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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

5800 TRANCAS CANYON, Plaintiff and Appellant, v. EMC MORTGAGE CORPORATION et al., Defendants and Respondents.	B216756 (Los Angeles County Super. Ct. No. SC097769)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed.

Neufeld Law Group, Paul S. Marks and Erin E. Brady; Neufeld, Marks, Gralnek & Maker for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, John B. Sullivan, Regina J. McClendon and Harold R. Jones for Defendant and Respondent EMC Mortgage Corporation.

LHB Pacific Law Partners, Clarke B. Holland, Patrick J. Bailey and Brendan J. Fogarty for Defendant and Respondent American Security Insurance Company.

INTRODUCTION

This appeal is from a judgment which was entered following the granting of two motions for summary judgment.

The action in the Los County Superior Court arose out of ownership of a home for investment purposes located in Malibu California by a Nevada based limited liability company known as 5800 Trancas Canyon, LLC. Appellant will be referred to herein as "Trancas."

Trancas acquired the home following serious fire damage. The homeowner's policy on the property provided coverage for replacement costs of the home.[1] The defendant/respondent insurer, American Security Insurance Company ("ASIC") made two payments totaling over $600,000. Trancas used these payments to begin rebuilding the home.

However, estimates obtained by Trancas showed that the true replacement cost was in excess of $1.5 million. Trancas felt shortchanged and made a demand on ASIC for the remaining balance of the true replacement costs. ASIC refused on the basis Trancas was not the true insured under the policy. ASIC maintained that the true insured was the mortgage[2] lender, defendant/respondent EMC Mortgage Corporation ("EMC"), and one Chung Kuang Lin, former owner, also an insured under the policy. ASIC took

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[1] The homeowner's policy will be referred to hereafter in this opinion as "policy" or "the policy" unless context requires otherwise.

[2] Frequently in its pleading in the trial court and before this court, Trancas uses the terms "a written mortgage agreement" instead of "deed of trust." We are constrained to point out that in California there is little practical difference between mortgages and deeds of trust. They perform the same basic function and a deed of trust is practically and substantially only a mortgage with power of sale. (*Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553.)

this position on the grounds that the contract of insurance was *forced insurance* obtained after Trancas' predecessor-in-interest had stopped paying the mortgage.

Trancas' suit for recovery of the alleged true value of replacement costs asserted causes of action for breach of contract, liability based on third party beneficiary theories, and breach of the covenant of good faith and fair dealing.[3] Following discovery, both ASIC and EMC filed motions for summary judgment on theories that Trancas had no rights under the policy either as an insured or a third party beneficiary. The trial court's tentative decision was to deny as to EMC after expressing at oral argument that the "best" beneficiary of the insurance policy appeared to be Trancas, the court ultimately sided with both defendants and granted both motions.

Trancas maintains it was not only the best beneficiary, but the only beneficiary of the insurance policy, and that both ASIC and EMC intended it to be the beneficiary of the policy and the proceeds. Based upon this reasoning, Trancas asserts it is a third party beneficiary of the policy proceeds with full contractual rights thereunder. Trancas further contends there are triable issues of material fact that must be decided by judge or jury and not by summary adjudication.

STANDARD OF REVIEW

The standard of review is correctly stated in Trancas' amended opening brief as follows: "It is black-letter law that summary judgment can be granted only if there is no triable issue of material fact and the moving parties are entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Defendants moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense. (*Id*., subd. (p)(2).) A defendant can

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[3] Specifically, Trancas alleged causes of action as follows in its first amended complaint, the operative pleading in this matter: 1. Breach of contract (third party beneficiary); 2. Breach of the covenant of good faith and fair dealing (insurance bad faith); 3. Breach of contract; 4. Breach of the covenant of good faith and fair dealing; 5. Claim in equity for insurance proceeds; and 6. Claim for lien on insurance proceeds.

satisfy this burden by presenting evidence that negates an element of the cause of action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) If this burden is met, the plaintiff then has the burden to set forth 'specific facts' showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).)

"The Courts of Appeal review a trial court's grant of summary judgment *de novo*, liberally construing the evidence in favor of the party opposed to the motion, and resolving all doubts concerning the evidence in favor of the opposing party. (*Miller, supra*, at p. 460.)" (Italics in original.)

FACTUAL AND PROCEDURAL SYNOPSIS

(FACTS)

The property.

