IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION 15

ULTRA CONTRACTORS, LLC
A/A/O GIDGETT and
ALFREDO CARVAJAL,

Plaintiffs,

-vs- **CASE NO. 2018CA-000673**

FEDERATED NATIONAL INSURANCE COMPANY,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court June 27, 2018, for hearing on the Motion to Dismiss Plaintiff's Complaint filed by Defendant **FEDERATED NATIONAL INSURANCE COMPANY** (hereafter "FNIC") in the above-styled case. Upon a review of the motion, the files and records in this case, the arguments of counsel, and the applicable law, the Court finds as follows:

1. The facts underlying the motion are not complicated. FNIC insured the home of Gidgett A. and Alfredo A. Carvajal during the period relevant to this suit. In response to the Carvajals' claim of water damage Plaintiff **ULTRA CONTRACTORS, LLC** ("Ultra") allegedly repaired that damage and purportedly obtained an assignment of rights from the Carvajals, both of whom are named insureds under the policy. However, that assignment was actually signed by Gidgett only. Thus, FNIC argues, it is only a "partial assignment" and so does not confer upon Plaintiff any right to sue. FNIC's argument is *not* based on any claim that its policy simply forbids assignments of claims. *See Bioscience West, Inc. v. Gulfstream Property & Casualty Insurance Co.*, 185 So. 3d 638 (Fla. 2d DCA 2016), even if Ultra expends many pages of its response to the motion to dismiss to this issue.

2. The parties have cited to a number of cases but, in this Court's judgment, the list boils down to two. FNIC places great reliance upon *Space Coast Credit Union v. Walt Disney World Co.*, 483 So. 2d 35 (Fla. 5th DCA 1986). Here the credit union

had obtained a small claims judgment against a Disney employee, who then executed an assignment of *a portion of* his earnings to the judgment creditor. The agreement also directed Disney to make periodic deductions from the debtor's wages for a period of about two years and remit them to the credit union. Disney refused to honor the assignment and there was neither allegation nor proof that it had agreed to it. While the Court of Appeal acknowledged that Florida law recognizes wage assignments and that these, like any other chose in action, are generally assignable, it looked to the Restatement (Second) of Contracts §326 and concluded that "if the assignment is partial only, it cannot be enforced against the debtor, or the employer, without his consent" and that "neither event occurred in this case."

3. Ultra appears to believe that *Space Coast* has been abrogated or severely limited by *Start to Finish Restoration, LLC v. Homeowners Choice Property & Casualty Insurance Co., Inc.,* 192 So. 3d 1275 (Fla. 2d DCA 2016). If so that conclusion is debatable. As in the present case, in *Start to Finish* a homeowner assigned his policy benefits to the contractor who repaired water damage to his home. The trial court ruled that the assignment was unlawful, but when doing so it had not had the benefit of *Bioscience West, Inc. v. Gulfstream Property & Casualty Insurance Co., supra,* which is among several cases holding that "post-loss insurance claims are freely assignable without the consent of the insurer." As noted, FNIC does not contest the applicability of *Bioscience West* to the case at bar.

4. The portion of *Start to Finish Restoration* relied upon by Ultra is found in footnote 1. Homeowners, like FNIC, argued that the contractor had acquired at best a "partial assignment" akin to the one rejected by *Space Coast Credit Union.* The Second DCA first distinguished *Space Coast* by repeating that *Bioscience West* had done away with any requirement that an insurer consent to the assignment. With some imagination this might be seen as an extension of *Bioscience West* beyond insurance companies to any parties holding obligations to the assignor, such as an employer like Disney. Certainly the wages in *Space Coast* belonged to the judgment debtor, who appears to have worked out an agreement with the creditor but not separately with Disney. Because the wages were *his*, the credit union argued, no consent by Disney should be required so long as Disney was not subject to liability above and beyond the amount of the employee's debt.

5. To a certain extent the credit union's argument finds support in one of two older opinions from other jurisdictions relied upon by the *Space Coast* court. In *State Street Furniture Co. v. Armour and Co.,* 345 Ill 160, 177 N.E. 702 (1931), an employee had assigned his wages to the plaintiff furniture dealer, but had also signed an employment contract with Armour in which he agreed not to do so without the employer's consent. The Illinois Supreme Court concluded that this contract amounted to a violation of the employee's property rights, that is, the right to alienate the wages due to him in any fashion he wanted. No such consent by the employer is required. "There was no privity of contract between the assignee and the employer. They were relying upon two separate contracts with the employee, to

each of which one or the other was not a party. The contract of the employee with Armour & Co. not to assign his wages without its consent was not binding upon the assignee, who was not a party to the agreement. After a contract has been fully executed and nothing remains to be done except to pay the money, the claim becomes a chose in action, which is assignable and enforceable under [Illinois statute]. A violation of an employee's agreement with his employer may provide ground for the employee's discharge or other action by the employer but cannot control the disposition of moneys earned under the contract of employment."

