchased through a warranty deed by Angel Barrios for \$275,000 on February 3, 2005. On February 19, 2005, Barrios obtained a mortgage from Warren Bank, which was recorded on March 18, 2005. On February 24, 2005, another company, Borrower's Network, LLC, made a loan to Barrios in the amount of \$137,500 and obtained a security interest in Barrios' property. That security interest was recorded on March 17, 2005.

Around the same time that Barrios obtained loans from Warren Bank and Borrower's Network, Barrios approached Fifth Third Bank (Fifth Third) about obtaining a loan secured by the property. Barrios told Fifth Third that he owned the property in fee simple and it was free of any liens or other encumbrances; he failed to inform Fifth Third about the other loans. Fifth Third and defendant had previously entered into a FACT service agreement (the agreement) on October 22, 2002, according to which defendant agreed to provide title information and insurance to Fifth Third on the mortgage its funds. Fifth Third contracted with defendant to receive a title report and a title insurance policy (the policy) from defendant regarding Barrios'

property. Understanding that it had title insurance, Fifth Third lent Barrios \$220,000 on March 5, 2005. Fifth Third sent the mortgage to defendant which received it on April 15, 2005. Defendant presented the mortgage to the recorder on April 28, 2005, and the mortgage was recorded on May 5, 2005.

Barrios defaulted on its mortgage with Borrower's Network, and Borrower's Network foreclosed on the property in 2006. Ultimately, the property was sold for \$154,301.14. The sale was recorded on May 16, 2006.

Barrios also defaulted on its loan with Fifth Third. Rhonda Jinks, an employee of Fifth Third, became involved with Barrios' mortgage when it became 75 to 90 days delinquent. Jinks thought that Fifth Third had first priority on the mortgage, but determined based on a title search that Borrower's Network had first priority. In November 2006, Jinks discovered that Borrower's Network had already foreclosed upon the property. At that point, Jinks realized that there was no equity to recover because of the foreclosure. Jinks recommended that Fifth Third file a claim with defendant. Fifth Third charged off the loan on January 31, 2007.

On March 23, 2007, Fifth Third made a claim on its title insurance policy with defendant because it had lost all of the equity in its loan to Barrios as a result of the foreclosure by Borrower's Network. Defendant sent a letter to Fifth Third on August 21, 2007, denying its claim because Fifth Third failed to mitigate damages. Ultimately, Jinks and Fifth Third decided not to pursue the issue further. On December 7, 2007, Fifth Third assigned all of its rights regarding the mortgage with Barrios to plaintiff.

Plaintiff filed a complaint on May 19, 2008, alleging breach of contract and fraud against Barrios and breach of contract, breach of MCL 500.2006, requiring the timely payment of claims, and bad faith against defendant. On June 17, 2008, defendant filed an answer to plaintiff's complaint and denied plaintiff's allegations that it breached a contract, violated MCL 500.2006, or engaged in bad faith. Defendant asked the trial court to dismiss all counts against defendant. Defendant further pleaded affirmative defenses. Among other defenses, defendant argued that plaintiff's claims were barred as a result of Fifth Third's failure to perform a condition under the insurance policy. On August 15, 2008, defendant filed a cross-claim against Barrios, alleging fraud or misrepresentation and breach of contract.

On November 20, 2008, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court denied defendant's motion for summary disposition as premature finding that further discovery might support plaintiff's position.

On March 6, 2009, defendant filed a renewed motion for summary disposition. Defendant moved pursuant to MCR 2.116(C)(10) and argued that 1) plaintiff lacked standing to sue defendant, 2) defendant was entitled to raise defenses not stated in its claim denial letter, 3) plaintiff's claims were excluded under the terms of the contract because of Fifth Third's failure to record the mortgage within five days of funding and its failure to make a claim within 90 days of the foreclosure, 4) plaintiff's claims were caused by Fifth Third's breach of an agreement with plaintiff, not because of defendant's actions, 5) plaintiff's claims were barred by the doctrine of laches, and 6) plaintiff's claim of bad faith does not exist under Michigan law.

Plaintiff filed a response brief in opposition to defendant's renewed motion for summary disposition and, additionally, moved for summary disposition under MCR 2.116(C)(10) on April 8, 2009. Plaintiff argued that the trial court should deny defendant summary disposition because 1) plaintiff had standing to sue, 2) an agreement between plaintiff and Fifth Third was irrelevant to plaintiff's lawsuit against defendant, 3) defendant was precluded from arguing that the mortgage was not timely recorded as a result of its failure to raise this defense in its claim denial letter, 4) Fifth Third complied with the 90 day provision in the policy by contacting defendant within 90 days of ascertaining its loss on the charge date, 5) the policy language was ambiguous allowing for the admission of extrinsic evidence to show that Fifth Third complied with the 90 day provision, and 6) plaintiff had a valid claim of bad faith. Plaintiff contended that the trial court should grant summary disposition in its favor because the agreement controlled the policy and the agreement precluded defendant from arguing that Fifth Third failed to timely record the mortgage. Moreover, plaintiff posited that defendant was not prejudiced as a result of Fifth Third's failure to timely record or failure to send the mortgage to defendant with ten days of funding the mortgage. Finally, plaintiff reiterated that Fifth Third complied with the 90 day provision, informing defendant of the loss within 90 days of the charge off date. Plaintiff argued that it was entitled to recover under the terms of the contract because of defendant's breach.

