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

UNITED WATER RESTORATION GROUP, INC., a/a/o Donald Knight,
Appellant,

Case No.: 14-000042AP-88A
UCN: 522014AP000042XXXXCI

v.

HOMEOWNER'S CHOICE PROPERTY & CASUALTY INSURANCE, CO.,
Appellee.
_____/

Opinion Filed _____

Appeal from Final Judgment
Pinellas County Court
Judge John Carassas

Susan W. Fox, Esq.
Gray R. Proctor, Esq.
Ashley M. McKinnis, Esq.
Attorneys for Appellant

David J. Salmon, Esq.
Andrew A. Labbe, Esq.
Attorneys for Appellee

PER CURIAM.

United Water Restoration Group, Inc. a/a/o Donald Knight appeals the "Final Order on Defendant's Motion for Final Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment and Motion for Reconsideration or Rehearing" entered on May 12, 2014. This appeal has been stayed during the pendency of appeals presented to the Fourth District Court of Appeal and presented to the Second District Court of Appeal.

Upon review of the amended briefs, the record on appeal, and the appellate opinions, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We reverse and remand for further proceedings.

Statement of Case

On September 11, 2012, Donald Knight, ("the insured"), called United Water Restoration Group, Inc. ("United") for services in remediation of damages due to a water leak. At that time, the insured signed the "CONTRACT FOR SERVICES, ASSIGNMENT OF BENEFITS, DIRECT PAYMENT AUTHORIZATION, AND HOLD HARMLESS AGREEMENT" with United. The contract includes a paragraph that states:

> Assignment of Insurance Benefits and Direct Payment Authorization: In consideration of the labor, services, and/or material provided to me by United Water Restoration Group, Inc. and its subcontractors (the "Services"), I agree to the following. I hereby assign all rights and benefits in relation to such Services to United Water Restoration Group, Inc. completely and without reservation. I authorize and instruct all insurance company(ies) that may be contractually obligated to provide benefits and/or payments to me for such Services to pay United Water Restoration Group, Inc. directly as sole payee. I authorize and instruct any payments issued by the insurance company for the Services to be sent to United Water Restoration Group directly. In the event United Water Restoration Group, Inc. does not receive payment in full for its Services, I hereby assign any and all causes of action, including to compromise, litigate, settle or otherwise resolve said claim exclusively as United Water Restoration Group, Inc. sees fit in its sole discretion. I understand, agree and waive any right or claim of interest that I may possess to interfere with United Water Restoration Group's exclusive discretion in this regard. I understand that whatever amount United Water Restoration Group, Inc. is unable to collect from the insurer is ultimately my responsibility. Payment must be made within 30 days. Late charges of 1.5% monthly are charged to any and all unpaid balances.

(R. 6).

On September 13, 2012, Homeowner's Choice Property & Casualty Insurance Company ("the Insurance Company") was notified of the insured's loss. The Insurance Company inspected the property on September 29, 2012.

On November 12, 2012, the Insurance Company denied the insured's claim. The Insurance Company's explanation for denying the claim was that, after investigation, it was determined that the water damage allegedly was caused by a long-term, pin-hole leak that was not covered by the policy as it allegedly had been leaking for more than fourteen days.

The insured's property insurance policy with the Insurance Company contains the following non-assignment clause:

SECTION I AND II -- CONDITIONS

. . . .

7. Assignment.

Assignment of this policy will not be valid unless we give our written consent.

(R 148, 150). Section 627.422, Florida Statutes (2012), governs assignment of insurance policies and states in part: "A policy may be assignable, or not assignable, as provided by its terms. . . ."

On February 6, 2013, United, as the assignee of the insured, filed a complaint in the County Court for the Sixth Judicial Circuit Court to recover $5,992.07 from the Insurance Company for services rendered. On October 1, 2013, the Insurance Company filed a "Motion for Summary Judgment." United filed a Response and Cross-Motion for Partial Summary Judgment. A hearing was conducted on February 11, 2014. At the conclusion of the hearing, the trial court orally announced its ruling in favor of the Insurance Company.

