WELLS FARGO HOME MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A., D.B.A. AMERICA'S SERVICING COMPANY, Plaintiff-Respondent,

v.

THE CUMBERLAND MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellant, and SHAREAM CUNNINGHAM, Defendant.

No. A-4289-09T4.

Superior Court of New Jersey, Appellate Division.

Submitted April 5, 2011.
Decided June 13, 2011.

Methfessel & **Werbel**, P.C., attorneys for appellant (Marc Dembling, of counsel and on the brief).

Levy, Ehrlich & Petriello, attorneys for respondent (Jeffrey W. Plaza, on the brief).

Before Judges Yannotti and Espinosa.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

The trial court entered an order on November 13, 2009, declaring that plaintiff Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A. (Wells Fargo), is entitled to coverage under a homeowner's insurance policy issued by defendant The Cumberland Mutual Fire Insurance Company (Cumberland) up to the value of its interest as morgagee in certain real property located in the Township of Piscataway (Township). Cumberland appeals from the order entered by the trial court on May 3, 2010, entering judgment in favor of Wells Fargo and against Cumberland in the amount of $133,004. For the reasons that follow, we affirm.

Defendant Shaream Cunningham (Cunningham) is the owner of the subject property. In June 2006, Cunningham refinanced an existing mortgage loan on the property with a loan from Credit Suisse Financial Corporation (Credit Suisse) in the amount of $268,000, and borrowed an additional $32,000 from Credit Suisse. On his application, Cunningham represented that proceeds of the loan were to be used for "home improvement." The transaction closed on June 16, 2006. Cunningham issued mortgages to Credit Suisse to secure the loans.

On June 30, 2006, Cunningham filed a certification with the Township regarding an application he had filed for demolition of the residential home on the property. The certification indicated, among other things, that the water well on the property had been abandoned, gas and electric utilities had been disconnected and the plumbing inspector had issued a permit for the capping of the sewer line. At some point thereafter, the home was demolished. On July 18, 2006, the Township's construction official issued a notice and order of penalty to Cunningham because he had not obtained a construction permit before demolishing the home.

The dwelling, appurtenant structures and personal property therein had been insured under a homeowner's policy issued by Cumberland. Credit Suisse was insured under the policy as mortgagee. The policy had been in effect for the period from April 1, 2006, through April 1, 2007. It was renewed for the period from April 1, 2007, through April 1, 2008. The policy stated that it did not cover any loss resulting from "[a]cts committed by, or at the direction of, any insured with the intent to cause a loss."

The policy also stated that any mortgagees named therein were covered "to the extent of their interest and in order of precedence of" their respective mortgages. However, according to the policy, coverage was conditioned upon the mortgagees complying with certain conditions, including notifying the insurer, without delay, "of any change in ownership or occupancy, foreclosure proceedings, or increased hazard known to the mortgagee." The policy additionally stated that it was void if any insured "misrepresents or knowingly conceals any material fact or circumstance, commits fraud, or swears falsely relating to any

aspect of this insurance, including information [the insurer] relied on in issuing" the policy.

It appears that at some point Wells Fargo acquired the Credit Suisse mortgage on the property. It also appears that, after he demolished the dwelling, Cunningham abandoned the property, leaving the same as a vacant lot. On February 21, 2008, America's Servicing Company submitted a claim on Wells Fargo's behalf to Cumberland as a result of the demolition of the home on the premises.

By letter dated October 31, 2008, Cumberland denied the claim, stating that there was no coverage for the intentional demolition of the residence. Cumberland stated, "The mortgagee was aware that construction was being performed upon the insured premises and did not inform [it] of the increased hazard." Cumberland also stated that coverage was being denied pursuant to other provisions of the policy, specifically the intentional loss exclusion and the exclusion for concealment, misrepresentation or fraud.

