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J.O. Kingston v. Great Southwest Fire Insurance Company, A Corporation: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ORIGINAL ACTION

Plaintiff and Appellant,

Case No. 15323

WELLS FARGO BANK, N.A.
Plaintiff and Appellant,
vs.
WELLS FARGO BANK, N.A.
Defendant and Respondent.

Defendant and Respondent.

VERIFICATION OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable G. Hal Taylor, Judge

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FILED

SEP 11 1977

Clerk, Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

J. O. KINGSTON,

Plaintiff and Appellant,

vs,

GREAT SOUTHWEST FIRE
INSURANCE COMPANY, a
corporation,

Defendant and Respondent.

Case No. 15323

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BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable G. Hal Taylor, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. O. KINGSTON,

*

Plaintiff and
Appellant,

*

vs.

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Case No. 15323

GREAT SOUTHWEST FIRE
INSURANCE COMPANY, a
corporation,

*

*

Defendant and
Respondent.

*

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action brought by the named insured against the insurance company on a policy of fire insurance covering a warehouse building which was damaged by fire.

DISPOSITION IN LOWER COURT

The case was submitted to the trial court by way of stipulation as to the material facts. From a judgment in favor of the defendant, the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law.

STATEMENT OF FACTS

The defendant, Great Southwest Fire Insurance Company, issued fire insurance policy #F442655, dated May 10, 1975, naming Plaintiff, J. O. Kingston, as the insured, and covering a warehouse building located at approximately 875 South 800 West, Salt Lake City, Utah (Exhibit "B"). In September, 1975, during the term of effective coverage under the insurance policy, the building burned, causing damage thereto in excess of \$20,000.00, the limits of coverage under the policy (Tr. 2-3).

On July 3, 1975, prior to the fire, Salt Lake City Corporation filed a complaint in condemnation, seeking to condemn the parcel of property upon which the insured building was located, in order that a Senior Citizens' Center could be constructed thereon. On August 12, 1975, still prior to the fire, the city was granted an Order of Immediate Occupancy with respect to the property sought to be condemned. Despite the order of immediate occupancy, J. O. Kingston was still in actual possession of the building and was using it as a warehouse for his merchandise when the fire occurred. The condemnation action was contested and the final order of condemnation vesting legal title to the property in Salt Lake City Corporation, was not signed until May, 1976, eight months after the building had been burned (Tr. 2-3 and Exhibit "A").

During the pendency of the condemnation action, J. O. Kingston commenced this action against Great Southwest Fire Insurance Company, seeking recovery under the terms of the insurance contract (R. 2-3). The trial court found that J. O. Kingston did not have an insurable interest in the warehouse building at the date it burned, and therefore, denied recovery (R. 91-92).

ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF HAD NO INSURABLE INTEREST IN THE INSURED BUILDING AT THE TIME OF THE FIRE.

The basis for the ruling in the court below was that the plaintiff had no insurable interest in the insured property at the time of the loss, as a result of the condemnation activity of Salt Lake City Corporation. Section 31-19-4, U.C.A. (1953), provides as follows:

"(1) No contract of insurance on property or of any interest therein or arising therefrom, shall be enforceable except for the benefit of persons having an insurable interest in the things insured.

(2) 'Insurable interest' as used in this section means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage."

In determining whether or not an insurable interest exists in a particular case, the courts have generally adopted a liberal view

in order to uphold the enforceability of the insurance contract.

In the case of Hill v. Safeco Insurance Company, 22 P.3d 96, 448 P.2d 915 (1969), this Court stated:

"Any interest in property, legal or equitable, qualified conditional, contingent or absolute, or merely the right to use property with or without payment of rent, is sufficient to create 'insurable interest'."

In the Hill case, the named insured under a policy of insurance had deeded the property covered (his house) to his wife. The wife and the named insured each had children from a previous marriage, and the wife disinherited her husband and her husband's children by will, leaving her assets to her own children. As it happened, the house burned down, killing both the named insured and his wife in the process, and the named insured's children sought recovery from the insurance company on the policy of insurance. The insurance company defended the claim, alleging that the named insured had no insurable interest in the property at the time it burned, since he had given up legal title to his wife, who had in turn bequeathed the property to her own children. The Court rejected the insurance company's argument, holding that where the husband had purchased the property, paid the insurance premium, lived in the house for several years, paid the taxes, and had the right of occupancy, he had an insurable interest therein, and his heirs were awarded recovery on the policy of insurance.

