Guilford v. First Am. Title Ins. Co.

Superior Court of New Jersey, Appellate Division

November 29, 2011, Argued; July 26, 2012, Decided

DOCKET NO. A-2445-10T4

Reporter
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FRANK C. GUILFORD, Plaintiff-Appellant, v. FIRST AMERICAN TITLE INSURANCE COMPANY, Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9629-08.

Counsel: Maeve E. Cannon argued the cause for appellant (Hill Wallack LLP attorneys; Ms. Cannon, of counsel and on the briefs; Megan McGeehin Schwartz, on the briefs).

Michael R. O'Donnell argued the cause for respondent (Riker, Danzig, Scherer, Hyland & Perretti LLP, attorneys; Mr. O'Donnell, of counsel and on the brief; Bethany A. Abele, on the brief).

Judges: Before Judges Messano and Espinosa.

Opinion

PER CURIAM

Defendant First American Title Insurance Company (First American) issued a title insurance policy (the Policy) to plaintiff Frank Guilford for property located on Poe Avenue in Newark (the Property) in November 2007. The mortgage and note submitted to First American in procuring the Policy represented that plaintiff loaned $200,000 to Cherrystone Bay, LLC (Cherrystone) for the purchase of this Property and disbursed the funds on November 24, 2007. However, it is undisputed that plaintiff only made a loan of $100,000; that the loan was to his life-long friend, Michael Bonner, the sole owner and shareholder of Cherrystone, rather than to Cherrystone; that the funds were disbursed over one year earlier; and that **[*2]** the $200,000 loan amount reflected in the mortgage and note included funds loaned by plaintiff's brother, Donald Guilford.

After First American declined a claim against the Policy, plaintiff filed a complaint,[1] seeking reimbursement for his loss on the mortgage loan and for the loss of the Property pledged as security for the loan. First American moved for summary judgment, seeking the dismissal of the complaint and

[1] The complaint has not been provided as part of the record.

rescission of the Policy. Plaintiff appeals from the order that granted summary judgment to defendant.[2] We affirm.

The record is replete with assertions, allegations and characterizations of the facts that are largely irrelevant to the question whether summary judgment was properly granted. We begin by reviewing the undisputed facts[3] relevant to this appeal.

Plaintiff made two loans totaling $100,000 to Bonner in 2006. The first $50,000 loan was made on January 21, 2006, and the second $50,000 loan was made on April 9, 2006. No loan documents or mortgage documents were executed at the time of either loan. Neither loan was made "in connection with any parcel of property" and neither were "secured by any property or properties at the time they were made." Indeed, it was undisputed that, at the time these loans were made, "Bonner was not aware that the Property existed." Donald Guilford also made loans to Bonner in 2006; his loans totaled $150,000.

Plymouth Park Tax Services, LLC (Plymouth) acquired the Property on November 22, 2006, through a tax foreclosure judgment against Helen Panagakos and two other defendants. On May 25, 2007, Cherrystone purchased the Property from Plymouth for $125,000. Cherrystone obtained a loan from Northern Funding, LLC for $175,000, which was secured by a mortgage on the Property. It was undisputed that Cherrystone did not use the $100,000 loaned by plaintiff in 2006 for this purchase.

On **[*4]** July 30, 2007, Cherrystone filed an eviction action against Panagakos and two other defendants. In its complaint, Cherrystone alleged that the three women had been in possession of the Property for over two months; that they had been tenants of the prior owner but had no lease with Cherrystone and were "holdover tenants" who had not paid any rent.

After Cherrystone obtained a judgment of possession, Panagakos refused to vacate the property. When a sheriff's officer attempted to evict Panagakos on October 22, 2007, she refused to leave and the officer was forced to drill through the lock. Because the writ of possession did not expire for an additional two weeks, Bonner agreed to reschedule the eviction and try to contact a relative of Panagakos.

On November 9, 2007, the rescheduled eviction date, an attorney retained by Panagakos's nephew requested an extension of time from the landlord-tenant judge and filed an Order to Show Cause in the Chancery Division, seeking to stay the eviction and appoint counsel to determine whether Panagakos was competent. The landlord-tenant court judge stated he would defer to the Chancery Court.

On November 21, 2007, counsel for Panagakos filed a motion to **[*5]** stay and vacate the judgment of foreclosure against her on the ground that she was "incompetent and/or unable to understand the import of the foreclosure action of the tax sales certificate brought against her."

While the eviction action was pending, First American issued a commitment for the Policy, dated November 13, 2007. The commitment identified the proposed insured as Frank C. Guilford and stated the amount of the Policy was $200,000, covering a mortgage Cherrystone made to him, dated November 24, 2007, three days after Panagakos's motion to vacate default judgment was filed.

