NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1340

CITIZENS SAVINGS BANK

VERSUS

SAFEWAY INSURANCE COMPANY OF LOUISIANA

Judgment Rendered: May 4, 2007

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of Washington, Louisiana
Docket Number 84,568

Honorable Patricia Hedges, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

This matter is before us on appeal by defendant, Safeway Insurance Company of Louisiana (Safeway), from a district court judgment granting summary judgment in favor of plaintiff, Citizens Savings Bank (Citizens), and awarding Citizens a sum under a Safeway insurance policy. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 9, 2000, Quanta Peters obtained a loan from Citizens in the amount of $12,817.20, secured by a 1996 Chevrolet C1500 pickup truck.[1] On that same date, Peters insured the vehicle through Safeway, with Citizens listed in the mortgagee/loss payee section of the insurance binder. The Safeway policy was in effect at the time of the incident in question.

On the morning of December 2, 2001, Peters reported to the Washington Parish Sheriff's Office that his truck had been stolen during the night. Later that day, the vehicle was located in Pearl River County, Mississippi, by the Pearl River County Sheriff's Office. The vehicle had been stripped and destroyed by fire.

Thereafter, Peters defaulted on the loan with Citizens, and Citizens instituted proceedings to seize the vehicle. Upon learning of the theft and destruction of the vehicle, Citizens, as lienholder, then made demand upon Safeway by letter dated February 22, 2002, for payment of insurance proceeds to cover its loss. However, Safeway refused to pay the claim, contending that the matter was under investigation by its special investigation unit, apparently because of Safeway's suspicion that Peters was involved in the loss.

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[1]In its brief to this court, Citizens contends that Peters obtained the loan in order to finance upgrades to his truck, which the parties do not dispute was a "show truck." However, there is no evidence in the record to establish the reason for the loan.

When payment was not forthcoming, Citizens filed the instant suit against Safeway on June 3, 2002, seeking to recover for its loss under the Safeway policy. In an amended answer, Safeway raised the defense of arson, contending that no payments were due Citizens because the loss at issue was caused either intentionally or at the direction of Peters, Safeway's insured.

Citizens filed a motion for summary judgment, contending that it was entitled to judgment in its favor as a matter of law because any defense of arson was not effective against it, as the lienholder. Citizens further argued that Safeway had been arbitrary and capricious in failing to pay the claim where it had taken no steps to investigate its suspicions of arson. In opposition to the motion, Safeway argued that because the loss payee clause in the insurance policy was an "open" mortgage clause, through which the rights of the mortgagee are wholly derived from those of the insured, the arson defense was valid against Citizens, as the lienholder.

After the motion was submitted to the court on memoranda, the trial court concluded that, even if Safeway was entitled to assert the defense of arson against Citizens as lienholder, Citizens was entitled to payment under the policy in that Safeway had failed to make any progress in its "investigation" in the two years following the loss to establish its alleged defense of arson. The trial court further found that Safeway's refusal to pay the claim while failing to move the investigation forward for that length of time constituted arbitrary and capricious behavior. Thus, the trial court rendered judgment in favor of Citizens in the amount of $11,392.02, the amount due on the loan, together with a 10% penalty, legal interest, court costs and attorney's fees of 25% of the total due.

From this judgment, Safeway appeals, contending that the trial court erred in granting summary judgment in favor of Citizens and in awarding Citizens the amount of the mortgage balance due as well as penalties and attorney's fees.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. Naquin v. Louisiana Power & Light Company, 98-2270 (La. App. 1st Cir. 3/31/00), 768 So. 2d 605, 607, writ denied, 2000-1741 (La. 9/15/00), 769 So. 2d 546. To be entitled to summary judgment, the movant must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B); Asberry v. The American Citadel Guard, Inc., 2004-0929 (La. App. 1st Cir. 5/6/05), 915 So. 2d 892, 894.

Thus, where the movant would bear the burden of proof at trial, he must establish the essential elements of his claim. Moreover, he must also show the absence of factual support for one or more of the elements essential to the adverse party's defense. See Jackson National Life Insurance Company v. Kennedy-Fagan, 2003-0054 (La. App. 1st Cir. 2/6/04), 873 So. 2d 44, 48, writ denied, 2004-0600 (La. 4/23/04), 870 So. 2d 307. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's defense, then the non-moving party must produce factual support sufficient to satisfy his evidentiary burden at trial. Jackson National Life Insurance Company, 873 So. 2d at 48.