The case of Stewart v. Commerce Insurance Company

Glen Falls, N. Y., 114 Ut. 278, 198 P. 2d 467, was one involving automobile insurance, but one of the issues was whether or not the claimants had an insurable interest in the vehicle at the time it was damaged. The automobile was owned and insured by a gentleman who died leaving six heirs. The automobile passed to the heirs, who decided to sell it. One of the heirs located a buyer and sold the car for a price to be determined in accordance with the O. P. A. regulations then in effect. The buyer gave the heir \$400.00 for the car, took possession of the vehicle, the title and registration certificates, and started towards Logan, Utah, where he was to determine the official O. P. A. price and arrange to have the title and registration properly transferred. In route to Logan, the buyer ran off the road, causing extensive damage to the car, and the insured's estate sued to recover under the insurance policy. The Court rejected the insurance company's defense that the estate lacked an insurable interest in the car at the time it was damaged, stating:

"***it is apparent that no valid sale was completed. If such is the case the fact that an abortive attempt was made, would not relieve the defendant from liability under the policy, as the estate would have an insurable interest in the car until such time as a completed sale was effectuated."

National Farmers Union Property and Casualty Company

v. Thompson, 4 Ut. 2d 7, 286 P. 2d 249 (1955), was another case where this Court was asked to determine whether or not an insurable interest

existed in the named insured. In that case, Thompson had sold his farm to one Hardy. Hardy had taken possession of the farm, except for one building, which Thompson continued to occupy with Hardy's permission for storage of machinery and equipment. Thompson continued to occupy the building up to and including the date it was destroyed by fire. In upholding a jury's finding that Thompson retained an insurable interest in the building even though it had been sold to another, the Court made the following pertinent comments:

"*** if he has an interest of any character in the property so that he will or may derive some pecuniary benefit from the continued existence of the property or suffer pecuniary loss from its destruction by fire, he may properly be said to meet the statutory requirement of having a 'substantial economic interest'. If this test is met, that suffices, and the nature of his interest or the status of title or possession is immaterial."

The Court went on to say:

"It is not disputed that Thompson did retain possession of the building, that his machinery was stored therein, and that he had never turned the keys over to Mr. Hardy."

The Court also pointed out that there was some testimony that Thompson had obligated himself to be responsible for the building during his possession and that the owner expected to be paid for the occupancy. The Court ruled that upon such facts, Thompson had an insurable interest in the property, and that the insurance company should pay on the contract of insurance.

Several cases from other jurisdictions support the principle

position that he is entitled to recover in this case, holding that as long as the property owner retains either legal title or possession, he has an insurable interest sufficient to allow recovery under the insurance contract. In the case at bar, the plaintiff had both legal title and possession. Among such cases is Irwin v. Westchester Fire Insurance Co., 58 Misc. 441, 109 NYS 612, affd without op 133 App Div 920, 118 NYS 1115, affd without op 199 NY 550, 93 NE 376, where the court ruled that the plaintiff still had an insurable interest in a frame addition to her house which had burned, even though the addition violated the City Fire Code and had been declared a nuisance and ordered abated by the Court prior to the fire. In this particular case, the City had even commenced demolition of the structure pursuant to the abatement order, at the time it burned. The owner, as in our case, retained possession and occupancy of the condemned portion of the structure, and as she was the legal owner, was declared to have a sufficient interest in the structure to support a recovery under the insurance policy.

An insurable interest was also found to be present in the case of Rosenbloom v. Maryland Insurance Company, 258 App Div 14, 15 NYS 2d 304. There, the property owner contracted on September 23, 1938 to sell his property to the Syracuse Housing Authority for the sum of \$12,600.00. Under the terms of the contract, the Authority had the option for 180 days to acquire the property by condemnation rather than

by purchase. On September 30, 1938, the building on the property was damaged by fire, and the Authority then rescinded the sales contract and condemned the property, paying the property owner the sum of \$12,300. The court declared that the plaintiff's insurable interest at the time of the fire was the full value of the insured building, not just the diminished market value, as determined by the difference between the original sale price and the award in condemnation.

