11CA2333 Meyer v. United General 01-17-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 11CA2333
Arapahoe County District Court No. 10CV704
Honorable Kurt A. Horton, Judge

Keith Meyer,

Plaintiff-Appellee,

v.

United General Title Insurance Company, a Colorado corporation,

Defendant-Appellant.

JUDGMENT REVERSED IN PART
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE WEBB
Lichtenstein and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced January 17, 2013

James K. Kreutz & Associates, P.C., James K. Kreutz, Denver, Colorado, for Plaintiff-Appellee

Montgomery Little & Soran, P.C., Frederick B. Skillern, Echo D. Ryan, Greenwood Village, Colorado, for Defendant-Appellant

In this action for breach of a title insurance contract, defendant, United General Title Insurance Company, appeals the judgment of $250,000 entered on a jury verdict in favor of its insured, plaintiff Keith Meyer. We conclude that although consequential damages can be recovered for breach of such a contract, Meyer failed to present any evidence that lost profits were reasonably foreseeable when United General entered into the contract. We further conclude that Meyer did not prove any loss in value of improvements to the property. Therefore, we reverse the judgment as to damages, and remand for entry of nominal damages.

I. Background

United General issued a residential title insurance policy to Meyer for property that he had purchased, which included a single-family residence and a separate garage. The policy provided: "This Policy insures your title to the land described . . . if that land is a one-to-four family residential lot or condominium unit."

Meyer rented out the residence. He used open space on the property and the garage to operate a business that involved hauling, repairing, and storing heavy machinery. However, his business -- Tonka LLC -- was not a named insured on the policy and was not a party to the case.

Approximately three years after purchasing the property, an adjacent property owner told Meyer that he had no right to use the adjacent property for access. Meyer then concluded that his property had no legal access, which was insured by the policy. He sent a notice of claim to United General based on this title defect. According to Meyer, United General failed to resolve this claim within a reasonable amount of time.

Before the access issue was resolved, Meyer sold the property for approximately $20,000 more than the purchase price. He testified that the title defect caused $470,000 in lost future profits, projected over five years, and that he had paid approximately $101,000 for improvements to the property. The jury found that United General had breached the contract and awarded Meyer $250,000 in damages. On appeal, United General challenges only the amount of damages awarded.

II. Lost Profits May Be Recovered as Consequential Damages

A. Law

United General first contends consequential damages, such as lost profits, are not recoverable for breach of a title insurance policy, as a matter of law. We disagree.

Title insurance policies generally include provisions that limit an insurer's liability for claims made under the policy. Here, for example, United General's liability is limited to the "actual loss or the policy amount in force when the claim is made -- whichever is less." However, as explained in Joyce Palomar, *Title Insurance Law* § 10:18 (2012 ed.):

> [W]here the insurer has breached its contract, the insured's claim may not be limited to the amount policy conditions provide when the insurer is paying the claim according to the policy's terms. Instead, the insured may be entitled to all foreseeable damages resulting from the title insurer's breach of contract, including consequential and incidental damages.

See Dreibelbiss Title Co., Inc. v. MorEquity, Inc., 861 N.E.2d 1218, 1222 n.5 (Ind. Ct. App. 2007) ("policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach"); V. Woerner, Annotation, *Measure, Extent, or Amount of Recovery on Policy of Title*

Insurance, 60 A.L.R.2d 972, § 8 (1958) (damages for breach of title insurance "may be recovered without regard to the usual policy provision limiting the insurer's liability to a specified amount.").

Further, consequential damages may be recovered for breach of an insurance contract. *See*, *e.g.*, *General Insurance Co. of America v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo. 1981) ("Generally, the measure of damages for a breach of contract is the loss in value to the injured party of the other party's performance caused by its failure or deficiency, plus any other incidental or consequential loss caused by the breach, less any cost or other loss that the injured party has avoided by not having to perform.").