6. Having thus ruled the Illinois court turned to the issue of *partial* assignments, finding that "the assignment here is of the entire claim and no question of partial assignment of a debt due or to become due is involved. Where the assignment is of the entire claim, the consent of the debtor is not required, as it is of no concern to the defendant in whose name the suit for wages due the employee is instituted. Where the employer owes the employee for wages earned, the contract of employment has, as to the wages earned, ceased to be a bilateral contract with mutual rights and duties. It has then become a unilateral contract or debt, with an absolute obligation on the part of the employer to pay and an absolute right on the part of the employee to receive his pay ... When one has incurred a debt, which is property in the hands of the creditor, the debtor cannot restrain its alienation as between the creditor and a third person any more than he can forbid the sale or pledge of other chattels. A debt is property, which may be sold or assigned, subject to the ordinary rules of the common law in determining the rights of the assignee, and, when untainted with fraud, its sale offers no ground for complaint by the debtor."

7. Unfortunately, at least to this observer, neither *Space Coast* nor *State Street Furniture* is of much use in determining what a partial assignment *is.* However, the answer is found in another case cited in *Space Coast. Pacific Mills v. Textile Workers' Union of America, Local No. 254,* 197 S.C. 330, 15 S.E. 2d 134 (1941). The assignment in this case involved a deduction of only a small part of the employees' wages for union dues. That is, the claimant's right was to only a portion of the wages owed by the employer. Given that the deduction in *Space Coast* was only twenty dollars per pay period, and not "the whole of said compensation," that decision is indeed consistent with *Pacific Mills,* which goes on to state: "The enforcement of these partial assignments, and it is conceded by the parties to this action that the wage assignments involved are partial assignments, would be to force appellant to become the agent of such of its employees as are members of respondent Union and have executed a partial assignment of their wages to the Union, and also the agent of the respondent Union to collect from the one and to pay over to the other. The appellant has the legal right to refuse to accept such an agency even if it were offered compensation for the additional work thus devolved upon it ... While the Courts of this State recognize a partial assignment of a chose in action as an equitable assignment and will protect the assignee when they can do so *without working a hardship upon the debtor,* yet the enforcement of such partial assignment can only be had in a Court of Equity."

8. The record in *Pacific Mills* indicated that the employer had obtained approximately 1,100 partial assignments, the processing of which was estimated to require six hours of employee time per week just to collect the union dues – and many more were apparently in the offing. If these and other conceivable partial assignments had to be honored "appellant would have to do a banking business insofar as open checking accounts are concerned." Further, "[A]side from the possibility of making errors in the collection of these dues, for which appellant would be answerable, and the possibility of having to defend actions for wrongfully deducting dues where there is a dispute as to whether an employee has actually executed an assignment, the appellant would suffer financial burden and hardship if it be compelled to recognize these partial assignments." This would amount to "a burden and hardship to which a court of equity cannot lend its aid."[1]

9. *Pacific Mills* makes clearer the potential burden placed upon Disney by the employee's assignment of only a portion of his wages, risks that are less likely to arise through the statutory procedure for wage garnishment. This is simply not the situation presented by *Start to Finish Restoration.* The record in that case contained no evidence that the homeowner had either assigned part of his benefits to another entity or retained any part of the assigned benefits for himself. Further, the opinion gives no indication of any insureds apart from the assignor. That being the case, there would be no danger that Homeowners might be subject to double recovery. The present case, at least according to FNIC, is distinguishable in that Alfredo Carvajal has not assigned *his* rights. Thus, reasons Defendant, the wife's unilateral assignment does not free it from the potential for multiple suits or claims over the same repair bill. The analogy to the wages in *Space Coast* may be broad but is not implausible.

10. If indeed this amounts to a different species of "partial assignment," the next question is whether dismissal is the appropriate remedy. The answer would be yes, albeit without prejudice, *if* Alfredo Carvajal is considered an indispensible party. Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder. An indispensable party has also been described as one whose interest will be substantially and directly affected by the outcome of the case and one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible. *Department of Revenue ex rel. Preston v. Cummings,* 871 So. 2d 1055 (Fla. 2d DCA 2004), *approved,* 930 So. 2d 604 (Fla. 2006) (*supporting citations omitted*).

