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IN THE
COURT OF APPEALS OF INDIANA

Mary M. Flannagan,

Appellant,

v.

Lakeview Loan Servicing, LLC, City of Indianapolis Department of Business & Neighborhood Services, and State of Indiana,

Appellees.

February 23, 2022

Court of Appeals Case No. 21A-MF-2043

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge

Trial Court Cause Nos. 49D06-1807-MF-28743 49D06-1812-PL-48144

Brown, Judge.

[1] Mary M. Flannagan appeals the trial court's order denying her motion for partial summary judgment and granting a cross-motion for partial summary judgment filed by Lakeview Loan Servicing, LLC ("Lakeview"). We affirm.

Facts and Procedural History

[2] Flannagan owned certain property in Indianapolis. In return for a loan of $76,892, Flannagan executed a promissory note, dated October 4, 2010, in favor of Embrace Home Loans, Inc. Flannagan also executed a mortgage (the "Mortgage") which granted a security interest in the property to Mortgage Electronic Registration Systems, Inc. ("MERS") "solely as nominee for Lender . . . and Lender's successors and assigns . . . as mortgagee" and "to the successor and assigns to MERS." Appellant's Appendix Volume II at 39-40. The Mortgage required insurance against certain losses and provided:

> Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires . . . . All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.
>
> In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower, and to Lender jointly. *All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument* first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, *or (b) to the restoration or repair of the damaged Property.* Any application of the proceeds to the principal shall not extend or postpone the due date of the

> monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

Id. at 42 (emphases added).

[3] In February 2017, a fire destroyed the house on Flannagan's property. Flannagan's insurance policy (the "Policy") with State Farm Casualty Insurance Company ("State Farm") stated, concerning loss payments, "[w]e will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment." Appellant's Appendix Volume III at 95. The Policy also provided:

> a. If a mortgagee is named in this policy, any loss payable under Coverage A shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order of precedence of the mortgages.
>
> b. If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:
>
> > (1) notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
> >
> > (2) pays on demand any premium due under this policy, if you have not paid the premium; and
> >
> > (3) submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so.

Id. The Policy noted that, for dwellings, State Farm would "pay the cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under Section I - Coverages, Coverage A - Dwelling . . . ." *Id.* at 92.

[4] Flannagan engaged Tate Bowen Daugherty Funk Spandau LLC ("Tate & Bowen") to represent her on June 29, 2017. On September 5, 2017, the servicing of the Mortgage was transferred to a new servicer, LoanCare, LLC ("LoanCare"), on behalf of Lakeview. In July 2018, MERS assigned the Security Instrument to Lakeview. On October 5, 2018, State Farm issued two settlement checks totaling $74,373.23 ("Hazard Insurance Proceeds") which were jointly payable to Flannagan, Tate & Bowen, and LoanCare.

[5] Meanwhile, on July 20, 2018, Lakeview instituted foreclosure proceedings against Flannagan. On December 4, 2018, Flannagan filed a complaint for declaratory judgment, seeking a declaration that Lakeview and LoanCare did not "have an interest in the [Hazard Insurance Proceeds], specifically allocated for Plaintiff's attorney fees, and/or for a declaration from the Court as to the extent of [Lakeview and LoanCare's] interest in the [Hazard Insurance Proceeds]." Appellant's Appendix Volume II at 62. On April 24, 2019, the trial court consolidated the foreclosure action and the action for declaratory relief. On April 8, 2020, Flannagan filed a motion for partial summary judgment against Lakeview "on the issue of the amount of money that should be paid to Tate & Bowen from the money paid by State Farm for the fire claim," and on August 5, 2020, Lakeview filed an objection to Flannagan's motion and a cross-motion for partial summary judgment requesting judgment against Flannagan in the amount of $102,119.17 and an order declaring that LoanCare was entitled to all insurance proceeds issued by State Farm until the judgment was satisfied in full. *Id.* at 72.

[6] On November 16, 2020, the court denied Flanagan's motion and granted Lakeview's cross-motion. The court entered judgment against Flannagan in the amount of $97,665.37, plus costs and interest, and ordered that LoanCare, "as attorney-in-fact and loan servicer for Lakeview[,] [was] entitled to all Insurance Proceeds issued by State Farm." *Id.* at 26.

[7] On January 12, 2021, State Farm deposited the settlement funds with the clerk of the court, and on January 26, 2021, the court ordered the settlement amount of $74,373.23 delivered to counsel for Lakeview. The court later entered an order stating its ruling on the parties' motions for partial summary judgment was a final and appealable order.