In determining whether summary judgment is appropriate, appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Because

it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. Keller v. Case, 99-0424, p. 4 (La. App. 1st Cir. 3/31/00), 757 So. 2d 920, 922, writ denied, 2000-1874 (La. 9/29/00), 770 So. 2d 354.

DISCUSSION

On appeal, Safeway contends that the trial court erred in granting summary judgment where it raised a valid defense of arson as to Citizens' claim and also where Citizens failed to establish the value of the vehicle at the time of the loss, which value should have determined the amount of any recovery by Citizens.

In support of its motion for summary judgment, Citizens offered into evidence: (1) the promissory note wherein it loaned Peters $12,817.20, and Peters granted Citizens a security interest in the vehicle at issue; (2) a copy of the insurance binder and declarations page of the Safeway policy, establishing that the vehicle was insured by Safeway and that Citizens had been designated as the loss payee; and (3) the police reports establishing that the vehicle had been reported stolen and had been stripped and destroyed by fire. Citizens also offered proof of its notice to Safeway of the claim by letter dated February 22, 2002, and Safeway's response.

In support of its contention that it was entitled to payment of the claim, and penalties and attorney's fees, Citizens relied upon LSA-R.S. 22:658, which, at the time of the loss, provided in pertinent part, as follows:

> A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:656, 22:657, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest.
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> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor, as provided in R.S. 22:658(A)(1), ... when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, ... together with all reasonable attorney fees for the prosecution and collection of such loss.[2]

However, Safeway contended that it raised a valid defense of arson against Citizens, noting that the policy provided that it did not apply to "damages caused intentionally by or at the direction of the insured." Safeway further asserted that because the policy further provided that "[w]here fraud, misrepresentation, material omission, or intentional damage has been committed by or at the direction of you or a relative, the Loss Payee or Lienholder's interest will not be protected," the defense of arson was valid against Citizens as well as its insured.[3]

With regard to the payment of claims where there is an ongoing arson investigation, LSA-R.S. 22:658(B)(2) exempts situations where there is an ongoing arson investigation from the thirty-day payment provision until the completion of the investigation, as follows:

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[2]Section (B)(1) has been amended twice since the date of the loss at issue to change the percentage for the calculation of the penalties. La. Acts 2003, No. 790, § 1; La. Acts 2006, No. 813, § 1. Currently, the statute provides for a penalty of 50% damages on the amount found to be due from the insurer to the insured. LSA-R.S. 22:658(B)(1)(as amended by Acts 2006, No. 813, § 1).

[3]This type of loss payable clause has been termed an "open" or "simple" loss payable clause, as distinguished from a "standard" or "union" clause. A simple or open loss payable clause is no more than a provisional appointment by the debtor of the one to whom the proceeds of the policy shall be paid to the extent of that party's interest. It merely provides that the proceeds of the policy shall be paid first to the mortgagee to the extent of its interest. Rushing v. Dairyland Insurance Company, 456 So. 2d 599, 601 (La. 1984). Under such a clause, the mortgagee recovers solely on the right of its mortgagor. McMahon v. Manufacturers Casualty Insurance Co., 227 La. 777, 784, 80 So. 2d 405, 407 (1955). Thus, the mortgagee's right to recover is affected by defenses available against the insured/mortgagor. See Chrysler Credit Corporation v. Dairyland Insurance Company, 491 So. 2d 402, 404 (La. App. 1st Cir.), writ denied, 494 So. 2d 1178 (La. 1986).

A "standard" or "union" clause, on the other hand, provides that the mortgagee shall be protected against loss from any act or neglect of the mortgagor or owner. Rushing, 456 So. 2d at 601.

> The period set herein for payment of losses resulting from fire and the penalty provisions for nonpayment within the period shall not apply where the loss from fire was arson related and the state fire marshal or other state or local investigative bodies have the loss under active arson investigation. The provisions relative to time of payment and penalties shall commence to run upon certification of the investigating authority that there is no evidence of arson or that there is insufficient evidence to warrant further proceedings.

