STATE OF MICHIGAN

COURT OF APPEALS

CLARENCE G. ARCHAMBO, III,

Plaintiff-Appellee,

v

LAWYERS TITLE INSURANCE CORPORATION and CHEBOYGAN TITLE COMPANY,

Defendants-Appellants.

UNPUBLISHED
September 3, 2002

No. 202289
Cheboygan Circuit Court
LC No. 95-005318-CK

ON REMAND

Before: Griffin, P.J., and White and Cooper[1], JJ.

PER CURIAM.

This case involving a title insurance policy is before us for the third time, on second remand from the Supreme Court. The facts and procedural history are set forth in *Archambo v Lawyers Title Ins Corp,* 466 Mich 402; 646 NW2d 170 (2002), in which the Supreme Court reversed this Court's decision[2] and remanded for a determination "whether coverage is excluded under § 3(a) of the policy, which excludes coverage for liens 'created, suffered, assumed or agreed to by the insured claimant . . . .'" We answer that question in the negative. We find no error in the trial court's determination that plaintiff neither created nor suffered the federal tax lien because he did not voluntarily assent to its placement.

Exclusion 3(a) of the title insurance policy defendants issued provides:

> The following matters are expressly excluded from the coverage of this policy and the company will not pay loss or damage, costs, attorney's fees or expenses which arise by reason of:
>
> * * *
>
> (3) Defects, liens, encumbrances, adverse claims or other matters:

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[1] Judge Cooper has been substituted for Judge McDonald.

[2] *Archambo v Lawyers Title Ins Corp,* unpublished opinion per curiam of the Court of Appeals, issued 1/9/01 (Docket No. 202289) (White, J., dissenting).

(a) created, suffered, assumed or agreed to by the insured claimant.

Defendants do not argue that plaintiff assumed or agreed to the federal tax lien. They rely solely on the "created" and "suffered" language. No Michigan case has defined the words "created" or "suffered" in relation to this clause, which is standard in many title insurance policies. The clause is addressed in Anno: *Title insurance: exclusion of liability for defects, liens, or encumbrances created, suffered, assumed, or agreed to by the insured*, 87 ALR 3d 515. That annotation states that generally the provision has not barred coverage for liens that were brought about by the insured's negligence. *Id.*, 518, citing cases including *Bourland v Title Ins,* 4 Ark App 68; 627 SW2d 567, 571 (1982). Conversely, where the lien has resulted from the intentional misconduct of the insured, the clause will bar coverage. *Anno, supra* at 523, citing cases including *Ginger v American Title Ins Co*, 29 Mich App 279; 185 NW2d 54 (1970).[3]

In 10 Words and Phrases (2001 Cum Supp), pp 151-153, under "Created," "Created or Suffered," and "Created, Suffered, Assumed or Agreed to," cases are cited interpreting clauses identical to the one in the instant case. There are no Michigan cases cited, however, it is appropriate to look to other jurisdictions for guidance when there are no Michigan cases directly on point. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 710; 572 NW2d 216 (1997), rev'd on other grounds 460 Mich 348; 596 NW2d 190 (1999).

While none of these foreign cases deal with a federal tax lien, other states have consistently held that an insured must intentionally act in order to be deemed to have come within the terms of the exclusion. See, e.g., *Ticor Title Ins v FFCA/IIP*, 898 F Supp 633, 639 (ND IN, 1995); and *Arizona Title Ins v Smith*, 21 Ariz App 371; 519 P2d 860, 862 (1974). The word "suffered" within the exclusion has been deemed to be synonymous with the word "permit" and to imply power to prohibit or prevent. *Arizona Title*, *supra*. An insured is not barred from coverage if he was merely negligent. *Resolution Trust Corp v Ford Mall*, 819 F Supp 826, 840 (D MN, 1991).

Defendants have not controverted the allegations regarding plaintiff's role in the defunct corporation, and the trial court apparently found credible plaintiff's account of the circumstances leading to the imposition of the lien. Not having been in charge of these corporate responsibilities, plaintiff would have lacked control of the nonpayment of the taxes that gave rise to the lien. He consequently could not be charged with intentionally failing to make the payments. Therefore, under the uniform interpretation of the clause, the trial court did not err in finding that plaintiff neither created nor suffered the lien. All evidence and testimony regarding the matter establishes that plaintiff had no responsibility for the payment of taxes in the corporation and in no way agreed to the placement of a lien.

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[3] In *Ginger,* similar exclusions were involved but not defined. This Court determined that there was no coverage where the insured was part of a scheme to have the property fraudulently conveyed to him, and then suffered the loss when the conveyance was set aside.

We affirm the trial court's determination that coverage is not excluded under § 3(a) of the policy.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Jessica R. Cooper