11. One case raising the "indispensable party" issue in the coverage context – and involving convoluted facts – is *Hanover Insurance Co. v. Publix Market, Inc.,* 198 So. 2d 346 (Fla. 4th DCA 1967). *Hanover* involved a policy offering protection from

[1] For aficionados of political trivia, future Governor and Senator Strom Thurmond dissented from this opinion.

hazards arising from promotional activities at a shopping center, one of whose merchants was Publix. The policy erroneously insured "Taft-Hollywood Merchants Association, Inc.," a non-profit corporation that was nonexistent as a corporation at the time the policy was issued and never subsequently came into being. Instead, the merchants' association remained unincorporated. A platform collapsed during an event, apparently staged in Publix's parking lot, resulting in several claims for personal injury. Hanover refused to accept the responsibility for adjusting or defending those claims, taking the position that the only named insured was the nonexistent corporation. Hence suit was filed to reform the policy and declare the respective rights of the parties. The trial court agreed to reform the policy to list the similarly-named *unincorporated* association as insured and further held that Publix, as a member of same, was entitled to benefits under the policy. More relevant to the case at bar, Hanover then argued that indispensible parties – all other merchants composing the association – should have been joined as indispensible parties. The Court of Appeal disagreed, finding that Publix had sustained losses for which it was entitled to compensation. While the remaining association members perhaps could have been "proper" parties they were not indispensible. A resolution of Publix's individual losses would not have precluded them from asserting their own claims, had any existed. However, the present case does not involve either a nonexistent insured nor existing insureds with no stake in the outcome.

12. Plaintiff's fallback position is that one spouse may act on behalf of the other and thereby bind both to a contract.[2] Not all of the opinions involve a situation similar to this case. For example, *Meadows Southern Construction Co. v. Pezzaniti,* 108 So. 2d 499 (Fla. 2d DCA 1959), is an appeal (successful) by one of two spouses named in a deficiency judgment that followed the foreclosure of a mechanic's lien. Only the husband had contracted for the repairs that subsequently went unpaid. The appellate court stated that the wife nevertheless was *partially* liable. The origin of that liability was statutory in nature; the governing law stated that when a contract for improving real property is made with a husband or wife who is not separated and living apart from his or her spouse and the property is owned by the other or by both, the husband or wife who contracts shall be deemed to be the agent of the other to the extent of subjecting the right, title or interest of the other in said property to liens under this chapter unless such other shall, within ten days after learning of such contract, give the contractor and file with the clerk of the circuit court of the county in which the property is situated written notice of his or her objection thereto. The wife had given no such required notice. By law she was deemed to have waived any objection to the repair contract.[3] Such liability, however, "reaches only to the property upon which the improvements were made ... and [the] statute does not include personal liability on the part of the non-

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[2] The Court rejects without comment Ultra's final argument that FNIC lacks standing to challenge the assignment.

[3] Because this case was decided on statutory grounds, the term "unjust enrichment" does not appear in the opinion, although that also might be a valid basis for imputing some liability to the non-contracting spouse.

contracting spouse to sustain a deficiency decree in the event the proceeds are insufficient to satisfy the lien ... Thus it is not contemplated, as applied to the instant suit, that a deficiency decree could rest elsewhere than on a contractual obligation. Mere subjection by one spouse of an estate by the entireties to a lien for improvements does not commit the other spouse to the contractual obligation."

13. A different set of facts arose in *Murray v. Sullivan,* 376 So. 2d 886 (Fla. 1st DCA 1979). The initial question considered by the appellate court was whether a certain instrument was a lease or an agreement to purchase land. The alleged breach of the lease was nonpayment of rent, but evidence at trial failed to establish any arrearage. The tenants/purchasers had counterclaimed for specific performance of the sale contract, but the trial court's granting of same was reversed. The property in question was an estate by the entireties belonging to a husband and wife, and the wife did not sign the contract. "There is authority to the effect that the rule that an estate by the entireties can only be alienated by the joint deed of both spouses is subject to the exception that such alienation may take place if in the transaction one spouse, with full knowledge of the facts, constitutes the other spouse as his or her agent, and with such knowledge consents and acquiesces to and in the act of alienation by the agent spouse so constituted. But this exception is applicable only if the separate transfer does not adversely affect the interest of the spouse for whom the other spouse is claimed to have acted as agent, and only if such separate transfer occurs with the assent of the spouse for whom the other spouse acted as such agent." Such proof must be had by clear and convincing evidence.

