STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HONOR STATE BANK,

Plaintiff,

vs

File No. 90-7855-CK
HON. PHILIP E. RODGERS, JR.

WEST AMERICAN INSURANCE COMPANY,
a division of Ohio Casualty Group,

Defendant.
/

George W. Beeby (P10620)
Attorney for Plaintiff

James I. Sullivan (P25330)
Attorney for Defendant
/

DECISION AND ORDER

Defendant originally submitted a Motion for Summary Disposition pursuant to MCR 2.116 (C)(8) and (10). Subsequently, the parties stipulated to waive their right to a jury trial. They further agreed that the Court may resolve any factual issues necessary to render a decision on the merits.

The first issue before the Court is whether Plaintiff had implemented a procedure which allowed it to identify uninsured property which served as collateral for bank loans and then secure the requisite hazard insurance on property so identified. If so, the Court is then asked to determine whether the failure to follow the procedure in this case constituted an "error or omission" compensable under Defendant's policy of insurance.

The Court has reviewed the briefs, motions, depositions and other documentary evidence submitted by the parties. The Court will now provide its findings of fact and conclusions of law. MCR 2.517.

The Plaintiff's complaint arises out of an October, 1987 mortgage loan made to the Mortensons by the Honor State Bank. The Mortensons failed to keep hazard insurance in place, and the

Plaintiff received a copy of a cancellation notice on April 18, 1988. The effective cancellation date was April 27, 1988. The premium was not paid, and the property was destroyed by fire on November 17, 1988.

While insurance policies are construed as contracts and liberally in favor of finding coverage, certain duties and obligations are imposed on both parties to the insurance contract. Home Federal Savings & Loan Assoc of Chicago v Republic Insurance Co, 405 F2d 18 (7th Cir 1968). The rules of construction which pertain to insurance policies were set forth by the Michigan Supreme Court in Fresard v Michigan Millers Mutual Insurance Co, 414 Mich 686, 694 (1982). There, the Court wrote as follows:

> "When examining the language of this or any other insurance policy, we are mindful of several other principles of construction so rudimentary as to be axiomatic:
>
> The contract should be viewed as a whole.
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> The intent of the parties should be given effect.
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> An interpretation of the contract which would render it unreasonable should be avoided.
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> Ambiguities should not be forced.
>
> Conflicts among clauses should be harmonized.
>
> The contract should be viewed from the standpoint of the insured.
>
> The insurer should bear the burden of proving an absence of coverage." Id. 694.

Recognizing these principles of construction, the Court reviewed those factual issues which bear upon the question of ambiguity as that term was discussed in Fresard. The import of "ambiguity" in the interpretation of insurance contracts also was discussed by the Michigan Supreme Court in Raska v Farm Bureau Insurance Co, 412 Mich 355 (1982). There, the Raska Court wrote as follows:

> "The only pertinent question, therefore is whether the exclusionary clause in this contract is ambiguous, for it if is not ambiguous we are constrained to enforce it. A contract is said to be ambiguous when its words may be reasonably understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances, and under another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against its drafter and in favor of coverage. Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." Id. 362. See, also, Allor v Dubay, 317 Mich 281 (1947).

No ambiguity was found in the Court's review of the relevant insurance policy.

Under Paragraph A, Section 3, Mortgage Holder's Liability, Defendant is liable to Plaintiff for a covered loss due to an error or accidental omission in implementing Plaintiff's customary procedure concerning hazard insurance coverage. Plaintiff has a duty under Paragraph G, Section 12(a) to require, procure and maintain valid insurance coverage on the mortgage interest property. A loss cannot be paid unless all the coverage terms have been satisfied. Paragraph G, Section 7(a). However, Plaintiff had no procedure in place to meet its Section 12(a) duty. As a result of this failure, Plaintiff is denied relief on the insurance contract due to the application of those provisions found in Paragraph G, Sections 5, Legal Action Against Us, and 7, Loss Payments. The failure to have a customary procedure to "require , procure and maintain" valid insurance together with the failure to "make every reasonable effort" to effect coverage must result in the loss of any contractual right for payment under the Policy and a loss of the concomitant right to bring legal action.