However, as noted by Citizens, LSA-R.S. 22:658(B)(3) provides that "[t]he provisions relative to suspension of payment due to arson shall not apply to a bona fide lender which holds a valid recorded mortgage on the property in question." Additionally, the suspension of the time delays for payment applies only where the state fire marshal or other state or local investigative bodies have the loss under active arson investigation. LSA-R.S. 22:658(B)(2).

In the instant case, Citizens also offered a Request for Production of Documents dated July 18, 2002 that it had propounded to Safeway. In that discovery request, Citizens sought copies of "any findings from the Fire Marshall's [sic] Office or any other governmental agency relative to an investigation of arson of the 1996 Chevrolet pick-up truck." In its response to the discovery request, which was also offered in support of the motion for summary judgment, Safeway stated, "[o]ther than the attached Incident Report prepared by the Pearl River County Sheriff's Department, none at this time." Safeway further stated that it reserved the right to supplement its response as more information was made available. However, no supplementation of that response was ever provided. Moreover, the December 3, 2001 supplemental report of the Pearl River County Sheriff's Department merely indicated that the Washington Parish Sheriff's Office had been informed that the vehicle was located at Millers Auto Sales. There

was no indication from the report that any further arson investigation was pending.

Accordingly, under the undisputed facts herein, the suspension of the time delays for payment of the claim set forth in LSA-R.S. 22:658(B)(2) were inapplicable, and the questions before the trial court were simply whether Citizens had demonstrated a lack of support for Safeway's arson defense and, if so, whether Safeway's refusal to pay Citizens' claim was arbitrary, capricious or without probable cause. LSA-R.S. 22:658(B)(1).

To sustain an arson defense, the insurer has the burden of proving that: (1) the fire was of incendiary origin, and (2) the insured was responsible for it. Chisholm v. State Farm Fire & Casualty Co., 618 So. 2d 1059, 1062 (La. App. 1st Cir. 1993). Thus, to be entitled to summary judgment, Citizens had to establish the lack of factual support for one of these two elements of the arson defense. Likewise, to be entitled to penalties and attorney's fees, Citizens had to establish that Safeway's refusal to pay the claim because of its allegation of Peters' involvement in the arson was arbitrary, capricious or without probable cause.

In support of its motion, Citizens contended that the evidence demonstrated that there was no ongoing arson investigation or internal investigation by Safeway to substantiate any suspicion by the insurer of Peters' alleged involvement in the loss. Thus, Citizens contended that Safeway could not refuse payment based on its suspicion that Peters was involved in the arson, where no steps were taken to investigate those suspicions in two years since the loss.

Safeway did not offer any evidence in opposition to the motion for summary judgment to counter the evidence presented by Citizens or any evidence to establish that any type of investigation had ever been

commenced or was in fact ongoing. The record is also devoid of any evidence to establish that Safeway had any information available to it to support its claim of Peters' alleged involvement in the incident.

In finding that Safeway's actions were arbitrary and capricious or without probable cause, the trial court concluded in its reasons for judgment that a period of two years since the date of loss was "an unreasonable length of time for any 'investigation' to be used as an excuse for non-payment, as no one appears to be doing anything to further the progress."

Based on our de novo review of the record, we must conclude, as did the trial court, that Citizens demonstrated an absence of factual support for one of the elements of Safeway's arson defense, i.e., that Peters, the insured, was responsible for the loss. Even though Safeway may have been entitled, under the policy language, to assert the arson defense against Citizens as the loss payee, once Citizens demonstrated a lack of factual support for one or more of the elements of Safeway's arson defense, the burden then shifted to Safeway to produce factual support sufficient to satisfy its burden of proof at trial on the arson defense. Jackson National Life Insurance Company, 873 So. 2d at 48. In offering no countervailing evidence in support of its defense, Safeway simply failed to carry its burden. Thus, we find no merit to Safeway's argument that the trial court erred in rejecting its arson defense and, consequently, in concluding that, under the undisputed facts presented, Safeway was arbitrary and capricious in failing to pay the claim for two years based only on its unsubstantiated suspicion of Peters' involvement in the arson.