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[2] Plaintiff filed a cross-motion for summary judgment, which was denied. He has not appealed from the denial of his motion.

[3] We rely upon the transactional documents in the record, and the material facts identified in defendant's Statement of Material Facts submitted pursuant to *Rule* 4:46-2(a) that were either admitted or properly deemed admitted because they were **[*3]** not "specifically disputed by citation . . . demonstrating the existence of a genuine issue as to the fact." *Rule* 4:46-2(b).

The commitment listed a number of requirements that had to be met before the Policy could close, including the following:

> (d) You must tell us in writing of any defects or claims by others against the land that you know about and which do not appear in the Schedule A or B — Section II. We may then make additional requirements or exceptions.
>
> (e) You must tell us in writing the name of anyone not referred to in this commitment who will get an interest in the land or who will make a loan on the land. We may then make additional requirements or exceptions.
>
> . . . .
>
> (g) An affidavit of title executed by the seller(s) **[*6]** must be obtained and specifically state there are no mortgages affecting the premises except those, if any, set forth in this Commitment and specific reference be made to any judgments, if any.
>
> . . . .

The commitment also advised that the Policy would have certain "exceptions" to coverage, including "[r]ights or claims of parties in possession of the land not shown by the public record."

Bonner executed an affidavit of title on behalf of Cherrystone that said, in part:

> We are in sole possession of the Property. We have owned the Property since May 25, 2007. Since then no one has questioned our ownership or right to possession. We have not given anyone else any right concerning the purchase or lease of this property.

The Policy insuring the mortgage was issued to Frank C. Guilford in the amount of $200,000. Plaintiff is the only lender listed on the mortgage, the note and the HUD-1. His brother, Donald, is not identified as a lender or mortgagee on any of these documents and is not named as an insured on the Policy.

Several statements made to First American in conjunction with the issuance of the Policy are contradicted by facts that are undisputed in this litigation. Both the mortgage and **[*7]** note state that plaintiff loaned $200,000 to Cherrystone. It is undisputed, however, that the amount of the loans made by plaintiff was only $100,000 and the borrower was Bonner, not Cherrystone. Further, the November 24, 2007 HUD-1 reflects that $200,000 was to be disbursed on November 27, 2007 in connection with the loan. However, it was undisputed that no funds were disbursed in November 2007 and that, in fact, plaintiff's loans were made over a year before the mortgage and note were executed. In addition, contrary to the representations made in the affidavit of title, there were parties in possession of the Property at the time the mortgage was issued.

Panagakos's motion to vacate the foreclosure judgment against her was granted on June 3, 2008. An action to quiet title was filed on behalf of Panagakos on July 28, 2008.

Plaintiff submitted a claim to First American through his counsel, asking it to provide a defense to him in the quiet title action. First American declined, noting the exception in the Policy for coverage against loss caused by "[r]ights or claims of parties in possession of the land not shown by the public record." The declination letter also noted the Policy's exclusion **[*8]** for claims that arise by reason of "[d]efects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed or agreed to by the insured claimant[.]" First American stated it had not received any notice of Panagakos's claims until July 23, 2008 and only received notice of plaintiff's claim in October 2008.

Plaintiff presents the following arguments for our consideration in this appeal:

POINT I

THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO FATICO WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING THE EXCLUSION CLAUSE IN THE GUILFORD'S TITLE INSURANCE POLICY.

A. STANDARD OF REVIEW.

B. THE TRIAL COURT PROPERLY CONCLUDED THAT WITH REGARD TO THE AMOUNT OF THE LOAN, THE DISBURSEMENT DATE AND THE SOURCE OF THE MONIES, FACTUAL QUESTIONS EXISTED THAT WOULD MAKE SUMMARY JUDGMENT INAPPROPRIATE.

C. THE TRIAL COURT IMPROPERLY CONCLUDED THAT APPELLANT GUILFORD FAILED TO GIVE NOTICE, SINCE THE FACTS INDICATE APPELLANT GUILFORD HAD NO KNOWLEDGE OF THE FACTS FOR WHICH HE WOULD HAVE BEEN REQUIRED TO GIVE NOTICE. AT A MINIMUM, IT IS A QUESTION OF FACT FOR TRIAL WHETHER HE HAD SUCH KNOWLEDGE AT THE TIME THE POLICY WAS ISSUED.

