Third District Court of Appeal

State of Florida

Opinion filed April 15, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2178
Lower Tribunal No. 17-22975

People's Trust Insurance Company,
Appellant,

vs.

Gladys A. Franco, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Cole, Scott & Kissane, P.A., and David C. Borucke and Mark D. Tinker (Tampa); Brett Frankel and Jonathan Sabghir (Deerfield Beach), for appellant.

Mintz Truppman, P.A., and Timothy H. Crutchfield, for appellee Gladys A. Franco.

Before SALTER, HENDON and LOBREE, JJ.

SALTER, J.

People's Trust Insurance Company ("PTIC") appeals a final circuit court order dismissing with prejudice PTIC's complaint against its insureds, Gladys Franco and Maximiliano Quesada (together, the "Insureds"), under a homeowner's insurance policy. The underlying case tests the right of PTIC to enforce an "election to repair" provision in its policy of insurance and the remedies that may be pursued when the Insureds repudiate that election or otherwise fail to comply with the policy's requirements.

We reverse the order and remand the case to the trial court for further proceedings. Although many of the facts detailed below regarding the background of the case are uncontroverted, the procedural status of the dismissal and our standard of review require us to consider the factual allegations of PTIC's complaint, including facts gleaned from the attachments to the complaint, as true.

Background and Procedural History

PTIC offered, and the Insureds chose, a homeowner's insurance policy ("Policy") with a premium discount and an endorsement allowing PTIC the right to have a designated contractor, Rapid Response Team, LLC™ (the "Contractor"), repair covered damages to an insured's home. The "direct repair" concept seems straightforward, and the form of endorsement has been approved by Florida's Department of Insurance. Apparently the devil, in the present case, is in the details.

The Policy was in effect on January 30, 2017, when the Insureds' home suffered water damage. Five days later, the Insureds entered into a one-page agreement with "911Claims," a Miami-based licensed public adjuster, whereby the Insureds retained 911Claims to "adjust, appraise, advise and assist in the settlement" of the water damage at the Insureds' home. The agreement included an assignment by the Insureds of "**20%** of the whole amount recovered (including recoverable depreciation and overhead & profit and any extra-contractual or bad faith damages less deductible)." (Original emphasis). The agreement defined "recovered" as "any amount that is actually paid by the insurance carrier or other applicable party/non-party (collectively 'carrier') OR any amount which is offered by the carrier." The agreement also specified "**NO recovery, NO fee to policy holder.**" (Original emphasis). It followed that if the Contractor designated by PTIC performed the repairs caused by the water damage, 911Claims would not be entitled to a payment by the Insureds.

On March 3, 2017, 911Claims notified PTIC that it represented the Insureds and that the loss had occurred. PTIC responded by email that very day, assigned a claim number, and provided a one-page explanation form, captioned "What to Expect During Your Claim." On March 9, PTIC's inspector visited the property to investigate the claim. On March 20, PTIC sent two separate letters to the Insureds, with a copy of each also sent to 911Claims. The first letter, two pages and an

attachment, notified the Insureds that they needed to complete and execute a sworn proof of loss for return to PTIC within 60 days, as required by the Policy. PTIC's letter also requested "estimates, invoices, photographs and documentation related to this claim," and informed the Insureds that the failure to comply with the requests "may prejudice [PTIC's] claim investigation and ultimately jeopardize coverage to the extent that coverage exists for this claim." The letter provided the name, phone number, address, and email address of a senior claims adjuster at PTIC and attached the form of proof of loss to be completed by the Insureds.

On March 20, 2017, the same senior claims adjuster also sent a longer, six-page letter to the Insureds reflecting PTIC's decisions after the March 9 inspection of the damage at the Insureds' residence. This letter acknowledged that the claim was covered for damage that was caused by a pipe leak and "damage associated with tearing out parts of the building as necessary to access the broken pipe which needs repair," but damage to the pipe itself was not covered. The letter identified the applicable policy provisions and notified the Insureds that PTIC elected to use the Contractor to repair the Insureds' property to its pre-loss condition by making repairs to the covered damages, as determined "by agreement or submitting the matter to an appraisal panel as set forth in the policy."

PTIC included with its March 20 notice of electing its right to repair an "Estimate and Scope of Repairs" pursuant to the "Preferred Contractor

Endorsement," and a copy of the endorsement was attached to the notice. PTIC followed up the March 20 correspondence with requests for compliance by the Insureds and 911Claims in May and June of 2017, but the completed "Sworn Statement in Proof of Loss" and other requested information were not forthcoming.

On September 27, 2017, over six months after the Insureds' claim was reported to PTIC, the property damage had been inspected by PTIC's claims adjuster, and PTIC had elected to have the Contractor repair the damage (all of which were accomplished in March 2017), PTIC filed its complaint in the circuit court. Alleging in detail the sequence of events and policy provisions, the Insureds' "obstinate and unjustified refusal and repudiation of [PTIC's] election-to-repair," and the resulting prejudice to PTIC as a result, PTIC sought (1) declaratory relief as to the parties' rights and obligations under the Policy, and (2) a judgment for anticipatory repudiation and breach of the Policy terms "permanently voiding any further coverage obligations, and for an award of all reasonable costs incurred in prosecuting this action," and any further relief deemed just and proper.

In response, the Insureds moved to dismiss the complaint as legally insufficient and improper. The trial court heard and granted the motion to dismiss in April 2018, initially granting leave to amend. PTIC's counsel waived amendment so that the legal sufficiency of the complaint and its attachments could be tested

here. The resulting final order was a dismissal with prejudice, and PTIC's timely appeal followed.