On March 9, 2009, Wells Fargo filed this action in the Law Division against Cumberland and Cunningham seeking, among other things, a declaration that it is entitled to coverage under the policy for the "unauthorized demolition" of the Cumberland dwelling and compensatory damages. Cumberland filed an answer denying liability and asserted a cross-claim against Cunningham. It appears that neither the complaint nor the cross-claim were ever served upon Cunningham.

Cumberland filed a motion for summary judgment and thereafter Wells Fargo filed a motion for partial summary judgment. The trial court considered the motions on November 10, 2009. The court filed a letter opinion dated November 12, 2009, in which it concluded that Wells Fargo was entitled to coverage under the policy. The court found that there was no proof that Cunningham demolished the dwelling with an intent to cause a loss.

The court stated that Cunningham's mortgage application suggested that the house had been demolished "as a precursor to a substantial improvement." The court rejected Cumberland's assertion that Wells Fargo had constructive notice of the demolition, noting that the lender "may have had constructive notice of the intent to improve the premises, but that is not the same as the intent to demolish the premises."

The court also rejected Cumberland's assertion that Wells Fargo was not covered under the policy because Cunningham had intentionally breached the policy's terms and conditions. The court noted that the policy stated that coverage would be provided "to protect the mortgagee's interest in covered property" even if the insurer denied the property owner's claim. The court stated that, if this provision of the policy "has any meaning at all, it means that [Wells Fargo] may recover under the policy up to its mortgage interest."

The court entered orders dated November 13, 2009, denying Cumberland's motion for summary judgment and granting partial summary judgment to Wells Fargo on the coverage issue. Thereafter, the parties represented to the court that there was no dispute as to the actual cash value of the dwelling that was demolished. Consequently, the court filed an order on May 3, 2010, entering judgment in favor of Wells Fargo and against Cumberland in the amount of $133,004. This appeal followed.

We note initially that there is an issue as to whether the trial court's order of May 3, 2010, is a final judgment from which an appeal may be taken as a matter of right pursuant to Rule 2:2-3(a). Such appeals may only be taken from final judgments that dispose of all issues as to all parties. N.J. Schs. Constr. Corp. v. Lopez, 412 N.J. Super. 298, 308 (App. Div. 2010). The trial court's order of May 3, 2010, resolved Wells Fargo's claims against Cumberland but did not dispose of the claims that Wells Fargo and Cumberland had asserted against Cunningham.

We have been advised that Cunningham never filed an answer to Wells Fargo's complaint. The record does not indicate whether default was entered against Cunningham, or whether the claims and cross-claims against him have ever been resolved. It would appear, therefore, that the trial court's May 3, 2010, order may not be a final order that may be appealed pursuant to Rule 2:23-(a).

Nevertheless, because the appeal has been fully briefed and the interests of justice warrant resolution of the matter without further delay, we will grant leave to appeal as within time pursuant to Rule 2:4-4(b)(2). See Panetta v. Equity One, Inc., 378 N.J. Super. 298, 309 (App. Div. 2005), rev'd on other grounds, 190 N.J. 307 (2007).

Cumberland argues that the trial court erred by finding that Wells Fargo was entitled to coverage under the policy because Wells Fargo violated the terms of the policy by failing to inform it of the increased hazard known to the mortgagee resulting from the demolition of the house. Cumberland contends that Wells Fargo had constructive notice of this increased hazard. We find no

merit in these contentions.

As stated previously, Wells Fargo is insured under the Cumberland policy as mortgagee of the property in question. Therefore, Wells Fargo is covered to the extent of its interest as mortgagee, provided however, that it complies with certain conditions, including "any change in ownership or occupancy, foreclosure proceeding, or increased hazard known to the mortgagee." (Emphasis added). Cumberland contends that Wells Fargo had constructive notice of the "increased hazard" because the loan documents indicated that Cunningham was going to use proceeds of the loans to renovate the property.

However, in his loan application, Cunningham indicated that proceeds of the loans would be used for "home improvements." Cunningham did not state that he intended to demolish the home. Because Cunningham had approximately $80,000 left at closing, Cumberland says that it should have been apparent to the lender that the renovations would be extensive and such renovations would increase the hazard to the mortgagee's security. We disagree.

