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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002291-MR

NORTHFIELD INSURANCE COMPANY APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
CIVIL ACTION NO. 00-CI-00762

FIRST NATIONAL BANK & TRUST APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Northfield Insurance Company appeals from a summary judgment granted by Laurel Circuit Court in favor of First National Bank & Trust, in which the court denied its counter-motion for summary judgment, reserving decision on the cross-claims between the co-defendants which, in relevant part, included Paradise Custom Yachts, Inc. and Northfield.

In October 1999, Northfield Insurance Companies, through Northfield (a self-described surplus lines carrier), issued a commercial insurance policy to Paradise, a houseboat manufacturer located in London, Kentucky. Among other provisions, the policy provided casualty loss coverage for the building in the amount of

$580,000.00, insured the personal property and inventory up to $1,500,000.00 and secured the replacement of business income loss up to $250,000.00. The policy was effective from October 1, 1999, to October 1, 2000, originally naming Paradise as the sole insured. First National was a secured lender to Paradise by virtue of a series of promissory notes and security agreements between the two parties pursuant to which First National possessed a security interest in specific personal property belonging to Paradise including a 1999 Paradise houseboat, accounts receivable, inventory and other items of collateral described in the agreements. At the time Paradise procured the commercial insurance policy at issue, it was leasing its business premises and had been in the business of manufacturing custom luxury houseboats for approximately one and one-half years without maintaining fire insurance.

On October 30, 1999, a fire occurred at the business premises of Paradise, destroying its property and inventory, the collateral securing the loans of First National. Paradise subsequently filed a claim with Northfield under the subject policy seeking to recover for its losses. Northfield initiated a review and investigation of the claim. Public fire officials and private fire investigators retained by Northfield independently determined that the fire was incendiary in nature.

In support of its claim, Paradise provided a sworn statement in proof loss as required by the policy on December 8, 1999, denying any involvement in the fire and making a claim of $580,000.00 for the building, $575,202.00 for its contents and $250,000.00 for lost business income. At the conclusion of an

extensive investigation into the circumstances surrounding the fire and the resulting claim, Northfield determined that Paradise, or someone acting on its behalf, had both motive and opportunity to set the fire, ultimately denying coverage based on the conclusion that either Paradise, or someone acting on its behalf, intentionally caused the fire in an attempt to collect the insurance proceeds.

In December 1999, more than one month after the subject fire loss, Paradise allegedly contacted Rob Hoenscheid, its local insurance agent, at Roeding Lexington Insurance Agency, to request that Northfield amend its policy to name First National as a mortgagee/loss payee and the City and County Industrial Development Authority as an additional insured, further requesting that the endorsement be retroactive, effective October 1, 1999. Hoenscheid, in turn, contacted Mark Melbostad, a Northfield underwriter, concerning the requested endorsement. Melbostad then contacted Northfield's general agent, Swett & Crawford, seeking additional information regarding the request.

In a letter dated December 14, 1999, Donna Jahn of Swett & Crawford asked Northfield to amend the policy as requested. Although Melbostad Arequested that an endorsement be prepared on December 16, [1999,] and forwarded to [Northfield's] broker at Swett & Crawford, Swett was instructed to hold [the endorsement]@ while Melbostad investigated the relationship of First National and CCIDA to Paradise. Upon obtaining further information concerning the nature of the relationship between First National and Paradise, Melbostad directed Swett & Crawford to return the original

endorsement to him along with any copies. On June 26, 2000, Swett & Crawford complied with this directive. In an affidavit of February 1, 2001, attached to Northfield's counter-motion for summary judgment, Melbostad testified as to the foregoing sequence of events, confirming that A[t]o date, the endorsement has not been issued to Paradise, First National or CCIDA.@ However, on or around March 27, 2000, Swett & Crawford, via Hoenscheid, issued a document entitled AEvidence of Property Insurance@ to Paradise, allegedly without authorization from Northfield, identifying First National as an additional insured under the policy at issue. Northfield later sent a notice of cancellation to First National on two separate occasions, the first on April 5, 2000, indicating that the policy would be canceled effective June 24, 2000, due to a Achange of risk which substantially increases any hazard insured against, after coverage has been issued,@ and the second on April 26, 2000, indicating that the policy would be canceled effective May 11, 2000, due to non-payment of premium with the final notice Asupersed[ing] previous notice sent.@ Both cancellation notices were signed by Melbostad.