Analysis

"When ruling on a motion to dismiss for failure to state a cause of action, the trial court must 'treat as true all of the . . . complaint's well-pleaded allegations, including those that incorporate attachments, and to look no further than the . . . complaint and its attachments.'" Romo v. Amedex Ins. Co., 930 So. 2d 643, 648 (Fla. 3d DCA 2006) (quoting City of Gainesville v. State, Dep't of Transp., 778 So. 2d 519, 522 (Fla. 1st DCA 2001)). Our standard of review is de novo. Romo, 930 So. 2d at 647.

Count I plainly states a cause of action for declaratory relief. The election-to-repair endorsement has been an established option for various Florida residential insurance policy forms for several years. The legal features of the endorsement have been analyzed repeatedly by Florida's appellate courts. The new contract formed between the insurer's preferred and designated contractor under such an endorsement and the insured has been termed a "Drew agreement," a reference to Drew v. Mobile USA Ins. Co., 920 So. 2d 832 (Fla. 4th DCA 2006).

"A declaratory judgment is a statutorily created remedy." Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991). Florida Statute section 86.011, entitled "Jurisdiction of trial court," states:

> The court may render declaratory judgments on the existence, or nonexistence: (1) Of any immunity, power, privilege, or right; or (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

"Put another way, 'the courts have the general power to issue declaratory judgments . . . in suits ***solely*** seeking a determination of any fact affecting the applicability of an "immunity, power, privilege, or rights."'" Heritage Prop. & Cas. Ins. Co. v. Romanach, 224 So. 3d 262, 265 (Fla. 3d DCA 2017) (quoting Higgins v. State Farm Fire & Cas. Co., 894 So. 2d 5, 12 (Fla. 2004)) (original emphasis).

"[T]he purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 404 (Fla. 1996) (quoting Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1192 (Fla. 1995)). A request for a declaratory judgment should be construed liberally. See § 86.101, Fla. Stat. (stating that Chapter 86 is to be "substantive and remedial" and, due to its purpose, it "is to be liberally administered and construed"); Kelner v. Woody, 399 So. 2d 35, 37 (Fla. 3d DCA 1981) (same). "[Q]uestions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights. Further, an insurer may seek determination of its

obligation to defend its insured by filing a declaratory judgment action." Travelers Ins. Co. v. Emery, 579 So. 2d 798, 801 (Fla. 1st DCA 1991) (footnotes omitted).

"A motion to dismiss a complaint for declaratory judgment is not a motion on the merits. Rather, it is a motion only to determine whether the plaintiff is entitled to a declaration of rights, not to whether it is entitled to a declaration in its favor." Romo, 930 So. 2d at 648 (internal quotations and citations omitted). To survive a motion to dismiss, a complaint for declaratory relief must show:

> [(1)] [T]here is a bona fide, actual, present practical need for the declaration; [(2)] that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; [(3)] that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; [(4)] that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; [(5)] that the antagonistic and adverse interest[s] are all before the court by proper process or class representation and [(6)] that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

Chiles, 680 So. 2d at 404 (quoting Santa Rosa Cty., 661 So. 2d at 1192-93 (quoting Martinez, 582 So. 2d at 1170)); Romo, 930 So. 2d at 648 (same); Floyd v. Guardian Life Ins. Co., 415 So. 2d 103, 104 (Fla. 3d DCA 1982) ("A complaint seeking declaratory relief must allege ultimate facts showing a bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff;

the plaintiff's doubt about the existence or non-existence of his rights or privileges; that he is entitled to have the doubt removed.").

Applying these requirements to the detailed allegations in the 15 pages and 53 numbered paragraphs of PTIC's declaratory judgment count in the complaint, the elements of a sufficient cause of action are evident. In prior lawsuits and appeals, PTIC sought to enforce its election-to-repair provision with a count for injunctive relief and an effort to compel the insureds to execute work authorizations and allow contractors and related parties to enter the home to perform the repairs. Such injunctions were denied on the grounds that irreparable harm did not exist and the insurer had adequate remedies at law. See, e.g., People's Trust Ins. Co. v. Acosta, 259 So. 3d 179 (Fla. 3d DCA 2018).

In the present lawsuit, PTIC seeks a declaration regarding those rights and remedies—not in a prohibited advisory or abstract form of opinion, but based on detailed allegations that an insured and its public adjuster are repudiating the endorsement and impeding the Contractor's performance. This is the kind of concrete scenario addressed by Florida's declaratory judgment statute.

The second count, for breach of contract based on the Insureds' alleged non-performance of post-loss conditions and refusal to cooperate with the Contractor's performance of repairs, is partially subsumed within the declaratory judgment count.

Like the declaratory judgment count, the contract count seeks a judgment against the Insureds "permanently voiding any further coverage obligations."

PTIC's contract count does, however, also include a prayer for relief seeking contract remedies: PTIC claims that the policy terms were anticipatorily repudiated by the Insureds, thus breaching the Policy, excusing further performance by PTIC and allowing it to seek damages. See A.I.C. Trading Corp. v. Susman, 40 So. 3d 769, 773 (Fla. 3d DCA 2010) (finding that conduct anticipatorily repudiating a contract "creat[es] an immediate cause of action for breach"); Twenty-Four Collection, Inc. v. M. Weinbaum Constr., Inc., 427 So. 2d 1110, 1112 (Fla. 3d DCA 1983) (same). In this case, PTIC seeks damages for its reasonable costs incurred in prosecuting its lawsuit. This count, too, states a legally sufficient cause of action.

Conclusion

Following our de novo review of the complaint and its attachments, our review of the parties' briefs, and our consideration of counsel's presentation at oral argument, we conclude that the final judgment below dismissing PTIC's complaint with prejudice must be reversed. Both counts of the complaint state legally sufficient causes of action, although we express no opinion regarding PTIC's ability to prove the allegations of fact within the complaint. The case is remanded for further proceedings.

Reversed and remanded.