POINT II

THE TRIAL COURT COMMITTED ERROR BY GRANTING **[*9]** SUMMARY JUDGMENT BASED UPON AN EXCLUSION CLAUSE WHEN THAT EXCLUSION WAS INAPPLICABLE, DEFEATED THE INSURED'S REASONABLE EXPECTATIONS AND WAS AMBIGUOUS.

A. THE TRIAL COURT COMMITTED ERROR BY GRANTING SUMMARY JUDGMENT BASED UPON AN EXCLUSION WHEN THAT EXCLUSION WAS AMBIGUOUS, AT BEST, AND THEREFORE WAS REQUIRED TO BE INTERPRETED IN FAVOR OF THE INSURED AND AGAINST THE INSURER.

B. THE "LOSS" WAS COMPLETELY UNRELATED TO WHETHER OR NOT AN OCCUPANT LIVED IN THE PROPERTY; TITLE WAS LOST BECAUSE THE PRIOR TAX LIEN WAS INVALID, THEREBY RENDERING THE FORECLOSURE JUDGMENT INVALID.

After considering these arguments in light of the record and applicable legal principles, we are satisfied that none of the arguments have any merit.

In challenging the order granting summary judgment, plaintiff has focused upon an alleged error in the trial court's reliance upon the "parties in possession" exception as a basis for denying coverage. He argues that this was error because: he had no knowledge that Panagakos was in possession of the Property until after the mortgage was executed and the Policy issued; the clause is ambiguous; and the loss of title was unrelated to Panagakos's possession of the premises. He **[*10]** further argues that the Policy exception, as applied, defeats his reasonable expectations as an insured. We are satisfied that this argument mischaracterizes the trial court's decision in this matter. Moreover, as "appeals are taken from judgments and not from opinions," *Glaser v. Downes*, 126 N.J. Super. 10, 16, 312 A.2d 654 (App. Div. 1973), *certif. denied*, 64 N.J. 513, 317 A.2d 726 (1974), we review the order granting summary judgment, and not the court's reasoning in granting the motion.

We employ the same standard of review as the trial court, *Coyne v. N.J. Dep't of Transp.*, 182 N.J. 481, 491 (2005), 867 A.2d 1159; *Burnett v. Gloucester County Bd. of Chosen Freeholders*, 409 N.J. Super. 219, 228, 976 A.2d 444 (App. Div. 2009), which grants summary judgment if the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, "show that there is

no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c); *see also Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540, 666 A.2d 146 (1995).

The thrust of First American's motion was that it was entitled to a rescission of the insurance contract because the contract was procured **[*11]** through equitable fraud. It is "well settled that equitable fraud provides a basis for a party to rescind a contract." *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 136, 827 A.2d 230 (2003); *see also Jewish Ctr. of Sussex Cnty. v. Whale*, 86 N.J. 619, 432 A.2d 521 (1981). Generally, '"equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party.'" *First Am., supra*, 177 N.J. at 136-37 (quoting *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 767 A.2d 515 (App. Div.), *certif. denied*, 169 N.J. 606, 782 A.2d 424 (2001)). An insurer "need not show that the insured actually intended to deceive." *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627, 635, 651 A.2d 92 (1995). "Even an innocent misrepresentation can constitute equitable fraud justifying rescission." *Ibid.* A misrepresentation is "material" if it "'naturally and reasonably influence[d] the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium.'" *Id.* at 638 (quoting *Mass. Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 115, 584 A.2d 190 (1991)); *see also Allstate Ins. Co. v. Meloni*, 98 N.J. Super. 154, 158-59, 236 A.2d 402 (App. Div. 1967).

An **[*12]** insurance contract

> requires the highest degree of good faith and fair dealing between the parties. It requires the insured to advise the insurer of such matters that he knows might influence the insurer in entering into or declining the risk, at least where such facts are not of record and are not discoverable therefrom by the insurer."
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> [*Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 338, 382 A.2d 933 (App. Div.), *aff'd o.b.*, 78 N.J. 320, 394 A.2d 360 (1978).]

The undisputed facts show that the representations made to First American regarding the amount of the loan made by plaintiff, the sources of the $200,000 identified as the mortgage loan and the date the funds were disbursed were false. Nonetheless, plaintiff argues that "there are genuine issues of fact with regard to the inception of the mortgage and title insurance, loan amount, source of funds and disbursement date."

This argument is based upon plaintiff's claims of ignorance as to the underlying facts and the representations made to First American. Plaintiff could not recall whether he reviewed the mortgage, the date on which it was executed or the amount his brother loaned to Bonner. Plaintiff was similarly ignorant regarding the Policy. He **[*13]** testified he did not review the Policy and did not know who ordered it for him. He also testified he did not file a title claim with First American regarding Panagako's quiet title action and did not know who did so on his behalf.