The property in question is located at 5800 Trancas Canyon in Malibu, California. Before Trancas owned the home, a lessee of the property obtained a money judgment for $900,000 against the then homeowner, a Mr. Lin. The lessee began enforcement proceedings against the residence. Mr. Lin responded by letting his homeowner's insurance policy lapse and stopped paying the mortgage. The mortgage lender was Washington Mutual Bank (WaMu) and to insure continued insurance coverage obtained a so-called "force placed insurance policy" from ASIC. WaMu was listed as the primary insured and Mr. Lin was listed as an additional insured. In April of 2004, while the mortgage was still in default, WaMu sold the first deed of trust to EMC. During that month fire caused extensive damage to the home.

Fire damage to the home.

Over the next two years, several inspections and investigations to assess the extent of the damage and the cost of repair were conducted. At least five inspectors opined on the extent of damage caused by the fire and the likely replacement cost. Initially the Los Angeles County Fire Department estimated fire damage at $2 million. In 2005 Trancas' contractor assessed the replacement cost as being in excess of policy limits of $1 million for each occurrence. Later, two representatives of ASIC and EMC did an on site

inspection at the property, one in 2005 and one in 2006. Both inspectors likewise stated that the damage exceeded the insurance policy limits.

Payments by ASIC.

In December of 2004, ASIC paid $490,272.47 of insurance proceeds to EMC, the mortgage lender. By this time the home had gone into foreclosure for non-payment of the mortgage. However, Mr. Lin's judgment creditor went to court to stop the foreclosure, so that he could proceed with his own execution sale to foreclose on his judgment lien. Having prevailed, an auction was held; the judgment creditor became the successful bidder at the judgment lien sale and took title to the home in the name of 5800 Trancas Canyon, LLC. The sheriff's deed was recorded on or about December 17, 2004. Shortly thereafter the judgment creditor transferred its interest in LLC to different owners, but the LLC itself remained the owner of the home.

Negotiations over the past due mortgage payments.

Trancas and EMC soon began negotiations over the mortgage which had continued in default. The loan was reinstated in March of 2005 following payment by Trancas to EMC in excess of $200,000. Included in this payment were premiums for the forced placed insurance from the time of the fire. Negotiations then took place over approximately $500,000 in insurance proceeds that EMC had been holding since late 2004. EMC disbursed to Trancas about half of the insurance proceeds in August 2005, and the other half in March of 2006. These disbursements did not, however, cover the full replacement cost for the home as estimated by Trancas' engineering experts.

Trancas' continued claim for full replacement costs.

Trancas submitted its engineering report to EMC and ASIC showing damages well in excess of the amout paid to date. ASIC analyzed the report, had its claims adjuster visit the property and ultimately determined to pay an additional $181,391.46 to Trancas. Still not satisfied with the amount received, Trancas made further demand upon both the lender, EMC, and the insurer, ASIC, for proceeds for the full damages incurred. In October 2006, EMC reported to Trancas that it had received from ASIC in excess of

$1 million in policy benefits. Although the sum of $1 million was credible, EMC later advised Trancas that it had been mistaken and no more payments would be forthcoming. Trancas continued to press its claim by demanding full payment of replacement costs, requested information about the insurance policy itself and demanded a copy of the claims file. Neither ASIC or EMC responded to Trancas' demands and litigation ensued by way of a declaratory relief action, which was later amended to include a claim for damages after discovery had been conducted. Upon failure to obtain a stipulation to amend its complaint to include damages, Trancas dismissed its complaint without prejudice and filed this action which was disposed of by way of summary judgment as herein set forth.

(PROCEEDINGS)

Reasoning of the trial court in granting motions for summary judgment.

On April 13, 2009, the trial court granted the respective motions of ASIC and EMC for summary judgment. The court found as follows concerning the parties to the contract:

The insurance policy in question was acquired from ASIC by WaMu (also naming "its successors and assigns," which includes EMC as a successor). The policy specifically names Mr. Lin as an "additional insured." The policy does not include subsequent owner/buyer of the real property in either specific or general terms. Thus, the trial court initially ruled that ASIC had met its burden by showing Trancas was not a party to the policy. The trial court then explained that Trancas had the burden of showing a triable issue of material fact on its "sole ground for damages arising from the allegation that it is an intended third party beneficiary to the contract." On undisputed facts, the trial court next found that Trancas was not an express third party beneficiary or a member of a class of intended beneficiaries of the policy as follows:

Plaintiff relies on *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004 which holds that, "'[T]he third person need not be named or identified individually to be an express beneficiary.' [Citations.] 'A third party may enforce a

contract where he shows that he is a member of a class of persons for whose benefit it was made.' [Citations.]'" (*Id*. at p. 1023.) Plaintiff argues that its status as a later "homeowner" of the property, put it in a class which the policy intended to benefit. However, unlike the lease agreement in *Spinks*, the insurance policy here does not specify a class at all. Only the prior owner, Lin, is identified by name. Had it been the intent of the parties at the time the policy was drafted to include subsequent owners of the property, it likely would have said so.

