

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60720
Summary Calendar

JUDY FRENCH,

Plaintiff-Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its Corporate Capacity in Liquidation
of First National Bank of Corpus Christi, ET AL.,

Defendants,

STEWART TITLE, CORPUS CHRISTI DIVISION,
and NEEL FULGHUM, III,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(C A C-93-314)

(May 1, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

In July 1989, Judy and Brian French entered into a contract with Villarreal and Villarreal, Inc. d/b/a Royal Homes of Corpus Christi, Texas ("Royal Homes") to purchase a house under construction. The Frenches moved into the unfinished home in March 1990. Subsequently, Royal Homes defaulted on payments to various suppliers and subcontractors who had provided materials and labor for the construction of the house. Materialmen's and mechanic's liens ("M&M liens") totalling \$25,000 were filed against the property. Royal Homes also defaulted on its interim financing which had been provided by First National Bank - Corpus Christi ("First National Bank"), and the bank foreclosed and acquired title to the property on April 3, 1990.

On May 14, the Frenches entered into a residential earnest money contract with First National Bank, and \$2,600 in earnest money was escrowed with Stewart Title Company ("Stewart Title"). The Frenches arranged for financing through Victoria Mortgage Corporation ("Victoria Mortgage"). As a condition of the financing, Victoria Mortgage required a mortgagee's policy of title insurance and a 10-year home warranty. Stewart Title Guaranty Company, the underwriter for the policy of title insurance, issued a commitment for title insurance. Schedule C of the title commitment listed the various M&M liens against the house. First National Bank was to provide the 10-year warranty and an "Agreement of Indemnity" to indemnify Stewart Title for any losses associated with the M&M liens in Schedule C.

On August 7, the Frenches and First National Bank signed the documentation which had been forwarded from Victoria Mortgage, and the documents were escrowed pending funding by Victoria Mortgage. First National Bank also provided an "Agreement of Indemnity," which was signed by a representative of First National Bank but was not approved by Neel Fulghum, III, President of Stewart Title. After the documentation was signed and escrowed, but before Victoria Mortgage provided the funds, Victoria Mortgage informed Stewart Title that Victoria Mortgage had incorrectly prepared certain documents and that the papers would have to be re-executed.

On August 9, before the new paperwork was completed, First National Bank was declared insolvent by the comptroller of the currency, and the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver. The FDIC as receiver informed Stewart Title that the FDIC had assumed the rights under the contracts in the transaction and that all contracts entered into by First National Bank in the transaction had been repudiated. Because the FDIC refused to provide the 10-year home warranty insurance policy and the agreement of indemnity, Stewart Title was unable to issue the mortgagee's title policy. The Frenches continued to live in the house, but the parties never concluded the sale.

In September 1991, Brian French was diagnosed with kidney cancer. Because Stewart Title had never issued a title policy, the Frenches were not able to close on the house or obtain mortgage life insurance. Brian French died in June 1993.

On August 2, 1993, Judy French filed a complaint against the FDIC, Stewart Title, and Fulghum, alleging that the defendants (1) failed to abide by the enforceable contracts to sell the house and to provide title insurance; (2) violated the Texas Deceptive Trade Practices Act ("DTPA") and Chapter 9 of the Texas Insurance Code; and (3) were negligent in regard to the issuance of the title policy insuring against the M&M liens. The parties consented to trial by magistrate judge. Subsequently, Judy French settled with the FDIC and moved to dismiss with prejudice the claims against the FDIC. The magistrate judge granted the motion.

Stewart Title and Fulghum filed a motion for summary judgment arguing (1) that the DTPA and negligence claims were barred by the two-year statute of limitations; (2) that Stewart Title had not breached the contract or, alternatively, that nonperformance was justified; and (3) that Fulghum was never involved in the transaction in his individual capacity and, therefore, could not be held individually liable. Judy French filed a motion for partial summary judgment on the issues that First National Bank and Stewart Title had a valid indemnity agreement and that Stewart Title breached that agreement by failing to issue the title insurance. Following a hearing, the magistrate judge granted the defendants' motion for summary judgment and denied as moot Judy French's partial motion for summary judgment.

