

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

JOHN F. MCMENAMIN, JR.,
Appellant,

Case No.: 14-000064AP-88A
UCN: 522011AP000033XXXXCI

v.

WESTERN GENERAL WARRANTY
CORPORATION and LYNDON
PROPERTY INSURANCE COMPANY,
Appellees.

_____/

Opinion Filed _____

Appeal from Final Judgment
Pinellas County Court
Judge Myra Scott McNary

James J. Dowling, Esq.
Attorney for Appellant

Matthew C. Scarborough, Esq.
Troy Vuurens, Esq.
Attorneys for Appellee

PER CURIAM.

Appellant/Plaintiff-below, John F. McMenamin, Jr., appeals the trial court's September 8, 2014, "Final Judgment" entered in favor of Appellee/Defendant-below, Lyndon Property Insurance Company on the issue of entitlement to attorney's fees and costs. We affirm.

Statement of Case

Mr. McMenamin brought a declaratory judgment action against Defendant-below, Western General Warranty Corporation, to determine if the mechanical breakdown of

Mr. McMenamín's vehicle was covered by the "Mechanical Breakdown Service Contract" with Western he purchased at the time he purchased his vehicle. In the wherefore clause of the Second Amended Complaint Mr. McMenamín alleged that Western and/or Lyndon were obligated to pay attorney's fees pursuant to "Section 634.271 and/or Section 627.428," Florida Statutes (2012).

A mediation conference was conducted and the parties settled the case except for the issue of attorney's fees and costs. A "Release" was executed by Mr. McMenamín for Western and Lyndon that states in part:

It is understood that the parties hereby released, admit no liability of any sort, by reason of the aforesaid incidents, acts, casualties or events. It is further recognized and understood that this Release and Settlement, constitute the compromise of a doubtful and disputed claim, more particularly described in that certain action pending in the County Court of the Sixth Judicial Circuit, of the State of Florida, in and for Pinellas, County, Florida, being Case No.: 13-621CO-41, on the docket of said court, and is made in good faith to terminate any further controversy respecting the claims for damages that might have heretofore been asserted or might hereafter be asserted because of any incidents, acts, casualties, or events described or alluded to above.

(R. 172-73).

On June 19, 2014, a hearing was conducted on Mr. McMenamín's "Motion for Entitlement to Attorney's Fees and Costs" pursuant to section 627.428. On July 19, 2014, the trial court entered an order denying attorney's fees and costs. The trial court made the following findings:

1. The court finds that at the time Plaintiff purchased his Lexus vehicle from the dealership he also purchased a Service Agreement provided by Defendant, WESTERN GENERAL WARRANTY CORPORATION. The Service Agreement includes language on how to make a claim with WESTERN GENERAL WARRANTY CORPORATION's Claims Service. It also includes the following language on filing a claim with Defendant, LYNDON PROPERTY INSURANCE COMPANY:

"The obligations and promises contained within this Service Contract are backed by Lyndon Property Insurance Company, 14755 N. Outer Forty Road, Suite 400, St. Louis, MO 630[1]7. Toll Free (800) 950-606[0]. You may file a claim with this insurance company if any promise made in this Service Contract has been denied or has not been honored within (60) days the date proof of loss was filed."

2. The court finds that there is no policy of insurance between Plaintiff, JOHN McMENAMIN, JR. and Defendant, LYNDON PROPERTY INSURANCE COMPANY.

3. The court finds that pursuant to §627.428, Florida Statutes, Plaintiff JOHN McMENAMIN, JR., cannot avail himself to the insurance provisions as it relates to prevailing party.

(R. 142-43). On September 4, 2014, Mr. McMenamin's motion for reconsideration was denied. The Final Judgment in favor of Lyndon on the issue of entitlement to attorney's fees and costs was entered on September 8, 2014.

Analysis

In Industrial Fire & Casualty Insurance Company v. Prygrocki, 422 So. 2d 314, 315-16 (Fla. 1982), the Florida Supreme Court noted that its opinion in Roberts v. Carter, 350 So. 2d 78 (Fla. 1977), had created confusion on the issue of entitlement to attorney's fees under section 627.428:

[In Roberts we] held that the plaintiff, as a third-party claimant, was not within the class of persons entitled to recover attorney's fees under section 627.428(1). Having so concluded, we added that "[t]o eliminate any remaining confusion, we . . . hold that an award of attorney's fees under Section 627.428(1) is available only to the contracting insured, the insured's estate, specifically named policy beneficiaries, and third parties who claim policy coverage by assignment from the insured." 350 So. 2d at 79 (footnotes omitted).

Rather than eliminating confusion, however, this language, "and especially the phrase 'contracting insured,' has created substantial confusion among the appellate courts." Norfolk v. Nationwide Mutual Fire Ins. Co., 407 So. 2d 1014, 1015 (Fla. 5th DCA 1981).