Finally, the trial court rejected Trancas' argument that later events showed the contracting parties intended for Trancas to benefit from the policy as follows:

"[P]laintiff asks the court to look not only at the 'evidence of circumstances and negotiations of the parties in making the contract,' but also at the 'subsequent conduct of the parties in construing an ambiguous cont[r]act.' ([*Spinks*, *supra*, 171 Cal.App.4th at p. 1024].) Here, plaintiff cites to certain undisputed facts: (1) it made payments to the mortgag[ee], EMC, which covered not only late mortgage payments but a portion of the insurance premiums; (2) it received initial and supplemental insurance proceeds paid by ASIC to EMC from EMC; (3) EMC used information gathered from plaintiff's consultants to obtain the supplemental insurance proceeds; and [(4)] in emails plaintiff was sometimes referred to as the 'homeowner.' [¶] These 'subsequent events' fall far short of the facts the Court found in [*Spinks*]. . . . ASIC dealt only with EMC. EMC, as the mortgag[ee], acted to benefit itself by working with the plaintiff to restore the property to its original condition. [¶] Looking at the evidence in the light most favorable to the plaintiff, the court cannot find that it has met its burden of showing a triable issue of material fact as to the intent of the parties to include plaintiff as a beneficiary of the insurance policy. The subsequent events are insufficient as a matter of law to show that the parties intended plaintiff to be a beneficiary of the contract at the time of its formation. Plaintiff is an incidental beneficiary, and nothing more."

Judgment was entered in favor of ASIC and EMC on April 30, 2009. Notice of entry of judgment was served on May 4, 2009.

Trancas filed a timely notice of appeal on June 2, 2009.

DISCUSSION

Relevant insurance policy provisions.

Logically, we look first to the relevant policy provisions in determining whether Trancas was provided coverage.

Definitions.

"Throughout this policy 'you' and 'your' refer to the 'Named Insured,' (Mortgagee) and the 'Additional Insured' (Mortgagor) shown in the Declarations. 'We,' 'our,' and 'us' refer to the Company providing this insurance."

In part, the policy had the following conditions:

"12. Loss Payment. We will adjust all losses with the Named Insured. Payment for loss will be made within 60 days after we reach agreement with the Named Insured, entry of a final court judg[e]ment, or the filing of an approved award with us. Loss will be made payable to the Named Insured and the Additional Insured as their interests appear. . . .

"15. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the loss.

"22. Assignment. Assignment of this policy shall not be valid unless we give our written consent."

Undisputed determinative facts.

WaMu's assignment of deed of trust to EMC.

Prior to the fire destroying a significant portion of the premises, in March 2004 WaMu assigned its deed of trust on the property to EMC. The policy expressly included any successor and/or assign of WaMu as the named insured. EMC thus became the insured.

EMC's claim to ASIC for fire damage to the premises.

When the fire damaged the premises in April 2004, only EMC and Lin had insurable interest covered by the policy. Following the fire, EMC notified ASIC of the claim. Lin never made a claim, apparently on the theory that he would not have been entitled to payment on the loss unless the damage exceeded the amount of his debt to EMC. After receiving notice of the claim on August 5, 2004, ASIC investigated the loss and made an evaluation. By letter of August 20, 2004, ASIC informed EMC that it had completed its review of the claim and informed EMC that it would pay $490,272.47.

Request for additional payment by EMC.

A supplemental claim was made by EMC to ASIC for additional payments on November 18, 2005, which was denied by a responding letter dated April 14, 2006, with a summarized explanation, but with an additional payment of $181,391.46, and stating that "No other damage will be considered." The record reflects that EMC did not exercise its rights under policy conditions to demand an appraisal of the amount of loss or to sue ASIC within one year after the loss. In summary, ASIC paid $671,663.93 to EMC on the claim in two payments as follows: $490,272.47 in August of 2004 and $181,391.46 in April of 2006. EMC made no claim for any further amount. No claim of loss was made by Lin, apparently on the theory that no entitlement could be established because the damage exceeded the amount of his debt to EMC.

History of formation of Trancas and its purchase of the property.

Robert Herrera eventually was the creator of Trancas. Herrera had obtained a money judgment against Lin in the amount of $900,289.00. Herrera then began enforcement proceedings to collect the judgment. Herrera was aware of the fire damage to the house when he sought to collect his judgment by way of writ of execution.

