2014 IL App (4th) 131072-U

NO. 4-13-1072

FILED
September 10, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SHANNON SMITH, Plaintiff-Appellant, v. BRADFORD VICTOR-ADAMS MUTUAL INSURANCE COMPANY, Defendant-Appellee, and KEVIN LINDER, Defendant.	)	Appeal from Circuit Court of Sangamon County No. 09L204 Honorable John W. Belz, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in granting summary judgment absolving defendant insurance company of liability where (1) plaintiff's insurance policy had been cancelled prior to plaintiff's home being destroyed by fire, and (2) defendant did not violate the implied covenant of good faith and fair dealing.

¶ 2 In the early morning hours of September 27, 2007, a property owned by Shannon Smith, plaintiff, burned to the ground. Smith's insurer, Bradford Victor-Adams Mutual Insurance Company (Bradford), refused to cover the claim, stating the policy had been cancelled on September 24, 2007, after Smith failed to make the quarterly premium payment. In February 2013, Smith filed a second amended count IV to her complaint, asserting Bradford was obligated to pay her claim because the policy was active at the time of the fire or, alternatively, Smith paid the premium within the customary grace period for reinstating a cancelled policy. Kevin Linder

was a party to the original complaint; however, he is not a party on appeal. In June and August 2013, the parties filed cross-motions for summary judgment. In November 2013, the trial court granted Bradford's motion for summary judgment.

¶ 3 Smith appeals, asserting the trial court erred by granting summary judgment to Bradford. Specifically, she asserts Bradford was obligated to pay her claim because Bradford (1) did not effectively cancel the policy until September 27, 2007, thus requiring Bradford to allow Smith 10 days to reinstate the lapsed policy pursuant to the policy provisions; and (2) violated the implied covenant of good faith and fair dealing by refusing to honor the customary grace period for accepting late premium payments. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The facts in this case are largely undisputed. For the policy year of March 7, 2007, through March 7, 2008, Smith held a town-landlord insurance policy with Bradford, which she purchased through the Redshaw Insurance Agency (Redshaw). The policy specifically covered Smith's property located at #41 Rosemary Court, Virginia, Illinois. Pursuant to the policy, Smith's next quarterly premium installment was due on September 7, 2007. Smith failed to submit her payment by September 7, 2007. On September 12, 2007, Bradford mailed Smith notice that her policy had lapsed and that it would be cancelled in 10 days, pursuant to the policy, if she did not submit her premium payment along with a $20 reinstatement fee. Smith failed to submit a payment within the 10-day period. Accordingly, on September 24, 2007, Bradford cancelled Smith's policy. On that same date, Bradford mailed Smith both a notice and a declaration (First Declaration) indicating Bradford cancelled her policy due to nonpayment of the premium.

¶ 6 Between the late evening hours of September 26, 2007, and early morning hours of September 27, 2007, Smith's Rosemary Court property caught fire and burned to the ground. Prior to business hours on September 27, 2007, Smith left a premium payment at Redshaw's office (not including the $20 reinstatement fee) and notified Redshaw about the fire. Later that day, Smith received Bradford's First Declaration, indicating her policy status as "CANCELLATION DUE TO NON-PAYMENT OF PREMIUM." Additionally, that same day, Bradford mailed a letter to Smith denying what it perceived to be her claim for recovery on the fire damage, noting the policy had been cancelled on September 24, 2007. Bradford then mailed a second declaration letter dated September 27, 2007 (Second Declaration), which noted, "POLICY CANCELLED" and stated "these declarations replace all prior declarations." The Second Declaration included the denial of Smith's claim based on the policy being cancelled for nonpayment of the premium. In October 2007, Bradford returned Smith's premium check, stating it would not accept the check because it had cancelled Smith's policy on September 24, 2007.

¶ 7 In August 2009, Smith filed a complaint in the trial court. After numerous amendments and various other motions which are not relevant to this appeal, in February 2013, Smith filed a second amended count IV, which is the only remaining count presented on appeal. This count alleged (1) Bradford improperly cancelled the policy, rendering the cancellation ineffective; (2) Bradford's attempt to cancel the policy with the First Declaration was superseded by the Second Declaration, which meant the policy was still in effect at the time of the fire; and (3) Bradford should have provided Smith with its customary "couple of days" grace period to reinstate the policy after the September 24, 2007, cancellation.

¶ 8 In June 2013, Smith filed a motion for summary judgment, citing the reasons set forth in her second amended count IV. In August 2013, Bradford filed a response and cross-motion for summary judgment, asserting the policy was not in effect at the time of the fire. Following an October 2013 telephone hearing, for which no transcript has been provided, in November 2013, the trial court denied Smith's motion for summary judgment and granted Bradford's cross-motion for summary judgment. The court found Bradford followed the policy's cancellation procedures and that the terms of the policy were clear and unambiguous.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, Smith asserts the trial court erred in granting summary judgment in favor of Bradford. In support, Smith argues Bradford (1) did not effectively cancel the policy until September 27, 2007, thus requiring Bradford to allow Smith 10 days to reinstate the lapsed policy pursuant to the policy provisions; and (2) violated the implied covenant of good faith and fair dealing by refusing to honor the customary grace period for accepting late premium payments. We begin by discussing the standard of review for summary-judgment cases.