On June 5, 2000, Northfield filed a AComplaint for Declaratory Judgment and Other Relief@[1] against Paradise in the

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[1] As alleged by First National and conceded by Northfield, the copy of the policy attached to this pleading as an exhibit included a copy of the subject endorsement which Paradise requested but Northfield denies issuing as well as a letter authored by Northfield's associate corporate counsel directed to its local counsel referring to the enclosed copy as Acomplete.@ However, Northfield has consistently maintained that the endorsement was attached due to clerical error, the endorsement was never incorporated into the policy and the copy of the policy in question does not represent a Atrue and accurate@ copy of the policy (continued...)

United States District Court for the Eastern District of Kentucky, London Division, alleging that Paradise breached the provision of its policy relating to Aconcealment, misrepresentation or fraud@ and is therefore entitled to no compensation under the policy. Further, Northfield requested the District Court to construe the policy accordingly, declare the policy void and award Northfield such other relief as deemed Aequitable and just,@ including costs and attorneys' fees. Paradise filed a counterclaim seeking a declaration of policy rights in its favor and alleging causes of action for breach of contract, statutory and common law bad faith, defamation and fraud. First National was not named as a party to the action.

On September 1, 2000, First National initiated an action against Paradise, its owners and Northfield in Laurel Circuit Court. In its complaint, First National sought enforcement of its rights as a secured lender against Paradise and its owners who had executed personal guaranties to First National in order Ato induce [First National] to extend credit to Paradise.@ Relying on the purported endorsement naming it as a mortgagee/loss payee, First National alleged that Northfield was obligated to satisfy the indebtedness of Paradise, claiming entitlement to Aa sum of money as damages for the value of [First National's] collateral destroyed by fire and covered by said insurance policy, less salvage.@

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[1] (...continued)
in effect on the date of the loss at issue. First National counters by arguing that Northfield's actions should constitute a Ajudicial admission,@ that this admission operates to preclude Northfield from denying the issuance of the endorsement and/or that waiver and equitable estoppel apply leading to the same result.

In a AMemorandum Opinion and Order@ entered on December 4, 2000, the District Court declined to exercise jurisdiction over Northfield's declaratory judgment action, dismissing the action without prejudice as the action involving Northfield and Paradise was pending in circuit court, the proper forum in which to determine the rights of both parties under the policy in question, particularly since the insured's mortgagee, i. e., First National, was also a party to that action.

Northfield appealed this dismissal to the United States Court of Appeals for the Sixth Circuit. At the time briefs were filed in the instant appeal, oral arguments in the case were scheduled for July 2002. Ultimately, the Sixth Circuit affirmed the decision of the District Court from the bench.[2]

With respect to the circuit court action, First National filed a motion for summary judgment supported by an affidavit from its vice-president, Jerry Dotson, which essentially echoed its complaint. In response, Northfield filed its own motion for summary judgment, disputing First National's contention that it was an insured under the subject policy because the endorsement being relied upon was never issued as revealed by the affidavit of Melbostad filed in support of its position. In the alternative, Northfield argued that the express terms of the endorsement did not afford any coverage to First National since it was not classified as a mortgagee.

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[2] United States Court of Appeals for the Sixth Circuit, Civil Action No. 01-5023.

