COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 93-3258

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MARTIN J. GREENBERG,

Plaintiff-Appellant-
Cross Respondent,

v.

STEWART TITLE GUARANTY COMPANY,

Defendant-Respondent-
Cross Appellant,

SOUTHEASTERN WISCONSIN TITLE COMPANY, INC., and THOMAS E. SWAN,

Defendants.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Judgment reversed and cause remanded; order affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Martin J. Greenberg has appealed from a judgment dismissing his breach of contract action against the respondent, Stewart Title Guaranty Company. The trial court granted summary judgment dismissing the action on the ground that Greenberg failed to provide prompt notice of his claim against Stewart. Stewart has cross-appealed from an order for judgment denying various other grounds for summary judgment raised in its motion.

We conclude that an issue of fact exists for trial as to whether Greenberg gave timely notice of his claim to Stewart and, if not, whether Stewart was prejudiced by the lack of timely notice. We therefore reverse the summary judgment dismissing the breach of contract claim and remand for further proceedings. We affirm the trial court's determination that summary judgment is unwarranted on the remaining grounds raised by Stewart.

This action arises from Greenberg's 1983 purchase of four condominium units which were covered by four title insurance policies issued by Stewart. In mid-1984, Greenberg retained two brokers to market the units. Greenberg's deposition testimony indicates that in the ensuing months he received exchange offers on the units, but that no offers closed because after the buyers and their representatives further investigated the proposed transactions, they discovered that Greenberg did not have marketable title to the units.

Greenberg did not succeed in selling the units, and three banks which held mortgages on them commenced foreclosure proceedings against him in the spring of 1985. On October 7, 1985, foreclosure judgments were entered against him by default. On October 4, 1985, three days before entry of the foreclosure judgments, Greenberg sent a letter to Stewart stating that he was making a claim against Stewart for $1,000,000—the total amount of insurance provided under the policies. He alleged in the letter that his title to the units was unmarketable and defective, that the units were not validly created condominiums and that the condominium documents failed to comply with the requirements of the Wisconsin Condominium Ownership Act in several respects, resulting in an adverse effect on his title to the units. He reiterated these claims in more detail in a follow-up letter dated October 25, 1985.

On February 24, 1986, after a sheriff's sale of the units, deficiency judgments were entered against Greenberg totaling $564,771. In August 1989, Greenberg filed this complaint against Stewart, claiming breach of contract based on the alleged unmarketability of the title to the units.[1]

The trial court awarded summary judgment on the ground that Greenberg failed to give prompt notice of claim to Stewart. The notice requirement was contained in paragraph 3(b) of the policies issued by Stewart and provides:

> The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy or, (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate...; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

The trial court granted summary judgment based on Greenberg's admission that by September 1984, he began receiving information from his

[1] The complaint also raised other claims which were dismissed in earlier proceedings in the trial court. Those dismissals were affirmed on appeal in ***Greenberg v. Stewart Title Guar. Co.***, 171 Wis.2d 485, 492 N.W.2d 147 (1992).

broker indicating that while offers were being received on the units, they were not proceeding to closing because potential buyers and their representatives were discovering title problems with the units. The trial court concluded that Greenberg's failure to give notice of any problems to Stewart until October 4, 1985, approximately thirteen months later, did not constitute prompt notification to Stewart as a matter of law. It held that under these circumstances, Stewart was prevented from investigating the claim early and promptly and from attempting to clear up the issue of unmarketability.

We reverse this determination on the ground that issues of material fact exist for trial as to whether notice was prompt and, if not, whether Stewart was prejudiced as a result of the delay. When reviewing a grant of summary judgment, we apply the same methodology as the trial court. *See* ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). When, as here, the pleadings set forth a claim for relief as well as a material issue of fact, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to discern whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.*** at 338, 294 N.W.2d at 477.