¶ 12 A. Standard of Review

¶ 13 "Summary judgment is proper 'where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " *Natale v. Gottlieb Memorial Hospital*, 314 Ill. App. 3d 885, 888, 733 N.E.2d 380, 383 (2000) (quoting *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333, 662 N.E.2d 397, 402 (1996)). This court's function in reviewing the trial court's summary-judgment order "is limited to determining whether the trial court correctly concluded that no genuine issue of

material fact was raised and, if none was raised, whether judgment as a matter of law was correctly entered." *Zubi v. Acceptance Indemnity Insurance Co.*, 323 Ill. App. 3d 28, 32, 751 N.E.2d 69, 74 (2001). A trial court's summary-judgment order is subject to *de novo* review. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 395, 893 N.E.2d 303, 308 (2008). With this standard in mind, we turn to the merits of Smith's appeal.

¶ 14 B. Was Smith's Policy Active at the Time of the Fire?

¶ 15 Smith first asserts her policy was active on September 27, 2007, thus requiring Bradford to pay the claim for the fire.

¶ 16 We initially note insurance companies must strictly comply with statutory-notice and policy provisions regarding the termination and forfeiture of insurance contracts based on nonpayment of a premium. *Yunker v. Farmers Automobile Management Corp.*, 404 Ill. App. 3d 816, 822, 935 N.E.2d 630, 636 (2010). On appeal, Smith does not contend Bradford failed to follow statutory-notice provisions or the policy's guidelines for cancelling the contract, nor does she contend Bradford's First Declaration improperly cancelled the contract. Rather, Smith argues the Second Declaration (1) reinstated the policy by overriding the First Declaration and (2) recancelled Smith's policy effective September 27, 2007, which would require Bradford to pay Smith's claim because she paid her premium within 10 days of the cancellation. We disagree.

¶ 17 "Insurance policies are subject to the same rules of construction applicable to other types of contracts." *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416, 860 N.E.2d 280, 285 (2006). The words in an insurance policy should be interpreted based on their plain and ordinary meaning. *Id.* at 416, 860 N.E.2d at 286. In doing so, "the court must construe the policy as a whole, taking into account the type of insurance

purchased, the nature of the risks involved, and the overall purpose of the contract." *Id*. By extension, a declarations page, though containing information specific to the policyholder, should not be read in isolation from the rest of the policy. *Hobbs v. Hartford Insurance Company of the Midwest*, 214 Ill. 2d 11, 23, 823 N.E.2d 561, 567-68 (2005). "A court's primary objective is to ascertain and give effect to the intention of the parties as expressed in the agreement." *Nicor*, 223 Ill. 2d at 416, 860 N.E.2d at 286.

¶ 18 The cancellation provision of Smith's policy stated, "when you [(Smith)] have not paid the premium, [Bradford] may cancel at any time by mailing you at least 10 days notice of cancellation." On September 12, 2007, Bradford sent notice to Smith indicating that the premium payment was past due and that "[i]f payment is not received in 10 days, your policy will cancel for non-payment. TO REINSTATE YOUR POLICY $20.00 MUST BE INCLUDED WITH THE PAYMENT." The notice indicated Smith's late premium payment was due by September 22, 2007. As September 22, 2007, fell on a Saturday, the following Monday, September 24, 2007, Bradford mailed both a notice and the First Declaration indicating the policy had been cancelled as forewarned in the September 12, 2007, letter. On September 27, 2007, after learning Smith reported a loss due to fire, Bradford issued both a letter and the Second Declaration reflecting the denial of any claim arising from the fire and noting the policy was cancelled.

¶ 19 Smith asserts the Second Declaration issued on September 27, 2007, overrode the First Declaration mailed on September 24, 2007, relying on the following language: "[t]hese declarations replace all prior declarations." In her brief, Smith provides the definition of the word "replace" as meaning "to take the place of," "serve as a substitute or successor," or to "succeed or supplant," to support her assertion that the Second Declaration overrode the First

Declaration. To follow this line of reasoning, however, would be to read the declaration in a vacuum rather than as part of the policy.

¶ 20 While the Second Declaration may have supplanted the First Declaration, nothing in the record indicates Bradford or Smith intended to reinstate and subsequently recancel the policy with the Second Declaration. Rather, the plain language contained in the Second Declaration states "POLICY CANCELLED," which expressed the status of the policy on September 27, 2007, the day of the fire and the date in which Smith reported her loss to Redshaw. The Second Declaration also noted it had denied what it perceived to be Smith's claim arising from the fire, as the policy had already been cancelled by that date. In interpreting the declaration alongside the policy, Bradford properly cancelled the contract on September 24, 2007, and nothing in the language of the Second Declaration specifically overrides that cancellation or indicates an intention of either party to reinstate and recancel the policy. Other than providing this court with general citations regarding the interpretation of insurance policies, Smith has provided no case law, statutory citations, or case analogies to support her position. Thus, as the parties presented no outstanding issue of material fact, we conclude the trial court did not err in granting summary judgment in favor of Bradford because, as a matter of law, Bradford properly cancelled the policy on September 24, 2007, prior to the fire.