On May 12, 2014, the trial court entered the written "Final Order on Defendant's Motion for Final Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment and Motion for Reconsideration or Rehearing." Final Summary Judgment was entered for the Insurance Company (HCI). United's cross-motion for summary judgment was denied. The Final Summary Judgment states in part:

> The Court finds the non-assignment provision of the Policy to be dispositive of the issues raised in this case. On the date Plaintiff's Assignment was executed, there was not a right to payment or a benefit accrued - no insurance proceeds were due and owing to the Insureds under the Policy to be assigned to Plaintiff. Donald Knight had nothing to assign since he had not yet reported the loss to HCI on the date of the Assignment and the claim was not reported to HCI until two days later, September 13, 2012. As a result of the non-assignment provision in the Policy, the only "assignment" enforceable under this Policy is a fully accrued right to payment or in other words, a post-loss assignment of an accrued benefit or right.
>
> Under the rules of law, the undisputed material facts of this case, and the Non-Assignment provision of the insurance contract, Plaintiff has no standing to sue to enforce the insurance contract.

United filed the present appeal from the trial court's ruling.

On April 2, 2015, after the briefs had been filed by the parties, this Court sua sponte entered an order staying the action because the issues involved in this appeal mirror those that were the subject of a final order pending on appeal before the Fourth District Court of Appeal in Emergency Services 24, Inc. v. United Property and Casualty Insurance Co., Case No. 4D14-576. This Court noted that the decision of the Fourth District Court of Appeal would be binding upon this Court as, at that time, the Second District Court of Appeal had not directly addressed the issues presented in this appeal.

Thereafter, the Fourth District Court of Appeal issued its opinion in Emergency Services 24, Inc. v. United Property and Casualty Insurance Co., 165 So. 3d 756 (Fla. 4th DCA 2015), and reversed and remanded the Final Summary Judgment entered by the trial court with a citation to One Call Property Services, Inc. v. Security First Insurance Co., 165 So. 2d 749 (Fla. 4th DCA 2015). The factual situations in Emergency Services and One Call are basically identical to that involved in the present case. The Fourth District Court of Appeal held that the assignments of benefits in those cases are valid.

The stay was lifted in the present appeal and the parties were directed to file amended briefs. Thereafter, the Second District Court of Appeal issued its opinion in Bioscience West, Inc. v. Gulfstream Property and Casualty Insurance Company, 41 Fla. L. Weekly D349 (Fla. 2d DCA Feb. 5, 2016)(mandate issued April 1, 2016).

Standard of Review

On appeal, a Final Summary Judgment is reviewed using a de novo standard. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397, 400 (Fla. 2d DCA 2004).

When a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove its cause of action. Rather, the court's function is solely to determine whether the record conclusively shows that the claim cannot be proved as a matter of law. Jennaro v. Bonita-Fort Myers Corp., 752 So. 2d 82, 83 (Fla. 2d DCA 2000).

Issues on Appeal

United Water Restoration Company's position:

In the Amended Initial Brief, United states that the questions presented in this appeal are:

"1) Whether an insurer can legally require written consent to an [Assignment of Benefits] before the insured has completed all conditions precedent to recovery?"

"2) Whether the tipsy coachman[1] arguments asserted by Appellees in the [original] answer brief, if considered, would warrant affirming the trial court?"

Issue One: In the Amended Initial Brief, in support of reversal, United points to the opinions of the Fourth District Court of Appeal in Emergency Services and One Call. Additionally, United directs this Court to Accident Cleaners, Inc. v. Universal Insurance Company, 40 Fla. L. Weekly D862 (Fla. 5th DCA April 10, 2015)(mandate issued May 28, 2015); Security First Insurance Company v. State of Florida, Office of Insurance Regulation, 177 So. 3d 627 (Fla. 1st DCA 2015); and United Water Restoration Group, Inc. v. State Farm Florida Ins. Co., 173 So. 3d 1025 (Fla. 1st DCA 2015). United asserts that all these cases squarely contradict the trial court's conclusion in the Final Summary Judgment that an assignment of benefits cannot occur before all conditions precedent to recovery are fulfilled.

Issue Two: United argues that the "Tipsy Coachman" arguments presented by the Insurance Company in its original answer brief are meritless as the trial court had accepted the "accrual" theory when it entered the final summary judgment. The "Tipsy Coachman" doctrine is a rule of judicial economy that may be utilized by appellate courts. Basically, if the appellate court concludes that the trial court made the right decision, albeit for the wrong reason, the decision may be affirmed. See Home Depot U.S.A. Co. v. Taylor, 676 So. 2d 479, 480 (Fla. 5th DCA 1996).

Homeowners Choice Property & Casualty Insurance Company, Inc.'s position:

Issue One: In its Amended Answer Brief, the Insurance Company concedes that this Court is bound by the decision of the Fourth District Court of Appeal in One Call; Emergency Services; and ASAP Restoration & Construction Inc. v. Tower Hill Signature

---

[1] See Home Depot U.S.A. Co. v. Taylor, 676 So. 2d 479, 480 (Fla. 5th DCA 1996)(concerning the "Tipsy Coachman" doctrine).