Prygrocki, 422 So. 2d at 315. Therefore, the supreme court clarified Roberts:

The term "contracting insured," as used in Roberts, refers to those persons insured under an insurance contract rather than the plaintiff third-party claimant discussed in Roberts. Norfolk; United States Fidelity & Guaranty Co. It is essential that Roberts be read in this manner in order to give the statute its true meaning. Section 627.428(1) provides that attorney's fees may be recovered by "an insured" under a contract of insurance. **Third-party claimants, as Roberts held, are not within the class of insureds under a contract.** Furthermore, the statute does not limit recovery of attorney's fees to "the" insured. To limit attorney's fees under section 627.428(1) to those who have directly contracted with an insurer and paid the premiums for an insurance policy, and to extend Roberts beyond the third-party claimant situation and preclude omnibus insureds from seeking attorney's fees both misconstrues Roberts and erroneously

interprets the statute. The district court in the instant case properly construed Roberts and we agree with the district court that the class of individuals entitled to recover attorney's fees is clearly expressed in section 627.428(1) as those who are either "an insured or the named beneficiary under a policy or contract executed by the insurer" and that respondent is a member of that class.

Id. at 316 (emphasis added).

Mr. McMenamin claims that he is an "omnibus insured" under the insurance policy between Western and Lyndon. In State Farm Fire & Casualty Company v. Kambara, 667 So. 2d 831 (Fla. 1996), the Florida Supreme Court explained the difference between third-party beneficiaries under an insurance contract and "omnibus insureds:"

An individual can be both an omnibus insured seeking first-party benefits under an insurance contract and also be a third-party beneficiary under the liability provisions of the coverage when suing the tortfeasor. **In the case of the omnibus insured, the individual's rights are derived directly from his or her status under a clause of the insurance policy without regard to the issue of liability;** if the individual fits within the class he or she is entitled to first-party benefits. As stated in Hammond v. Grange Mutual Casualty Co., 1994 WL 521193, *4 (Ohio Ct. App. 1994):

Because the medical payments in this case are to be paid directly to a party injured on the premises of the named insured, without regard to the named insured's liability, we believe that a medical payments claimant can be defined as an insured under the policy to whom benefits flow directly under the terms of the policy.

Accordingly, such an individual should be entitled to claim attorney's fees under section 627.428(1).

In the case of the third-party beneficiary, the benefits inure directly to the tortfeasor who is the insured. The benefits flow to the injured person only if that person successfully establishes liability against the tortfeasor. When an injured person sues to establish liability coverage, that person is suing to establish the rights of the tortfeasor which then indirectly inure to his or her benefit upon successfully establishing a right to recover against the tortfeasor. See generally Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). The difference in the way benefits are derived from an insurance policy is significant for purposes of establishing who is and who is not an omnibus insured rather than a third-party beneficiary.

Id. at 833-34 (emphasis added).

Discussion

Mr. McMenamin claims that he is an "omnibus insured" who is entitled to recover his attorney's fees from Lyndon because as a matter of law he prevailed against Lyndon. Mr. McMenamin points out that Lyndon settled Mr. McMenamin's claim after a substantial period of litigation with the only issue remaining to be resolved was entitlement to fees. It is asserted that the settlement acted as the equivalent of a judgment in Mr. McMenamin's favor against Lyndon. In the Reply Brief, Mr. McMenamin asserts that Lyndon "ignores the fact that the contract at issue binds Lyndon to pay McMenamin directly in the event Western denied his claim." (Reply Br. p. 1). Further, Mr. McMenamin argues that he did not have the burden to demonstrate that Western's denial of the claim was wrongful. Allegedly, the fact that Lyndon paid Mr. McMenamin's claim post suit forfeited any defense against fee entitlement.

The Service Contract is attached to the Amended Complaint. The portion of the contract on "HOW TO MAKE A CLAIM" states in part: "You may file a claim with this insurance company if any promise made in this Service Contract has been denied or has not been honored within (60) days the date proof of loss was filed." (R. 83).

Mr. McMenamin's arguments are meritless. The Service Contract merely provides that upon Western denying a claim, Mr. McMenamin is permitted to file a claim with Lyndon, the insurance company. The Service Contract does not provide that there is undisputed liability in favor of Mr. McMenamin against Lyndon if a claim is denied by Western.

Further, there has been no determination of the merits of Mr. McMenamin's claim to Western for service. The terms of the Release as set forth above clearly state that Western and Lyndon did not admit any liability with regard to the claims made by Mr. McMenamin in the action pending in County Court. (R. 172-73).

The trial court properly determined that Mr. McMenamin is not entitled to recover his attorney's fees pursuant to section 627.428. Mr. McMenamin is a third-party beneficiary under the insurance contract. He is not an omnibus insured because to recover under the policy he was required to establish liability in Western. Mr.

McMenamin did not demonstrate that Western wrongfully denied his claim. The final judgment is affirmed.

Affirmed.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this
9th day of April, 2015.

Original Order entered on April 9, 2015, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

Copies furnished to:

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Hon. Myra Scott McNary