In December 2004, Herrera was the successful bidder on the fire damaged property at a judgment lien sale. Title to the property was taken in the name of Trancas, a limited liability company Herrera had formed in November 2004.

Later in December of 2004, the current owners of Trancas purchased the company from Herrera for $550,000, subject to EMC's lien "in excess of $1,628,303.65" and a second judgment lien of $42,622.37. The sole asset of Trancas consisted of three lots in Malibu, where the damaged house was located.

The current owners of Trancas received the property in an "as is" condition and for land use only. Having inspected the property, the current owners of Trancas were aware of the burned out condition of the house and its uninhabitability, and potential serious mold problem.

Negotiations between Trancas and EMC in 2005 pertaining to EMC's mortgage lien and claim proceeds.

In 2005, Trancas undertook negotiations with EMC regarding the insurance proceeds received from ASIC. The agreement required EMC to provide the "insurance benefit payments" to Trancas if Trancas paid the past due amount on Lin's mortgage. After Trancas paid the past due sum, EMC paid Trancas the amount that ASIC had already indemnified EMC on the claim. After receiving the supplemental claim payment from ASIC in 2006, EMC also paid that amount to Trancas under the 2005 agreement.

Trancas' request for assignment of policy rights.

Trancas asked EMC in September of 2006 for an assignment of its claim against ASIC. EMC did not assign any of its rights under the policy to Trancas. ASIC did not receive or consent to any assignment of the policy to Trancas.

Trancas' direct request to ASIC for payment.

Trancas wrote directly to ASIC on June 13, 2006, asking for payment on the claim. ASIC responded in writing in mid-June 2006 denying the request because Trancas was not insured by the policy on the date of loss, and pointing out that the policy was not transferable.

Trancas' attorneys wrote to ASIC requesting information about the policy and claim in December of 2006. ASIC declined the request in January 2007 because Trancas

was not a named insured on the policy. ASIC further maintained it had already paid the claim in full to EMC, the named insured.

Payment of EMC's mortgage lien.

EMC received funds in June 2008 which paid in full the amount of EMC's mortgage lien on the property.

CONCLUSIONS

For the reasons hereafter set forth, we conclude that the claims of Trancas have no merit and Trancas was a stranger to the policy with ASIC and not entitled to any of the proceeds under the policy. We address the numerous claims of Trancas hereafter, as this court understands them.

Insurable interest.

In order to have a right to insurance policy proceeds arising from damage to property, one must have an insurable interest in that property at two requisite times: when the policy is issued and when the loss occurs.

Insurance Code section 281 provides: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." Property insurance does not insure the property itself; instead, it indemnifies a particular insured against damage to the insured's pecuniary interest in the property. (See *Davis v. Phoenix Ins. Co.* (1896) 111 Cal. 409, 414.)

Insurance Code section 282 provides: "An insurable interest in property may consist in: 1. An existing interest; 2. An inchoate interest founded on an existing interest; or 3. An expectancy, coupled with an existing interest in that out of which the expectancy arises."

Insurance Code section 286 provides in pertinent part as follows: "An interest in property insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime. . . ."

ASIC and EMC maintain that Trancas cannot satisfy the requirement of Insurance Code section 286 because it had no insurable interest in the property at the time the policy issued on February 21, 2004, or at the time of the loss on April 24, 2004. ASIC and EMC further point out that Trancas did not obtain an insurable interest in the property until December 2004, well after the contract formation and the fire.

We note that the formation of Trancas occurred on November 30, 2004 and its purchase of the property occurred in December 2004, more than seven months after the fire. The record shows that when the fire occurred, only EMC and Lin had insurable interests in the property. The policy covered their interests, but only EMC submitted a claim. ASIC paid the claim submitted by EMC. After ASIC's final payment in April 2006, EMC never requested any further claim payments.

Trancas opines that "Appellant became an insured party under the policy when it acquired the property" at the Sheriff's sale. But as ASIC and EMC argue, it is well-settled that "an insurance policy does not 'run with the land,'" citing *Long v. Keller* (1980) 104 Cal.App.3d 312, 320, *Russell v. Williams* (1962) 58 Cal.2d 487, 490, and the recent case decided by Division Eight of this court in *Washington Mut. Bank v. Jacoby* (2009) 180 Cal.App.4th 639. As stated by our high court in *Alexander v. Security-First Nat. Bank of Los Angeles* (1936) 7 Cal.2d 718, 722-723, the insurance policy "does not pass with title to the property." Therefore, "[a] fire insurance policy does not insure the property covered thereby, but is a personal contract indemnifying the insured against loss resulting from the destruction of or damage to his interest in that property . . . . The sum paid is in no proper or just sense the proceeds of the property." (*Long v. Keller, supra,* 104 Cal.App.3d at p. 320; see also *Burns v. Cal. Fair Plan* (2007) 152 Cal.App.4th 646, 651-652, an opinion decided recently by Division Four of this court.)

