IN THE SUPREME COURT OF FLORIDA
CASE NO. 90,323

FILED
SID J. WHITE
APR 24 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

LEXINGTON INSURANCE COMPANY,

Petitioner,

vs.

SIMKINS INDUSTRIES, INC.,

Respondent.

JURISDICTIONAL BRIEF ON PETITION FOR DISCRETIONARY REVIEW

DANIEL S. PEARSON, ESQUIRE
HOLLAND & KNIGHT
Co-Counsel for Petitioner
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

HINDA KLEIN, ESQUIRE
CONROY, SIMBERG & GANON, P.A.
Co-counsel for Petitioner
3440 Hollywood Boulevard
Second Floor
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 8

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

CASES — PAGE

Camden Fire Ins. Ass'n v. Daylight Grocery Co., 12 so. 2d 768 (Fla. 1943) 8

Classic Concepts, v. Poland, 570 So. 2d 311 (Fla. 4th DCA), rev. denied, 581 So. 2d 163 (Fla. 1990) 4, 5, 6, 8

Ford Motor Cc. v. Kikis, 401 so. 2d 1341 (Fla. 1981) 6

Herring v. First Southern Ins. Co., 522 So. 2d 1066 (Fla. 1st DCA 1988). 8

Rinker Materials Corp. v. Citv of North Miami, 286 So. 2d 552 (Fla. 1973) 6

State Farm Fire & Cas. v. Deni Assoc., 678 So. 2d 397 (Fla. 4th DCA 1996) 7, 8

Sturgis v. Fortune Ins. Co., 475 So. 2d 1272 (Fla. 2d DCA 1985) 8

U.S. Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976) cert. denied, 345 So. 2d 426 (Fla. 1977) 7

STATUTES

Fla. Stat. 5627.422 5

STATEMENT OF THE CASE AND FACTS

In 1988 and 1989, SIMKINS INDUSTRIES, INC. loaned WAK Limited, Inc. $5.5 million to finance WAK'S ownership of the Monte Carlo hotel on Miami Beach. (A.2) In exchange for these loans, WAK executed promissory notes, mortgages and security agreements granting SIMKINS a security interest in the real property, as well as the personal property and insurance policies covering the property. (A.2) SIMKINS properly recorded these agreements. (A.2)

As part of the agreements, WAK agreed to keep the property properly insured, agreed to direct its insurers to make payments to SIMKINS in the event of a loss, and assigned all policies to SIMKINS. (A.2) WAK obtained a $2 million multi-peril policy with LEXINGTON which provided coverage for the building, personal property and business interruption in the event of, inter alia, a fire.[1] (A.2) SIMKINS was listed on the policy as a mortgagee, but not as an additional insured or loss payee. (A.2)

In October 1993, the hotel was damaged by a fire which, LEXINGTON contended, was caused by the insured and/or its agents. (A.2) LEXINGTON paid SIMKINS, as mortgagee, for the building damage. (A.2-3) SIMKINS, as WAK'S assignee, also claimed entitlement to personal property and business interruption damages, but LEXINGTON denied coverage not only because it contended that the fire had been caused by SIMKINS' assignor WAK, but on the further ground that under its policy insuring WAK, SIMKINS was not an additional insured or loss payee and

[1] The court's opinion incorrectly characterizes the policy as an "all-risk" policy. (A.2)

the assignment under which it claimed an interest in the policy was not binding on LEXINGTON because of the policy's "no assignment" clause. (A.3)

SIMKINS sued LEXINGTON. The suit sought the personal property and business interruption proceeds allegedly due SIMKINS under the policy by way of the assignment from WAK and language in their financing documents providing that SIMKINS was entitled to receive all insurance proceeds directly from the insurance company. (A.3) As defenses, LEXINGTON raised the insured's arson and criminal acts as well as the "no assignment" clauses in its policy which provided, "[a]ssignment of this policy shall not be valid except with the written consent of this Company," and "[the insured's] rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual insured." (A.3) Ultimately, summary judgment was entered for LEXINGTON and SIMKINS was denied the right to recover proceeds for personal property or business interruption. (A.3)

SIMKINS appealed this judgment to the District Court of Appeal, Third District. (A.1-6) In its decision reversing the trial court, the appellate court held that although the policy contained these "no assignment" clauses, the assignments at issue were not precluded or invalidated by them. (A.3-5) The Court reasoned that the assignment of the policy was part and parcel of the security for WAK's debt to SIMKINS. (A.4) It determined that these types of assignments are "outside the scope and purpose of general policy provisions against assignment without the insurer's consent." (A.4) The Court went on to opine that "the purpose of such nonassignability clauses is 'to prevent

an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer.'" (A.4-5) The Court concluded that "that purpose is not implicated by the assignment in this case" and accordingly, reversed the summary judgment in LEXINGTON'S favor. (A.5)

