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

STEVE PAPASTEFANOU; and
MARY PAPASTEFANOU

PLAINTIFF

V. **ORDER GRANTING DEFENDANT, KENTUCKY GROWERS INSURANCE COMPANY'S, MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

DEFENDANTS

The defendant, Kentucky Growers Insurance Company, has filed a motion for a partial summary judgment to dismiss the plaintiffs' individual claims under the policy. For the reasons stated below, the motion is GRANTED.

On November 12, 2012, the plaintiffs' house suffered a fire loss. Kentucky Growers learned during its investigation that two banks had foreclosed on two mortgages against the property in an action filed in Warren Circuit Court, Division 2, Civil Action No. 11-CI-00335. Kentucky Growers, therefore, denied the claim because the insurance policy that it issued contains a provision that states: "The entire policy shall be void . . . if with knowledge of the 'insured' foreclosure proceedings be commenced." The defendant relies on an identical provision to one in a policy upheld in Anderson v. Kentucky Growers Insurance Company, 105 S.W.3d 462 (Ky.App. 2003).

The plaintiffs argue that the defendant is precluded from asserting these defenses because the defendant cannot prove that they ever provided a copy of the insurance policy to the plaintiffs, or made the plaintiffs aware of this particular provision. Alternatively, the plaintiffs

argue, even if the insurance policy is void regarding its payment for the structural damage (because payment now is due to the mortgagees), the plaintiffs are entitled to recover from the defendant their claim for contents, living expenses, and the excess value of the property, if any, after the mortgages have been paid.

In Anderson, the Kentucky Court of Appeals held that the same policy provision was valid and enforceable against the named insured. Plaintiffs, however, claim that when there is an unusual or unreasonable provision, such as this one here, Kentucky Growers must be estopped from asserting the provision against them unless they can prove that they had provided the plaintiffs with a copy of the policy, or otherwise made them aware of that provision.

An insurance policy is a written contract whose terms are binding on both parties; and after acceptance, the insured's lack of knowledge of its contents does not furnish a sound basis for reforming it or voiding its provisions. The interpretation and construction of an insurance contract is a matter of law for the Court. See, Stone v. Kentucky Farm Bureau Mut. Ins. Co., 34 S.W.3d 809, 810 (Ky.App. 2000). In the absence of ambiguities that call into question the meaning of the policy, or in the absence of a statute to the contrary, the terms of a policy of insurance must be enforced as written. Goodman v. Horace Mann Ins. Co., 100 S.W.3d 769, 772 (Ky.App. 2003). Unless the terms employed in the policy have acquired a technical meaning in law, they are to be interpreted "according to the usage of the average man and as they should be read and understood by him in light of the prevailing rule that uncertainties must be resolved in favor of the insured." Fryman v. Pilot Life Ins. Co., 704 S.W.2d 205, 206 (Ky. 1986).

In essence, the plaintiffs are arguing for a "reasonable expectation" doctrine to apply because, they say, the defendant cannot prove that the plaintiffs ever read that particular provision in the policy and, thus, the policy must be enforced according to what the insureds

would expect it to cover. However, the plaintiffs cite no case law for their contention about the burden of proof, or for their "rule" that unless the defendant can proves the plaintiffs received a copy of the policy, any unusual provisions cannot be enforced.

Moreover, the plaintiffs have not shown that this foreclosure provision is unusual. In fact, it would appear to be a usual and common protection for insurance companies loathe to underwrite risk for a house in which the owners might have diminished incentive to protect. Furthermore, the law provides for exclusions in contracts, particularly provisions such as the one in this case, where it is clear and conspicuous. Under the doctrine of reasonable expectations, an insured would be entitled to all coverage he may reasonably expect to be provided according to the terms of the policy, unless there is a conspicuous, plain and clear manifestation of the insurance company's intent to exclude coverage, which notice would defeat that expectation. In the instant case, the terms of the policy excluding coverage for a home in foreclosure defeated whatever reasonable expectations, if any, the insured could hold, because the language in the provision was clear and conspicuous that "this entire policy shall be void . . . upon foreclosure proceedings.

Finally, the plaintiffs do not satisfy the essential elements of equitable estoppel, which are:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are (1) *Lack of knowledge and the means of knowledge of the truth as to the facts in questions;* (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Gosney v. Glenn, 163 S.W.3d 894, 899 (Ky.App. 2005). (*emphasis* added)

The Kentucky Court of Appeals has held that an assertion of equitable estoppel fails when an insured did not lack knowledge of the policy, or had the means of obtaining knowledge of it. Here, the provisions of the insurance policy clearly showed the exclusion for coverage on foreclosed properties. Ms. Papastefanou signed the application for insurance and received a copy of the insurance policy as evidenced by her negotiation of the refund check included in the package. More importantly, they certainly had the means of obtaining knowledge of the provision, and the fact that they did not read the policy does not provide them with a basis for their claim. The mere lack of knowledge of the contents of a written contract for insurance cannot serve as a legal basis for avoiding its provisions.

WHEREFORE, THE COURT ORDERS that the motion for partial summary judgment of Kentucky Growers Insurance Company against the plaintiffs is GRANTED, and, therefore, the plaintiffs' individual personal claims are DISMISSED, with prejudice.

This matter shall be scheduled for a status conference to schedule resolution of the remaining claims by separate order.

This 1 day of May, 2015.

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

Clerk, send copies to:

5/4/15

[ ] James I. Howard
[ ] Don A. Pisacano
[ ] PHH Mortgage Corporation, c/o CSC-Lawyers Incorporation Service Company
[ ] David T. Reynolds