Without hearing oral argument, the trial court issued an opinion and order granting defendant's motion for summary disposition. The trial court concluded that there existed a question of fact regarding whether plaintiff had any contractual rights under the policy, and as a result, there was a question of fact regarding whether plaintiff had standing to sue. The trial court further found that there was a question of fact regarding whether defendant caused an injury to plaintiff or whether Fifth Third did. Finally, the trial court decided that defendant was not precluded from raising Fifth Third's failure to timely record the mortgage in its motion for summary disposition because it failed to raise the issue in its claim denial letter, and concluded that there was no genuine issue of material fact that Fifth Third failed to comply with the policy when it failed to record its mortgage with Barrios within five days of funding it.¹

Plaintiff moved for reconsideration on May 19, 2009. The trial court issued an order on February 17, 2010, denying plaintiff's motion for reconsideration. Plaintiff now appeals.

II. SUMMARY DISPOSITION

Plaintiff's only issue on appeal is that the trial court erred in granting summary disposition in favor of defendant because the agreement superseded the policy and defendant was precluded from arguing that the mortgage was not timely recorded based on the language in its claim denial letter. We disagree.

¹ The trial court never ruled on plaintiff's motion for summary disposition.

A. STANDARD OF REVIEW

We review de novo a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

B. COMPLIANCE WITH THE POLICY

The trial court concluded that defendant was entitled to summary disposition under the terms of the policy because Fifth Third failed to record the mortgage in a timely manner. We agree.

“The rules of contract interpretation apply to the interpretation of insurance contracts.” *McGrath v Allstate Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289210, issued Nov 2, 2010), slip op, p 2. “When the language of an insurance policy is clear, a court must enforce the specific language of the contract.” *Id.* “A court must give effect to every word, phrase, and clause in a contract and avoid an interpretation which would render any part of the contract surplusage or nugatory.” *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007) (internal quotation marks omitted). “Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims.” *Brown v Farm Bureau Gen Ins Co of Mich*, 273 Mich App 658, 661; 730 NW2d 518 (2007), quoting *Century Surety Co v Charron*, 240 Mich App 79, 83; 583 NW2d 486 (1998). Exclusion clauses are to be “strictly construed in favor of the insured.” *Brown*, 273 Mich App at 661.

The exclusion section of the policy entered into by defendant with Fifth Third states:

The following matters are expressly excluded from the coverage of this Policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * *

2. The failure of the Insured to present the Insured Mortgage for Recording within five (5) business days of the Funding Date to the appropriate governmental agency, responsible for maintaining those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property purchasers for value and without Knowledge.

Based on the clear language of the statute, an insured must record the mortgage within five days of its funding or the mortgage will be excluded from coverage. Plaintiff conceded that Fifth Third failed to record the mortgage within five days of its funding. As a result, Fifth Third was excluded from coverage under the policy and could not assign any rights under the policy to plaintiff. The trial court properly concluded that there was no genuine issue of material fact with regard to the exclusion clause and defendant was entitled to judgment as a matter of law.

Plaintiff argues that the provision requiring Fifth Third to timely record the mortgage did not apply because it was superseded by the agreement, which prohibited defendant from raising the failure to timely record as a defense. We disagree. Even if the trial court erred and the agreement governed the dispute between Fifth Third and defendant, the result would have been the same. Fifth Third was not in compliance with the agreement and, as a result, the mortgage remained excluded from coverage under the policy.

According to the agreement, for a mortgage to be covered under a title insurance policy with defendant, certain requirements must be met. The agreement states:

2.5. Lender's Determination to Lend and Proceed Under FACT Master Policy. Lender shall, in its sole discretion, determine whether Lender will make a loan to a Proposed Borrower. In the event Lender elects to make such a loan, Lender may include the Mortgage Lien as Insured Mortgage under the FACT Master Loan Policy by satisfying all of the following:

- (i) Review of the Borrower's Credit Score and Report(s); and
- (ii) _ [sic] Review of the FACT Report with Title Information, or if applicable, Ownership Report or Property Report; and
- (iii) Obtaining an executed and notarized Borrower's Affidavit from the Borrower(s); and
- (iv) Forwarding the Mortgage Lien to First American within ten (10) business days of funding with recording instructions using the legal description and name of mortgagor(s)/trustor(s) as set out in the FACT Report or, if applicable, the Ownership Report. *In the event that Lender complies with the ten (10) business day limitation set forth within this subsection, Paragraph 2 of the Exclusions from Coverage in the FACT Master Loan Policy shall not be asserted as a defense in any claim made under the FACT Master Loan Policy.* In the event that Lender fails to forward a Mortgage Lien to First American within ten (10) business days of the Funding Date, the Schedule of A of the FACT Master Loan Policy as it applies to each delayed Mortgage Lien shall be amended to reflect the Date of Policy for the Insured Mortgage to be the Funding Date. *In the event that Lender fails to forward Mortgage Liens to First American, then that Mortgage Lien shall not be an Insured Mortgage under the FACT Master Loan Policy.*

In the event that all of the preceding requirements are not satisfied in the manner specified, that Mortgage Lien shall not be an Insured Mortgage under the FACT Master Loan Policy. [Emphasis added.]