LEXINGTON unsuccessfully moved for Rehearing, Clarification and Rehearing En Banc.[2] (A.7-22, 32-33) LEXINGTON timely filed its Notice to Invoke this Court's jurisdiction and this jurisdictional brief follows. (A.30)

[2] The Florida Defense Lawyers' Association filed a Motion for Leave to Appear as Amicus Curiae on Rehearing. (A.23-29) That Motion was denied by the court. (A.33)

SUMMARY OF ARGUMENT

The District Court of Appeal's decision expressly and directly conflicts with decisions of other District Courts of Appeal as well as this Court in two ways. First, the appellate court's determination that the unambiguous "no assignment" clause contained in LEXINGTON'S policy was inapplicable because the reasons behind the clause were not implicated in this case clashes with the decision of the Fourth District in Classic Concepts, v. Poland, 570 So. 2d 311 (Fla. 4th DCA), rev. denied, 581 So. 2d 163 (Fla. 1990). In Classic Concents, the Fourth District held that a virtually identical clause was clear and unambiguous and must be enforced as written. The appellate court's refusal to do so in this case provides the Court with the express and direct conflict necessary to accept jurisdiction over this case.

Second, the Third District's refusal to enforce the "no assignment" clause as written conflicts with an entire line of cases decided by this court and other District Courts of Appeal which hold that where a contract provision is unambiguous, is not in contravention of any public policy or statute and is not unconscionable, it is enforceable as written without regard to whether the provision is thought by a court to be superfluous.

The appellate court's decision in this case has wide-reaching implications to contracts in general, and is not confined to insurance contracts. "No assignment" clauses are found in virtually every type of contract. If the courts are free to disregard them or any other clauses whenever they feel that the policy reasons behind them are not

implicated, contracting parties will be unable to rely on the terms of their contracts.

ARGUMENT

The Third District Court of Appeal's Decision in this case expressly and directly conflicts with the Fourth District's decision in Classic Concepts, Inc. v. Poland, 570 So. 2d 311 (Fla. 4th DCA), rev. denied, 581 So. 2d 163 (Fla. 1990) and with an entire line of cases holding that unambiguous contract provisions are to be enforced as written.

A.

The decision conflicts with the Fourth District Court of Appeal's decision in Classic concepts, Inc. v. Poland, 570 So. 2d 311 (Fla. 4th DCA), rev. denied, 581 so. 2d 163 (Fla. 1990). There, the Fourth District held that an almost identical "no assignment" clause clearly and unambiguously precluded the insured from assigning the policy without the insurer's permission.

Florida law provides that "[a] policy may be assignable, or not assignable, as provided by its terms." Fla. Stat. $627.422. Thus, the legislature has explicitly sanctioned the use of "no assignment" clauses in insurance policies. In the present case, the insurance policy clearly and unequivocably provides that "[a]ssignment of this policy shall not be valid except with the written consent of this Company." (A.3) The appellate court did not find this provision ambiguous or otherwise invalid, but nevertheless held it inapplicable to WAK's pre-loss assignment to SIMKINS of the LEXINGTON policy.

Although there is a dearth of Florida case law regarding assignments of insurance policies, the appellate court's decision in this case expressly and directly conflicts with a Fourth District

decision addressing an almost identical "no assignment" clause.' In Classic Concepts, Inc. v. Poland, 570 so. 2d 311, the Court held that the policy before it clearly and unequivocally prohibited assignment without the insurer's consent, and therefore, the insurer had no obligation to indemnify a purported assignee even though the assignment was otherwise valid. Id. at 313. Thus, on this basis alone, this Court has jurisdiction to consider the express and direct conflict between the Third and Fourth District Courts of Appeal on the issue of whether a clear and unambiguous "no assignment" clause should be enforced in accordance with its terms.

B.

This Court also has jurisdiction to consider this case because the appellate court obviously misapplied well-established decisional rules of contract construction. Cf. Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552 (Fla. 1973)(misapplication of established common law rules of statutory construction is a clear basis of conflict). See also, Ford Motor Co. v. Rikis, 401 So. 2d 1341 (Fla. 1981)(court's discussion of legal principles applied provided sufficient basis for the exercise of the Supreme Court's jurisdiction). It is well-established that:

> 'A court may resort to construction of a contract of insurance only when the language of the policy in its ordinary meaning is indefinite, ambiguous or equivocal. If the language employed in the policy is clear and unambiguous, there is no occasion for construction or the exercise of a

[3] In Classic Concepts, the policy provided, "[t]his cover note shall not be assigned either in whole or in part, without the written consent of the Broker endorsed hereon." Id. at 312.

> choice of interpretations. In the absence of ambiguity, waiver or estoppel, contravention of public policy or positive law, it is the function of the court to give effect to and enforce the contract as it is written . . . .'

