

IN THE COURT OF APPEALS OF IOWA

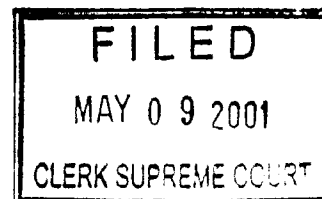
No. 1-111 / 00-694

Filed May 9, 2001

CONRAD BROTHERS,
Plaintiff-Appellee,

vs.

JOHN DEERE INSURANCE CO,
Defendant-Appellant.



Appeal from the Iowa District Court for Keokuk County, Dan F. Morrison
and Daniel P. Wilson, Judges.

The defendant insurer appeals from the district court's judgment for the
plaintiff on its claim for replacement coverage. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellant.

Mark McCormick of Belin Lamson McCormick Zumbach Flynn, P.C., Des
Moines, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

We must decide whether a mortgagee is entitled to insurance proceeds payable as a result of damage to the mortgagor's property. Like the district court, we answer "yes" to this question. Accordingly, we affirm.

I. Background Facts and Proceedings

R.L. Schott Implements, Inc. operated a John Deere dealership in Sigourney. Conrad Brothers Partnership held a mortgage on the property. The mortgage instrument required Schott to maintain insurance on the buildings. The instrument further provided Conrad Brothers could file a deed in lieu of foreclosure in the event Schott defaulted on its mortgage payments.¹ If a deed was filed, the mortgage instrument assigned Conrad Brothers the right to any insurance proceeds payable as a result of damage to the mortgaged property prior to the filing.²

Schott obtained an insurance policy from John Deere Insurance Company that provided coverage for damage due to wind. The policy was in the name of

¹ 20. Deed in Lieu of Foreclosure.

Contemporaneously with the execution of this Mortgage, Mortgagor agrees to place in escrow a deed to the real estate herein described which, in an Event of Default as herein defined, may be recorded by Mortgagee as complete satisfaction of this Mortgage and the Obligations secured thereby.

² 9. Insurance

c. Assignment of Policy. If the Mortgaged Property is sold at a foreclosure sale or if the Mortgagee shall acquire title to the Mortgaged Property by way of deed in lieu of foreclosure, Mortgagee shall have all of the right, title, and interest of Mortgagors in and to any proceeds thereof resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

Schott only. It afforded Schott actual cash value and replacement cost coverage.³

Within two months of obtaining this insurance, Schott closed the dealership. Shortly thereafter, the buildings that had comprised the dealership were damaged in a violent windstorm. Schott notified John Deere of the loss. Conrad Brothers also notified Deere of its interest in the property and of its intent to file a deed in lieu of foreclosure. Representatives of Conrad Brothers and Schott apprised John Deere that Conrad Brothers, not Schott, was entitled to the insurance proceeds. John Deere ultimately issued a joint check to Schott and Conrad Brothers for the actual cash value of the claim.

The claim for replacement cost coverage remained unresolved. Conrad Brothers notified John Deere it intended to replace the buildings at a different site than the location of the damaged buildings. John Deere refused to pay, contending that only Schott was entitled to the coverage and Schott had not complied with certain prerequisites set forth in the policy.

Conrad Brothers sued John Deere, seeking \$60,037.50 plus interest to cover the replacement cost of the damaged buildings. The district court granted its motion for summary judgment, concluding Conrad Brothers was entitled to replacement cost insurance proceeds. However, the court allowed the parties to present additional evidence in case it was later concluded the summary judgment ruling did not resolve all outstanding issues. Following trial, the court entered

³ Actual cash value coverage requires a deduction for depreciation which occurred prior to the loss. Replacement cost coverage, sometimes called "depreciation insurance," "pays for full replacement cost new of the insured property, without deduction for depreciation." *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 551, 553-4 (Iowa 1996).

judgment in favor of Conrad Brothers in the amount requested. John Deere appeals.

II. Standard of Review

As a preliminary matter, we must establish the proper standard of review. John Deere contends we must review the summary judgment ruling to determine if there is a genuine issue of material fact and if the district court correctly applied the law. See *Walls v. Jacob North Printing Co., Inc.*, 618 N.W.2d 282, 284 (Iowa 2000). Conrad Brothers argues our scope of review is for errors in the post-trial conclusions of law and contends we are bound by the court's fact findings if supported by substantial evidence. See *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 551, 553 (Iowa 1996).

The key facts are essentially undisputed. Therefore, under either standard, the only issue we must review is whether the district court committed an error of law in concluding Conrad Brothers was entitled to replacement cost coverage.

III. Conrad Brothers' Entitlement to Replacement Cost Coverage

John Deere maintains Conrad Brothers is not entitled to replacement cost coverage because: (1) the assignment clause contained in the mortgage was invalid or ineffective and (2) even if valid, Schott and Conrad Brothers did not satisfy certain policy prerequisites for obtaining such coverage. In addition to disputing these contentions, Conrad Brothers argues John Deere waived any defenses to its insurance claim when it paid the actual cash value proceeds. We elect to bypass this waiver argument and address John Deere's defenses.