Consistent with these rules, in *Hedgecock v. Stewart Title Guar. Co.*, 676 P.2d 1208, 1210 (Colo. App. 1983), a breach of title insurance action, the division awarded rentals lost due to a title defect as consequential damages. We discern no basis on which to distinguish between consequential damages in the form of lost rentals due to a title defect and such damages in the form of lost profits.[1]

Accordingly, we conclude that lost profits may be recovered as consequential damages for breach of a title insurance policy.

B. Lost Profits Were Not Reasonably Foreseeable Damages

Alternatively, United General contends the trial court should have set aside the jury's award of lost profits because such damages were not reasonably foreseeable. We agree.

Generally, a jury verdict may be set aside only where the court finds that the damages awarded are grossly and manifestly excessive, or grossly and manifestly inadequate. *Belfor USA Group, Inc. v. Rocky Mountain Caulking and Waterproofing, LLC*, 159 P.3d 672, 676 (Colo. App. 2006). However, C.R.C.P. 59(e) also permits the court to grant a judgment notwithstanding the verdict where the evidence supporting the award is insufficient as a matter of law. *Id.*

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[1] Other jurisdictions to have addressed this issue also hold that consequential damages may be recovered for breach of a title insurance policy. *See, e.g., Safeco Title Ins. Co. v. Reynolds*, 452 So. 2d 45, 48 (Fla. Dist. Ct. App. 1984) ("an insured owner may be able to recover consequential or special damages such as lost profits as damages for breach of a title insurance contract . . . ."); *Couch on Insurance* § 185:92 (3d ed.) ("The title insurer is liable for consequential damages").

Before doing so, the evidence must be viewed in the light most favorable to the party against whom the motion is directed, C.R.C.P. 59(e), with every reasonable inference being drawn in favor of the non-moving party. *Durango School District No. R-9 v. Thorpe*, 200 Colo. 268, 275, 614 P.2d 880, 886 (1980).

In breach of insurance contract cases, consequential damages are limited to those damages arising from consequences that were reasonably foreseeable to the parties at the time of contract. *See Giampapa v. Am. Family Mut. Ins. Co.,* 64 P.3d 230, 237 n.3 (Colo. 2003) ("special" or "consequential damages" are "foreseeable damages within the reasonable contemplation of the parties at the time the contract was made"); *Bainbridge, Inc. v. Travelers Cas. Co. of Connecticut*, 159 P.3d 748, 756 (Colo. App. 2006) (consequential damages "include those damages that arose naturally from the breach and were reasonably foreseeable at the time of contract").

The jury determines whether such damages were foreseeable. *H.M.O. Systems, Inc. v. Choicecare Health Services, Inc.*, 665 P.2d 635, 639 (Colo. App. 1983) ("Recovery under the theory of breach of contract requires that a causal relationship exist and that compensation for these damages were within the contemplation of the parties . . . This is a matter to be determined by the trier of fact.”).

Here, the jury was instructed that damages could include: “Any loss of net profits [Meyer] reasonably could have earned, but did not because of [United General’s] breach . . . .” The court further instructed:

> You may award these damages if you find that they were a natural and probable consequence of the defendant’s breach of contract and the defendant reasonably could have foreseen at the time the parties entered into the contract that the damages would probably occur if the defendant breached the contract (here, a title insurance policy).

United General did not object to either instruction.

At trial, Meyer testified that he suffered approximately $470,000 in lost profits during the time he lacked legal access to his property and for a period after he sold the property. He based this testimony on net profits of approximately $10,000 per month that he had earned from his business on the property between 2006 and 2008.

After trial, United General argued that Meyer had presented no evidence to show that when the policy was issued, it knew or reasonably should have known that a title defect could cause Meyer to incur lost profits from a business being operated on the property. Meyer responded that the following evidence supported foreseeability:

> Evidence was offered to show that the Defendant should have known that Mr. Meyer's business would suffer "in the now" and "in the future" *since Mr. Meyer put the Defendant on notice that he had no access and thus his business was being damaged and he was concerned that he could lose his business through this lack of legal access.* This was supported by additional correspondence to Defendant by undersigned attorney, on more than one occasion in letters directed to the Defendant as well as the Defendant's attorneys. Such correspondence alerted the Defendant to the fact that by failing to act would result in the loss of Plaintiff's business and future profits. Therefore, the Defendant "should have known" that their failure to perform under the contract would have these results as appropriately found by the trier of facts in their judgment for the Plaintiff.

