IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 66,712

PIONEER NATIONAL TITLE INSURANCE COMPANY, a foreign corporation,

Petitioner,

vs.

FOURTH COMMERCE PROPERTIES CORPORATION, a foreign corporation,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

J. A. PLISCO
2875 South Ocean Blvd.
Suite 213
Palm Beach, FL 33480
(305) 588-9610
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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PREFACE

The parties will be referred to as the insured and the insurer.

The following symbol will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

We accept petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The insurer agreed to defend the insured in all litigation consisting of actions or proceedings "... or defenses ... interposed against a foreclosure ..." The Fourth District held the meaning of the word "defenses" is ambiguous and should be construed against the insurer. Insurer has not cited any authority to the effect that a denial is not a defense, which is essential to its position. Since duty to defend is determined by the allegations of the pleadings, the insurer was clearly required to defend based on these pleadings.

It is respectfully submitted that the issues are not really questions of great public interest, because this is a very unusual factual situation and the question has never come up in Florida or any other jurisdiction. The Fourth

District did not certify the questions when it issued its opinion, but only did so on rehearing, perhaps out of deference to Judge Letts, who urged certification in his dissent. It is submitted that this Court should initially consider whether these are questions of great public importance since review by this court is discretionary under these circumstances.

ARGUMENT

CERTIFIED QUESTION

I.

IS AN INSURER UNDER A MORTGAGEE INSURANCE POLICY THAT INSURES AGAINST LOSS OR DAMAGE SUSTAINED OR INCURRED BY THE INSURED BY REASON OF THE INVALIDITY OR UNENFORCEABILITY OF THE LIEN OF THE INSURED MORTGAGE UPON THE ESTATE OR INTEREST INVOLVED OBLIGATED, IN A FORECLOSURE OF SAID MORTGAGE, TO PROVIDE A DEFENSE TO THE INSURED AGAINST THE CLAIM OF A DEFENDANT RAISED BY GENERAL DENIAL THAT THE INSURED MORTGAGE WAS EXECUTED BY THE FEE SIMPLE OWNER OF THE MORTGAGED PROPERTY?

Insurer refuses to accept the certified questions as stated by the Fourth District and attempts to restate the issues in a light most favorable to insurer. The certified questions make no mention of the term "junior lienor" as injected by insurer. Steckmar was a contract purchaser, not a junior lienor. It is elementary that a contract purchaser

is regarded as the equitable or beneficial owner of the property. Lafferty v. Detwiler, 20 So.2d 338 (Fla. 1944).

The issue posed by the certified question is whether a general denial that the insured mortgage was executed by the owner is a defense giving rise to a duty to defend.

The complaint foreclosing the mortgage alleged in paragraph 13:

> 13. On August 28, 1975 Conrad J. DeSantis, individually and as trustee, who on said date was the owner in fee simple of the lands mortgaged as alleged in this paragraph, made, executed and delivered a promissory note and mortgage securing payment of said promissory note to VNB; the mortgage was recorded on August 28, 1975 in Official Record Book 2452, page 156. This mortgage shall hereinafter be referred to as Mortgage #1. A copy of said mortgage is attached hereto as Exhibit 2. ...

Steckmar's answer said, with regard to the above paragraph, "denied except as to the existence of public records." (R 1, Exhibit 5).

The policy provision which the Fourth District held required the insurer to defend was a provision stating:

> "The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders or injunctions interposed against a foreclosure

of the insured mortgage...to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy." (emphasis provided).

The policy provided coverage as follows:

"Subject to the exclusions from coverage, the exceptions contained in Schedule B in the provisions of the conditions and stipulations hereof, PIONEER NATIONAL TITLE INSURANCE COMPANY ... insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:..."

"2. Any defect in or lien or encumbrance on such title; ..."

"5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured mortgage and is based upon a. usury, or b. any consumer credit protection or truth in lending law; ..." (emphasis provided).

"6. The priority of any lien or encumbrance over the lien of the insured mortgage; ..."

To summarize, the insurer agreed to defend the insured "... in all litigation consisting of actions or proceedings commenced against such insured, or defenses ... interposed against a foreclosure of the insured mortgage ..."

Steckmar denied that the property was owned by the mortgagor, denied that the mortgagor executed and delivered the mortgage, but admitted the existence of the public records where the mortgage was recorded. The issue in this case is the meaning of the word "defenses" and whether Steckmar's denial was a defense.