In short, we discern that ASIC and EMC are correct in their observation that a purchaser of property does not, by virtue of the purchase, have a right to the prior owner's insurance proceeds in the property. We further note that on facts similar to those here, the second appellate district, Division Eight, recently held that a subsequent

property owner may not recover on a prior owner's insurance policy. (*Washington Mut. Bank v. Jacoby, supra,* 180 Cal.App.4th at pp. 644-645.) In *Washington Mut. Bank v. Jacoby,* one Pittman owned property which he insured against loss by fire with State Farm. The property was encumbered by a first deed of trust held by Home Savings, the predecessor in interest of Washington Mutual. The insurance policy had a "lender's loss payable endorsement," ultimately protecting Washington Mutual's interest as the successor of Home Savings. A fire damaged the property and State Farm denied Pittman's fire claim because he failed to provide information as required by the policy. Jacoby then bought the fire-damaged property at a Sheriff's sale, subject to Washington Mutual's mortgage lien. When Washington Mutual received the proceeds from the Sheriff's sale, and the claim payment from State Farm, Washington Mutual realized that it had obtained more than its interest in the property. For that reason, Washington Mutual interpleaded the excess, pitting Jacoby against State Farm. The trial court granted State Farm's motion for summary judgment, awarding it the interpleaded funds.

On appeal, Jacoby argued that as Pittman's successor in interest with respect to the property, he was entitled to the policy's proceeds. The court disagreed, finding that Jacoby's purchase did not "insert him into the insurance contract that was between Pittman and State Farm." The court concluded that the "insurance policy was a personal contract between Pittman and State Farm" and that there was "no privity of contract between Jacoby and State Farm."

In *Long*, the court held the buyer was not entitled to insurance proceeds paid to the sellers after the subject property was damaged. (*Long, supra,* 104 Cal.App.3d at pp. 318-320.) In *Long*, the buyer claimed he was entitled to insurance proceeds paid by the sellers' insurance because, "once escrow opened the buyer's interest was in the land while the sellers' interest was only in the unpaid purchase price." (*Id*. at p. 320.) The court rejected this argument, restating the longstanding principle that insurance is a personal contract that does not transfer with title to a property. (*Ibid*.; see Ins. Code, § 305 ["mere transfer of subject matter does not transfer the insurance"].) It was the

sellers, not the buyer, who entered into the contract with the insurance company; therefore, it was the sellers, not the buyer, who were entitled to the insurance proceeds. (*Long, supra,* 104 Cal.App.3d at p. 320; see also *Bonaparte v. Allstate Ins. Co.* (9th Cir. 1995) 49 F.3d 486, 488 [insurance contract is personal and protects named insured, not a general class of owners].)

The *Long* court further explained, "[g]ranting buyer the proceeds of the insurance policy of sellers would result in a windfall to the buyer. It would be a clear case of unjust enrichment, since buyer would gain the benefits of insurance coverage for which she never contracted or paid." (*Long, supra,* 104 Cal.App.3d at p. 320.) The court reasoned that if the buyer in *Long* were entitled to insurance proceeds she would "receive a $13,000 piece of property for $1,000." Explaining that the sellers neither received a windfall nor were unjustly enriched, the court stated the sellers had an insurable interest in the property; they "contracted and paid for fire insurance. When the fire occurred, sellers received exactly what they contracted and paid for – the proceeds of the fire insurance policy." (*Id*. at pp. 320-321.)

Like the buyers in *Jacoby* and *Long*, Trancas had no right to insurance proceeds by virtue of its purchase of the insured property many months after the fire. Nor is Trancas, despite its assertion, entitled to receive claim proceeds due to its status as a "successor in interest" to Lin's ownership interest in the property. Lin's contract with ASIC was a personal one – it did not transfer when Trancas purchased the property. To the contrary, as Insurance Code section 305[4] and case law interpreting it demonstrate, the transfer of the insured property does not also transfer the insurance. (See *Alexander, supra,* 7 Cal.2d at p. 723; see also *Jacoby, supra,* 180 Cal.App.4th at p. 644.)

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[4] Insurance Code section 305 provides "The mere transfer of subject matter insured does not transfer the insurance, but suspends it until the same person becomes the owner of both the insurance and the subject matter insured."