The Illinois Court, in the case of American National Bank & Trust Company of Chicago v. Reserve Insurance Company, 38 Ill. App. 2d 315, 187 NE 2d 343 (1962), also held that the building owner had an insurable interest in a building which burned after condemnation proceedings had commenced, but before the condemnation proceedings were completed. There, the Court said:

"It is the defendant's next contention that recovery should be denied on the grounds that the insured lacked an insurable interest in the premises at the time of the fire. *** The petition was still pending and undisposed of at the time of the fire. A jury subsequently entered a verdict of \$6775.00 in the condemnation proceedings representing the value of the property at the time the petition to condemn was filed. Defendant suggests that the jury's verdict having been affirmed *** title relates back to the date of filing the petition to condemn, upon payment of compensation by the condemning authority.

We think there is no merit to this contention insofar as it is directed to the relevant question of plaintiff's insurable interest on the date of the fire. At that date, the city's petition was pending but had not been acted upon. At the date of the fire there had been no change in the legal title.

to the property, or even a jury verdict in the proceedings by the city. At that stage of the condemnation proceedings the city might have abandoned its petition altogether upon payment of the property owners' expenses in the proceedings, as provided by statute * * *. This being so, it seems clear to us that plaintiff did have an insurable interest in the property on the day of the fire. The fact that the city continued its proceedings against the property after the fire, rather than exercising its statutory prerogative to abandon them, is certainly a fortunate circumstance for the plaintiff, but it is not an event which defendant may seize in an effort to avoid liability on its contract of insurance.

* * * Accordingly, we are of the opinion that the condemnation award received by plaintiff does not limit or bar plaintiff's right to recover in this action."

The Virginia Court reached the same conclusion in the case of Home Insurance Co. v. Dalis, 206 Va. 71, 141 SE 2d 721 (1965). In this case, two barns located on plaintiff's property were insured against fire. On April 22, 1963, the State Highway Commission recorded a certificate describing the road right-of-way and stating the fair market value of the plaintiff's lands located within said right-of-way to be \$113,666.00. Under Virginia law, upon such recording, the title to the property vested in the Commonwealth. The barns were destroyed by fire on April 27, 1963, and on April 29, 1963, the State notified plaintiffs to vacate the barns within 60 days. On September 27, 1963, plaintiffs applied for and obtained an order of the Court, distributing the sum of \$113,666.00, the full amount of the appraised value before the fire, to plaintiffs for the property. The insurance code of Virginia contains the same requirements that recovery can be had under a contract of insurance

on property, only by one having an insurable interest therein, as found in Utah law, and the Virginia code defines "insurable interest" precisely as does Section 31-19-4, U.C.A. (1953), cited above. The Court ruled in the Virginia case, that on the date of the fire, plaintiffs had an insurable interest in the barns sufficient to support the contract of insurance, and that their interest was to be measured by the value of the barns at that date. In rejecting the insurance company's defense that plaintiffs had no insurable interest in the barns on the date of the fire, the Court said:

"Under the provisions of the aforementioned statutes the Commonwealth acquired, upon the filing of the Commissioner's certificate, title to plaintiffs' property, but it was subject to defeasance and other steps were necessary before it could ripen into an absolute and indefeasible title."
* * *

In the present case, the plaintiffs had a lawful and substantial economic interest in the safety of the barns on the date of the loss. They were not only in possession and occupancy of the buildings, in which they had stored valuable materials when the fire occurred, but had the right to continue occupying them for sixty days from April 29, 1963. * * *

Defendant says that plaintiffs would suffer no pecuniary loss by reason of the fire and they are not entitled to recover under the policy of insurance sued on. It argues that to permit them to recover would amount to a double recovery.