However, any notice given to United General by Meyer concerning his lack of access and potential lost profits occurred long after the policy had been issued. Therefore, this evidence is not relevant to whether lost profits were foreseeable at the inception date.

Meyer does not point to evidence, nor have we found any, that United General knew or should have known that he planned to operate a business on the property. The agent who conducted the title search testified that he assumed the property was residential because that was "the way the order came in." Nothing in the record indicates that Meyer had any contact with United General or the agent before the policy issued. And United General's expert testified that if Meyer's plan to operate a business "had been conveyed or communicated to the title company, the title company would have issued a different form of policy which would be a standard owner's policy which is not restricted only to single family residences."

Meyer argues that if the agent had visited Meyer's property, the agent would have seen the four-car garage, which would have suggested a use other than residential. However, we have found no authority imposing such a duty, nor does Meyer cite any. *See Couch on Insurance* § 159:39 (3d ed.) ("Because . . . title insurance is a contract of indemnity which only insures against defects, discrepancies, or other impediments of record . . . it is widely held that such indemnification does not protect the insured from matters dependent upon a . . . critical inspection of property unless the policy provides for extended coverage or the insured requests special endorsements.").

Meyer also argues that the agent had a duty to ask him "appropriate questions about usage," but again provides no authority, and we have found none. *See* Joyce Palomar, *Title Insurance Law* § 10:17 ("Title insurers generally argue adamantly that they insure title, and not use. In fact, title insurers sell a special endorsement to insureds who want to insure a particular use."); *cf. Kaercher v. Sater*, 155 P.3d 437, 441 (Colo. App. 2006) ("[I]t is well settled that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage.").

Nor does Meyer identify any policy language showing that lost profits to his business were foreseeable. The policy is entitled "Residential Title Insurance Policy One-To-Four Family Residence" and it expressly insures a "one-to-four family residential lot." Further, the "Covered Title Risks" section of the policy refers to the land being used "as a single-family residence." The record does not indicate that Meyer sought greater coverage when he received the policy.

In *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423, 428 (Idaho 1988), the court explained that lost profits were not recoverable "unless there is something in [the policy] that suggests that they were within the contemplation of the parties and are proved with reasonable certainty." It concluded that lost profits were not foreseeable: "The business success is not what has been insured, only the title." *Id.* at 429; *see also Pulte Home Corp. v. Industrial Val. Title Ins. Co.*, 73 Pa. D. & C.2d 320, 1975 WL 16878 (C.P. 1975) (lost profits from inability to subdivide lots into sizes contemplated at the time of purchase due to title defect were too remote).

Thus, viewing the evidence in a light most favorable to Meyer, we discern no support for the jury's award of damages that necessarily included lost profits because such damages were not reasonably foreseeable to United General when it issued the policy. Accordingly, we conclude that the trial court erred in denying United General's motion to set aside the verdict.[2] Given this conclusion, we need not address United General's argument that Meyer failed to prove the amount of lost profits with reasonable certainty.

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[2] Meyer's only other category of damages was for less than $250,000. Therefore, because the award must have been based, at least in part, on lost profits, it cannot stand.

III. Value of Improvements

United General next contends the damages award cannot include loss in value of improvements that Meyer made to the property because he failed to present any evidence of the property's value with those improvements, before the title defect was discovered. We agree.