A requirement of "prompt" notice under an insurance policy is synonymous with requiring notice within a reasonable time. *See* ***RTE Corp. v. Maryland Casualty Co.***, 74 Wis.2d 614, 627, 247 N.W.2d 171, 178 (1976). Generally, the mere passage of time does not constitute noncompliance with a notice provision as a matter of law. ***Garcia v. Regent Ins. Co.***, 167 Wis.2d 287, 303, 481 N.W.2d 660, 667 (Ct. App. 1992). The circumstances of the particular case must be considered. ***Id.*** The determination is essentially one of fact. ***Ehlers v. Colonial Penn Ins. Co.***, 81 Wis.2d 64, 67, 259 N.W.2d 718, 720 (1977). However, it may also be decided as a matter of law if the court is able to say that: (1) there is no material issue of fact as to when notice was given and when the duty to give it arose, and (2) that no jury could reasonably find the delay to

have constituted only such time as was reasonably necessary under the circumstances. ***Garcia***, 167 Wis.2d at 303-04, 481 N.W.2d at 667.[2]

Here, it is undisputed that Greenberg believed there were some kind of title problems or issues by September 1984. However, whether the problems of which he was aware were of sufficient magnitude as to give rise to a duty to notify Stewart and when they rose to that level cannot be decided as a matter of law on this record. In addition, since the mere passage of time alone generally does not constitute noncompliance with a notice requirement as a matter of law, we conclude that Stewart failed to establish a right to summary judgment with such clarity as to leave no issue of timeliness for the fact finder. To hold otherwise would require us to determine that merely showing the passage of time from September 1984 to October 1985 prima facie established that the notice was untimely. We cannot make that determination, since the reasonableness of the delay depends also on the surrounding facts and circumstances, and Stewart has not provided a sufficient record concerning those circumstances to conclusively show that the delay was unreasonable.

We also conclude that a factual issue exists as to whether Stewart was prejudiced by Greenberg's failure to give notice of his claim sooner. The policies issued by Stewart expressly provided that failure to give prompt notice did not bar liability unless the delay prejudiced Stewart, and then only to the extent of the prejudice.

The preferred arbiter to resolve the issue of prejudice arising from untimely notice to an insurer is the trier of fact. ***City of Edgerton v. General Casualty Co.***, 172 Wis.2d 518, 556, 493 N.W.2d 768, 784 (Ct. App. 1992), *rev'd in part on other grounds,* 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 514 U.S. ___, 115 S. Ct. 1360 (1995), *and cert. denied*, 515 U.S. ___, 115 S. Ct. 2615 (1995). When controverted, the question of whether an insurer was prejudiced by an insured's failure to give timely notice is a question of fact. ***Id.*** The summary judgment methodology does not effortlessly embrace this issue since it is

[2] Generally, when the facts concerning an issue are undisputed, the construction of an insurance policy presents a question of law which may be decided on summary judgment. *See* ***Wisconsin Elec. Power Co. v. California Union Ins. Co.***, 142 Wis.2d 673, 677, 419 N.W.2d 255, 256 (Ct. App. 1987). However, when competing inferences may be drawn from the undisputed facts, an issue exists for trial.

difficult for a party to an untimely notice dispute to demonstrate a right to judgment with such clarity as to leave no room for controversy. ***Id.*** at 557, 493 N.W.2d at 784.

Stewart contends that a presumption of prejudice exists under § 631.81(1), STATS., because notice was given by Greenberg more than one year after it was required under the policy. It contends that based on the statutory presumption, it made a prima facie showing of prejudice which was unrebutted by Greenberg. Stewart also contends that it made a prima facie showing of actual prejudice because by failing to give notice until foreclosure judgments were about to be entered, Greenberg deprived Stewart of the opportunity to demonstrate the marketability of title to the units and to mitigate the loss to Greenberg and itself.

Section 631.81(1), STATS., addresses who wins when the totality of the evidence is inconclusive and is not concerned with tipping the scales as to prejudice in favor of either the insurer or the insured. ***Edgerton***, 172 Wis.2d at 558, 493 N.W.2d at 784. Moreover, as a burden-shifting statute, it has little utility on summary judgment where the moving party has the burden of going forward and a considerable burden of persuasion. ***Id.*** at 558, 493 N.W.2d at 785.