Although it is undisputed that Bonner had knowledge of the falsity of the representations made to First American, plaintiff argues that a question of fact exists because there is no agency agreement or relationship between Cherrystone/Bonner and him. This argument is totally lacking in merit.[4]

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[4] Plaintiff's argument that First American was misled because it failed to ask the right questions or conduct appropriate investigations is similarly unavailing. "An insurer is entitled to relief when it relies on incorrect information provided by an insured in an insurance application

No agreement is necessary to the existence of an agency relationship. **[*14]** "'[T]he law will look at [the parties'] conduct and not to their intent or their words as between themselves but to their factual relation.'" *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 337, 634 A.2d 74 (1993) (quoting *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 374, 161 A.2d 69 (1960)). An agency relationship is created "'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Agency, Inc*., 203 N.J. 208, 220, 1 A.3d 632 (2010) (quoting *Restatement (Third) of Agency* § 1.01 (2006)).

Here, plaintiff allowed Bonner to act on his behalf regarding the mortgage, note and acquisition of the Policy. Bonner's assent to this arrangement is manifest by his actions and plaintiff's assent is manifest by the fact that he executed the mortgage and note. No genuine issue of fact is created by his contentions to the contrary. We are satisfied that Bonner's misstatements to defendant in procuring the Policy are fairly attributed to plaintiff.

Moreover, plaintiff's claimed ignorance that false statements were **[*15]** made to First American does not preclude a finding of equitable fraud. It is only when inquiries call for subjective information that there must be proof that the insured knew that the information was false when provided. *See Ledley, supra*, 138 N.J. at 635-36. The misstatements here were of objective facts - the amount of the loan, the date the funds were disbursed and the identity of the lender or lenders.

These facts were basic components of the application to secure title insurance. As in *Mass. Mut., supra*, 122 N.J. at 115, it is clear beyond peradventure that the nature of these false statements would "naturally and reasonably influence[] the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium." (Internal citation and quotation marks omitted). It is also evident that the party who provided the information requested by First American understood and intended that First American would rely upon that information in assessing the risk.

The documents themselves make it very clear that First American was relying upon these facts to determine the risk it was asked to assume. For example, subparagraph **[*16]** (e) of the title commitment states,

> You must tell us in writing the name of anyone not referred to in this commitment who will get an interest in the land or who will make a loan on the land. *We may then make additional requirements or exceptions*.
> [(Emphasis added.)]

Plaintiff's failure to disclose his brother's purported interest in the transaction violated this express requirement and deprived First American of its right to make additional requirements or exceptions.

Further evidence of First American's reliance upon those misrepresentations was provided in testimony from its Vice President and State Claims Counsel, Nancy Newman Brown, Esq., that First American generally does not insure mortgages given for antecedent debts absent exceptional circumstances.[5] Explaining that mortgages given on account of antecedent debts raise a "red flag[,]" Brown stated that "if

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if the information was material either to the insurer's decision to insure or to the terms of the contract." *Mass. Mut., supra*, 122 N.J. at 118. The applicant who provides such misinformation may not successfully urge that "[the] victim should have been more circumspect or astute." *Pioneer, supra*, 155 N.J. Super. at 342.

[5] Mortgages given to secure an antecedent debt may be voidable as a **[*17]** preference under the Bankruptcy Code. *See* 11 *U.S.C.A.* § 547(b).

First American knew that the money was not being disbursed at the closing table, that it had been disbursed at some previous time, I think . . . we either would not have insured or there would have been other exceptions raised in the policy to deal with that."

In order to characterize the mortgage loan as $200,000, it was necessary for plaintiff to include funds loaned by his brother. Yet, the documents did not identify Donald as a lender. Brown testified that First American considers a mortgage that secures a loan funded by multiple sources an "extra hazardous risk" that would prompt further action before a policy would be issued. There was no countervailing evidence to refute First American's assertions that the information sought was generally relied upon in evaluating the risk to be assumed and that, because the misstatements deprived it of the opportunity to inquire further and either make additional exceptions or decline to issue a policy, First American relied upon those misstatements to its detriment.

In summary, we are satisfied that this record presents "a single, unavoidable resolution" of the question whether the elements of equitable fraud were proven. Because rescission of the insurance contract was therefore appropriate, the contract was void *ab initio*. *See U.S. Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 481, 38 A.3d 570 (2012) ("Rescission essentially restores the status quo **[*18]** ante[.]" (internal citation and quotation marks omitted)). Therefore, we need not address plaintiff's arguments regarding the exception clause. We are further satisfied that plaintiff's remaining arguments lack sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E).

Affirmed.