In the summary judgment entered on August 29, 2000, the circuit court found that Northfield Aissued a policy covering fire loss to [Paradise], which policy had an endorsement naming First National [] as a mortgagee, effective October 1, 1999[,]@ and, further, that the policy provided coverage for First National Aas a loss payee by virtue of being designated a creditor whose interest in Covered Property is established by financing statements or security agreements@ and that said loans were Acovered by such lien documents.@ The court found that Northfield sent notices of cancellation to First National on two separate occasions, AFirst National having been named as Mortgagee/Loss Payee in such cancellations.@ Based on these findings[3] and others regarding the existence and amounts of the notes due to First National, the court concluded that the Apolicy issued by [Northfield] covered First National's collateral, the subject of the loans mentioned herein by virtue of the mortgagee/loss payee endorsement and provisions of such policy@ and that Northfield canceled its coverage of First National with the notices of May 11, 2000, and June 24, 2000, received by First National. Accordingly, the policy issued by Northfield Acovered such collateral when the houseboats and inventory were destroyed by fire on October 30, 1999.@

[3] Although the circuit court purports to make findings of fact, such findings are inappropriate in the context of a summary judgment. When ruling on a motion for summary judgment, the court must refrain from deciding issues of fact, simply examining the evidence to determine if a genuine issue as to any material fact exists. Ky. R. Civ. Proc. (CR) 56.03. Here, the court apparently determined that no genuine issue existed as to these material facts which it presumably set forth to clarify the basis for its decision in order to assist with the review process.

Consistent with the foregoing, the court granted summary judgment in favor of First National, holding Paradise, its owners and Northfield jointly and severally liable for the sums due under the notes plus interest and late charges and awarding First National ownership of the 1999 Paradise houseboat, accounts receivable and inventory. Further, the court denied Northfield's counter-motion for summary judgment and reserved the remaining cross-claims between the co-defendants for future decision. Northfield filed a motion to alter, amend or vacate the summary judgment which the court denied following a hearing on October 5, 2001. Northfield now appeals from the summary judgment in favor of First National and the order denying its motion to motion to alter, amend or vacate said judgment.

On appeal, Northfield's argument is threefold:

> I. Material issues of fact exist regarding issuance of a policy endorsement adding First National to the policy precludes entry of summary judgment in the Bank's favor.
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> II. The subject endorsement does not provide the coverage claimed by First National in any event.
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> III. Through proper application of the policy language in the subject endorsement, Northfield is entitled to summary judgment on First National's claim.

In response, First National frames its argument as follows:

I. First National's interest in the insurance proceeds at issue is evidenced by the plain language of the insurance policy and clearly within the Afour corners@ of the documentation of record, which cannot subsequently be refuted by unreliable parole evidence in the face of a motion for summary judgment. [In this vein, First National further claims that the Melbostad affidavit is irrelevant because Kentucky law provides First National with a right to recover even in the absence of an endorsement.]

* * *

II. Northfield waived any right to refute, and was estopped from refuting, the loss endorsement.

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III. Northfield's insurance policy is internally ambiguous, using the words Amortgagee@ and Aloss payee@ interchangeably, and thus the endorsement constitutes a Astandard mortgagee@ endorsement requiring payment to First National regardless of any defenses to coverage available against Paradise, the insured.

* * *

IV. Northfield's [a]ppeal must be dismissed due to its failure to include [d]efendant Paradise as an [i]ndispensable party [a]ppellee.

Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment Aif the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together

with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.@ Summary judgment is only proper Awhere the movant shows that the adverse party could not prevail under any circumstances.@[4] However, Aa party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.@[5] In ruling on a motion for summary judgment, the circuit court must view the record Ain a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.@[6]

On appeal from a summary judgment, we must determine Awhether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.@[7] Since no factual findings are at issue, deference to the trial court is not required.[8] Although Northfield appeals from the summary judgment granted in favor of First National, it is likewise appealing from the denial of its own motion for summary judgment. Under CR 56.03 the general rule is that such a denial is, Afirst, not appealable

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[4] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[5] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

[6] Steelvest, supra, n. 4, at 480.

[7] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

[8] Id.

because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact.@[9] However, there is an exception to the general rule which applies when, as is the case here, the following criteria are met: A(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom.@[10]

Applying these governing principles to the instant case, our analysis must necessarily begin with a review of the pleadings and proof of record in order to answer the dispositive question of whether there is a genuine issue as to any material fact presented by the evidence of record. More specifically, the inquiry becomes whether Northfield did in fact issue the endorsement at the center of the present dispute as resolution of the remaining issues hinges on the answer to this determinative question.

