IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 8, 2009

BARBARA L. WOLF v. JOHN HOYLE CLACK, ET AL.

Appeal from the Chancery Court for Monroe County
No. 15,090 Jerri S. Bryant, Chancellor

No. E2009-01126-COA-R3-CV - FILED DECEMBER 30, 2009

This litigation followed a denial of Barbara L. Wolf's[1] claim for coverage under a title insurance policy issued by First American Title Insurance Company ("First American"). Initially, Wolf filed suit against a neighboring landowner, John Hoyle Clack, seeking to clear her title to approximately 20 acres of land after discovering that different surveys of their adjoining properties reflected an area of overlapping acreage. Wolf subsequently amended her complaint to add First American as a defendant. She argues that her claim with respect to the overlapping acreage is covered by the First American title insurance policy she purchased when she acquired the land that included the 20+ disputed acres. First American argues that Wolf's claim is not covered by the policy. As a consequence of that position, it moved for judgment on the pleadings. The trial court granted the motion and dismissed Wolf's complaint against First American. Wolf and Clack later entered into an agreement by the terms of which the disputed acreage was evenly divided between the two parties. Wolf appeals from the order granting First American judgment on the pleadings. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Barbara L. Wolf, Jupiter, Florida, appellant, pro se.

M. Edward Owens, Jr., Knoxville, Tennessee, for the appellee, First American Title Insurance Co.

OPINION

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[1] The pleadings reflect that Wolf purchased the title policy and proceeded in this action as the authorized trustee on behalf of Lani Wolf and Shaye Wolf.

I.

We recite the underlying facts as set forth in Wolf's original complaint filed against Clack in December 2005.

In August 1984, Wolf acquired title by warranty deed to approximately 207 acres of undeveloped mountain land located in Monroe County. The property conveyed to Wolf was described with reference to a 1976 survey by Joe W. Torbett. In July 1993, Clack acquired title to real property that was also located in Monroe County. He acquired his title by quitclaim deed. The Wolf and Clack properties are adjacent tracts. All of the relevant deeds and surveys pertaining to the Wolf and Clack properties were duly recorded in the office of the Monroe County Register of Deeds. The Wolf property survey and the Clack property survey overlap with respect to an area of approximately 20 acres. Wolf alleges that a portion of the description in Clark's deed pertaining to the disputed acres was based on an erroneous September 1986 survey. Based on the Wolf property survey and deed, Wolf claimed title to the disputed acres and asserted that Clack had no right, title, or interest to it. Clack also claimed an ownership interest in the disputed acreage. Based on these facts, Wolf asked the trial court to declare she is the owner in fee simple of the disputed area and to void or reform the Clack's deed as necessary to demonstrate Clack's lack of ownership. Wolf further sought a writ of possession for the disputed acreage and a judgment against Clack based on damages she allegedly sustained when Clack cut down trees within the disputed acreage.

In May 2007, Wolf moved to add First American as a defendant and to amend her complaint to add a breach of contract claim and a claim for declaratory relief against First American. In support of her motion, Wolf asserted that, under the title policy, First American was obligated to insure and defend her interest in the disputed acres. The trial court granted the motion. As stated in Wolf's amended complaint, First American is a title insurance company licensed in Tennessee. There is no dispute that at the time of her 1984 land purchase, Wolf also purchased from First American a title policy with respect to the property.

Wolf has paid taxes on her property which she alleges "always included the 20+ disputed acres," every year since its purchase. Wolf notified First American of her dispute with Clack, and demanded that it insure and defend her title to the disputed area. In response, First American denied coverage under the policy and refused to defend Wolf in this action. Wolf claimed that First American thereby breached its contract with her for which she is entitled to damages. In addition, Wolf added a claim for insurance fraud based on First American's denial of coverage.

On February 20, 2008, the trial court heard First American's motion for judgment on the pleadings. First American and Wolf argued their respective positions, but no witnesses testified and no evidence was introduced. In granting the motion, the trial court stated as follows:

> After reviewing the documents provided by both parties, the court hereby finds that [Wolf's] assertion that First American's denial of coverage falls under [the criminal code sections defining and prohibiting insurance fraud] is hereby denied and that part of the claim is dismissed.