¶ 21 Smith also asserts Bradford anticipatorily repudiated the contract by stating it would not cover any claims from the fire; however, because we have concluded the policy had been cancelled prior to the date of the fire, the parties had no contract for Bradford to repudiate.

¶ 22 C. Did Bradford Fail To Honor the Customary Grace Period?

¶ 23 Smith next argues, even if Bradford properly cancelled the policy prior to the fire, Bradford should have accepted the late premium payment as part of its implied covenant of good

faith and fair dealing. "[A]n insurer must exercise good faith and deal fairly with all parties insured by its policies." *Country Mutual Insurance Co. v. Anderson*, 257 Ill. App. 3d 73, 78, 628 N.E.2d 499, 503 (1993). The purpose of requiring good faith and fair dealing "is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286, 876 N.E.2d 156, 161 (2007). A party's exercise of good faith may be challenged where that party has been given broad discretion in performing its contractual obligations. *Id.* at 286, 876 N.E.2d at 161-62. "The duty of good faith and fair dealing is a limitation on the exercise of that discretion, requiring the party vested with discretion to exercise it reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations." *Id.* at 286, 876 N.E.2d at 162.

¶ 24 During the pendency of the case, Smith deposed Beverly Fick, Bradford's former office manager. Smith points to a brief portion of Fick's deposition in which Fick discussed Bradford's office policies to support Smith's argument that Bradford violated its policy of allowing "a couple of days" grace period for the reinstatement of cancelled policies. Smith's attorney asked Fick whether Smith could have reinstated the cancelled policy by paying the premium and a $20 late fee. Fick replied, "yeah – within a couple of days. We aren't gonna – we wouldn't go on forever to do that. It was a courtesy."

¶ 25 Smith interprets Fick's statement to mean that Bradford's failure to accept the late premium payment three days after the cancellation of the policy violated the implied covenant of good faith and fair dealing because Smith paid the premium "within a couple of days" of the

policy's cancellation. However, during the deposition, Fick clearly stated the extension was offered as a courtesy to its policyholders and, as such, would not be part of the policy itself.

¶ 26 In support of her argument Bradford violated the implied covenant of good faith and fair dealing, Smith cites *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 891 N.E.2d 1 (2007). In *Midwest*, a cabinet seller entered into an agreement with a purchaser that conditioned payment on obtaining, from the buyer, a signature on all purchase order documents. *Id*. at 647, 891 N.E.2d at 7. When the seller sued in response to the purchaser withholding payment due to unsigned purchase order documents, the trial court found in favor of the seller. *Id.* Upon review, the appellate court found the signature requirement a valid condition precedent, but affirmed the trial court, finding the purchaser's failure to make available someone to sign the purchase order documents violated the implied covenant of good faith and fair dealing. *Id*. at 672, 891 N.E.2d at 27. The court noted, " 'Where the performance of the contingency or condition is within the control of a party to the agreement, the party for whose benefit the condition precedent runs is required to use "reasonable efforts" to have it occur.' " *Id*. at 671, 891 N.E.2d at 26 (quoting *Dodson v. Nink*, 72 Ill. App. 3d 59, 64, 390 N.E.2d 546, 549 (1979)). The court also stated the covenant of good faith and fair dealing "prohibits the parties from exercising their *contractual* discretion 'arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.' " (Emphasis added.) *Id*. at 671-72, 891 N.E.2d at 26 (quoting *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112, 618 N.E.2d 418, 424 (1993)).

¶ 27 The analysis in *Midwest* undermines Smith's argument in this case. The contract in this case is devoid of an express condition such as the requirement considered in *Midwest*. The two-day period was not part of the contract; rather, as described by Fick, it was simply a

courtesy afforded to customers. As such, the implied covenant of good faith and fair dealing is not implicated under the facts of this case.

¶ 28 Also, Smith did not pay her premium "within a couple of days" of the policy's cancellation. A "couple" is commonly defined as "two." Merriam-Webster's Collegiate Dictionary 265 (10th ed. 2000). In other words, as Bradford cancelled the policy on September 24, 2007, "a couple of days" grace period would have allowed Smith to pay by September 26, 2007. Smith did not tender the premium payment within that time frame. Therefore, even when construing the facts in favor of Smith, we conclude, as a matter of law, that Bradford did not violate the implied covenant of good faith and fair dealing. Accordingly, the trial court did not err in granting summary judgment in Bradford's favor on this issue.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the trial court's judgment.

¶ 31 Affirmed.