State Farm Fire & Cas. v. Deni Assoc., 678 So. 2d 397 (Fla. 4th DCA 1996)(quoting U.S. Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976) cert. denied, 345 So. 2d 426 (Fla. 1977). In the present case, the appellate court found no ambiguity, waiver, estoppel, or violation of public policy or statutory law. Despite that, it chose to disregard the policy language, simply because it concluded that the purpose behind the "no assignment" clause, i.e., the prevention of an increase of risk, was not present in this case.[4]

Courts are precluded from hypothesizing as to the intent behind a given contract provision where that provision is clear and unambiguous on its face. See, Deni Assoc., 678 So. 2d 397 (courts are obliged to construe exclusionary clauses in insurance policies as written and may not read into a clear provision a meaning more fair or desirable to the insured). Where, as here, the appellate court ignores the language of the contract because it can not deduce its purpose in a given case, or because, in its view, the language does not accomplish a particular purpose, the appellate court thereby disregards established decisional law from virtually every jurisdiction, including the Supreme Court, which requires that an unambiguous contract be construed in accordance

---

[4] The court reached this conclusion without reference to the Record before it because there was no evidence in the record to sustain the Court's "finding" that LEXINGTON had no such concerns. Nor would it have mattered if there had been such evidence, in light of the clear and unambiguous prohibition against assignment.

with its plain language, and not the percieved undisclosed purpose of the parties. See, e.g., Deni Assoc., 678 So. 2d 397; Herring v. First Southern Ins. Co., 522 So. 2d 1066 (Fla. 1st DCA 1988); Sturgis v. Fortune Ins. Co., 475 So. 2d 1272 (Fla. 2d DCA 1985); Camden Fire Ins. Ass'n v. Davlisht Grocery Co., 12 So. 2d 768 (Fla. 1943).

The appellate court's cavalier rewriting of an unambiguous policy has serious consequences. While the contract in this case is an insurance policy, the appellate court's decision is in no way limited to insurance cases. "No assignment" clauses are common clauses in all contracts.[5] As such, the appellate court's decision is equally applicable in other contract scenarios. A contracting party has the right to rely on the terms of the agreement and a right to expect that clear and unambiguous terms will be enforced by the court as written. If the appellate courts are free to discard such provisions simply **because** they do not believe that the rationale behind the provisions applies in a given case, or because they find no rationale at all, business dealings and relationships established and defined by contracts of all types will disintegrate into chaos at the well-meaning hands of the courts.

CONCLUSION

It is respectfully submitted that this Court should accept jurisdiction to hear this case to reconcile the patent conflict between the Court's decision in this case and Classic Concepts, and the patent

[5] Indeed, SIMKINS' Mortgage and Security Agreement, found in the Record on Appeal, contains a clause prohibiting the Mortgagor from transferring, selling or assisning its interest in the property without the prior written consent of SIMKINS.

conflict between the court's decision in this case and the multitude of decisions defining the limits of a court's authority to construe a contract in a manner inconsistent with its plain and unambiguous language. The appellate court's opinion has the potential to foster patently irreconcilable case law governing contract assignments, and unless resolved, the existing conflicts will generate needless litigation in the future as this opinion becomes used to rewrite unambiguous terms to suit a court's view of what is or is not necessary to accomplish the perceived goals of the contracting parties, whether or not the court's perception of the parties' goals is correct. For these reasons, the Petitioner LEXINGTON INSURANCE COMPANY respectfully requests that this Court accept jurisdiction to resolve the conflict of decisions.

Respectfully submitted,

HOLLAND & KNIGHT
Co-counsel for Petitioner
701 Brickell Avenue
Miami, Florida 33131
(305)374-8500
BY: DANIELS. PEARSON, ESQUIRE
FLORIDA BAR NO. 062079

CONROY, SIMBERG & GANON,P.A.
Co-counsel for Petitioner
3440 Hollywood Boulevard
Second Floor
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

BY: 
HINDA KLEIN, ESQUIRE
FLORIDA BAR NO. 510815

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/~~hand-delivered~~ this 21st day of April 1997, to: PATRICIA M. SILVER, ESQUIRE, Silver & Waldman, P.A., 800 Brickell Avenue, Suite 902, Miami, Florida 33131; ALAN T. DIMOND, ESQUIRE, Greenberg, Traurig, Hoffman, Lippoff, Rosen & Quentel, P. A., 1221 Brickell Avenue, Miami, Florida 33131: and DANIEL S. PEARSON, ESQUIRE, Holland & Knight, P.O. Box 015441, Miami, Florida 33130.

HOLLAND & KNIGHT
Co-counsel for Petitioner
701 Brickell Avenue
Miami, Florida 33131
(305)374-8500
BY: DANIEL S. PEARSON, ESQUIRE
FLORIDA BAR NO. 062079

CONROY, SIMBERG & GANON,P.A.
Co-counsel for Petitioner
3440 Hollywood Boulevard
Second Floor
Hollywood, Florida 33021
(954) 961-1400 (Braward)
(305) 940-4821 (Dade)

BY: Hinda Klein
HINDA KLEIN, ESQUIRE
FLORIDA BAR NO. 510815