Under this provision of the agreement, defendant would have been precluded from raising the five day limit existing in the policy to exclude coverage if Fifth Third forwarded the mortgage to defendant within ten days of funding. However, plaintiff concedes that Fifth Third failed to forward the mortgage to defendant within ten days of funding the mortgage. The mortgage was funded on March 5, 2005, and defendant did not receive the mortgage to record it until more than a month later on April 15, 2005. Based on this provision, Fifth Third's mortgage to Barrios should still have been subject to the exclusion clause in the policy.

Plaintiff further argues that section 4 of the agreement concerning loan closings by defendant also prohibited defendant from raising the failure to record within five days by stating:

In the event that Lender elects to make a loan to a Proposed Borrower which loan is secured by an Insured Mortgage under the FACT Master Loan Policy and the loan closing *or* security instrument recording is handled by First American, Paragraph 2 of the Exclusions from Coverage in the FACT Master Loan Policy shall not be asserted as a defense in any claim made under the FACT Master Loan Policy. [Emphasis added.]

Plaintiff urges this Court to conclude that so long as defendant participates in the loan closing or the recording of the security instrument, the exclusion at issue here does not apply. We are not persuaded by this reasoning. Despite the use of "or[.]" this section is entitled "Loan Closing" and appears to only to apply when defendant participates in the actual loan closing, which is not the case here. To read this provision otherwise would render section 2.5, discussed above, as surplusage. If the fact that defendant recorded the mortgage at any time exempts the mortgage from the exclusion in the policy, then why would the agreement have a separate provision in section 2.5 requiring the lender to forward the mortgage to defendant within ten days of funding. Reading this provision as requested by plaintiff would render section 2.5 meaningless. We conclude that section 4 does not apply in this situation to exempt Fifth Third from the exclusion clause.

Finally, plaintiff contends that the delay in forwarding the mortgage to defendant was immaterial because even if Fifth Third had forwarded the mortgage to defendant within ten days of funding the loan, defendant would not have recorded the mortgage for 20 days and Borrower's Network would still have had first priority. We again disagree. Defendant's justification is purely hypothetical and beside the point. Other than the fact that defendant recorded the mortgage 20 days after receiving it from defendant, plaintiff provided no evidence of when recording would have happened in its hypothetical exercise. At the very least, if Fifth Third had gotten the mortgage to defendant within ten days of funding, by March 15, 2005, Fifth Third would have had the opportunity to obtain first priority. As it was, the failure of Fifth Third to send the mortgage to defendant before April 15, 2005, made it impossible for Fifth Third to record the mortgage before Borrower's Network recorded its interest on March 17, 2005, and obtain first priority. As a result, Fifth Third's actions amounted to a material breach.

Ultimately, the trial court's failure to consider the agreement was irrelevant because, even considering the agreement, summary disposition in favor of defendant based on the failure to record within five days of funding was proper.

C. WAIVER

Plaintiff argues that defendant was precluded from raising the failure to timely record in its motion for summary disposition because it failed to raise that issue in its original claim denial letter to Fifth Third. We disagree. The determination of what constitutes a waiver is a question of law which is reviewed de novo on appeal. *Angott v Chubb Group Ins*, 270 Mich App 465, 469; 717 NW2d 341 (2006).

“[O]nce an insurer has denied coverage to an insured and stated its defenses, [it] has waived or is estopped from raising new defenses.” *In re Smith Estate*, 226 Mich App 285, 290; 574 NW2d 388 (1997). However, waiver and estoppel “will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy.” *Kirschner v Process Design Assoc*, 459 Mich 587, 594; 592 NW2d 707 (1999).

In this case, defendant sent a letter to Fifth Third on August 21, 2007, denying its claim under the policy because Fifth Third failed to mitigate damages through foreclosure of the property and failed to timely notify defendant of the foreclosure. Defendant did not mention Fifth Third's failure to record the mortgage within five days of its funding. As a result, plaintiff argues that defendant waived the exclusion. We disagree and conclude that the trial court correctly found that defendant was not estopped from raising this defense in its renewed motion for summary disposition by its failure to raise it in the claim denial letter. Concluding otherwise would result in an expansion of the policy and would require defendant to provide coverage to a risk that it expressly excluded.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly