Iwanicki v. Safepoint Ins. Co.

Court of Appeal of Florida, Second District

August 11, 2021, Decided

No. 2D19-4583

Reporter
2021 Fla. App. LEXIS 11802 *

MARY IWANICKI, Appellant, v. SAFEPOINT INSURANCE COMPANY, Appellee. No. 2D19 4583

Opinion

[*1] Appeal from the Circuit Court for Hillsborough County; Cheryl K. Thomas, Judge.

Jeffrey S. Pekar of Pekar Law, P.A., Tampa, for Appellant.

Elizabeth K. Russo of Russo Appellate Firm, P.A., Miami, and Jason A. Herman of Herman & Wells, P.A., Pinellas Park, for Appellee.

NORTHCUTT, Judge.

Mary Iwanicki appeals a final judgment entered in favor of

SafePoint Insurance Company after the trial court granted the latter

party a directed verdict at the trial of the former's breach-of-contract suit. We reverse and remand for a new trial.

Iwanicki sustained water damage to her home on January 2, 2018. She reported the incident to SafePoint, her homeowner's insurer, the next day. SafePoint's adjuster sent a company named Paul Davis Restoration to Iwanicki's house to perform restoration work. Afterward, SafePoint issued payments to Iwanicki on January 16 and 30, and it paid Paul Davis Restoration directly on January 29. Together, these three payments totaled $14,950.34. On February 2, SafePoint asked Iwanicki to provide a sworn proof of loss as well as specified documentation regarding the damage and repair work. Iwanicki submitted her sworn proof of loss on April 18, claiming more than $165,000 in damages. [*2] She reported that this total was the result of damage estimates and additional repair work that had been performed since the initial restoration work.

Twenty-one days later, having received no response from SafePoint, Iwanicki filed the instant action, asserting two breach-of-contract counts. In the first, Iwanicki alleged that SafePoint failed to fully pay for Iwanicki's covered losses in breach of the insurance

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contract. The second count claimed that SafePoint had exercised

its policy option to repair the damage and had breached its

resulting obligation to fully restore the home to its preloss

condition. The case proceeded to jury trial, neither party having

sought an appraisal or abatement. Following the presentation of

evidence, the trial court granted SafePoint's motion for directed

verdict on both counts. It should not have done so.

This court has observed that "[a] motion for directed verdict

should be granted only where no view of the evidence, or inferences

made therefrom, could support a verdict for the nonmoving party."

James v. City of Tampa, 193 So. 3d 1040, 1042 (Fla. 2d DCA 2016)

(quoting *Sims v. Cristinzio, 898 So. 2d 1004, 1005-06 (Fla. 2d* DCA

2005)). Indeed,

[i]n considering a motion for directed verdict, the court must evaluate the testimony in the light most favorable to the nonmoving party [*3] and every reasonable inference deduced from the evidence must be indulged in favor of the nonmoving party. If there are conflicts in the evidence or different reasonable inferences that may be drawn from the evidence, the issue is factual and should be submitted to the jury. The standard of review on appeal of the trial court's ruling on a defendant's motion for

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directed verdict is the same test used by the trial court in ruling on the motion.

Id. (*quotingSims, 898 So. 2d at 1005-06*).

With respect to Iwanicki's first count, the trial court concluded

that Iwanicki had filed suit prematurely and had not given

SafePoint all the time to which it was entitled before payment was

due, precluding any breach of the policy by SafePoint. The loss-

payment provision in Iwanicki's policy stated:

10. Loss Payment

. . . .

Loss will be payable:

a. Twenty (20) days after we receive your proof of loss and reach written agreement with you; or

b. Sixty days after we receive your proof of loss and:

(1) There is an entry of final judgment; or

(2) There is a filing of an appraisal award or a mediation settlement with us.

c. Within 90 days after we receive notice of an initial, reopened, or supplemental property insurance claim from you, where for each [*4] initial, reopened, or supplemental property insurance claim, we shall pay or deny such

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claim or portion of such claim, unless there are circumstances beyond our control which reasonably prevent such payment.

SafePoint argues that under this loss-payment provision it was entitled to ninety days to investigate Iwanicki's claim and could not be in breach of the contract prior to the expiration of those ninety days. It contends that by filing suit only twenty-one days after submitting her sworn proof of loss, Iwanicki prematurely filed

suit before any breach occurred.

However, unlike subsections (a) and (b) of the loss-payment provision, the time prescribed in subsection (c) did not commence upon the filing of the sworn proof of loss. Rather, that subsection's clock started when SafePoint "receive[d] notice of an initial, reopened, or supplemental property insurance claim." Viewing the facts in the light most favorable to Iwanicki, a jury could have found that SafePoint received notice of Iwanicki's initial claim on January 3, 2018, that this gave SafePoint until April 3 to pay or deny the claim, and that SafePoint did not do so. Therefore, Iwanicki's May 9 lawsuit was not premature, and the directed verdict on this [*5] count was error. But even assuming arguendo that the lawsuit was

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premature, the directed verdict and final judgment in SafePoint's

favor were not warranted. Rather, the proper course in such an

event would have been to abate the action or dismiss it without

prejudice. *See* Curtis v. Tower Hill Prime Ins. Co., 154 So. 3d 1193,

1196 (Fla. 2d DCA 2015) (citing *Shuck v. Bank of Am., N.A.*, 862 So.

2d 20, 24-25 (Fla. 2d DCA 2003)). As this court noted in *Shuck*:

The premature element of an action filed before the expiration of an applicable statutory waiting period is cured once the waiting period has expired. In cases where the premature element of an action is curable simply by the passage of time, Florida courts have generally disapproved dismissal of the action. Instead, the favored disposition is abatement of the action until the cause matures.

Shuck, 862 So. 2d at 24.

The trial court also erred when granting SafePoint a directed

verdict on Iwanicki's second count, in which she alleged that

SafePoint exercised its option to repair and then breached the

resulting contract by not fully repairing the home. *See Drew v.*

Mobile USA Ins. Co., 920 So. 2d 832, 835-36 (Fla. 4th DCA 2006)

(explaining that when an insurer exercises its option to repair, a

new contract is created that requires the insurer to restore the

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premises to substantially the same condition it was in prior to the loss). On this issue, the court held that SafePoint [*6] had not exercised its option to repair because it had not elected to do so in writing, as required by the policy language. However, the testimony presented at trial in this case created a question of fact that should have precluded a directed verdict.

At trial, Iwanicki recounted that when she reported the water damage, SafePoint's adjuster asked Iwanicki whether she had arranged for a restoration company to remediate the damage. When Iwanicki responded that she had not, the adjuster informed Iwanicki that SafePoint "was going to go ahead and provide [Paul Davis Restoration] with the information and send them out to [Iwanicki's] house." A representative from Paul Davis Restoration confirmed at trial that the company had been assigned to the job by

SafePoint.

Iwanicki further testified that Paul Davis Restoration never consulted her about the work it was performing or the work that needed to be done. Neither did it submit any estimates or invoices to Iwanicki. Based on these facts-establishing that SafePoint

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unilaterally chose and dispatched a restoration company which then dealt solely with SafePoint regarding estimates, invoices, and payment-a jury reasonably could have found that SafePoint [*7] had exercised its option to repair notwithstanding its failure to give written notice of such. *See* *St. Joe Corp. v. McIver, 875 So. 2d 375, 382 (Fla. 2004)* ("[T]he parties' subsequent conduct . . . can modify the terms in a contract." (citation omitted)); *Kiwanis Club of LittleHavana, Inc. v. de Kalafe, 723 So. 2d 838, 841 (Fla. 3d DCA 1998)* (noting that "[a] written contract can be modified by subsequent oral agreement between the parties or by the parties' course of dealing" and that whether a contract has been modified is a question of fact for the jury (citation omitted)); *see also* *W.W.Contracting, Inc. v. Harrison, 779 So. 2d 528, 529 (Fla. 2d DCA 2000)* (stating that an oral modification "is permissible even where the written contract contains a provision prohibiting its alteration except in writing"). The directed verdict on this count was error.

Accordingly, we reverse the judgment at hand and remand for a new trial on both counts.

Reversed and remanded.

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MORRIS, C.J., and SMITH, J., Concur.

Opinion subject to revision prior to official publication.

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