In support of its motion for summary judgment, First National relied solely upon its complaint, brief and the affidavit and deposition testimony of Dotson, its vice-president and authorized representative. Similarly, Northfield's evidence consists solely of the affidavit and deposition testimony of its underwriter, Melbostad, submitted in conjunction with its answer and counterclaim. Dotson's testimony essentially serves to confirm the existence of the debt owed to it by Paradise, providing a time

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[9] Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Leneave, Ky. App., 751 S.W.2d 36, 37 (1988).

[10] Id.

line complete with an itemization of each note and a description of its terms. Beyond that, Dotson's testimony merely highlights the relevant facts relating to First National's demand for payment from Northfield as summarized in its complaint.

Melbostad's testimony, on the other hand, directly refutes the effectiveness of the endorsement, acknowledging that he requested the endorsement and it was subsequently prepared, but specifically denying that it was ever issued.

Here, First National places much emphasis on the alleged inconsistencies between the evidence and arguments of Northfield before the United States District Court and this Court, arguing that the summary judgment in its favor must be upheld on the basis of waiver and estoppel as Northfield Adeliberately omitted First National as a party to that action,@ Aobviously embark[ing] upon a strategy to separate the adjudication of rights in the policy as between the insured and the loss payees.@ In its estimation, Northfield's actions in attaching the version of the policy encompassing the prepared endorsement to its complaint in the declaratory judgment action which was then incorporated into its answer to First National's complaint and Paradise's cross-claim in circuit court, Ahad the effect of waiving or dispensing with the necessity of the insureds producing evidence of what constitutes the insurance policy@ and Northfield is now barred from disputing the validity of the version it previously asserted was correct.

Alternatively, First National contends that judicial estoppel applies on the current facts since the Aelement of suit between the same parties@ is met because First National Ashould have

been a party@ to the U.S. District Court action. Again relying on Northfield's representation to the U.S. District Court which was allegedly incorporated into the circuit court pleadings and is therefore properly before this Court, First National asserts that Northfield's conduct constitutes a knowing waiver of the right to claim that Melbostad did not intend to issue the endorsement. AFor this Court's convenience,@ First National attached copies of the parties' briefs filed in the Sixth Circuit proceeding to its brief here, attempting to incorporate the documents by reference.

In short, this argument is based on a faulty premise, i.e., that the pleadings, orders, etc., from the District Court and Sixth Circuit actions were authenticated below and can therefore be properly considered as evidence of record for purposes of review. In making this assumption, First National has neglected to comply with Kentucky Rules of Evidence (KRE) 901, which, in relevant part, provides: A(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.@ Subsection (b) of this rule contains an illustrative list of acceptable methods by which to satisfy this threshold requirement.

First National made no attempt to authenticate any of the documents relating to either the U.S. District Court action or its appeal to the Sixth Circuit during the proceedings below, instead attaching the complaint, etc., upon which it relies so heavily to its pleadings and labeling them as exhibits rather than authenticating them via affidavit, interrogatory or comparable

means, just as it attached copies of the parties’ briefs from the Sixth Circuit action to its brief here. Although the examples in KRE 901(b) are A[b]y way of illustration only, and not by way of limitation,@ the necessary implication is that some method must be utilized to verify the authenticity of such documents as a condition precedent to their admissibility. Even assuming arguendo that the documents in question could accurately be described as self-authenticating, certification as defined in KRE 902 is required and is equally lacking.

Presumably, First National is implicitly arguing that this Court should take judicial notice of these related proceedings and the pleadings, etc., generated therefrom pursuant to KRE 201. This we cannot do. Because First National failed to take the necessary steps below to authenticate the purported evidence, i.e., the complaint in the U.S. District Court action to which Northfield attached a copy of the insurance policy containing the endorsement, etc., it stands to reason that said evidence is not of record on appeal and, therefore, we are precluded from considering this extraneous information. In other words, there is no proof that the documents in question were attached to the filings in the federal action and in the present context, our review is limited to the Apleadings . . . .@

That being the case, Melbostad’s affidavit stands unrefuted with the necessary conclusion being that no genuine issue as to any material fact exists regarding whether the endorsement was issued. Accordingly, we look to the literal language of the policy as initially written. There is no allegation that the

original policy provided coverage for First National. In the absence of the endorsement, then, no credible argument can be made that First National is entitled to coverage under the express terms of the policy. Northfield is entitled to judgment as a matter of law. This determination renders moot the issue of whether the terms of the disputed endorsement encompass the type of loss sustained by First National.