Steckmar also filed affirmative defenses and a counter-claim alleging that it had contracted to purchase a portion of the property involved on or about February 1, 1979, that it claimed an equitable lien, which was superior to the insured's mortgage, for various reasons, and asked the court to determine that Steckmar had legal title to the property unencumbered by the insured's claims (R 1, Exhibit 5).

Although the title insurance industry claims this will wreak havoc in the industry, it is important to remember that the issue is merely whether there was a duty to defend, not whether there is coverage. The duty to defend, of course, is governed by the allegations of the complaint. National Union Fire Insurance Company v. Lenox Liquors, Inc., 358 So.2d 533 (Fla. 1977).

The issue is whether a denial is or could be a defense. The Fourth District determined that the word "defense" was

ambiguous, stating that each side cited material which supported either view. The Fourth District then held that since the word was ambiguous it must be construed against the insurer, citing Travelers Insurance Company v. Bartoszewicz, 404 So.2d 1053 (Fla. 1981). When the Fourth District held the term "defense" to be ambiguous, it gave more credence to insurer's argument than the law provides. In fact there is no authority which holds that a denial is not a defense, and insurer has cited no such authority in its brief.

Black's Law Dictionary, Revised Fourth Edition, defines "Defense" at Page 507 as follows:

> That which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks; ... In either of these senses it may be either a denial, justification or confession and avoidance of the facts averred as a ground of action, or an exception to their sufficiency in point of law. (emphasis supplied)

Black's Law Dictionary, Revised Fourth Edition, defines "Denial" at page 521 as follows:

> A traverse in the pleading of one party of the allegation of fact set up by the other; a defense. (Emphasis supplied)

Black's Law Dictionary, Revised Fourth Edition, defines "Affirmative Defense" at Page 82 as:

> In code pleading, new matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it. (Citations omitted)

In 71 CJS, Pleading, Page 302, it is stated:

> The word "defense" has been referred to as a term of art derived from the Norman-French and originally used in Common Law pleading in the sense merely of denial; a denial of the truth of the declaration or complaint; ... It subsequently assumed a wider scope of meaning, so that it came to embrace two classes of defenses, those which denied some material allegations on the part of plaintiff and those which confessed and avoided those allegations. Further, the departure from the original meaning of the term has resulted in the making of a distinction, on the part of some text writers and judges between a "denial" and a "defense" defining a denial as being strictly a traverse only of the complaint, and a defense as constituting only an averment of new matter in bar of the action.

Both the Florida and Federal Rules of Procedure also demonstrate that defense means more than affirmative defense.

Rule 1.110(f) R.C.P. provides:

> All averments of claim or defense shall be made in consecutively numbered paragraphs ... Each claim founded upon a separate transaction or occurrence and <u>each defense other than denials</u> shall be stated in a separate count or defense when a separation facilitates the clear presentation of the matters set forth. (Emphasis supplied)

The Federal counterpart of this rule is Rule 10(b) which provides:

> All averments of claim or defense shall be made in numbered paragraphs ... Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separate facilitates the clear presentation of the matters set forth. (Emphasis supplied)

If a defense was not a denial, there is no reason why our Rules of Civil Procedure and the Federal Rules would use the terminology ". . . each defense other than denials . . ."

In Gilbert v. Eli Lilly & Co., Inc., 56 FRD 116, USDC Puerto Rico, 1972), certain defendants raised an issue by affirmative defense and the court noted that the same issue had been raised in the answer by a general denial, stating at Page 123:

> What this Court cannot concede is that the jurisdictional issue should be raised by way of an affirmative defense. What the Court has before it is nothing more than a negative defense, one which controverts the plaintiff's claim in his prima facie case; that is, one which tends to disprove one or all of the elements of a complaint. An affirmative defense is properly concerned with the pleading of a matter not within the plaintiff's prima facie case, that is, pleading matter to avoid plaintiff's cause of action. (Citations omitted).

The Court stated on page 124:

> [21] While the affirmative defenses are governed by Rule 8(c) of the Federal Rules of Civil Procedure, Title 28, United States Code, the negative defenses are governed by Rule 8(b) of the same federal rules. The Court is of the opinion that it is a misnomer to speak of a defense, that is in substance a denial, as an affirmative defense. Whenever a denial is erroneously termed an affirmative defense it should, nevertheless, be treated for what it is, a negative defense. (Emphasis supplied)
>
> * * *
>
> Nevertheless, the defense of a lack of jurisdiction should remain as a part of co-defendants' responsive pleadings, but only as a defense and not an affirmative defense.

