

14-0967

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

MARLON ALLEN, SR., individually
and as Administrator of the Estate of
MARCUS ALLEN,

Plaintiff,

v.

Civil Action No.: 12-C-43

MICHAEL O'CONNOR,

Defendant/Counter-Plaintiff,

v.

MARLON ALLEN, SR., individually
and as Administrator of the Estate of
MARCUS ALLEN,

Counter-Defendant.

**AMENDED ORDER GRANTING SUMMARY JUDGMENT
FOR COUNTER-DEFENDANT**

On this the _____ day of August, 2014, this matter came on for hearing before the Circuit Court of Mineral County, West Virginia, upon the motion of F&M Insurance Company for modification of this Court's Order of December 16, 2013. Whereupon the Court, upon consideration of the arguments and representations of counsel, does find that its previously entered Order of December 16, 2013 was erroneously entitled as an Interlocutory Order. Therefore, this Court does hereby reform its Order Granting Summary Judgment for Counter-Defendant as follows:

On December 16, 2013, during a previously scheduled hearing set by the Court's Scheduling Order, the Court heard oral arguments regarding the subrogation issues presented in

12/16/13
P. H. Allen
K. D. Allen
Michael
T. H. Allen
S. Swarden

the underlying case. During the hearing, Michael O'Connor, as Defendant was represented by Patrick J. Nooney, Esq., and Nelson M. Michael, Esq.; Mr. O'Connor, as a Counter-Plaintiff was represented by Tyler G. Lansden, Esq.; Marlon Allen, Sr., individually and as Administrator of the Estate of Marcus Allen, as a Counter-Defendant, was represented by Trevor K. Taylor, Esq.; Farmers & Mechanics Mutual insurance Company, as Intervener Counter-Plaintiff, was represented by Matthew R. Whitler, Esq. Counsel for Plaintiff, Marlon Allen, Sr., individually and as Administrator of the Estate of Marcus Allen, Katherine L. Doohey, Esq., did not make an appearance at the hearing. Upon consideration of the motions, memorandums of law, and responses, as well as after hearing oral arguments regarding the subrogation issues in this case, the Court finds as follows:

Findings of Fact

This civil action was filed by Marcus Allen's estate seeking damages from Defendant, Michael O'Connor, as a result of a house fire that occurred on May 6, 2010, in which Mr. Allen perished. The fire occurred at 175 Keys Street, Keyser, West Virginia. The evidence uncovered during discovery demonstrated that Mr. Allen contracted to purchase the home from Shelly O'Connor in December 2009. To formalize this agreement, Ms. O'Connor prepared a lease-to-own contract. Ms. O'Connor testified that this contract was negotiated between herself and Mr. Allen. The lease-to-own contract addressed how the monthly payments were to be allocated. Specifically, the contract indicated that the mortgage and taxes for the home were to be paid from the monthly payments from Mr. Allen. Further, the contract indicated that the homeowner's insurance for the property was to be paid by Mr. Allen's monthly payments. The homeowners' insurance was purchased by Ms. O'Connor and provided by Farmers & Mechanics Mutual Insurance Company (hereinafter referred to as "F&M"). Ms. O'Connor testified that the \$389

yearly premium payment for the F&M policy that insured the home was paid entirely from Mr. Allen's monthly payments to her. She testified that the F&M policy purchased with Mr. Allen's money was purchased for Mr. Allen's benefit. Ms. O'Connor denied that she paid anything out of her own pocket for the F&M policy, but that the policy was paid for entirely by Mr. Allen's monthly payments to Ms. O'Connor. Like Ms. O'Connor, her father Michael O'Connor also agreed that the F&M policy was purchased for Mr. Allen's benefit. Mr. O'Connor also testified that there was insurance purchased for the property from the payments made on a monthly basis by Mr. Allen.

Standard of Review

A Circuit Court should grant summary judgment if there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56 of the West Virginia Rules of Civil Procedure ("W.Va.R.Civ.P.") Under W.Va. R. Civ. P. 56(c), summary judgment is proper only where the moving party shows by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams v. Precision Coal, Inc.*, 459 S.E.2d 329, 336 (W.Va. 1995). "[A] genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Jividen v. Law*, 461 S.E.2d 451,459 (W.Va. 1995) (citation omitted). A material fact is one "that has the capacity to sway the outcome of the litigation under the applicable law." *Id.* at 460 (citation omitted).

Conclusions of Law

After suit was filed, the insurer for Defendant, F&M filed a Counter-Claim against Mr. Allen's estate. The essence of the Counter-Claim is that F&M is seeking to subrogate under its

policy against Mr. Allen, the individual who paid for the policy in question. The Court finds that the doctrine of equity mandates that F&M not be permitted to maintain a claim for subrogation and summary judgment should be awarded to Mr. Allen regarding such claims.

