STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR COUNTY OF GRAND TRAVERSE

GENE DENMAN,
Plaintiff/Appellant,
V

File No. 91-8605-AV
PIONEER STATE MUTUAL INSURANCE COMPANY,
Defendant/appellee.
HON. PHILIP E. RODGERS, JR.

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DECISION AND ORDER

The matter before the Court is Plaintiff/Appellant's (Denman) appeal of a decision by the District Court granting Defendant/Appellee's (Pioneer) Motion for Summary Disposition, dismissing Denman's Complaint and awarding Pioneer $550.00 reimbursement pursuant to its counterclaim. See, Trial Court Decision attached to Denman's brief as Exhibit B.

The parties agree that Denman purchased eight aluminum dock sections in August of 1990. The dock sections were manufactured by the Allen Dock Company. Denman purchased the sections during a "going out of business sale" at the Grand Bay Boat and Sports Company, which sale was supervised by an agent of the Internal Revenue Service.

Following the purchase of these dock sections, Denman stored them at the former business place of Grand Bay Boat and Sports. Later, they were allegedly repossessed by Allen Dock Company pursuant to a security interest which it had in them. However, it is not disputed that at the time of repossession Denman reasonably believed that the building in which they had been stored had been broken into and the dock sections stolen.

Based upon Denman's report of theft, Pioneer initially paid $550.00 on the insurance claim. Thereafter, when it was learned that the dock sections had been repossessed by Allen Dock Company, Pioneer denied further coverage for the dock. The

litigation described above then ensued.

The trial court based its decision awarding summary disposition to Pioneer on a finding that the alleged repossession of the dock was not a "theft" within the meaning of the insurance policy. Denman alleges three errors arising out of this decision:

1) A specific intent to steal is not required to trigger theft coverage under the applicable insurance policy;

2) The theft portion of the policy was ambiguous and should be interpreted in favor of the insured to provide coverage; and

3) Genuine issues of material fact were presented by the parties' affidavits in support of their motion precluding an award of summary disposition.

It is the opinion of this Court that the undisputed facts of the case require Plaintiff to seek relief from Allen Dock Company to first determine whether its taking of the dock sections was wrongful. If it was not, Denman cannot call upon the theft portions of the insurance policy for reimbursement. Conversely, if the taking was indeed wrongful, then Plaintiff may have his relief from the Allen Dock Company.

In a civil dispute regarding title to personally, a claim on the theft provisions in a homeowners policy should not be made until the civil dispute regarding title is resolved. Theft insurance may provide coverage if Allen Dock Company's taking was wrongful and it is impecunious or otherwise incapable of making Plaintiff whole for a wrongful repossession.

For reasons that will be elaborated further ahead, it is this Court's opinion that neither the language of the policy, Michigan law, nor sound policy require that issues of title in repossession cases be litigated in the first instance with insurance carriers under the theft portions of home owners insurance policies. The decision of the trial court is affirmed.

There is no factual dispute regarding the allegation that Allen Dock Company has taken the disputed dock sections under the color of law. The parties agree that Allen Dock Company claims

to have a security interest in the dock sections and that security interest together with the financing statement are part of the District Court record.

On these facts, Denman would have Pioneer bring a third party action against Allen Dock Company and litigate the issue of title. If title were found to be properly with Denman, it would be paid under the terms of the policy and collection from Allen Dock would be pursued by the insurance carrier in accordance with its contractual subrogation rights. In support of this position, Denman directs the Court's attention to a decision of the Florida District Court of Appeal. St. Paul Fire and Marine v Pensacola Diagnostic Center, 505 Southern 2d, 513 (Fla App 1 Dist 1987)

While the St. Paul Fire and Marine case is clearly analagous to the issues on appeal here, this Court declines to follow it. In the absence of specific Michigan precedent addressing this issue, it does not appear to this Court that claims of title in repossession cases should be litigated in the first instance with insurance carriers under the theft provisions of home owners insurance policies. The issues raised are civil in nature and the costs for litigating them should appropriately be borne by the parties whose interests are directly affected. In this Court's view, this case is no more the appropriate subject of a theft claim than a hypothetical case wherein Plaintiff suspended payments on the purchase of a boat due to claimed breaches of warranty by seller and seller peacefully repossesses the boat in the middle of the night. Such claims raise contractual issues which should be resolved between the parties directly and not through the intermediary of their insurance carrier under the theft provisions of the home owners policy. The additional costs associated with defending such litigation do not appear to be appropriate economic costs to be borne by all purchasers of home owners insurance in this state.

In reviewing the allegations of error, it is this Court's conclusion that a specific intent to steal is not required to trigger the theft provisions of the policy. It is required, though, that the taking be wrongful. That is, there is no requirement that an intent to permanently deprive Plaintiff of his property be shown. Wetzel v Cadillac Mutual Insurance Company, 17 Mich App 57,60-61 (1969).

Although the trial court referred to theft in the context of stealing which requires felonious intent," the Court went on to note that Allen Dock Company acted under a "claim of right." While the trial court's determination overstates the requirement

of felonious intent, its determination in substance was correct.

Denman further alleges that he was a "buyer in the ordinary course of business." On the undisputed facts, this cannot be so. MCL 440.1201. It would not appear that Denman could ever satisfy the test of Section 1.201 of the Uniform Commerical Code when he is purchasing inventory in a "going out of business sale" supervised by the Internal Revenue Service.

Denman's claim to title may be based on MCL 440.9307(2), as a purchaser of consumer goods without notice of Allen Dock Company's secured interest. However, given this Court's ruling, title should be determined in direct litigation between Denman and Allen Dock and a finding of title was not necessary by the District Court.

While this Court agrees that the term "theft" should be given its ordinary meaning, it does not agree that the word stealing" is ambiguous. While the intent to deprive one of rightful possession need not be permanent, a wrongful taking certainly is a condition precedent to satisfy the requirement of "stealing" as it is used in the theft provision of the policy. It is this Court's obligation to determine whether an ambiguity existed in the policy, and this Court finds none. Jones v Farm Bureau Mutual Insurance, 172 Mich App 24 (1988); Powers v DAIIE, 427 Mich 602 (1986).

The final issues raised by Denman are the material factual questions surrounding title. This Court agrees that factual and legal questions remain to be determined. However, it is this Court's opinion that those are matters appropriately to be determined in litigation between Denman and Allen Dock Company.

This is not a case where the goods disappeared and the identity of the party removing them is unknown, or the reasons for their removal unrevealed. To the contrary, Allen Dock Company removed the disputed dock sections pursuant to its security interest and financing statement which it alleges create a superior right to possession. Denman's proper remedy is to litigate this issue with Allen Dock Company and not with it homeowners insurance carrier. As Pioneer states in its brief, in effect he (Plaintiff/Appellant) is asking the Court to hold that the policy insures against bad title."

For the reasons discussed above, this Court finds that the complaint against Pioneer was properly dismissed and Pioneer was correctly reimbursed. The decision of the trial court is affirmed

and Plaintiff/Appellant's appeal dismissed. Costs and fees are awarded to Defendant/Appellee.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 5/4/91