Discussion

[8] We review an order for summary judgment de novo, applying the same standard as the trial court.[1] *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* We construe

[1] Lakeview claims this appeal is moot because the Hazard Insurance Proceeds have been released to it, Flannagan did not seek a stay, and Lakeview has already deposited the funds. Although the Hazard Insurance Proceeds have been distributed, this Court is able to address the issues raised by Flannagan. *See Duran v. Duran*, 585 N.E.2d 1373, 1375 (Ind. Ct. App. 1992) (holding that the failure to seek a stay of execution and the resultant distribution of an IRA, the subject of the lawsuit, did not render the appeal moot).

all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* Our review of a summary judgment motion is limited to those materials designated to the trial court. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). In reviewing a trial court's ruling on a motion for summary judgment, we may affirm on any grounds supported by the Indiana Trial Rule 56 materials. *Catt v. Bd. of Comm'rs of Knox Cty.*, 779 N.E.2d 1, 3 (Ind. 2002). The fact that the parties have filed cross-motions for summary judgment does not alter our standard of review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 677 (Ind. 2015). Matters involving disputed insurance policy terms present legal questions and are particularly apt for summary judgment. *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 629 (Ind. 2018), *reh'g denied*.

A. *Mortgage Provisions*

[9] Flannagan asserts the Mortgage does not control the distribution of the entire amount paid pursuant to the Policy because the term "insurance proceeds" is not defined in the Mortgage or Policy, and she claims that the term refers to the Hazard Insurance Proceeds less the cost of her attorney fees. She also argues that Lakeview's status as a loss payee does not confer upon it a superior claim to the insurance proceeds.

[10] "Generally speaking, a mortgage agreement is a contract, and as such, the mortgagor and mortgagee are free to enter into an agreement concerning the disposition or application of insurance proceeds in the event of a loss." *Pearson v. First Nat. Bank of Martinsville*, 408 N.E.2d 166, 169 (Ind. Ct. App. 1980). "Where a mortgage or insurance policy provides for insurance proceeds to be paid to the mortgagee 'as its interest appears', the mortgagee is entitled to the insurance proceeds to the extent of the mortgage debt." *Loving v. Ponderosa Systems, Inc.*, 444 N.E.2d 896, 906 (Ind. Ct. App. 1983), *vacated on other grounds*, 479 N.E.2d 531 (Ind. 1985); *First Federal Sav. and Loan Ass'n of Gary v. Stone*, 467 N.E.2d 1226, 1233 (Ind. Ct. App. 1984). Regarding the mortgagee's interest:

> The analysis underlying this position posits the mortgagee's interest as one in the indebtedness, not in the property, and also finds that under such standard, or union, mortgage clause the mortgagee has entered into a separate agreement with the insurer. Therefore, the mortgagee is not subject to any defenses which the insurer might have against the mortgagor . . . and is entitled to the insurance funds no matter what the mortgagor has done.

Loving, 444 N.E.2d at 906. "It is well established that the rights of the mortgagee to the insurance proceeds are determined as of the time of the loss." *Fifth Third Bank v. Ind. Ins. Co.*, 771 N.E.2d 1218, 1223 (Ind. Ct. App. 2002) (quoting *Loving*, 444 N.E.2d at 906). "Even if [mortgagors] are not held responsible for the terms of the insurance policy, they are responsible for the clear provision of the mortgage agreement." *Id.* at 1233. "When interpreting the mortgage agreement we are bound to give effect to the plain meaning of the language of the mortgage." *Id.* at 1233-1234. "It is not within the province of a

court to make a new contract for the parties or to ignore or eliminate provisions of the instrument." *Id.* at 1234.

[11] The plain language of the Mortgage does not support Flannagan's interpretation of the phrase "insurance proceeds." Flannagan claims that "proceeds" refers to "the net amount received (as for a check or from an insurance settlement) after deduction of any discount or charges" and points to Merriam-Webster's definition.[2] Appellant's Brief at 24. In a section of the Mortgage titled "Fire, Flood, and Other Hazard Insurances," the Mortgage addresses losses which result from "hazards, casualties, and contingencies, including fire," and provides that, upon a loss, the insurance company "is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly." Appellant's Appendix Volume III at 33. The next sentence states: "All or any part of the insurance proceeds may be applied by the lender to reduce the mortgagor's indebtedness or to rebuild the property." *Id.* The Mortgage does not expressly refer to a partial distribution of insurance proceeds or, at least where the proceeds do not exceed the amount of the mortgagor's indebtedness, to a distribution of a portion of the insurance proceeds to the lender and a portion of the proceeds to the mortgagor. Also, the Mortgage does not suggest the amount of insurance

[2] The dictionary includes a definition for "proceeds" of: "the total amount brought in." *Proceeds*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/proceeds [https://perma.cc/EG8M-9Y3X].

proceeds to which the lender is entitled must be reduced by an amount equal to the costs or attorney fees incurred by the mortgagor to secure the proceeds.