Intended third party beneficiary status.

Trancas next contends that it is an intended third-party beneficiary of the policy. Trancas does not dispute that it was not named in the policy. Trancas argues, however, that it is "a member of a class of persons for whose benefit [the policy] was made." It also asserts that there are triable issues of material fact regarding its status as such a beneficiary. We disagree with these contentions. We discern no triable issue of material fact has been demonstrated by Trancas. We explain.

Our analysis begins with the basic proposition set forth in Civil Code section 1559 as follows: "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." "[T]he third person need not be named or identified individually to be an express beneficiary." (*Kaiser Engineers, Inc. v. Grinnell Fire Protection Systems Co.* (1985) 173 Cal.App.3d 1050, 1055.) An intended beneficiary may be named, identified, or part of "a class of persons for whose benefit" the contract was made. (*Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th at p. 1023.)[5] Someone only incidentally or remotely benefited by the contract, however, cannot enforce it. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590; *Jones v. Aetna Casualty & Sur. Co.* (1994) 26 Cal.App.4th 1717, 1724.)

To determine whether a contract was intended to benefit a third person, one looks to the terms of the contract, using an "intent test." (*Spinks, supra,* 171 Cal.App.4th at p. 1022.) The test requires that the contracting parties "intended to confer a benefit on the third party." (*Ibid.* citing *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348 [third party bears burden of proving contract was made to benefit it or its class].) Under the test, contract performance which causes an incidental benefit to a third party is of no

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[5] Both sides of this appeal cite *Spinks* in their briefing. Trancas maintains this 42-page opinion should be followed by this court on the merits of its claim to have status as an intended third party beneficiary of the proceeds of the policy with ASIC. ASIC and EMC discuss *Spinks* at length but with a different motive, namely to distinguish the facts of this case from the facts in *Spinks*.

consequence. (*Spinks, supra,* 171 Cal.App.4th at p. 1022 citing *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891.)

"The primary goal of contract interpretation is to give effect to the parties' intent as it existed at the time of contracting." (*Spinks, supra,* 171 Cal.App.4th at p. 1023 citing Civil Code § 1636; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) "Intent is to be inferred, if possible, solely from the language of the written contract." (*Spinks, supra,* 171 Cal.App.4th at p. 1023 citing Civil Code §§ 1636-1639; *Waller, supra,* 11 Cal.4th at p. 18.)

Trancas argues that it is in a class of subsequent mortgagors for whose benefit the policy was made. But we note that in the first instance, the parties to the policy were as follows: "1. American Security Insurance Company; 2. Named insured mortgagee . . . Washington mutual Bank, FA, its successors and/or assigns; and 3. additional insured . . . Chung Kuang Lin." Further, the "additional insured" is also described as the "mortgagor" shown in the policy. It appears to this court that any payment by ASIC on a claim would be to the named insured and the additional insured, "as their interests appear." We note further that Trancas, non-existent at the time of contract formation, was not an identified beneficiary in the policy. Secondly, Trancas contends the policy contemplated that a claim payment to the mortgagee "would necessarily benefit someone else." This contention lacks merit. We note that the policy does not require the mortgagee to use an indemnity payment in any particular way. In addition, we note that the policy confers no benefit on a future purchaser of the property. We are constrained to point out that courts "do not rewrite a provision of any contract, [including any provision of an insurance policy], for any purpose." (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073.) It appears to this court that Trancas had no rights as a later owner of the property because the policy expressed no such rights.

Trancas next argues that performance on the contract shows that the contracting parties intended to benefit Trancas as a member of a class, relying on subsequent events to establish it as an intended beneficiary. Where, as here, the contract language alone

resolves the question of Trancas's status, we find no need to look at the performance of the contract. (See *Spinks, supra*, 171 Cal.App.4th at p. 1023.) But were we to look at subsequent events, our conclusion would be that Trancas, at best, is an incidental beneficiary.

The *Spinks* case is cited by all parties to this appeal as indicated in footnote 5, *supra*. However, we find *Spinks* to be distinguishable from the facts of this case.

In *Spinks*, Lori Spinks and her employer Mobile Medical Staffing entered into a written employment agreement. (*Spinks, supra*, 171 Cal.App.4th at p. 1016.) Their contract required Mobile to provide housing. Thus, Mobile entered into a lease with Briarwood Apartments for a unit in which Spinks would ultimately reside. Spinks later sued Briarwood for wrongful eviction alleging that she was a third-party beneficiary of the lease. (*Id*. at p. 1018.) The trial court granted Briarwood's motion for summary judgment, ruling that Spinks was not an intended third-party beneficiary of the lease. (*Id*. at p. 1019.) The appellate court reversed, finding triable issues of fact as to Spinks' status. (*Id*. at p. 1030.)