Insurance Co., 165 So. 3d 736 (Fla. 4th DCA 2015). It also acknowledges the Fifth District Court of Appeal decision in Accident Cleaners holds that a post-loss assignee is not required to have an insurable interest at the time of loss. The Insurance Company candidly admits:

> The effect of the Fourth DCA's opinions is relatively straightforward. As of the filing of this Amended Answer Brief, this Court is bound by those decisions, and the decision of the trial court cannot be affirmed based on the argument that the Insured could not assign rights which had not accrued under the Policy.

However, in the Amended Answer Brief, the Insurance Company directs this Court to the then-pending appeal before the Second District Court of Appeal in Bioscience West, and states that the issues in that appeal mirror those presented to the Fourth District Court of Appeal and the issues in the present appeal. It notes that upon issuance of the opinion, the decision of the Second District Court of Appeal in Bioscience West would be binding upon this Court.

Issue Two: The Insurance Company urges this Court to uphold the trial court's Final Summary Judgment "based on any theory or principle of law present in the record." The Insurance Company asserts that under the "Tipsy Coachman" doctrine, this Court may affirm the trial court by finding that (a) the Assignment of Benefits is an invalid partial assignment, or (b) the Assignment of Benefits violates section 626.854, which specifically prohibits a licensed contractor from adjusting a claim on behalf of an insured.

Analysis

In entering the Final Summary Judgment, the trial court did not have the benefit of the Second District Court of Appeal decision in Bioscience West, 41 Fla. L. Weekly D349, or the decisions of the other District Courts of Appeal in Accident Cleaners, 40 Fla. L. Weekly D862; Security First, 177 So. 3d 627 United Water Restoration, 173 So. 3d 1025; Emergency Services, 165 So. 3d 756; and One Call, 165 So. 2d 749. The trial court was persuaded by the Insurance Company's arguments presented at the summary judgment hearing.

As noted above, the Insurance Company concedes that, based on the Fourth District Court of Appeal decisions, the Final Summary Judgment cannot be upheld on a finding that the Insured could not assign rights which had not accrued under the Policy.

The Insurance Company points out that the Fourth District Court of Appeal decisions do not address the two "Tipsy Coachman" arguments it advances and; therefore, the trial court's Final Summary Judgment should be affirmed. However, as explained below, in its recent opinion, the Second District Court of Appeal has rejected the Insurance Company's two "Tipsy Coachman" arguments.

In Bioscience West the Second District Court of Appeal addressed a factual situation substantially similar to that before this Court: The insured suffered water damage and hired Bioscience West to perform emergency water removal services at her home. The insured executed an Assignment of Insurance Benefits authorizing Bioscience West to directly bill and receive payment from the insurance company for the emergency services it provided.

The insurance company denied the insured's claim based on a determination that the damages were not covered by the policy. Bioscience West, as the assignee, brought an action for breach of contract based on the denial of coverage.

The trial court granted summary judgment for the insurance company finding that the assignment to Bioscience West was prohibited "without the consent of the insurer" and that any "assignment improperly purports to transfer the right or privilege to adjust the claim to" Bioscience West. This ruling was reversed by the appellate court.

"Tipsy Coachman" Issue One:

In the present case, the Insurance Company asserts that "a valid assignment must transfer all rights of the assignor under the claim and the policy to the assignee, including the assignor's status as an insured, as only one party can own a claim and maintain a lawsuit under the policy." Additionally, the Insurance Company points to the fact that the assignment was made only by the insured, Donald Knight, although Sharon Knight is listed as an additional insured, and Wells Fargo, N.A. is listed as an additional interest/lienholder under the policy. In support of its argument, the Insurance Company cites to case law that is legally and factually distinguishable from the situation involved in the present case.

The Second District Court of Appeal opinion Bioscience West is legally and factually on point for the issue of whether the assignment in this case is valid. The prohibition on assignment language in Bioscience West is identical to that involved in

the present case: "**Assignment.** Assignment of this policy will not be valid unless we give our written consent." 41 Fla. L. Weekly D349 at *2; R 148, 150. The appellate court agreed that this language prohibited assignment of the entire policy, but "not something less than the entire policy, such as an assignment of the financial proceeds derived from a benefit of the policy." 41 Fla. L. Weekly D349 at *2.