[12] The record reveals the Mortgage was executed in 2010, the loss of Flannagan's dwelling occurred on February 5, 2017, Flannagan and Tate & Bowen entered into an attorney-client agreement on June 29, 2017, the Mortgage was transferred to the new servicer LoanCare on behalf of Lakeview on September 5, 2017, and MERS assigned the Mortgage to Lakeview on July 9, 2018. MERS was granted a security interest in the property in 2010, and the rights of the loss-payable mortgagee were determined at the time of the loss, which was February 5, 2017. Based upon the record and the provisions of the Mortgage, we conclude the Mortgage did not require the mortgagee in this case to accept less than the full amount of the Hazard Insurance Proceeds.

B. *Equity Claims*

[13] Flannagan further argues that equity requires that Tate & Bowen's attorney fees be paid from the Hazard Insurance Proceeds and asserts unjust enrichment, an equitable attorney lien, equitable subrogation, and the common fund doctrine. She claims that, without Tate & Bowen's effort, the insurance proceeds would not exist and that Lakeview has been unjustly enriched by Tate & Bowen's efforts.

[14] This Court has stated "the mere existence of the duty [to insure for the benefit of the mortgagee] is sufficient to impress upon the proceeds of any policy taken out by the mortgagor an equitable lien in favor of the mortgagee." *Marling Fam.*

Tr. v. Allstate Ins. Co., 981 N.E.2d 85, 88 (Ind. Ct. App. 2012) (emphasis & quotation omitted).

[15] "A claim for unjust enrichment is a legal fiction invented by the common law courts in order to permit a recovery . . . where the circumstances are such that under the law of natural and immutable justice there should be a recovery . . . ." *Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 220 (Ind. 2009) (quotation omitted). "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Id.* Equitable subrogation "is not founded upon contract but upon principles of equity and is applicable in every instance in which one party, not a mere volunteer, pays the debt of another which, in good conscience, should have been paid by the one primarily liable." *Loving v. Ponderosa Sys. Inc.*, 479 N.E.2d 531, 536 (Ind. 1985). "The ultimate purpose of the doctrine, as with other equitable principles such as contribution, is to prevent unjust enrichment." *Erie Ins. Co. v. George*, 681 N.E.2d 183, 186 (Ind. 1997). Further, Indiana courts have recognized liens which arise in equity to protect attorney fees. *See State ex rel. Shannon v. Hendricks Circuit Court*, 243 Ind. 134, 139, 183 N.E.2d 331, 333 (1962) ("The rule is well established in Indiana that the statutory lien is not the only lien available for the security of an attorney in performing services beneficial to his client, but that equity supplies a lien independent of statute."). Finally, the common fund doctrine "allows attorneys' fees to be awarded out of a common fund to those who have,

through their legal efforts, made the existence of the fund possible." *N. Ind. Pub. Serv. Co. v. Citizens Action Coal. of Ind., Inc.*, 548 N.E.2d 153, 161 (Ind. 1989). Compensating attorneys' fees from a common fund is premised "on the theory that those who benefit from the creation of the fund or from the creation of any other legal benefit should share in the expense of producing the benefit." *Id.* (citation omitted).

[16] According to the Mortgage and the Policy, Lakeview as the mortgagee was entitled to the Hazard Insurance Proceeds to the extent of Flannagan's indebtedness. The Mortgage also provides:

> If . . . there is a legal proceeding that may significantly affect Lender's rights in the Property . . . then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's right in the Property, including payment of taxes, hazard insurance and other items . . . .
>
> Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument.

Appellant's Appendix III at 34. While payment of the Hazard Insurance Proceeds to Lakeview reduced Flannagan's indebtedness, the payment did not create a new benefit in favor of Lakeview. Further, the mortgagee and its servicer were not required to pay Flannagan's attorney fees, and they were not parties to the contingency fee agreement between Flannagan and Tate & Bowen. Flannagan does not point to authority for the proposition that her attorneys have a valid lien. *See Wilson v. Sisters of St. Francis Health Servs., Inc.*, 952 N.E.2d 793, 796 (Ind. Ct. App. 2011) (noting that the attorney never had possession of his client's money, and consequently, that a retaining lien was

inapplicable and that the attorney cited no authority for the proposition that insurance payments made to a third party under the client's health insurance policy were subject to a charging lien). We do not find Flannagan's claim that equity requires that Tate & Bowen's attorney fees be paid from the Hazard Insurance Proceeds to be persuasive.

Conclusion

[17] We conclude the trial court did not err in denying Flannagan's motion for partial summary judgment and in granting Lakeview's cross-motion for partial summary judgment. The Mortgage and Policy control the distribution of the Hazard Insurance Proceeds, and Flannagan's equitable claims do not require payment to Tate & Bowen from the Hazard Insurance Proceeds.

[18] For the foregoing reasons, we affirm.

[19] Affirmed.

May, J., and Pyle, J., concur.