COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT, DIVISION 2
CIVIL ACTION NO. 13-CI-01440

STEVE PAPASTEFANOU; and
MARY PAPASTEFANOU PLAINTIFF

V. **FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** ✓

KENTUCKY GROWERS INSURANCE COMPANY;
FIRST SECURITY BANK OF OWENSBORO, INC.; and
PHH MORTGAGE CORPORATION DEFENDANTS

This matter is before the Court on both parties' motions for summary judgment. Having considered the legal arguments and authorities presented by counsel, their written memoranda, and the record as a whole, and being otherwise fully and sufficiently advised;

THE COURT ORDERS that defendant's motion is GRANTED and plaintiff's motion is DENIED.

This case arises from a fire that damaged the Papastefanous' residence on November 12, 2012. Two mortgage companies, PHH Mortgage Corporation (hereinafter "PHH") and First Security Bank of Owensboro (hereinafter "FSB"), held mortgages on the property. The property was insured by Kentucky Growers Insurance Company (hereinafter "KGIC"). Prior to the fire, both mortgage companies had begun foreclosure proceedings against the Papastefanous. On May 4, 2015, this Court granted KGIC's motion for partial summary judgment against the Papastefanous because the foreclosure proceedings voided their insurance contract with KGIC. The Papastefanous have continued to pursue a derivative suit on behalf of the two mortgage companies, and have moved this Court for summary judgment to order KGIC to pay the

insurance proceeds to the mortgage companies. KGIC has also moved for summary judgment dismissing the case entirely.

Summary judgment should only be awarded when the movant has shown his right to judgment "with such clarity that there is no room left for controversy. Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." Steelvest, Inc., v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991). However, "impossible" does not mean in the absolute sense, but merely reflects the need for the moving party to show its right to judgment with such clarity that no other conclusion could practically be reached. See Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992). Since the motions were submitted KGIC and FSB have reached a settlement. Therefore, the only remaining claim before this Court is whether or not PHH can maintain a cause of action against KGIC. For the following reasons, it cannot.

"It is well recognized that a standard [mortgage] clause operates as a distinctive and separate contract between the insurer and the mortgagee." Grange Mutual Casualty Co. v. Central Trust Co., N.A. (THE), 774 S.W.2d 838, 839 (Ky. 1989). The Kentucky Supreme Court has previously left its mark on the two operative clauses in this insurance contract. In Anderson v. Kentucky Grower's Insurance Company, 105 S.W.3d 462, 465-66 (Ky. 2003), the Court held that Provision 17 of KGIC's insurance contract was a "standard mortgage clause." Therefore, the Anderson court permitted the insured to bring a derivative suit on behalf of the mortgagee provided there was no clause in the contract limiting the mortgagee's right to recover. KGIC argued that the mortgagee was not permitted to recover because it failed to notify KGIC of a "substantial risk of which the mortgagee became aware." KGIC argued that foreclosure proceedings were a "substantial risk," but the Kentucky Supreme Court disagreed. "Had

Kentucky Growers desired to make the mortgagee's recovery under the policy contingent upon notifying it of filing of foreclosure proceedings, it could have done so with explicit language." Id. at 466.

In response to this adverse ruling, KGIC amended their standard insurance contracts. The old policy stated, "If this Company denies a claim to the insured, that denial does not apply to a valid claim of the mortgagee, if the mortgagee has: (a) notified this Company of change of ownership, occupancy or substantial change in risk of which the mortgagee became aware..." Id. at 464. The new policy states:

> If "we" deny "your" claim, that denial does not apply to a valid claim of the mortgagee, if the mortgagee has:
> a) notified "us:" upon commencement of foreclosure proceeding, a change in ownership, occupancy or any other substantial change in risk of which the mortgagee became aware...

(Def. Resp. to Pl. Mot. Summ. J. and Cross-Mot. Summ. J. Ex. 1.). Furthermore, Policy Provision 18 states, "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with and unless commenced within twelve (12) months next after inception of the loss." (Ex. 2 at 21).

KGIC moves for summary judgment on two grounds. First, it argues that PHH failed to notify it of foreclosure proceedings, and is therefore incapable of recovery pursuant to the terms of the contract. PHH essentially argues that the new policy language is ambiguous, not conspicuous, and PHH never received a copy of the contract. PHH argues that any ambiguity should be resolved in favor of the insured, but this Court does not find the language to be ambiguous. The language was entered into the standard form as a direct response to the adverse Anderson holding, and is designed to protect KGIC in the very circumstance before this Court. In order for a mortgagee to protect its right to payment under the policy, it must notify KGIC

when it has initiated foreclosure proceedings against the insured. PHH failed to comply with its responsibilities under the insurance contract and is now barred from recovery. PHH also argues that the policy provision should have been more conspicuous. However, the Anderson court did not require KGIC to amend its contract conspicuously, it required KGIC to amend it *explicitly*. KGIC did just that. Finally, although PHH has argued that it did not receive a copy of the contract, KGIC has provided evidence the contract was tendered to PHH. (Def. Reply to Pl. Cross-Mot. Summ. J. Ex. 2).

Second, KGIC moves for summary judgment because PHH failed to pursue its rights within twelve months after the fire. The Papastefanous filed their complaint on November 12, 2013, the last possible day under the policy. The complaint named PHH as a defendant and attempted to reserve PHH's right to recover under the policy even if it was discovered that KGIC was not required to compensate the Papastefanous. See Compl. ¶ 10. The first pleading filed by PHH was on May 7, 2014, in which it asserted its own claim against KGIC for the first time. PHH argues that its pleading should relate back to the filing date of the complaint. KGIC argues that cross-claims do not relate back to the filing date of the complaint, which distinguishes them from counter-claims. KGIC cites L.C. Charters, Inc. v. Mel's Multi-Service, 2011 WL 5244821 (Ky. App. Ct. 2011) (UNPUBLISHED), to support its argument that cross-claims do not relate back. The Court of Appeals distinguished counter-claims, which do relate back to the filing date of the complaint, from cross-claims which do not. "In fact, a cross-claim is more akin to an original action. While there is no Kentucky law on point, other jurisdictions have considered this issue. . ." Id. at *2 (citations omitted).

Although there is no published case directly on point, this Court finds L.C. Charters to be persuasive. PHH's cross claim is akin to an original action which should have been brought

within twelve months of the loss. PHH could have protected its interest in the property by notifying KGIC it had begun foreclosure proceedings. It cannot argue that the decision of the Papastefanous to wait until the last day of the limitations period to file their claim prohibited it from filing its own claim within twelve months of the loss.

Finally, PHH argues that the clause at issue should be void as a matter of public policy because it operates to cancel an insurance contract in violation of KRS 304.20-300 through KRS 304.20-350. However, this argument was already rejected by the Anderson court. Anderson, 105 S.W.3d at 465 ("policy provisions declaring a policy void if a foreclosure action is filed [are] held to be generally valid and enforceable as against the insured."). Therefore, the clause is not void.

Having considered the legal arguments and authorities presented by counsel, and the record as a whole, and being otherwise fully and sufficiently advised;

THE COURT ORDERS that defendant's Motion for Summary Judgment is GRANTED and plaintiff's case is DISMISSED.

This is a final and appealable order and there is no just cause for delay.

This 22 day of November, 2016.

JOHN R. GRISE, JUDGE
WARREN CIRCUIT COURT, DIVISION 2

Clerk, send copies to:

11.23.16 TR

[✓] James I. Howard
[✓] Don A. Pisacano
[✓] V. Ashley Waller