> As to the balance of [First American's] claim that the policy contains an exception for boundary disputes and shortages in area, the court must take the plain meaning of the words as stated in the policy. A contract must be interpreted as written even though it contains terms which may be thought to be harsh and unjust. . . . For reasons stated above, [First American's] Motion for Judgment on the Pleadings is hereby granted.

Wolf appealed the judgment. This court initially dismissed the appeal. We did so because we lacked appellate jurisdiction due to the fact that Wolf's complaint against defendant Clack was still pending in the trial court.[2] In April 2009, Wolf and Clack settled their dispute. Under their agreement, Wolf and Clack each received one-half of the disputed acreage. On May 27, 2009, Wolf timely appealed the judgment dismissing her claim against First American.

II.

In her brief, Wolf has presented a number of issues all of which are directed at her contention that the trial court erred in granting judgment in favor of First American. We conclude that Wolf's multiple issues are properly consolidated into one issue:

> Whether the trial court erred in granting a judgment on the pleadings in favor of First American based on its finding that Wolf's complaint presented a boundary line dispute that was not covered under the title insurance policy issued by First American and thus failed to state a cause of action upon which relief could be granted against First American.

III.

This court recently stated our standard of review in a case involving a judgment on the pleadings:

> A motion for judgment on the pleadings is in effect a motion to dismiss for failure to state a claim upon which relief can be granted. ***Waldron v. Delffs***, 988 S.W.2d 182, 184 (Tenn. Ct. App.1998). It "admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." ***Id***. Both the trial court and this court must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion. ***Cherokee Country Club, Inc. v. City of Knoxville***, 152 S.W.3d 466, 470 (Tenn.2004); ***McClenahan v. Cooley***, 806 S.W.2d 767, 769 (Tenn. 1991). The

[2]The initial appeal was not pursued from a judgment entered pursuant to Tenn. R. Civ. P. 54.02.

> ultimate determination of whether the facts alleged make out a cause of action is a question of law. Our review of questions of law is de novo, with no presumption of correctness. ***Gunter v. Laboratory Corp. of America***, 121 S.W.3d 636, 638 (Tenn. 2003).

Shaw v. Cleveland Utils. Water Div., No. E2009-00627-COA-R3-CV, 2009 WL 4250157 at *4 (Tenn. App. E.S., filed Nov. 30, 2009).

IV.

The essential allegations of Wolf's complaint against First American are as follows:

> [First American] has breached its contract with [Wolf] by denying her coverage for the disputed acreage, thereby ignoring and breaching its contractual obligation to insure that title is vested in [Wolf] as stated in the Policy – under Schedule C of the Policy which expressly insures the 207.27 acres described in the Joe W. Torbett recorded survey that included the disputed acreage as being vested in [Wolf]; and by further breaching its contractual obligation by refusing to defend [Wolf] in this action.

The gist of Wolf's argument on appeal is that the trial court erred in dismissing her complaint because, according to her, the court failed to consider the insurance contract in its entirety and improperly characterized her claim as being based on a "boundary dispute." First American points to the provision in Schedule B that excepts from coverage "any discrepancies or conflicts in boundary lines, [and] any shortages in area . . . ." In a nutshell, First American asserts that Wolf's complaint arises out of a dispute over a boundary line or a claimed shortage, which, according to the company, is expressly excepted under the policy. We agree with First American for the reasons hereinafter stated.

We begin by examining the title insurance policy issued by First American to Wolf on August 20, 1984. The policy contains the following provisions relevant to our analysis:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, FIRST AMERICAN TITLE INSURANCE COMPANY OF MID-AMERICA, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;

2. Any defect in or lien or encumbrance on such title;

3. Lack of a right of access to and from the land; or

4. Unmarketability of such title.

* * *

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy:

* * *

3. Defects, liens, encumbrances, adverse claims, or other matters . . . (d) attaching or created subsequent to the Date of Policy. . . .

* * *

Schedule A

* * *

3. The land referred to in this policy is described in Schedule C.

* * *

Schedule B

This policy does not insure against loss or damage by reason of the following:

1. Any discrepancies or conflicts in boundary lines, any shortages in area, or any encroachment or overlapping of improvements.

2. Any facts, rights, interests or claims which are not shown by the public record but which could be ascertained by an accurate survey of the land or by making inquiry of persons in possession thereof.