In Clements v. Clements, 167 Va 223, 188 SE 154, this Court cited with approval the holding in the case of Hartman v. Pepper, 166 Mass 288, 44 NE 222, 223, 33 LRA 239, 55 Am St Rep 404, wherein it was said: " * * * the contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid is in no proper or just sense the price

of property. (Citing cases) * * * Whether the amount of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff'. 167 Va at p. 233, 188 SE at p. 158.

Here plaintiffs' claim for recovery is based on contract. The risk of destruction at the time the fire occurred remained with the plaintiffs and the insurance contract was personal. They had an insurable interest in the buildings when they were destroyed by fire and they suffered a loss. Defendant cannot escape liability of its contractual obligations by reason of plaintiffs' dealings with a third party who is not even a party to this proceeding. (Citing cases)

In a recent Oregon case, Fenter v. General Acc Fire & Life Assurance Corp., 258 Or. 545, 484 P. 2d 310 (1971), the Court resolved a similar question. In this case, property formerly owned by the plaintiff had been taken by the County for non payment of taxes. An Oregon statute (ORS 312.200) provided that all rights of redemption to properties so taken terminated after one year, at which time, the property would be formally deeded to the County. The one year period for redemption had expired and the property had been so deeded, when the insured building thereon was destroyed by fire. As in Utah, Oregon law (ORS 743.033) requires the named insured to have an insurable interest in the subject property of the insurance contract before recovery is allowed. Even so, the Court ruled that the former owner's pecuniary interest was not too insubstantial to constitute an insurable interest, in view of a statute which provided that the County may, at any time, sell and convey the property to the former owner or his assigns for the delinquent taxes.

Obviously, the County having absolute legal title, also had the right to sell and convey the property to any other person, but the plaintiff was given judgment, nonetheless.

In the case at bar, the plaintiff obviously realized an economic benefit from the continued existence of the insured building which housed his merchandise, and did in fact suffer severe economic loss when it burned down with his possessions inside. Although it may be true that Salt Lake City had the right to require the plaintiff to remove his possessions from the building at any time, until the plaintiff actually did so, either voluntarily or by coercion, he had an economic interest in the building's continued existence, if only as shelter and protection for the merchandise inside. The plaintiff had a right to continue to protect that interest, which is clearly insurable under the case law cited, and the defendant has never offered to return any part of the premium paid by the plaintiff as consideration for the insurance contract issued by the defendant.

At the time of the fire, the condemnation proceedings were still pending, and the plaintiff still had legal title to the property, which did not pass to Salt Lake City until May, 1976. Section 78-34-15, U.C. (1953), provides:

"When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two preceding sections, the court must make a final judgment

of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the judgment must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified."

Under Section 78-34-14, U.C.A. (1953), and Section 78-34-16, U.C.A. (1953), it was possible on the date of the fire, that title would never have passed from the plaintiff, had the final award not been paid or the condemnation proceedings not been completed for any other reason. Such a possibility, even though remote, is enough to find an insurable interest in the owner.

A primary objection raised to the payment of the claim in this type of case, is that such payment would constitute double payment for the property and amount to a windfall to the plaintiff. Even if this were true, the previously cited cases declare that such a benefit to the plaintiff would not invalidate the insurance contract or void the insurance company's obligation to pay for the loss it agreed to insure against. In this case, however, such an allegation of double payment is not well founded, as a review of the pleadings in the condemnation case entered as evidence (Exhibit "A") in this case, particularly the Stipulation for Judgment and the Judgment, will show. The anticipated recovery under the insurance policy was basic to the settlement figure accepted by the plaintiff.

On the other hand, to disallow recovery by the plaintiff

would amount to a windfall to the insurance company, by allowing it to avoid payment for a loss which it voluntarily insured against, and for which it accepted and retained the premiums, simply because of the action of one not even a party to this lawsuit, creating a situation which plaintiff did not desire and over which he had no control.

CONCLUSION

Based upon all of the foregoing considerations, the trial court erred in finding that the plaintiff had no insurable interest in the building on the date it burned, and its judgment should be reversed and judgment granted to the plaintiff in the sum of \$20,000.00, the amount of coverage afforded under the policy issued by the defendant.

Respectfully submitted,

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