IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SECURITY FIRST INSURANCE COMPANY,

Appellant,

v. Case No. 5D19-2839

NANETTE PHILLIPS,

Appellee.

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Opinion filed June 12, 2020

Appeal from the Circuit Court
for Marion County,
Edward L. Scott, Judge.

Steven G. Schwartz, and David J. Pascuzzi, of Schwartz Law Group, Boca Raton, for Appellant.

M. Lee Reeder, of Wilson Reeder & Zudar, P.A., Tampa, for Appellee.

HARRIS, J.

Security First Insurance Company ("Security First") appeals the dismissal of its complaint in which it sought declaratory relief against one of its policyholders, Nanette Phillips. Believing that Phillips' insurance policy barred recovery because the damage for which she filed a claim occurred prior to the inception of her policy, Security First alleged that there was a bona fide dispute between the parties, and that even though the dispute

concerned a factual issue, it was entitled to seek declaratory relief. We agree. Because a bona fide controversy existed, declaratory relief was appropriate to determine the factual issues raised. The trial court therefore erred in dismissing the complaint, and we reverse.

Soon after Phillips purchased her homeowners policy from Security First, she reported that her house sustained significant damages arising from ground cover collapse. However, her policy precluded recovery for any damages which occurred prior to the inception of the policy. After conducting an investigation, Security First concluded that the damage claimed by Phillips predated and pre-existed her insurance policy and filed its action for declaratory relief. Phillips moved to dismiss the complaint, alleging that Security First needed to assert its contention that the damage predated the insurance policy as an affirmative defense.

The trial court ultimately found that the complaint was inappropriate in the context of a declaratory action, reasoning that this case was about whether the alleged damage occurred before or after Phillips purchased the policy, and that it was not simply a matter of policy interpretation. Agreeing with Phillips that Security First could raise its argument that the damage preexisted the insurance policy as an affirmative defense, the trial court dismissed the complaint with prejudice, and this appeal followed.

"To be entitled to declaratory relief, a party must show he is in doubt as to some right or status and that he is entitled to have such doubt removed." Palumbo v. Moore, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001) ( first citing § 86.021, Fla. Stat. (2000); then citing Kelner v. Woody, 399 So. 2d 35, 37 (Fla. 3d DCA 1981)). More specifically, a complaint must allege that:

> [1] there is a bona fide dispute between the parties, [2] that the moving party has a justiciable question as to the existence or non-existence of some right, status, immunity, power or privilege, or as to some fact upon which the existence of such right, status, immunity, power or privilege does or may de[p]end, [3] that plaintiff is in doubt as to the right, status, immunity, power or privilege, and [4] that there is a bona fide, actual, present need for the declaration.

Romo v. Amedex Ins. Co., 930 So. 2d 643, 648 (Fla. 3d DCA 2006) (citing Smith v. City of Fort Myers, 898 So. 2d 1177, 1178 (Fla. 2d DCA 2005)). The declaratory judgment statute must be construed liberally. § 86.101, Fla. Stat. (2019). "The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all." Golf Club of Plantation, Inc. v. City of Plantation, 717 So. 2d 166, 171 (Fla. 4th DCA 1998) (quoting Rosenhouse v. 1950 Spring Term Grand Jury, in & for Dade Cty., 56 So. 2d 445, 448 (Fla. 1952)).

Here, a bona fide controversy existed between the parties. Security First and Phillips clearly disagreed as to whether the ground cover damage occurred before or after the inception of the insurance policy. Phillips filed a claim, attempting to recover losses she claims to have sustained as a result of the damage. By contrast, Security First alleged in its complaint that the damage occurred before the insurance policy was purchased. Because the insurance policy would permit Security First to deny coverage if the ground coverage damage happened before the inception of the insurance policy, there was a genuine dispute between the parties, and Security First presented a justiciable question as to the existence of its right to deny coverage under the insurance policy.

Security First also argues on appeal that the trial court had the power to determine factual issues under the declaratory judgment act. Security First is correct. "[A]n insurer may pursue a declaratory action which requires a determination of the existence or nonexistence of a fact upon which the insurer's obligations under an insurance policy depend." Higgins v. State Farm Fire & Cas. Co., 894 So. 2d 5, 12 (Fla. 2004). As stated in section 86.011, Florida Statutes (2019), a trial court may render a declaratory judgment "on the existence, or nonexistence: (1) Of any immunity, power, privilege, or right; *or* (2) Of *any fact* upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future." (emphasis added); see also Allstate Ins. Co. v. Conde, 595 So. 2d 1005, 1011 (Fla. 5th DCA 1992) (en banc) (holding declaratory action appropriate against insured to determine duty to defend insured in shooting incident, where insurer asking the court, pursuant to section 86.011 to determine "the existence or nonexistence" of a "fact [to wit: whether the shooting was intentional] upon which the existence or nonexistence of . . . immunity [lack of coverage] . . . does or may depend"). Therefore, the trial court had the authority to render a declaratory judgment, determining whether Phillips' ground coverage damage occurred before the inception of her insurance policy with Security First.

In Higgins, the Florida Supreme Court ultimately concluded that Florida's declaratory judgment statute authorizes declaratory judgments as to factual issues dealing with an insurer's obligation to defend or indemnify. 894 So. 2d at 15. Our sister court recently applied Higgins to declaratory actions in which the insurer initiated the action against the insured to determine factual questions related to its obligation to

provide coverage. In Heritage Property & Casualty Insurance Co. v. Romanach, 224 So. 3d 262, 265 (Fla. 3d DCA 2017), the Third District concluded that the insurer had stated a cause of action for declaratory relief when it alleged that an appointed umpire, who oversaw the appraisal of damage to the insured's home, was not impartial and competent as required in the subject insurance policy. (citing Higgins, 894 So. 2d at 12). The court explained that this was "a fact that *might* affect the existence or nonexistence of some immunity, power, privilege or right of Heritage." Id.

We agree with the analysis of the court in Heritage. Security First appropriately invoked the declaratory jurisdiction of the trial court in asking it to make a factual determination with respect to whether the ground damage occurred before the inception of Security First's insurance policy. It was error to dismiss its complaint.

REVERSED and REMANDED.

GROSSHANS and TRAVER, JJ., concur.