Whether summary judgment is appropriate on the issue of prejudice depends solely on whether material issues of fact exist, leaving for trial the application of any presumption and the risk of nonpersuasion. *See* ***id.*** Here, Stewart contends that actual prejudice is prima facie shown because it did not receive notice until the foreclosure judgments were being entered. However, Stewart has failed to show in the summary judgment record what it would have done differently if it had known of Greenberg's claim earlier. Greenberg's claim hinges upon whether title to the units was marketable, and Stewart's position is that title always was marketable. If that is the case, delay in giving notice would not have prejudiced Stewart since it would have had no impact on marketability. Since Stewart also has not shown that material evidence or information was lost as a result of the delay, no prima facie

showing of prejudice entitling it to summary judgment was made, and the issue remains one for the trier of fact.[3]

While we conclude that the trial court erroneously granted summary judgment on the notice of claim issue, we conclude that it properly denied summary judgment on the remaining grounds raised by Stewart. Stewart's first argument is that Greenberg is barred by principles of "issue preclusion" from claiming any actual loss in this case. Stewart cites cases applying principles of both res judicata and collateral estoppel.

The terms "res judicata" and "collateral estoppel" are distinct.[4] ***A.B.C.G. Enters. v. First Bank Southeast***, 184 Wis.2d 465, 473, 515 N.W.2d 904, 906-07 (1994). Issue preclusion, or collateral estoppel, limits relitigation of issues that have been litigated in former proceedings. ***Id.*** at 473, 515 N.W.2d at 907. Claim preclusion, or res judicata, limits relitigation of issues that were or might have been litigated in former proceedings. ***Id.***

For the first action to bar a second action under claim preclusion, there must be an identity of parties and an identity of causes of action or claims in the two cases. *See* ***DePratt v. West Bend Mut. Ins. Co.,*** 113 Wis.2d 306, 311, 334 N.W.2d 883, 885 (1983). Since there was no identity of parties between this action and the foreclosure proceedings, claim preclusion principles are inapplicable.

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[3] As an additional basis for upholding the trial court's grant of summary judgment, Stewart argues that the notice of claim was deficient because it did not provide sufficient information. This argument was not addressed by the trial court in granting summary judgment. Nevertheless, we reject it because the October 1985 letters clearly set forth Greenberg's claim that the titles were defective and unmarketable, resulting in an adverse effect on his interests. By demanding damages, the letters also indicated that Greenberg had been injured as a result of the alleged defects.

[4] The Wisconsin Supreme Court has decided to jettison the terms "res judicata" and "collateral estoppel": "The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel." ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995).

Whether issue preclusion applies is a question of law which we decide without deference to the trial court. ***Heggy v. Grutzner***, 156 Wis.2d 186, 192, 456 N.W.2d 845, 848 (Ct. App. 1990). Issue preclusion may be asserted defensively to prevent a party from relitigating an issue which was conclusively resolved against him or her in a prior case even if the party asserting preclusion was not a party to the prior case. ***Id.*** at 193, 456 N.W.2d at 848. Generally, the issue must be actually litigated in the prior action. ***Lindas v. Cady***, 183 Wis.2d 547, 559, 515 N.W.2d 458, 463 (1994). However, under some circumstances, issue preclusion may be applied to prevent the party against whom a default judgment was taken from relitigating the issues on which the default judgment was based. *See* ***Heggy***, 156 Wis.2d at 193, 456 N.W.2d at 848-49. An issue on which relitigation may be foreclosed may be one of evidentiary fact, ultimate fact or law. ***Id.*** at 195, 456 N.W.2d at 849. The issue must have been essential to the judgment. ***Id.***

In the trial court, Stewart argued that Greenberg should be barred from claiming that title to the units was unmarketable based on his failure to contest the foreclosures or to implead or notify Stewart of the foreclosure proceedings. In its cross-appeal, Stewart argues that Greenberg should be barred from claiming that he suffered an actual loss as a result of the foreclosures. Stewart contends that by permitting default judgments to be entered against him, Greenberg permitted findings to be made that he abandoned the units and that the units were sold for their fair market value at the sheriff's sale.

