

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,264

DCA CASE NO. 87-46

AIU INSURANCE COMPANY,)
)
 Petitioner,)
)
 vs.)
)
 BLOCK MARINA INVESTMENT, INC.,)
 d/b/a FLORIDA YACHT BASIN,)
 and NORFOLK MARINE COMPANY,)
)
 Respondents.)
 _____)

BRIEF OF RESPONDENT, BLOCK MARINA

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STATEMENT OF THE CASE AND FACTS

Respondent, Block Marina Investment, Inc., (Block) adopts Respondent, Norfolk Marine Company's (Norfolk) statement of the case and facts with the addition of the following:

On April 25, 1986, Block filed a declaratory judgment and a breach of contract action against Petitioner AIU Insurance Company, (AIU), to enforce coverage under an insurance policy issued by AIU to Block. (R. 1-4).

On July 25, 1986, Norfolk moved to intervene as party plaintiff. (R. 13-14). The basis for Norfolk's motion was that it had secured a consent judgment against Block for \$125,000 in another action. In such consent Block had assigned all its rights against AIU except for Block's claims against AIU for attorney's fees and punitive damages and, in return, Norfolk had agreed not to enforce the \$125,000 consent judgment against Block. (R. 20-23). The trial court granted Norfolk's motion to intervene as party plaintiff. (R. 24).

On October 17, 1986, Norfolk moved for summary judgment in favor of itself and Block on the ground that AIU was estopped to deny coverage under its policy. Norfolk claimed AIU had failed to comply with section 627.426(2), Florida Statutes (1985), of the Insurance Code by failing to properly reserve its rights to a coverage defense and by failing to timely notify Block of its refusal to defend. (R. 47-51).

The trial court entered final summary judgment in favor of Norfolk and Block. It awarded \$125,000 plus interest to Norfolk. It

further retained jurisdiction to tax costs and attorney's fees in favor of Norfolk and Block. (R. 169-170).

AIU moved for rehearing, which the trial court subsequently denied. (R. 163-164, 171). AIU then appealed the final summary judgment in favor of Norfolk and Block to the District Court of Appeal of Florida, Third District. (R. 165).

On appeal, AIU argued inter alia that section 627.426, Florida Statutes (1985) did not apply to a case where there is no insurance coverage for the loss claimed due to an exemption in the policy for losses arising from bailment contracts. AIU cited as authority for such contention, United States Fidelity and Guaranty Company v. American Fire and Indemnity Co., 511 So.2d 624 (Fla. 5th DCA 1987). (A. 1-3). In United States Fidelity and Guaranty, the insured argued the notice provisions of the statute applied although the policy term and liability coverage had terminated ten years before any claim was made. The court ruled the term "coverage defense" under the statute, did not apply because there was a complete lack of coverage in the first place. (A. 4-8).

The Third District Court of Appeal ruled the instant case was distinguishable from United States Fidelity and Guaranty Company because here there was a policy in effect at the time of the loss and a legitimate question as to whether the policy provided coverage for the loss. The court explained, "In United States Fidelity and Guaranty Company the court held, essentially that there is no coverage issue where there is no policy. The question in this case is whether the policy covers a specific loss." AIU Insurance Company v. Block

Marina Investment, Inc., 512 So.2d 1118, 1119 (Fla. 3d DCA 1987). (A. 1-3).

The court in AIU Insurance Company certified the decision as "possibly" being in conflict with United States Fidelity and Guaranty. A dissenting opinion indicated the statute did not apply, citing as authority United States Fidelity and Guaranty Company v. American Fire and Indemnity Company. (A. 1-3).

AIU then brought the foregoing review before this Court.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT AGAINST AIU FOR FAILURE TO COMPLY WITH SECTION 627.426(2), FLORIDA STATUTES (1985), AND THE DISTRICT COURT PROPERLY AFFIRMED SUCH JUDGMENT?

SUMMARY

Block adopts Norfolk's summary of the argument.

ARGUMENT

THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT AGAINST AIU FOR FAILURE TO COMPLY WITH SECTION 627.426(2), FLORIDA STATUTES (1985) AND THE DISTRICT COURT PROPERLY AFFIRMED SUCH JUDGMENT.

Block adopts Norfolk's argument on appeal.

CONCLUSION

This Court should deny jurisdiction or in the alternative, the opinion of the District Court affirming the final summary judgment in favor of Norfolk and Block should be approved.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of December, 1987 to: RICHARD A. SHERMAN, ESQ., Suite 102, Justice Building, 524 South Andrews Avenue, Ft. Lauderdale, FL 33301; MICHAEL D. SIKES, ESQ., Merritt, Sikes & Craig, P.A., Third Floor, McCormick Building, 111 S.W. Third Street, Miami, FL 33130-3989 and KENNETH CARUSELLO, ESQ., Payton & Rachlin, P.A., Suite 1810, New World Tower, 100 N. Biscayne Boulevard, Miami, FL 33132.

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