DOCKET NO. CV-17 6023554 S : SUPERIOR COURT

MARILYN WOODEN, AS THE EXECUTRIX OF ESTATE OF LONNIE THOMAS, SR. : JUDICIAL DISTRICT OF ANSONIA-MILFORD

VS. : AT MILFORD

DINANYELLY PEREZ, ET AL : JANUARY 2019

MEMORANDUM OF DECISION

STATEMENT OF THE CASE

Pending before the court is a motion filed by the third party defendant, First American Title Insurance Company (FATIC), to strike the complaint filed against it by the third party plaintiff, Dinanyelly Perez. Perez alleges the following in her revised third party complaint. On April 6, 2016, Perez purchased property located at 120 North Prospect Street Extension, in Ansonia. In connection with that purchase, Perez also purchased a title insurance policy from FATIC. On September 15, 2017, Perez notified FATIC of the instant lawsuit filed by the plaintiff, Marilyn Wooden, claiming adverse possession of a portion of Perez' property. On October 10, 2017, FATIC admitted to Perez that Wooden's claim of adverse possession is a covered risk under the title insurance policy. However, FATIC also informed Perez that it would not defend Perez' title against Wooden's claim and that, pursuant to section 4.a. (5) of the title insurance policy, FATIC was exercising its option to end coverage under the title insurance policy by paying Perez her what FATIC determined to be her "actual loss," calculated by FATIC to be in the amount of $1569.60.[1] On October 12, 2017, FATIC mailed a check to Perez in the

[1]Section 4 of the title insurance policy, entitled "Our Choices When We Learn of a Claim," states the following:

"a. After we receive Your notice, or otherwise learn, of a claim that is covered by

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amount of $1569.60, which she thereafter deposited into her bank account on October 16, 2017.

Perez claims that FATIC breached its obligations under the title insurance policy by failing to defend Perez' title against Wooden's claim of adverse possession. Contrary to FATIC's position, Perez argues that under section 4.a. (5) of the title insurance policy, FATIC is required to continue to defend Perez' title until an "actual loss" is sustained. Specifically, Perez claims that "[FATIC] has breached its contract of insurance with [Perez] by refusing to defend her title in that the policy language requires [FATIC] to continue to defend [Perez] until an 'actual loss' is sustained pursuant to section 4.a. (5) of the policy. Actual loss will not occur unless and until the adverse possession claim proves successful." Revised Third Party Complaint, ¶ 9.

On June 20, 2018, FATIC filed a motion to strike the revised third party complaint on the

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this Policy, Our choices include one or more of the following:

(1) Pay the claim;
(2) Negotiate a settlement;
(3) Bring or defend a legal action related to the claim;
(4) Pay you the amount required by this Policy;
(5) End the coverage of this Policy for the claim by paying you your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
(6) End the coverage described in Covered Risk 16, 18, 19 or 21 by paying You the amount of Your insurance then in force for the particular Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
(7) End of coverage of this Policy by paying You the Policy Amount then in force, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
(8) Take other appropriate action.

b. When we chose options in Sections 4.a.(5), (6) or (7), all our Obligations for the claim end, including Our obligations to defend, or continue to defend, any legal action."

ground that it fails to state a cause of action. The motion was accompanied by a memorandum of law. Perez filed an objection to the motion to strike and a memorandum of law in opposition to the motion on August 3, 2018. FATIC filed a reply memorandum on August 17, 2018. The motion was argued on September 17, 2018.

DISCUSSION

"[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court. . . ." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016). "The court must construe the facts in the complaint most favorably to the plaintiff. . . . If facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997).

On their face, the allegations contained in the revised third party complaint appear to state a cause of action that is within the terms of coverage of the parties' insurance contract. See generally, *Imperial Casualty & Indemnity Co.* v. *State*, 246 Conn. 313, 323-24, 714 A.2d 1230 (1998) (Citation omitted; internal quotation marks omitted.) ("[A]n insurer's duty to defend . . . is determined by reference to the allegations contained in the [injured party's] complaint. . . . The duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage.") As indicated in the revised third party complaint, under section 4.a. (5) of the title insurance policy, FATIC reserves the right to "end coverage of this policy . . . by paying [the] actual loss resulting from the covered risk." The revised third party complaint alleges that FATIC refused to defend Perez' title until an "actual loss" is sustained under section 4.a. (5). This complaint further alleges that an "actual loss" has not yet

occurred, nor will it occur unless and until the plaintiff's claim of adverse possession proves successful. Because the revised third party complaint alleges that it has not been established whether there will be any actual loss resulting from the adverse possession claim, nor has the amount of any actual loss been established, Perez' revised third party complaint sufficiently alleges a claim for breach of contract. Although the title insurance policy, as FATIC emphasizes, gives FATIC a range of options with regard to its obligations under the policy, including payment of the "actual loss" suffered, Perez' revised third-party complaint makes clear that she disputes whether the amount paid adequately compensates her for such a loss and whether such amount could be determined at the present time.