"An increase in hazard takes place when a new use is made of the insured property, or when its physical condition is changed from that which existed when the policy was written, and the new use or changed condition increases the risk assumed by the insurer." Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 9 (2000) (quoting Indus. Dev. Assocs. v. Commercial Union Surplus Lines Ins. Co., 222 N.J. Super. 281, 291-92 (App. Div.), certif. denied, 111 N.J. 632 (1988)). The Cumberland policy provided in pertinent part that the coverage

> is suspended while the hazards [the insurer] undertook to insure are increased by means within [the insured's] control or those [the insured] designate[s] to have control of the premises. Lawful building alteration, construction, maintenance, or repair, unless changing the use of the premises, is not an increase in hazard.
>
> [(Emphasis added).]

There is no evidence that the lender was told that the loan proceeds would be used to demolish the dwelling. Under the circumstances, the lender could reasonably assume that Cunningham would spend the loan proceeds for lawful alterations or construction that would not alter the use of the premises. We therefore conclude that the lender did not have constructive notice of an increase in hazard that the lender had a duty to report to the insurer.

Cumberland also argues that Cunningham's demolition of the dwelling was an intentional act that voided the mortgagee's coverage under the policy. Again, we disagree. As indicated previously, the Cumberland policy stated that mortgagees named therein "are covered for loss to the extent of their interest and in order of precedence of the mortgages." The policy also states, "[w]e agree to provide this insurance to protect the mortgagee's interest in covered property even if we deny your claim."

The policy defines "We" to mean "the insurance company named in this policy" and "You" to mean "the insured named in this policy." Thus, under the plain language of the policy the mortgagee is covered to the extent of its interest in the covered property as mortgagee even though the named "insured" may not be entitled to coverage.

Our conclusion is supported by Home Savings of America, F.S.B. v. Continental Ins. Co., 104 Cal. Rptr. 2d 790 (Cal. Ct. App. 2001). In that case, defendants John and Joan Veenstra borrowed monies, used the loan proceeds to purchase a home and gave the lender a mortgage. Id. at 792. The property was insured under a homeowner's policy and the lender was named in the policy as the mortgagee. Ibid.

The Veenstras transferred title to the property to a company which demolished the home for redevelopment purposes. Ibid. The Veenstras defaulted on their loan and the lender commenced foreclosure proceedings. Id. at 793. The lender then learned for the first time that title had been transferred and the residence demolished. Ibid. The property was sold and the lender filed a claim seeking its out-of-pocket loss plus interest. Ibid. The insurer denied the claim and the lender brought suit against the insurer. Ibid.

The policy provided that, "If a mortgagee is named in this policy, any loss payable . . . shall be paid to the mortgagee and you, as interests appear[.]" Id. at 795. The policy further provided that, "If we deny your claim, that denial shall not apply to a valid claim of the mortgagee[.]" Ibid. The California appellate court held that this was a "standard loss payable clause," under which the insured would be barred from recovering on the policy in the event the insured willfully destroys the property, but the mortgagee would not be barred from recovery absent evidence of some complicity in the destruction of the property. Id. at 799.

The policy provisions at issue here are substantially the same as the "standard loss savings clause" at issue in Home Savings.

The Cumberland policy provides that the mortgagee is entitled to coverage even if the named insured is barred from recovery. Therefore, while Cunningham could not assert a claim under the policy due to his intentional destruction of the residence, the policy nevertheless provided coverage to the lender to the extent of its interest as mortgagee, provided the lender is not otherwise barred from recovering under the policy.

The record establishes that the lender did not have actual or constructive notice that Cunningham intended to demolish the residence, and did not breach its duty to inform the insurer of an increase in hazard. Accordingly, the trial court correctly found that the lender was entitled to coverage under the policy.

Affirmed.