OPINION

This court reviews the district court's granting of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212

(5th Cir. 1990). The party moving for summary judgment must "demonstrate the absence of a genuine issue of material fact but need not negate one of the elements of the nonmovant's case." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (internal quotations and citation omitted). If the movant fails to meet this burden, the motion should be denied regardless of the nonmovant's response. Id. If the movant meets this burden, the nonmovant must go beyond the pleadings to designate specific facts to show a genuine issue for trial. Id. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted. Id. at 1076.

Statute of Limitations

French argues that the district court improperly dismissed her DTPA and negligence claims as barred by the applicable statute of limitations. The statute of limitations for the DTPA and negligence claims is two years. See TEX. BUS. & COM. CODE ANN. § 17.565 (West 1987) (DTPA claim); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 1986) (negligence claim). Generally, the cause of action accrues when a wrongful act effects an injury, regardless of when the plaintiff learns of the injury. Foreman v. Pettit Unlimited, Inc., 886 S.W.2d 409, 411 (Tex. App. -- Houston [1st Dist.] 1994).

By the terms of the commitment for title insurance, all liability and obligations under the contract ceased 90 days after the effective date of the commitment. The effective date of the commitment was 5 p.m. on July 24, 1990, and 90 days from that date

was October 22, 1990. Therefore, French's cause of action accrued on October 22, 1990, the date upon which it became known that Stewart Title would not issue title insurance as promised in the commitment of title insurance. Because French did not file suit until August 2, 1993, more than two years after the cause of action accrued, her DTPA and negligence claims are barred by the applicable statute of limitations.

French argues, however, that the cause of action accrued in September 1991 when Brian French was diagnosed with cancer and the Frenches were unable to obtain mortgage life insurance because Stewart Title had failed to issue the title insurance. Although the Frenches apparently did not attempt to purchase mortgage life insurance until after Brian French was diagnosed with cancer in 1991, any legal injury occurred no later than October 22, 1990, when Stewart title refused to provide title insurance. As of October 22, 1990, the Frenches were unable to purchase the mortgage life insurance, and it is legally irrelevant that they did not need the insurance until Brian French was diagnosed in September 1991. The district court properly entered summary judgment for the defendants on the DTPA and negligence claims.

Contract Claims

French also argues that Stewart Title and Fulghum breached the contract because the Frenches performed fully under the contract and Stewart Title failed to issue the title insurance. Stewart

Title and Fulghum argue, however, that they were not required to issue the title insurance because the FDIC repudiated First National Bank's agreement of indemnity.

A condition precedent is an event which must happen or be performed before a right can accrue to enforce an obligation. Shaw v. Kennedy, LTD., 879 S.W.2d 240, 246 (Tex. App. -- Amarillo 1994). The breach of a condition precedent affects the enforceability of the provision to which the condition attaches. City of Alamo v. Garcia, 878 S.W.2d 664, 665 (Tex. App. -- Corpus Christi 1994). A provision in a contract creates a condition precedent in the absence of anything in the contract to show that such was not the intent of the parties. Shaw, 879 S.W.2d at 246. Although no particular wording is necessary to create a condition precedent, Garcia, 878 S.W.2d at 665, the use of terms like "provided that," "if," or "subject to" usually indicate that a promise is not to be performed except upon a condition or the happening of an event. Shaw, 879 S.W.2d at 246.

On August 7, 1990, First National Bank signed the agreement of indemnity in which it agreed to indemnify Stewart Title for any potential losses associated with the M&M liens in exchange for Stewart Title issuing title insurance. The agreement specifically noted that Stewart Title would not issue the policy of insurance without the agreement of indemnity. Although the representative of First National Bank signed the agreement, Fulghum, as president of Stewart Title, did not approve the agreement.

Subsequently, and before closing was completed and Stewart

Title issued the policy of title insurance, the FDIC repudiated the agreement. When the FDIC is appointed receiver of a failed bank, the FDIC may repudiate any contract to which the failed bank was a party. See 12 U.S.C. § 1821(e)(1). Because the FDIC repudiated the agreement that was a condition precedent to Stewart Title issuing the insurance policy, Stewart Title was not required to issue the policy. The district court properly granted summary judgment for the defendants.

AFFIRMED.