Issue preclusion does not apply here because the issues regarding marketability of title and loss were not actually litigated in the foreclosure actions and were not essential to the foreclosure judgments. In determining whether the banks were entitled to foreclose on the property mortgaged to them by Greenberg when Greenberg failed to timely repay loans made by them, the trial court was not required to determine whether title to the property was marketable.[5] Similarly, the issue of whether Greenberg suffered a loss as a result of Stewart's determination that valid title existed to the units was not litigated in the foreclosure proceedings, nor was resolution of that issue implicit

[5] While judgment in the foreclosure proceedings transferred Greenberg's title to the units to the mortgagee banks, this transfer did not necessitate or constitute a determination that title was without defect.

in the foreclosure judgments.[6] Since Stewart also cites no authority to support a claim that Greenberg was required to join it as a party to the foreclosure proceedings, summary judgment based on those proceedings was properly denied.

Stewart's next argument is that summary judgment was warranted because Greenberg failed to provide it with a written statement of loss or damage as required by the title insurance policies. The trial court rejected this argument on the ground that Greenberg notified Stewart of his alleged loss in his letters of October 4 and 25, 1985, which claimed that title to the units was unmarketable and demanded payment of the policy limits of $1,000,000.[7]

Greenberg's letters of October 4 and 25, 1985, clearly contend that title to his four units in the condominium project was defective and unmarketable, that the condominium was not properly created and that the documents creating the condominium failed to comply with state statutes. He further alleged that these defects were covered by the insurance policies issued by Stewart. Because he was demanding coverage for losses insured by the policies, Greenberg's demand for payment of the policy limits of $1,000,000 constituted a representation that he had suffered losses of $1,000,000 and satisfied the requirement that he provide a written statement of loss or damage.

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[6] Stewart contends that a finding that Greenberg abandoned the units was essential to the trial court's decision to set a shorter redemption period of two months in the foreclosure proceedings. However, even if Greenberg abandoned the units for purposes of contesting foreclosure, this does not preclude him from making a claim against Stewart under the title insurance policies if, in fact, the titles were not marketable.

Stewart also contends that by approving the sheriff's sale, the trial court implicitly found that the units were sold for their fair market value. Again, even if this is true, it does not resolve the issue of whether the value of the units was less because of defects in title to the units.

[7] The trial court concluded that an issue of fact existed as to whether Stewart received notice of loss in compliance with the terms of the policies. We agree with Stewart that the issue of whether the October 1985 letters constituted a statement of loss within the meaning of the policies is a question of law. *See* ***Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.***, 144 Wis.2d 68, 77, 423 N.W.2d 521, 524 (1988) (application of the terms of an insurance policy to established facts constitutes a question of law). While we therefore review that issue without deference to the trial court, *see* ***id.***, we reject Stewart's claim that the notice was insufficient.

A more exact statement of damages was not required since the foreclosure sale had not yet occurred and the amount of the loss therefore could not be specified more precisely.

Stewart also argues that summary judgment was warranted because Greenberg failed to demonstrate that he suffered a loss as a result of the alleged breach of contract. However, as previously discussed, a party moving for summary judgment has the burden of showing a prima facie right to judgment. To do so here, Stewart was required to show that Greenberg suffered no losses as a result of the alleged defects in title. It did not meet this burden. In addition, a factual issue concerning Greenberg's alleged losses arose from his testimony that offers on the units did not proceed to closing because prospective buyers discovered title problems and from the evidence that foreclosure occurred when he could not sell the units and make his loan payments.

Stewart's final argument is that Greenberg's claim is barred because having lost the units to foreclosure, he had no insurable interest in them when this action was commenced. Stewart relies on a provision in the policies which indicated that they continued in force so long as the insured retained an estate or interest in the land to which the policies applied.

Stewart's argument fails because Greenberg had an interest in the property at the time the alleged breach and loss occurred. Since the policies thus were in force at the time the alleged breach and loss occurred, Greenberg was entitled to commence this action for breach of contract.

Costs are not awarded to either party.

By the Court.—Judgment reversed and cause remanded; order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.