The "subsequent events" in *Spinks* were as follows: 1. Spinks was allowed to move into the apartment; 2. She had to provide personal information to the lessor; 3. She completed a walk-through on the unit's condition; and 4. She was given a resident handbook spelling out the rules of occupancy. (*Spinks, supra*, 171 Cal.App.4th at pp. 1029-1030.) The Court of Appeal found disputed material facts existed as to the "later actions" and whether Spinks was the specific person who would reside in the unit and benefit by the lease. (*Id*. at p. 1030.)

But here, as to "subsequent events," it is undisputed that ASIC never paid policy benefits on the claim to Trancas – all of ASIC's payments were to EMC, as specifically required by the policy. Trancas obtained those amounts only as a result of negotiations in 2005 with EMC. ASIC was not involved in those negotiations and had no control or influence over EMC's decision to pay Trancas. Finally, it appears to this court that ASIC properly treated Trancas as a non-party to the contract by refusing to pay Trancas or to

give Trancas a copy of the policy or claim file. We find that Trancas' "later actions" theory fail to raise a triable issue of material fact on the "status" issue.

Bad faith.

By reason of our holding that Trancas has no breach of contract claim, Trancas' second cause of action for breach of the implied covenant of good faith and fair dealing must fail. This proposition is well established in the law. (See *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151.) "Someone who is not a party to [a] contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party." (*Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027, 1034.) In *Jones v. Aetna Casualty & Sur. Co., supra,* 26 Cal.App.4th 1717, in affirming a judgment in favor of the insurer, the Court of Appeal was unpersuaded by a lessee's argument that he had standing to prosecute a bad faith case as a third-party beneficiary of his landlord's insurance policy: "An insurer's duty of good faith and fair dealing is owed solely to its insured and, perhaps, any express beneficiary of the insurance policy. Incidental or remote beneficiaries of the policy cannot state a cause of action against the insurer for a breach of the duty. [Citations.] [¶] [¶]

"It is apparent from the terms of the insurance policy in the instant case that Jones was not an intended beneficiary. The fact that, by virtue of the lease provision for rent abatement, Jones would have received some benefit in the event Aetna indemnified the lessor for loss of rental income only makes him an incidental beneficiary under the policy. The policy itself and surrounding circumstances do not demonstrate that Aetna and lessor intended Jones to benefit from their agreement.

"The implied covenant of good faith and fair dealing in the insurance policy at issue was intended to benefit the insured lessor. Jones has no standing as a third party beneficiary to enforce the covenant made for the benefit of the lessor." (*Jones, supra,* 26 Cal.App.4th at pp. 1724-1725.)

We hold that because Trancas has no standing under the contract, Trancas' bad faith cause of action fails as well.

Equitable right to proceeds.

Trancas next resorts to equitable principles in its quest to convince this court that ASIC owes Trancas on the claim. We note that Trancas has not cited any authority supporting its equitable claims. We proceed further to determine if Trancas has made a case for equitable relief. As a general principle, equity follows the law. A court of equity cannot grant relief where the law denies such relief. (*Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 673 citing *Johnson v. Tago, Inc.* (1986) 188 Cal.App.3d 507, 518.)

We further note that the goal of equity is to do right and justice. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 770.) A court's use of its equitable power must take into account both sides of the dispute. A court cannot create a substantive right in the guise of doing equity. (*Cortez v. Purolater Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 180; *Stein v. Simpson* (1951) 37 Cal.2d 79, 83.)

Another general rule that comes into play involves purchase of property at a sale conducted by a Sheriff or any other authorized officer. The principle of caveat emptor applies to Trancas' purchase of the property at the Sheriff's sale. (See *Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 583.) We note that Trancas bought the property knowing of its significant fire damage. The record is clear that Trancas' current owners took possession of the property subject to two liens, to wit, in an "as is condition" and "for land value only." The record is also clear that possession was taken after inspection with knowledge of its "burned out condition," uninhabitabilitiy, and potential serious mold problem. In *Jacoby*, the court rejected Jacoby's argument that he should have received the insurance proceeds to fix undisclosed fire damage. It appears to this court that Trancas is in a much weaker position in invoking equitable principles than was the court in *Jacoby*. It is patent that Trancas bought the property at the Sheriff's sale fully aware of the fire damage, and the current owners knew of its severe disrepair before receiving it.