Here, Plaintiff failed to require the Mortensons to provide proof of the requisite homeowners insurance at the time of closing in 1987. Nor did Plaintiff require the Mortensons to pay one-twelfth of the yearly installments for hazard insurance as required in the mortgage document. The next year, Honor State Bank became

aware of the policy cancellation nine days before its effective date and six months prior to the fire. Yet, Plaintiff took no affirmative action to secure the insurance coverage. The letter sent to the Mortensons by Mr. Yeager (Exhibit D) indicates that Plaintiff was fully aware that the homeowner's insurance policy was canceled for lack of payment. The only attempt by Plaintiff to secure insurance was the single correspondence sent by Mr. Yeager twenty days after the hazard insurance was canceled and several telephone calls to the Mortensons. (Yeager transcript pp 40 line 11 to 17). Plaintiff did not itself secure the insurance upon notice of cancellation and add that cost to the amount financed as the loan agreement allowed.

Plaintiff's response to the cancellation notice went beyond a simple error or accidental omission and evidenced a studied indifference to the absence of insurance coverage. From the inception of the mortgage loan until the loss by fire, Plaintiff failed to secure insurance coverage for the collateral despite numerous opportunities to do so and despite its legal right and obligation to do so.

Plaintiff did have a duty under the rule of avoidable consequences to acquire the hazard insurance. Seaman v Rindge Etc Co, 195 Mich 417, 428; 161 NW 919 (1917). This rule is also applied in, Harrington-Wiard Co v Blomstrom Manufacturing Co, 166 Mich 276, 290; 131 NW 559 (1911).

> "The doctrine is well settled that, when there has been a breach of contract, the injured party must do all in his power to diminish the damages suffered, or which he may suffer. If he has an opportunity to protect himself from loss and does not do so, he cannot be heard thereafter to complain." 13 Cyc. p. 72; Chandler v Allison, 10 Mich 460; Hopkins v Sanford, 41 Mich 243 (2 NW 39); Dennis v Huyck, 48 Mich 620 (12 NW 878, 42 Am Rep 479); Talley v Courter, 93 Mich 473 (53 NW 621); Tradesman Co v Manufacturing Co, 147 Mich 702 (111 NW 708). See also Sauer v Marshall Construction Co, 179 Mich 618, 629; 146 NW 422 (1911).

Plaintiff allowed six months to elapse after receiving notice of cancellation without paying the premium or replacing the

coverage. This failure to act is more than the "slip-up" described by the Court in Home Federal Savings. One-half year was more than adequate time to protect the interest held by the Plaintiff bank. Plaintiff did not make reasonable efforts to secure hazard insurance on the property. Plaintiff did not "do all within his power to diminish the damages suffered." Harrington-Wiard, at 290. Plaintiff had an opportunity to protect itself from the loss and failed to do so. Plaintiff "cannot be heard thereafter to complain." Id. 290. Were this Court to hold otherwise, an insured would be free to ignore the errors of its employees, of which it has actual notice, and circumvent its obligation to avoid losses through the exercise of due diligence. The insurance policy at issue here was never intended to compensate an insured for such a loss.

Plaintiff has not complied with the terms of the Policy and the loss here was not incurred by an error or omission in the enforcement of a customary procedure to ensure that hazard insurance premiums were paid on mortgaged property either by the bank or the property owner. The failure to have such a procedure in place is not itself a compensable error or omission in view of both the duties imposed by Paragraph A, Section 1, and Paragraph G, Section 12(a) and the definitions found within the Policy at Paragraph H.

For the foregoing reasons, judgment shall be entered for Defendant and Plaintiff's complaint is dismissed with prejudice. A judgment consistent with the terms of this Decision and Order shall be submitted in accordance with the provisions of MCR 2.602 within the next fourteen days.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/11/92