14. The sole benefit to Plaintiff of *Murray v. Sullivan* may be that the case proceeded to trial rather than resolution by dismissal, after which the appellate court was able to review all the evidence in the plaintiff's possession before finding it lacking. However, the Court must also consider two Circuit Court opinions provided by Plaintiff which are more closely on point. While the Court is not bound by these opinions, it is appropriate to review them for their powers of persuasion. The earlier of the two decisions is the "Order Denying Defendant's Motion to Dismiss" entered by the Hon. Angela A. Dempsey in *The Swanson Group, LLC v. Security First Insurance Co.,* Volusia County Court Case No. 15-30400-COCI (June 9, 2015). The plaintiff asserted an assignment of rights under an insurance policy. The purchaser of that policy and listed owner of the covered property was Carland Kerr, but the assignment was made solely by her husband William. Thus, reasoned the defendant insurer, William had no insurance rights or benefits to assign. Judge Dempsey rejected this argument for at least two reasons. The first, which evokes this Court's prior remarks about *Murray v. Sullivan,* is that a court confronted with a motion to dismiss should look no farther than the "four corners of the complaint." However, the opinion goes on to find that the assignment was in fact valid. This was based on policy language that clearly defined "insured" to include a spouse. It is not clear whether Judge Dempsey also took evidence or reviewed affidavits, though at the dismissal stage it is unlikely she did.

15. The second decision is the "Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Cross-Motion for Summary Judgment" entered by the Hon. Rex M. Barbas in *Nextgen Restoration, Inc. v. American Integrity Insurance Co. of Florida,* Hillsborough County Circuit Court Case No. 2016CA-120 (November 7, 2016). The Circuit Court ruled, *apropos* the case at bar, that "spouses can sign for each other so long as it is for the benefit of both, *and here there is no evidence indicating otherwise*" (*emphasis added*). The remainder of the order discusses the now-discredited argument that an insurer's consent is required for an assignment of benefits. Once again, Judge Barbas's reference to "evidence" augurs in favor of denying the motion to dismiss without prejudice to move for summary judgment if appropriate.

16. Finally, the Court has considered the effect of *Ostosky v. Cianfrogna,* 789 So. 2d 529 (Fla. 5th DCA 2001), in which the defendants persuaded the trial court to dismiss the action for the plaintiff's failure to join an indispensable party. Plaintiff Ostoski contended he had been fraudulently induced to invest in two automobile dealerships. The alleged indispensable party was his wife, based on the fact Ostoski utilized funds from a joint account when making the investments. The Court of Appeal discerned two discrete errors in the trial judge's order, which more specifically directed Ostroski to add his wife as a party plaintiff. First, "a trial court has absolutely no authority to order any non-party, over whom it has no *in personam* jurisdiction, to become a party plaintiff. Secondly, even though the trial court could order Gary Ostoski to join Linda Ostoski as a party *defendant* (assuming she declined to become a plaintiff) it was clear error in this case to do so since the pleadings before the court furnish no support for the argument that Linda Ostoski is a proper party, much less an indispensable one to this action. According to the complaint, Gary Ostoski severed his tenancy by the entireties with Linda Ostoski in regard to their jointly owned funds, as he apparently had the right to do, and used those funds for separate investments in his own name. Given that severance, Linda Ostoski would have no interest in the subsequent investment of those funds. Thus, her joinder would require the needless waste of attorney fees, court costs, and time by an improper party to the litigation" (*emphasis added*).

17. To summarize the Court's findings regarding the Defendant's motion, they are as follows: (a) This case does not involve the type of "partial assignment" discussed in *Space Coast Credit Union v. Walt Disney World Co.*; (b) Therefore, the only plausible rationale for dismissal is under the theory that Alfredo Carvajal is an indispensable party, an argument that the motion does not actually make; (c) Defendant has the authority to join Alfredo Carvajal as a third-party defendant; (d) Alternatively, the questions whether Alfredo is an indispensable party and whether his spouse can waive his rights under the policy require a determination of fact and cannot be resolved within the four corners of the complaint.

Accordingly, it is **ORDERED** and **ADJUDGED** that Motion to Dismiss Plaintiff's Complaint is hereby **DENIED** without prejudice to Defendant to raise the

issues therein at trial or *via* motion for summary judgment. Defendant shall answer the compliant within 20 days of receipt of this order.

DONE and ORDERED on this the 5TH day of July 2018 in chambers at Bartow, Polk County, Florida.

/s/ Michael E. Raiden
MICHAEL E. RAIDEN,
Circuit Court Judge

Copies furnished to:
Imran Malik, Esq.
1061 Maitland Center Commons Blvd.
Maitland, FL 32751

Sarah M. Baggett, Esq.
Galloway Johnson *et al.*
400 N. Ashley Drive
Suite 1000
Tampa, FL 33602