A. Effect of Assignment. John Deere argues the assignment of insurance proceeds was invalid or ineffective because: (1) the filing of the deed in lieu of foreclosure extinguished the underlying debt and any insurable interest; (2) the assignment was obtained without John Deere's consent; and (3) pre-loss assignments of coverage are invalid.

1. Extinguishment of Debt. In support of its contention that the deed in lieu of foreclosure extinguished Conrad Brothers' debt, John Deere points to the policy language stating the deed served "as complete satisfaction of this Mortgage and all obligations secured thereby." However, this provision cannot be read in isolation. The mortgage instrument also provides:

If the Mortgaged Property is sold at a foreclosure sale or if the Mortgagee shall acquire title to the Mortgaged Property by way of deed in lieu of foreclosure, Mortgagee shall have all of the right, title, and interest of Mortgagors in and to any proceeds thereof resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

Conrad Brothers bargained for and received two things as consideration in the event of a default by Schott: (1) the right to file a deed in lieu of foreclosure; and (2) the right to receive insurance proceeds for prior damage to the property. See *Union Central Life Ins. Co. v. Bracewell*, 209 Iowa 802, 807, 229 N.W. 185, 188 (1930) (noting insurance loss was part of consideration paid for land). Neither alone was sufficient to fully compensate Conrad Brothers for its losses. See *Greenbush v. Farmer's Home Group*, 620 N.W.2d 721, 724 (Minn. Ct. App. 2000). The mortgage language authorizing Conrad Brothers to file a deed in lieu of foreclosure in "complete satisfaction" did not extinguish its right to the proceeds, but, instead, triggered that right under the assignment clause. To hold

otherwise would be to render the assignment clause in the mortgage instrument superfluous. See *A.Y. McDonald Industries, Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 625 (Iowa 1991).

Our conclusion finds support in *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799 (Iowa 1973). Faced with deciding a seller's interest under a real estate purchase contract, the court noted the interest was two-fold, measured by "the unpaid purchase price, reinforced by the buyer's obligation to keep the premises insured for the seller's benefit for not less than the unpaid balance of purchase price." *Kintzel*, 203 N.W.2d at 803. Equating the seller with a mortgagee, the court stated its interest in insurance proceeds "was a matter of equitable right, regardless of whether the policy was in express terms payable to the mortgagee or not." *Id.* at 804.

Here, Conrad Brothers had a legal right to the insurance proceeds by virtue of the assignment clause in the mortgage instrument. It also had an equitable right to the proceeds because the insurance was obtained for its benefit and protection.⁴

Cases appearing to hold otherwise are distinguishable. In *Farmers & Merchants Sav. Bank v. Farm Bureau Mut. Ins. Co.*, 405 N.W.2d 834 (Iowa 1987), the court held an assignee of a seller's interests in a real estate contract could not recover insurance proceeds after the seller forfeited the contract, as the forfeiture satisfied the debt owed to the seller. *Farmers & Merchants*, 405 N.W.2d at 838. The result turned on the principle that an assignee only acquires the rights of an assignor. *Id.*; accord *Boyce v. Farmers' Mut. Ins. Ass'n*, 209 Iowa

⁴ The mortgage required Schott to maintain insurance on the buildings, with the amount at least equal to the sum owed to Conrad Brothers.

11, 12, 227 N.W. 523, 524 (1929). As the assignment was executed after the seller forfeited the contract, the assignor had no interest it could transfer.

Similarly, in *Risken v. Clayman*, 398 N.W.2d 833 (Iowa 1987), the court held a seller who recovered the property through forfeiture extinguished the debtor's liability and, therefore, had no right to proceeds under an insurance policy obtained by the buyer. *Risken*, 398 N.W.2d at 838. The court noted the insurance proceeds were no longer necessary as security on the debt because, even in its damaged state, the property value exceeded its purchase price. That is not the case here. Although the debt was \$300,000, Conrad Brothers recovered only \$160,000 through the sale of the damaged property.

We conclude Conrad Brothers' filing of the deed in lieu of foreclosure did not extinguish its right to collect replacement cost proceeds from John Deere.

. . . **2. Insurer Consent.** The windstorm policy does not list Conrad Brothers as a loss payee. Conrad Brothers concedes this fact but points to precedent holding a mortgagee may recover under a mortgagor's policy even if not expressly named in the policy. See *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804 (Iowa 1973). John Deere disagrees, arguing it was required to consent to the assignment before the assignment became effective.

Kintzel disposes of this issue. Responding to the insurer's contention that an insurance policy is a personal contract "not assignable without its consent," the court stated:

After the loss was incurred, the issue became not an assignment of the policy, but the assignment of a chose in action--the right to compel defendant's payment of insurance proceeds in accord with that interest of the owner-vendor recognized in the policy and defined in the contract.