In Levine v. Behn, 25 N.E.2d 872 (N.Y. 1940), the court stated on page 873:

> The choice between these positions is not an easy one. The word "defense" is ambiguous. We find no authority holding that a general denial is not a defense.

In Mione Acres, Inc. v. Chatmas Orchards, 100 NYS 2d 963 (N.Y. App.Div. 1950), the court stated on page 965:

> In this connection the word "defense" embraces anything that would tend to defeat the Plaintiff's claim including even a general denial.

The insurer has cited no authority that a denial is not a type of defense. The insurer simply ignores the distinction between an "affirmative defense" and a "defense".

The first case cited by insurer on page 11, Accurate Metal Finishing Corp. v. Carmel, 254 So.2d 556 (Fla. 3d DCA 1971) does not, as insurer represents, hold that a denial does not constitute a defense. The case is not remotely on point. The other cases cited by insurer do not even merit discussion, because by insurer's own description, it is clear that they are not on point.

The Fourth District was also being kind to insurer when it used the term "general denial" in the certified question. Steckmar's answer specifically admitted or denied individual paragraphs of the complaint and, as in the case with this particular allegation, specific facts which consisted only of portions of sentences. With regard to this particular paragraph Steckmar admitted the existence of the public records, only denying that DeSantis was the owner and that DeSantis executed and delivered the note and mortgage.

Black's Law Dictionary, Revised 4th Edition, in defining denial states that a general denial puts in issue all allegations of the complaint while a specific denial applies to particular allegations. This was not, therefore, merely a general denial.

One of the amicus briefs cites Ferris v. Nichols, 245 So.2d 660 (Fla. 4th DCS 1971), however that case is also easily distinguishable. In that case suit was brought on a promissory note and the answer consisted of one sentence in which the defendant denied every allegation of the complaint. The court held that this was simply a general denial which had the legal effect of admitting that the defendant signed the note under the Uniform Commercial Code, which provides in Section 673.3-307(1):

> Unless specifically denied in the pleadings each signature on an instrument is admitted.
> . . .

Steckmar's denial in the present case is not a general denial. Steckmar answered each numbered paragraph of plaintiff's complaint separately, and for this particular paragraph Steckmar denied all allegations except the existence of the public records. Furthermore, even if Ferris was applicable, it would only be in regard to the signature on the promissory note, because the note would be the only negotiable instrument covered by the UCC. A mortgage is not a negotiable instrument. Oates v. New York Life Ins. Co., 178 So.570 (Fla. 1937). Moreover, provisions of the UCC only apply to signatures, not to the denial of the ownership of the property by the mortgagor or delivery of the mortgage.

Insurer, on page 8 in its summary of argument, says:

> The policy clearly does not provide coverage for any action that is not an attack on the priority or validity of the mortgage.

What the insurer refuses to recognize is that this denial was an attack on the validity of the mortgage.

Steckmar's denial of the ownership of the land by the mortgagor, and execution and delivery of the mortgage, required proof of those allegations in the foreclosure action. Had the insured not been able to prove them and been denied foreclosure of its mortgage, can there be any question but that the title insurance policy would have covered this loss? That is the very thing it was written for.

What position would the insurer take if the mortgagor, rather than Steckmar, denied execution of the mortgage? Would insurer still maintain that this denial was not a defense which went to the very validity of the mortgage? Of course not.

Insurer and amicus argue this will bankrupt the title insurance industry. First, there is nothing in the record in this case which says all title insurance policies use the term "defenses". Second, the use of this language only

requires the insured to defend the case. If the mortgage is shown to be valid, there will be no loss. Third, the courts of this state have never hesitated to construe an ambiguity in an insurance policy in favor of the insured simply because it might result in a construction of the policy which the insurer did not intend.

For example, in Hartnett v. Southern Insurance Company, 181 So.2d 524 (Fla. 1965), the appellate court held there was no theft coverage because the policy showed there was no premium paid for theft coverage. This Court reversed, since the terms of the policy were in conflict, stating on page 528:

> There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who reply upon the companies and agencies in such transactions.

The Fourth District correctly construed this policy.