Generally, "[t]he rule to be utilized in determining damages recoverable by an insured resulting from a title insurer's failure to discover defects in title is the difference between the value of the property with and without the [defect] on the date of discovery of the [defect] by the insured." *Happy Canyon Inv. Co. v. Title Ins. Co. of Minnesota*, 38 Colo. App. 385, 389, 560 P.2d 839, 843 (1976); *cf. Dandrea v. Board of County Comm'rs of El Paso County*, 144 Colo. 343, 348, 356 P.2d 893, 896 (1960) ("The time-tested measure or damages ordinarily applied to cases involving injury to property is the difference between the reasonable market value of the property before and after the impairment.").

This measure of damages accounts for diminution in the value of both the land and any improvements thereon. *See Dandrea*, 144 Colo. at 348, 356 P.2d at 896. As explained in *Overholtzer v.*

Northern Counties Title Ins. Co., 253 P.2d 116, 125 (Cal. Ct. App. 1953):

> The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously . . . he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid.

See also L. Smirlock Realty Corp. v Tit. Guar. Co., 97 A.D.2d 208, 232, 469 N.Y.S.2d 415, 429 (N.Y.A.D. 1983) ("improvements are to be taken into account in measuring plaintiff's loss under the title policy"), *aff'd as modified*, 473 N.E.2d 234 (N.Y. 1984).

Here, the jury was instructed that it could award: "Any loss of value of improvements made to the property by Mr. Meyer to the extent not otherwise recovered as part of his sale of the property." United General did not object to this instruction.

Meyer testified that he purchased the property for $350,000, paid $58,000 for regrading and filling the land, and made $43,000 in improvements to the residence. He also testified that after the title defect was discovered, he listed the property for $550,000, but eventually sold it, with disclosure of the title defect, to the adjacent property owner for $363,000.

We recognize that an owner "is always competent to testify as to the value of his or her property." *People v. Moore*, 226 P.3d 1076, 1084 (Colo. App. 2009). But Meyer did not testify to the value of his property as improved, but without regard to the title defect. The listing price of $550,000 "is speculative and unreliable and does not bear a sufficient relationship to the fair market value of the property so as to sustain the purchaser's burden of proof as to damages." *Bennett v. Price*, 692 P.2d 1138, 1140 (Colo. App. 1984) (explaining that "listing prices may tend to be inflated and may overstate the value of the property").

The purchase price approximately five years earlier was evidence of value that the jury could have considered. *Epstein v. City and County of Denver*, 133 Colo. 104, 108-09, 293 P.2d 308, 310 (1956). However, the jury was left to speculate whether, and if so to what extent, the improvements contributed to the value of the property, but for the title defect. *See Kinter v. United States*, 156 F.2d 5, 7 (3d Cir. 1946) ("cost of land and cost of improvements taken separately and added are not to be equalized with fair market value").

Thus, even assuming that Meyer's selling price of $363,000 sufficiently established value with the title defect, the sole evidence of value without the defect was Meyer's purchase price. And using only those two prices, Meyer made a slight profit.

The testimony of Meyer's expert did not cure this deficiency. The expert explained that Meyer had incurred an $82,000 loss on the property based on the following calculation:

> So what I did was add the original purchase price to the approximately $44,000 and approximately $58,000 to arrive at the total investment in the property. Then the property was sold for $363,000, and that resulted in an $82,000 loss for Mr. Meyer.

But like Meyer, the expert did not opine on the fair market value of the property, considering the improvements but without regard to the title defect.

Accordingly, we conclude that the jury's award of damages could not have been based on loss of the value of improvements to the property because only evidence of their cost, not of their value, was presented.[3] Because Meyer presented no other theories on which damages could have been awarded, remand for a new trial on damages would be improper. However, the portion of the verdict that United General breached the policy stands, and Meyer remains the prevailing party. Therefore, the case is remanded "for an award of nominal damages." *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1380 (Colo. 1993).

The judgment as to damages is reversed and the case is remanded for entry of a judgment awarding nominal damages.

JUDGE LICHTENSTEIN and JUDGE FOX concur.

[3] Given this conclusion, we need not address United General's contention that the jury award was the result of bias or prejudice.