Kintzel, 203 N.W.2d at 804-5. The court held an assignee of the real estate contract had a right to the insurance proceeds "even without the other assigning language incorporated in the instrument." *Id.* at 806. Here, as in *Kintzel*, the assignment clause did not purport to assign the policy but the right to the insurance proceeds Schott might have as of the date the deed in lieu of foreclosure was filed. Therefore, John Deere's consent was unnecessary.

3. Pre-Assignment Clauses Void. John Deere next argues the assignment was effectuated before the loss, rendering it void. It is true Iowa precedent holds that an insured cannot assign a policy to a stranger before loss, without the consent of the insurer. See *Bartling v. German Mut. Lightning & Tornado Ins. Co.*, 154 Iowa 335, 342, 134 N.W. 864, 865 (1912) (sale without assignment of policy precludes former owner from recovering policy proceeds); *Davis v. Bremer County Farmers' Mut. Fire Ass'n*, 154 Iowa 326, 333, 134 N.W. 860, 863-4 (1912) (sale prior to fire damage extinguishes assignable interest under policy as to new owners). However, these cases turn on the absence of an insurable interest at the time the proceeds were sought. Here, in contrast, Schott was the mortgagor when the proceeds were assigned to Conrad Brothers and when the windstorm struck. Therefore, Schott had an insurable interest to assign.

We conclude the assignment of Schott's right to insurance proceeds under the terms of the mortgage was valid and effective.

B. Conditions Precedent to Receipt of Replacement Cost Coverage. John Deere argues in the alternative that, even if the assignment of proceeds to Conrad Brothers was valid, Schott did not comply with the policy's prerequisites

for obtaining replacement cost coverage. First, John Deere notes neither Schott nor Conrad Brothers replaced the damaged buildings before seeking replacement cost coverage, a prerequisite under the terms of the policy.⁵ Conrad Brothers responds it had no assurance from John Deere that replacement cost proceeds would be forthcoming, excusing the need for actual replacement. We agree with Conrad Brothers' position.

Generally, an insured is required to completely replace damaged property as a prerequisite to receipt of replacement cost proceeds. *Pierce v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d at 554; *Bosch v. Garcia*, 286 N.W.2d 26, 28 (Iowa 1979); *Cf. Kolls v. Aetna Cas. & Sur. Co.*, 503 F.2d 569, 571 (8th Cir. 1974) (noting insured spent less than agreed cash value of loss and, accordingly, could not recover replacement cost value). The purpose of this requirement is to prevent an insured from profiting from a loss. *Pierce*, 548 N.W.2d at 554. However, less than complete performance may be sufficient when the record reflects an intent on the part of the insured to replace the property. *Id.* at 557. In *Pierce*, the Iowa Supreme Court held an insured entitled to replacement cost coverage where the insured did not replace a damaged home but entered into an executory contract for the purchase of another home and filed the document with the county recorder. Similarly, in *Bailey v. Farmers Union Co-Op. Ins.*, 498

⁵ The policy states in pertinent part:

3. Replacement Cost

d. We will not pay on a replacement cost basis for any loss or damage:

- (1) Until the lost or damaged property is actually repaired or replaced; and
- (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

N.W.2d 591, 594 (Neb. Ct. App. 1992), our sister state excused the requirement of complete replacement where the insurer refused to assure the insured it would cover the cost of rebuilding her home.

Here, the district court found Conrad Brothers "ready, willing and able" to incur the costs of replacing the damaged property. John Deere does not dispute this finding or contend the evidence is insufficient to support it. Because John Deere disputed coverage, we conclude that Conrad Brothers was entitled to the replacement cost proceeds, despite the fact it had not actually replaced the buildings.

John Deere also contends Conrad Brothers should not receive replacement cost proceeds because it expressed an intent to replace the damaged property on a different site, an act which it contends is prohibited by the policy language.⁶ We disagree. The policy provision cited by John Deere begins by stating "we will not pay more for loss or damage on a replacement cost basis than" This language merely limits recovery to no more than the amount it would cost to replace the damaged property "on the same premises." It does not require the replacement facility to be on the same site as the damaged property.

⁶ The policy states in pertinent part:

3. Replacement Cost

e. We will not pay more for loss or damage on a replacement cost basis than the least of:

(1) The Limit of Insurance applicable to the lost or damaged property;

(2) The cost to replace, on the same premises, the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount you actually spend that is necessary to repair or replace the lost or damaged property.

John Deere cites a number of other conditions precedent it claims were not satisfied. We have either explicitly addressed those conditions in other portions of our opinion or find them unnecessary to resolve.

IV. DISPOSITION

We conclude Conrad Brothers is entitled to replacement cost coverage. Accordingly, we affirm the judgment as set forth in the district court's post-trial ruling.

AFFIRMED.