Additionally, we note that the purchase document clearly shows the current owners of Trancas knew that insurance benefits of approximately $490,000 "*may* be applied" against EMC's first mortgage lien. Trancas received no confirmation or indication that it would actually receive that money, nor did it receive any indication that any additional policy benefits would be paid to EMC. It clearly appears from the record that Trancas bought the property at fair market value at a judicial sale, aware of its physical flaws and monetary liens. We conclude that all of the money that Trancas later obtained from EMC was a windfall to Trancas. (See *Long, supra,* 104 Cal.App.3d at pp. 320-321 [granting insurance proceeds to a property buyer causes a windfall and unjust enrichment].)

The record raises a point of interest in that in September 2006, Trancas asked EMC for an assignment of the claim. However, the record is devoid of any evidence that EMC ever assigned any of its rights under the policy to Trancas. The record is also devoid of any evidence that ASIC had received or consented to any assignment of the policy to Trancas.

We further conclude that ASIC is not equitably estopped from asserting that Trancas has no rights under the policy for another reason. Trancas did not plead this theory in its complaint, and is therefore precluded from raising the issue on appeal. (See *Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640.) Going further, we note that Trancas makes no attempt to set forth the elements of equitable estoppels and has not set forth an example of how its theory would apply.

Policy claim limitation (one year).

Assuming Trancas could establish rights under the policy, expiration of the policy's one-year "suit against us" condition bars any lawsuit against ASIC on the claim. Although the trial court did not reach this issue, ASIC may raise it again on appeal. (See *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

The policy contains the following suit condition mandated by California Insurance Code sections 2070-2071 as follows: "15. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the loss." It is well established that in cases like this one, involving a sudden fire loss, the one-year period in the suit limitation condition begins to run on the date of the damage-causing event. (*Prieto v. State Farm Fire & Cas. Co.* (1990) 225 Cal.App.3d 1188, 1196.) In *Prudential-LMI Com. Insurance v. Superior Court (Lundberg)* (1990) 51 Cal.3d 674 however, the California Supreme Court held that the doctrine of equitable tolling applies to toll the statutory one-year suit provision in insurance contracts. Under this doctrine, the one-year period is tolled from the time an insured files a notice of claim until the time the insurer denies the claim. (*Id*. at p. 678.) The equitable tolling period also ends when the insurer unequivocally settles or pays the claim. (*Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122, 125-126.)

We observe that a year passed between the time of ASIC's unequivocal settlement of the claim and the date Trancas filed this lawsuit. ASIC informed EMC of the claim payment on August 20, 2004. The one-year suit limitation period began to run on that date. Under the policy, EMC had until August 20, 2005 to demand an appraisal of the amount of loss or to sue on a contested claim. (See *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 892-893 (review denied); *Mahnke v. Superior Court (Cal. Fair Plan)* (2009) 180 Cal.App.4th 565.) The record reflects that EMC did neither. If Trancas were an intended third-party beneficiary of the policy, Trancas had no greater rights than EMC. (See *Spinks, supra,* 171 Cal.App.4th at p. 1024.) We observe that Trancas' suit, filed April 9, 2008, was more than two and a half years late.

ASIC acknowledged that it handled EMC's supplemental claim of November 2005 and paid it in April 2006. But we note, in doing so ASIC expressly stated that it was not waiving any of its rights. After the one-year suit period expires, an insurer's claim payment is not a waiver of the right to rely upon the prior expiration of the one-

year period as a defense to a claim. (*Prudential-LMI Ins. Co., supra,* 51 Cal.3d at p. 690, fn. 5; *Aceves v. Allstate Ins. Co.* (9th Cir. 1995) 68 F.3d 1160, 1163-1164.) Moreover, we observe that Trancas did not plead waiver in its complaint or argue it in its opening brief. We hold that Trancas is precluded from raising waiver now. (See *Scolinos, supra,* 37 Cal.App.4th at p. 640.)

We find Trancas' lawsuit is barred for another reason. The final payment letter of ASIC dated April 14, 2006, unequivocally informed EMC that "[n]o other damage will be considered." Assuming the one-year suit limitation had not expired as previously held by this court, under the policy EMC had until April 14, 2007, to demand an appraisal of the amount of loss or to sue on the claim. EMC did neither and the one-year suit limitation expired no later than April 14, 2007, thus barring either EMC or Trancas from suing ASIC. We discern that when Trancas filed its lawsuit on April 9, 2008, the suit was more than 11 months late. It appears to this court that the bar applies to all of Trancas' causes of action because they are all "on the policy." (See *Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722.)

DISPOSITION

The judgment in favor of ASIC and EMC is affirmed. Respondents to recover costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**