Allowing for this possibility, First National also claims that it is entitled to recover even if we accept Melbostad's affidavit as true because it had an equitable lien on the insurance proceeds by virtue of its agreement with Paradise requiring Paradise to procure and maintain property insurance with coverage for its personal property collateral. In so arguing, First National relies on Castle Ins. Co. v. Vanover,[11] in which this Court established that a creditor has an insurable interest and equitable lien in insurance proceeds even in the absence of express contractual provisions.

Citing the majority rule as recited in Northwestern Fire & Marine Ins. Co. of Minneapolis v. New York Life Ins. Co.,[12] we held that A[i]n situations where the mortgagor agrees to insure the property for the benefit of the mortgagee, but fails to do so, an equitable lien is created on the insurance proceeds for the benefit of the mortgagee to the extent of its insurable interest.@[13] Clearly, First National is correct in its assertion that this

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[11] Ky. App., 993 S.W.2d 509, 510 (1999).

[12] 238 Ky. 229, 37 S.W.2d 67 (1931)

[13] Castle, supra, n. 10, at 511.

reasoning applies on the instant facts which is favorable to its position as far as it goes. What First National fails to recognize, however, is that its right to recover is still dependent on the success of Paradise's claim with Northfield, the merits of which have not yet been addressed and are questionable. Given our determination as to the validity of the endorsement, First National is not a loss payee. Thus, it has only a derivative right to recover, a right which can not be assessed until the pending claim between Paradise and Northfield is fully adjudicated.

First National's remaining argument is that A[p]roper interpretation of the parties' relationships as defined by the subject casualty insurance policy show that Paradise is an indispensable party to this action and the appeal, because, in Paradise's absence, complete relief cannot be afforded to First National or Northfield . . . .@ Citing CR 19.01, First National alleges that failure to name Paradise as a party will impair the ability of Paradise to protect its interests as an insured under the policy and leave all of the parties subject to a substantial risk of incurring inconsistent obligations. We disagree. Paradise is indisputably an interested party but cannot properly be categorized as indispensable.

As previously mentioned, the circuit court explicitly reserved the claims between the co-defendants, i.e., Paradise (and its owners) and Northfield for future decision. While disposing of the case in its entirety would have arguably been more efficient, the fact remains that the court chose a different approach. Reversal of the summary judgment in favor of First National and

against Northfield has no direct effect on the outcome of those claims under any possible scenario. If Paradise ultimately prevails on its claim by demonstrating that the subject fire was not the result of arson, it will receive full coverage pursuant to its policy with Northfield, irrespective of the disposition here. Likewise, even if we had reached the issue of whether First National has a direct right of recovery under the terms of the endorsement and found in favor of Northfield on the merits, the rights of Paradise would have been unaffected. To summarize, given the nature of the relief sought by Northfield on appeal, we find no error in the omission of Paradise at this stage of the litigation.[14]

Because the uncontradicted evidence of record reflects that the endorsement at the heart of this controversy was prepared but never issued and First National is not entitled to coverage under the express terms of the policy, First National Acould not prevail under any circumstances.@ Thus, the circuit court erred by granting summary judgment in favor of First National and denying Northfield's motion for the same relief. To the contrary, a review of the record demonstrates that there is no genuine issue as to any material fact in this regard, conclusively resolving this dispositive legal question in favor of Northfield rather than First National. Accordingly, the summary judgment is reversed and this case is remanded to Laurel Circuit Court with directions to grant summary judgment in favor of Northfield.

ALL CONCUR.

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[14] See Braden v. Republic-Vanguard Life Ins. Co., Ky., 657 S.W.2d 241 (1983).

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