CERTIFIED QUESTION

II.

> WAS THE CLAIM ASSERTED IN THIS CASE BY WAY OF A GENERAL DENIAL THAT THE INSURED MORTGAGE WAS EXECUTED BY THE FEE SIMPLE OWNER OF THE PROPERTY SUBJECT TO THE INSURED MORTGAGE LITIGATION FOUNDED UPON AN ALLEGED DEFECT, LIEN, ENCUMBRANCE, OR OTHER MATTER INSURED AGAINST BY THE POLICY IN QUESTION OBLIGATING THE INSURER TO PROVIDE A DEFENSE TO THE INSURED?

Again the insurer misstates the issue. Under this point insurer emphasizes that Steckmar's interest in this property arose after the effective date of the policy. What insurer refuses to acknowledge is that Steckmar was denying the validity of the mortgage, not necessarily claiming it had an interest superior to the mortgage. The opinion of the Fourth District in the present case is now reported at 463 So.2d 307, and the Fourth District stated on page 309:

> It appears to us the issue triggering coverage was Steckmar's attack on the validity of the mortgage. Steckmar denied that the owner of the property had executed the mortgage. If Fourth Commerce was unable to prevail on that issue, it could not successfully foreclose the mortgage. Whether Steckmar succeeded in defending against the foreclosure by defending against the allegations of paragraph 13 via a denial thereof, or by asserting in a separate affirmative defense that the owner had not executed the mortgage, is of no consequence. Whether the issue was created by a denial in answer or an affirmative defense in the answer, it was the insurer's obligation to litigate the issue.

With all due respect to Judge Letts, who dissented, his opinion suffers from the same deficiency. His reasoning rests on the faulty assumption that Steckmar's:

> ... affirmative defenses and his counterclaims are plainly not directed to the validity of the original mortgage or any lien or defects superior to it.

The facts are that Steckmar did deny the validity of the original mortgage and this denial, under our Rules of Civil Procedure, under the Federal Rules, under every case which has decided this issue, and according to all text-writers, constitutes a defense.

This policy had an effective date of January 3, 1979. Steckmar's contract was executed February 1, 1979, less than thirty days later, and paragraph 34 of Steckmar's affirmative defenses reads:

> STECKMAR agreed to purchase (lands involved in the FORECLOSURE SUIT) from LeCHALET, INC., by contracts on/or about February 1, 1979 ..... STECKMAR alleges that the Plaintiff's predecessor in interest, VIRGINIA NATIONAL BANK, and/or Defendant, LeCHALET INC., individually or in concert, misused certain documents to the detriment of STECKMAR and intentionally violated the intent of the agreement in their use of the documents. In addition, while inducing the representatives of STECKMAR to execute the aforesaid documents, VIRGINIA NATIONAL BANK and/or LeCHALET, INC., ... made material misrepresentations of fact and made assurances to STECKMAR intended to and in fact resulting in STECKMAR'S reliances upon the same to its severe detriment.

The above allegation does not specify when or specifically by whom the alleged misconduct occurred, and it could well have occurred more than the 28 days between the effective date of the policy and the execution of the contract. Steckmar also, in defenses 39, 40 and 41 alleged that the insured was barred from foreclosing the property because of certain specified equitable principles. (R 1, Exhibit 5)

The policy did obligate the insured to defend based on these pleadings.

CONCLUSION

The law is clear that a denial is a form of a defense. Even if the term is merely ambiguous the insurer loses. The major argument of insurer, amicus, and the dissenting opinion in the court below is that this will make title insurers defend cases which they did not anticipate they would have to defend. As the Fourth District recognized, they write these policies and it is up to them to describe the coverage they are undertaking. If they don't want this responsibility they can rewrite their policies in the

future. The certified questions should be answered in the positive and the opinion of the Fourth District approved.

J. A. PLISCO
2875 South Ocean Blvd.
Suite 213
Palm Beach, FL 33480
(305) 588-9610
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By _____
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 17th day of May, 1985, to:

ROBERT T. SCOTT
GUNSTER, YOAKLEY, CRISER,
& STEWART, P.A.
P. O. Box 71
Palm Beach, FL 33480

PETER GUARISCO
2003 Apalachee Parkway
Suite 101
Tallahassee, FL 32301

PAUL J. STICHLER
P. O. Box 2671
Orlando, FL 32802

_____
LARRY KLEIN