I. No Common Law Equitable Right to Subrogation for Farmers

The Court finds that F&M is not be permitted to subrogate against Mr. Allen because he paid for the policy. The Supreme Court of Appeals of West Virginia (“W.Va. Supreme Court”) has determined that “the right of subrogation depends upon the facts and circumstances of each particular case.” Syllabus Point 1, *Kittle v. Icard*, 405 S.E.2d 456 (W.Va., 1991); *Huggins v. Fitzpatrick*, 135 S.E. 19, 20 (W.Va. 1926); Syllabus point 3, *Ray v. Donohew*, 352 S.E.2d 729 (W.Va. 1986). Additionally, the W.Va. Supreme Court has held that, “subrogation, being a creature of equity, will not be allowed except where the subrogee has a clear case of right and no injustice will be done to another.” Syllabus Point 2, *Kittle v. Icard*, 405 S.E.2d 456 (W.Va., 1991); *Buskirk v. State-Planters' Bank Trust Co.*, 169 S.E. 738 (W.Va. 1933). As explained in *Porter v McPherson*, 479 S.E.2d 668 (W.Va., 1996), “subrogation did not originate out of statute, custom, or common law but it was adapted from the equitable principles found in the Roman or civil law”, citing 83 C.J.S. Subrogation § 2 (1953). The *Porter* Court also agreed that “subrogation is related closely, if not directly, to the equitable principles of ‘restitution’ and ‘unjust enrichment’.” *Id.*

As the Court views the facts presented in this case, F&M is not permitted to the equitable remedy of subrogation against Mr. Allen’s Estate. As developed during discovery, Mr. Allen had agreed to purchase the insured premises located at 175 Keys Street. The contract between Mr. Allen and Ms. O’Connor required that Mr. Allen pay to Ms. O’Connor \$625 every month. From these monthly payments, it was agreed that “\$550.00 will go for mortgage, insurance and taxes.” Ms. O’Connor testified that pursuant to the contract, she did purchase insurance with Mr. Allen’s

monthly payments. The insurance that she purchased was the policy provided by F&M. The Court finds that there is nothing equitable about allowing F&M, based upon a policy purchased with Mr. Allen's money, to pursue a subrogation claim against Mr. Allen's Estate to repay it for the loss covered under the F&M policy.

The law in West Virginia clearly establishes that not only is subrogation an equitable remedy, but of great importance in this case, this "remedy is for the benefit of one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor." *Kittle v. Icard*, 405 S.E.2d 456 (W.Va., 1991). In this case, F&M has paid a debt to Ms. O'Connor for the policy covering the property in question. F&M's right to subrogation is to the extent that Ms. O'Connor, as its named insured, has a right to assert a claim against Mr. Allen for the loss. However, this produces a result that is not equitable. The Court finds that F&M wants to step into the shoes of Ms. O'Connor and seek repayment from Mr. Allen under a policy of insurance that Mr. Allen paid for. Consequently, based upon equitable principles, the Court finds that there is no genuine issue of fact to argue that F&M has a right to subrogation in this case against a person that funded the F&M policy.

Disposition

WHEREFORE, upon consideration of the foregoing, and finding it proper, this Court does hereby GRANT summary judgment in Mr. Allen's favor and does hereby ORDER, ADJUDGE, and DECREE that the claims brought by F&M seeking subrogation against Mr. Allen are DISMISSED with prejudice. However, the remaining claims in the underlying matter will proceed forward. The Court hereby orders that the Intervenor/Counter-Plaintiff, F&M Insurance Company, insofar as it pertains to the subrogation action of F&M Insurance Company in this matter, is hereby DISMISSED with prejudice.

To all of which this Court does note the objections and exceptions of the Parties as aggrieved. The Court considered two proposed orders and objections in crafting this order and is cognizant that F&M Insurance Company intends to pursue an appeal of all rulings adverse to its interests.

In that regard, since this final order disposes of all issues between Intervenor/Counter-Plaintiff, F&M Insurance Company and Counter-Defendant, Marlon Allen, Sr., this Court makes an express determination that there is no just reason for delay and determines that the rulings contained in this Order are deemed to be a final judgment with respect to the matters set forth in F&M Insurance Company's Motion for Summary Judgment and Counter-Defendant, Marlon Allen, Sr.'s Motion for Summary Judgment, pursuant to W.Va.R.Civ.P. 54(b). Therefore, it is the intention of this Court that this matter, as it relates to the dismissal of the claims brought by F&M seeking subrogation against Mr. Allen, be a final appealable order.

The Clerk of this Court is directed to transmit certified copies of this Order to counsel of record:

Trevor K. Taylor, Esquire
Taylor Law Office
34 Commerce Drive
Morgantown, West Virginia 26501

Patrick J. Nooney, Esquire
PATRICK J. NOONEY, P.A.
117 Potomac Street, Second Floor
P.O. Box 3115
Hagerstown, Maryland 21741

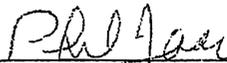
Katherine L. Dooley, Esquire
THE DOOLEY LAW FIRM, P.L.L.C.
1660 Third Avenue
P.O. Box 1270
Charleston, West Virginia 25339-1270

Nelson M. Michael, Esquire
NELSON M. MICHAEL, L.C.
126 East Street
Post Office Box 59
Keyser, West Virginia 26726

Tyler G. Lansden, Esquire
Javitch, Block & Rathbone
11 Commerce Drive, Suite 206
Westover, West Virginia 26501-3858

Susan R. Snowden, Esquire
Matthew R. Whitler, Esquire
MARTIN & SEIBERT, L.C.
P.O. Box 1286
1453 Winchester Avenue
Martinsburg, WV 25402-1286

ENTERED this 2 day of September, 2014.



HONORABLE PHILLIP B. JORDAN, JR.

Prepared by:



Susan R. Snowden

W.Va. Bar No. 3644

P.O. Box 1286

1453 Winchester Avenue

Martinsburg, WV 25402-1286

(304) 267-8985

Counsel for Farmers & Mechanics Mutual Insurance Company



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