FATIC argues that the third party complaint fails to state a cause of action because the complaint misconstrues the terms of the title insurance policy. Under FATIC's interpretation, it properly exercised its rights under section 4.a. (5) of the policy. Specifically, FATIC argues that when Perez submitted the adverse possession claim, the policy gave it a range of options and it elected, pursuant to section 4.a. (5), to pay Perez for her actual loss and end the coverage of the policy. See n. 1. According to FATIC, by electing to pay Perez for her actual loss, its obligations under the title insurance policy terminated, including any obligation to defend the present action brought by the plaintiff, Marilyn Wooden. In contrast, Perez argues that it cannot now be determined whether the amount FATIC paid her adequately compensates her for any loss because an "actual loss" has not yet occurred. According to Perez an "actual loss" will not occur unless and until Wooden's claim of adverse possession is successful. Thus, the crux of the parties' dispute involves the construction of the phrase "actual loss" as used in the policy, and more particularly, how and when an "actual loss" should be determined under section 4.a. (5) of the policy. The general rule governing the interpretation of an insurance contract is well established.

"In interpreting an insurance contract, the determinative question is the intent of the parties, that is, what coverage the insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy. If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. Under those circumstances, the policy is to be given effect according to its terms. When interpreting an insurance policy, we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result.

"In determining whether the terms of an insurance policy are clear and unambiguous, a court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Citation omitted; internal quotation marks omitted.) *Arrowood Indemnity Co.* v. *King,* 304 Conn. 179, 186-87, 39 A.3d 712 (2012).

The phrase "actual loss" is not a defined term in the title insurance policy, and there is nothing in the manner in which the phrase is used in the policy that provides a clear and unambiguous direction as to how it should be interpreted and applied to the parties' dispute. The most specific description of the phrase is in the "Owner's Coverages Statement" provision of the policy stating that "[t]his policy insures You [the insured] against actual loss, including any costs, attorneys' fees and expenses provided under this policy." Revised Complaint, Ex. A, p. 2. FATIC

indicates that "actual loss" is often or routinely defined as the difference in value of the property as insured and its value without the defect in title, but FATIC has not presented any controlling authority that on a motion to strike, this court is required to accept this definition as the correct or definitive interpretation of this phrase in the present context of the parties' dispute. Stated differently, the court rejects FATIC's argument that the phrase "actual loss" as used in the title insurance policy is so clear and unambiguous that FATIC's interpretation must be accepted by the court as a matter of law or will not be rejected by a jury as an issue of fact, especially when the law is established that "any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." Id.

Alternatively, FATIC argues that Perez' receipt and acceptance of the $1,569.60 check tendered by it constitutes a waiver of the claims asserted by Perez in the third party complaint. In reply, Perez argues that the check she received from FATIC was not payment in full for her claim, nor was it a concession that she waived any rights under the title insurance policy by endorsing and depositing the check. "Waiver is the voluntary relinquishment of a known right." *MacKay* v. *Aetna Life Ins. Co.*, 118 Conn. 538, 547, 173 A. 783 (1934). "A waiver occurs. . . only if there is both knowledge of the existence of the right and intent to relinquish it." *Heyman Associates No. 1* v. *Insurance Co. of Pennsylvania*, 231 Conn. 756, 777, 653 A.2d 122 (1995). In ruling on a motion to strike, the court's consideration is limited to the allegations of the pleading at issue and there is nothing in the revised third-party complaint establishing or supporting the elements of waiver as FATIC contends.

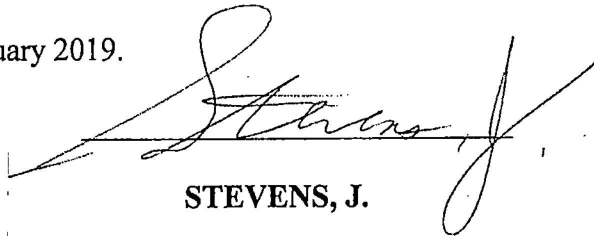
FATIC argues that according to paragraphs 7 and 8 of the revised third party complaint, Perez accepted and deposited the check knowing that FATIC was ending coverage for the claim. On the contrary, these two paragraphs allege the exact opposite. Specifically, in paragraph 8

Perez alleges that there was no notation, or other wording, that indicated that by endorsing and depositing the check she was agreeing to an accord and satisfaction on the claim, or that acceptance of the check amounted to a waiver of any rights that Perez may have against FATIC. As Perez correctly states, research reveals no case law that supports FATIC's claim that simply endorsing and depositing a check under the circumstances alleged constitute a knowing waiver of rights under the insurance policy.

CONCLUSION

Accordingly, for these reasons, FATIC's motion to strike is denied and Perez's objection to the motion is sustained.

So ordered this 10th day of January 2019.



STEVENS, J.