* * *

Schedule C

> The land referred to in this commitment/policy is situated in the State of Tennessee, County of Monroe and is described as follows:
>
> LYING AND BEING in the Fifth Civil District of Monroe County, Tennessee, in the Rural Vale Community, and being described according to the survey of Joe W. Torbett, Registered Land Surveyor, dated August 19, 1976, and recorded in Plat Book 4, page 109, in the Register's Office for Monroe County, Tennessee and being more particularly described as follows:
>
> [A metes and bounds description of the Wolf property appears that concludes by describing the property as "[c]ontaining 207.27 acres, more or less.].

(Capitalization in original.)

This court has observed that title insurance policies are interpreted under the same rules of construction applicable to other contracts. ***Swanson v. Mid-South Title Ins. Corp***., 692 S.W.2d 415, 419 (Tenn. Ct. App. 1984). "The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc***., 521 S.W.2d 578, 580 (Tenn. 1975). In the absence of fraud or mistake, a contract must be interpreted as written even though it contains terms that may be thought harsh and unjust. ***E.O. Bailey & Co. v. Union Planters Title Guaranty Co.***, 232 S.W.2d 309, 314 (Tenn. 1949). Absent any ambiguity, a court must apply to the words used their usual, natural and ordinary meaning. ***Ballard v. North American Life and Casualty Co.***, 667 S.W.2d 79, 82 (Tenn. Ct. App. 1983). "The courts, of course, are precluded from creating a new contract for the parties." ***Griffin v. Shelter Mutual Insurance Company,*** 18 S.W.3d 195, 200 (Tenn. 2000)***; United States Stove Corp. v. Aetna Life Ins. Co.***, 84 S.W.2d 582, 583 (Tenn. 1935).

Wolf contends that her claim against First American is not based on a "boundary dispute," but rather constitutes a breach of contract action. Wolf's original complaint alleged that the dispute in question arose based on surveys of the parties' adjacent properties that indicated an "overlap over approximately 20 acres" of which both Wolf and Clack claimed ownership. As quoted above, the insuring clause in Wolf's policy is made subject in Schedule B to expressly stated exclusions. The

pertinent exclusion relates to "[a]ny discrepancies or conflicts in boundary lines, any shortages in area." We think a common sense reading of the plain language of the exclusion reflects that the dispute between Wolf and Clack as to the "boundary line[]" between their adjoining properties falls within the clear and unambiguous language of the exclusion. The same can be said for Wolf's related allegation that approximately 20 acres of the "202.27 acres, more or less" she believed she had purchased was in dispute. In our view, this is clearly a claimed "shortage in area" as addressed in the same exclusion.

A policy of title insurance is a "contract of indemnity under which the insurer for a valuable consideration agrees to indemnify the insured in a specified amount against loss through defects of title to . . . realty in which the insured has an interest." ***Sandler v. New Jersey Realty Title Ins. Co.***, 36 N.J. 471, 478-79 (1962). "Like other policies of insurance, title policies are liberally construed against the insurer and in favor of the insured." ***Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.***, 116 N.J. 517, 529 (1989). "Notwithstanding that principle of construction, courts should not write for the insured a better policy of insurance than the one purchased." ***Id***. (citing ***Last v. West Am. Ins. Co.***, 139 N.J.Super. 456, 460 (App.Div.1976)).

In summary, we conclude that the dispute over the 20+ overlapping acres between Wolf and Clack clearly falls within the policy's stated exclusion for "[a]ny discrepancies or conflicts in boundary lines, any shortages in area." The exclusion is stated in clear language. It means what it says. This exclusion was a part of the contract between the parties. We are not at liberty to make a new contract for the parties. Under the exclusionary language, Wolf's suit against Clack is not covered. It necessarily follows that the trial court was correct in granting First American judgment on the pleadings.[3]

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for collection of costs assessed below. Costs on appeal are taxed against the appellant, Barbara L. Wolf.

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CHARLES D. SUSANO, JR., JUDGE

[3]Wolf argues that the New Jersey Supreme Court case of ***Walker Rogge, Inc. v. Chelsea Title & Guaranty Co***., 116 N.J. 517 (1989) supports her position in this case. We have read this case and have concluded that Wolf's reliance is misplaced.