We also find no merit to Safeway's argument that the trial court erred in the amounts awarded to Citizens, considering the record herein and the

policy language at issue. Specifically, in the "Limit of Liability" section of the policy, the policy language provides in pertinent part as follows:

> The Company's liability for all losses under Part IV [Physical Damage] except for non-owned trailers shall not exceed the smallest of the following:
> (a) the actual cash value of stolen or damaged property or part thereof at the time of the loss;
> (b) the amount necessary to repair the damaged property at the time of the loss;
> (c) the amount necessary to replace the stolen or damaged property at the time of the loss with like kind and quality property less depreciation.

As previously noted, the right of a mortgagee to recover under an open loss payee clause is solely derived from the mortgagor/insured's right to recover, McMahon, 227 La. at 784, 80 So. 2d at 407, which in the instant case, is limited by the above "Limit of Liability" section of the policy. Moreover, while the purpose of an open loss payable clause is to protect the mortgagee's interest, which is the balance of the mortgage debt, the interest that is actually insured is the debtor's interest in the mortgaged property. Thus, when an insured loss occurs, the insurer is liable for **the value of the loss to the extent of the policy limits** and must direct payment to the loss payee, up to the balance of the mortgage debt. Rushing, 456 So. 2d at 601.

Accordingly, while Citizens' interest in the balance due on the mortgage debt was protected by virtue of Peters, the insured, naming Citizens as loss payee, Citizens' right to recover the balance due on the debt is limited to the value of the loss as defined within the policy, i.e., the actual value of the vehicle at the time of the loss. Therefore, if the vehicle was valued at an amount less the balance due on the mortgage debt, Citizens' right to recover would clearly be limited to the value of the vehicle at the time of the loss.

In its brief to this court, Citizens contends that the trial court's award was justified because LSA-R.S. 22:658 subjects an insurer to the possibility of exposure beyond its policy limits where the insurer violates the statute's requirements for timely payment of claims. Citizens argues that LSA-R.S. 22:658 provides for the imposition of penalties and further provides that the penalty will be in addition to "the amount of the loss." According to Citizens, the phrase "amount of the loss" is thus not equivalent to the amount recoverable under the policy, as asserted by Safeway. Rather, Citizens contends that the "amount of the loss" was the balance due on the loan to Peters, i.e., $11,392.02. While we disagree with Citizens' interpretation of the statute at issue, we find the record otherwise supports the amount awarded, based on the value of the truck and the language of the policy.

Louisiana Revised Statute 22:658(B)(1) provided at the time of the loss that the insurer's arbitrary and capricious failure to pay a claim "shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater." However, Citizens' interpretation of the phrase "the amount of the loss" as being the total loss suffered by Citizens, i.e., any amount due on the loan, ignores the fact that the interest that is actually insured is the debtor's interest in the mortgaged property, Rushing, 456 So. 2d at 601, and the fact that the right of a mortgagee to recover under an open loss payee clause is derived solely from the mortgagor/insured's right to recover, McMahon, 227 La. at 784, 80 So. 2d at 407. Indeed, as stated above, the insurer is liable for the value of the loss **to the extent of the policy limits** and must direct payment to the loss payee up to the balance of the mortgage debt. Rushing, 456 So. 2d at 601.

Accordingly, we conclude that the "amount of the loss" referred to in LSA-R.S. 22:658 refers to the **covered loss** under the policy language at issue. Such an interpretation is further supported by the language of LSA-R.S. 22:658(B)(1) itself, which provided for calculation of the penalty as "ten percent damages on **the amount found to be due from the insurer to the insured**," an amount to be determined by the policy language. (Emphasis added).

Nonetheless, as Citizens notes in its brief to this court, the Washington Parish Sheriff's Office incident report shows the estimated value of Peters' "show truck" as $25,000.00. Because Safeway failed to offer any evidence to contradict the value of the insured loss herein, i.e., the stated value of the vehicle at the time of its destruction, we agree that Citizens was entitled to at least the $11,392.02 amount sought by Citizens as its derivative claim recoverable under the "Limit of Liability" section of the policy. Accordingly, on de novo review, we find the trial court properly granted summary judgment in Citizens' favor herein and that the record supports the amounts awarded.

CONCLUSION

For the above and foregoing reasons, the February 26, 2004 judgment is affirmed. Costs of this appeal are assessed against defendant, Safeway Insurance Company

AFFIRMED.