In Bioscience West, the Second District Court of Appeal found that the insurance company could not argue that the entire policy was unilaterally transferred by the insured to the remediation company. Id. at *2-*3. In the present case, the basis of the Insurance Company's "invalid partial assignment" argument is that the insureds have not unilaterally transferred the entire policy.

In a ruling directly on point, the Second District Court of Appeal noted that "there is no contractual language restricting the post-loss assignment of benefits under 'this policy' without [the Insurance Company's] consent." Id. at *3. By this ruling the Second District Court of Appeal upheld the "partial assignment" of the insurance policy by the insured to the emergency water remediation service, Bioscience West. Id. at *2-3. This Court holds that in the Bioscience West decision the Second District Court of Appeal has rejected the appellate arguments made by the Insurance Company in its first "Tipsy Coachman" issue.

In *dicta* the Second District Court of Appeal stated that even if an insurance policy contained a specific provision precluding an insured's post-loss assignment of benefits without the insured's consent, "Florida's case law yields deep-rooted support for the conclusion that post-loss assignments do not require an insurer's consent." Bioscience West, 41 Fla. L. Weekly D349 at *4 (citing One Call, 165 So. 2d at 755; emphasis in original). This Court holds that by this ruling in Bioscience West, the Second District Court of Appeal once again is expressing its rejection of the Insurance Company's first "Tipsy Coachman" argument that "partial assignments" of insurance policies are invalid.

"Tipsy Coachman" Issue Two:

In Bioscience West, the insurance company argued that Bioscience West impermissibly adjusted the insurance claim, which is contrary to section 626.854(16), Florida Statute's mandate prohibiting a licensed contractor from adjusting a claim on

behalf of an insured. Id. at 3. In a factual situation essentially identical to that involved in the present appeal, the Second District Court of Appeal completely rejected the insurance company's argument that an Assignment of Benefits violates section 626.854(16). The Second District Court of Appeal's opinion in Bioscience West disposes of the Insurance Company's second "Tipsy Coachman" argument based on section 626.854(16).

Additional Ruling By the Second District Court of Appeal in Bioscience West:

The Second District Court of Appeal also rejected the argument that because Bioscience West, as assignee did not have an "insurable interest" in "the things at the time of the loss," the assignment of benefits to Bioscience West allegedly violated section 627.405, Florida Statutes (2012)[2]. The Second District Court of Appeal stated that the insured had a "vested insurable interest at the time of the loss. [The insured/assignor], then assigned her vested insurable interest by the post-loss execution of the assignment of benefits to Bioscience [West], permitting Bioscience [West] to step into [the insured's] shoes." Id. The Second District Court of Appeal cited to United Water Restoration, 173 So. 3d at 1027; Accident Cleaners, 40 Fla. L. Weekly D862; and Curtis v. Tower Hill Prime Insurance Co., 154 So. 3d 1193, 1196 (Fla. 2d DCA 2015), to support its holding that the assignment of benefits did not violate section 627.405.

Conclusion

The Insurance Company has conceded that the Fourth District Court of Appeal decisions require reversal of the Final Summary Judgment based on the trial court's ruling that the non-assignment clause in the insurance policy controls and United had no standing to bring this action. The recently issued Second District Court of Appeal

---

[2] Section 627.405, states:

(1) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.

(2) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

(3) The measure of an insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof.

decision in Bioscience West also supports the reversal of the Final Summary Judgment on this issue.

This Court holds that the Second District Court of Appeal decision in Bioscience West and the decisions of the Fourth, Fifth, and First District Courts of Appeal, as discussed above, are dispositive of all issues in this appeal. The Final Summary Judgment is reversed and this matter is remanded for further proceedings.

On remand the trial court now has the benefit of the decision of the Second District Court of Appeal in Bioscience West, 41 Fla. L. Weekly D349 (mandate issued April 1, 2016), and the decisions of the Fourth, Fifth, and First District Courts of Appeal in Accident Cleaners, 40 Fla. L. Weekly D862; Security First, 177 So. 3d 627 United Water Restoration, 173 So. 3d 1025; Emergency Services, 165 So. 3d 756; and One Call, 165 So. 2d 749, in order to rule on the issues presented in this case.

Reversed and remanded for further proceedings.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 19th day of April, 2016.

Original Order entered on April 19, 2016, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia A Muscarella.

Copies furnished to:

Susan W. Fox. Esq.
Gray R. Proctor, Esq.
122 E. Colonial Dr., Ste. 100
Orlando, FL 32801

Ashley M. McKinnis, Esq.
1211 Orange Ave., Suite 200
Winter Park, FL 32789