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No. 64261-8 I

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I

DAVE ROBBINS CONSTRUCTION, LLC,
a Washington Limited Liability Company,

Appellant,

v.

FIRST AMERICAN TITLE COMPANY,
a domestic insurance company,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
STATE OF WASHINGTON
THE HONORABLE DEBORAH FLECK

AMENDED BRIEF OF APPELLANT

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COMES NOW Appellant DAVE ROBBINS CONSTRUCTION LLC (“DRC”), by and through its attorney of record, MAHER AHRENS FOSTER SHILLITO PLLC, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Appellant’s brief on Appeal as follows:

I. ASSIGNMENTS OF ERROR

A. **Assignment of Error:** The trial court erred in granting Defendant’s Motion for Dismissal pursuant to CR 12(b)(6) on September 4, 2009.

B. **Issues on Appeal:** Did the Court properly conclude that there were insufficient facts or a failure of Appellant to state a claim upon which relief could be granted for breach of contract based upon a title insurance policy issued to Appellant by Respondent? **No.**

II. STATEMENT OF THE CASE

Appellant, Dave Robbins Construction LLC (“DRC”) was a licensed and bonded contractor of upscale custom homes. DRC was the owner of five of a total of six lots within Green Valley Estates in Black Diamond, Washington. CP 4. However, since inception of this suit, the lots have been lost to foreclosure to Kitsap Bank, primarily as a result of the events outlined in the underlying Complaint in this matter.

Green Valley Estates is a six lot subdivision that received final plat approval from King County in August, 2005. The plat is recorded under

King County Recorder's No. 20050816001625. CP 4. The original developers of the plat were Randy Weber and Linda Weber, who retained ownership of one of the lots and subsequently built their personal residence thereon. CP 4. DRC purchased Lots 1, 3, 4, 5, and 6 (collectively the "Lots") of Green Valley Estates from the Webers at various times. CP 5. DRC's plan was to construct residential homes on each lot, sitting on approximately one acre each. At the time of purchase, DRC obtained preliminary commitments for title prior to closing which revealed no unusual conditions on title. CP 5. DRC obtained title policies upon closing that also did not reveal any unusual exceptions.

DRC first applied for a building permit for lots 3, 4 and 5 on June 13, 2006, identified as King County Department of Development and Environmental Services ("DDES") project numbers B06L0844, B06L0847 and B06L0849 respectively. After receiving the permits, DRC began construction on each lot. The homes passed all initial inspections and were collectively approximately 75% complete as of late February, 2008. CP 5,6.

DRC applied for a permit for lot 6 on April 5, 2007, DDES project number B07L0388. The home was approximately 67% complete as of late February, 2008, and passed all building department inspections. Finally, DRC applied for a permit for Lot 1 on April 24, 2007, identified

as DDES project number B07L0471. As of late February, 2008, it approximately 67% complete, and also passed all inspections. CP 6.

On March 4, 2008, a stop work order was issued by DDES against the Lots owned by DRC after a third party discovered Native American artifacts on the Lots. CP 6. The stop work order indicated that DRC had to obtain an archaeological survey in order to comply with RCW 27.53 (Archaeological Sites and Resources). CP 6. In addition to surveys, DRC was also required to obtain a permit for building and conducting the survey. In addition to extra permitting and building requirements, the Muckleshoot tribe of Indians was notified as an interested party pursuant to RCW 27.53.060 (as being the local affected and interested tribe).

After the issuance of the stop work order, DRC only then discovered that the Lots are located in the Green River Gorge Historical District (GRGHD). CP 5. GRGHD is historic district designated in the Washington State Register of Historic Places under RCW 27.34.220. Pursuant to RCW 27.53.020, a ‘historic archaeological resource’ is one that is listed or is eligible for listing in the Washington State Register of Historic Places. Thus, based upon its placement within the GRGHD, the property is subject to RCW 27.53.060. That section provides in pertinent part as follows:

(1) on the Private and public lands of this state, it shall be unlawful for any person, firm, corporation, or any agency or institution of the state or a political subdivision thereof to knowingly remove, alter, dig into, or excavate by use of any mechanical, hydraulic, or other means, or to damage, deface, or destroy any historic or prehistoric resource or site. . . .without having first obtained a written permit from the director for such activities.

RCW 27.53.060. Thus, by virtue of the GRGHD designation, a permit should have been obtained for any work conducted within the district before it began. DRC was not required to do so, and was only advised to do so after the Native American artifacts were discovered and the Stop Work Orders issued. CP 6. Nonetheless, any future owner of the property would have to be advised by DRC, as seller, of any issues affecting title and/or use of the property, pursuant to RCW 64.06 *et. seq.*, simply based upon that designation.

As a result of the stop work order and GRGHD designation, DRC was not financially able to complete construction due to the stringent restrictions placed upon the parcels. Following placement of the Stop Work Orders, DRC proceeded to obtain an archaeological survey, as required by DDES and the Washington Department of Archaeology and Historic Preservation. The excess costs and time involved, and the potential restrictions on completion caused DRC to ultimately lose the properties to foreclosure.

Neither DRC nor any of its members or agents knew of the GRGHD designation at the time of purchase, from either the title company, the seller, or King County. As stated, at the time of purchasing the Lots, DRC obtained title insurance policies from Respondent First American Title Insurance Company (First American) for each of the Lots, under Policy Nos. 4209-986456-A (Lot 1), 4209-816531-A (Lot 3), 4209-816536-A (Lot 4), 4209-816543 (Lot 5), and 4209-986450-A (Lot 6). CP 5. The title insurance policies issued by First American did not contain any notification or disclosure that the properties were located within the GRGHD, nor was there an exception noted on the deeds. CP 5. The GRGHD designation is of public record, designated in the Department of Historical and Archaeological Preservation's database of historic properties. Indeed, review of the map area contained within the GRGHD, and attached to Plaintiff's Response to Defendant's Motion to Dismiss, reveals that GRGHD is very large and encompasses a great deal of affected property. CP 76.

Had DRC been aware of the historic district designation affecting title, it would not have purchased the lots due to their location within a historic designation and potential restrictions placed on development of those lots under RCW 27.53 *et. seq.* CP 6. Upon placement of the stop work orders, the company lost a sale of one of its lots. CP 6. Had an

archaeological survey even been conducted as part of the plat requirement due to plat location within a Historical District under SEPA review, the artifacts would have been found, and the company would not have suffered delays in construction.

DRC made a claim under its title policies with First American for failing to notify DRC of the historic designation and failure to insure marketable title. CP 7. First American denied all claims of DRC under the titled policies. CP 7. Following denial by First American, DRC filed this lawsuit, claiming breach of contract and bad faith. First American brought forth a motion for dismissal of Plaintiff's Complaint under CR 12(b)(6) for failure to state a claim under which relief may be granted. CP 11, 14. First American alleged that the policies did not provide coverage for historical designations. First American was granted dismissal on September 4, 2009. CP 93-94. This appeal followed upon DRC's filing of a Notice of Appeal to Division I of the Washington Court of Appeals. CP 95-98.

III. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a dismissal of a claim under CR 12(b)(6) is de novo. *Reid v. Pierce Cy.*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). Dismissal of a claim is appropriate only if it appears beyond

a reasonable doubt that no facts exist that would justify recovery. *Reid*, at 201. The court accepts as true the allegations in a plaintiff's complaint and any reasonable inferences therein. *Reid*, 136 Wn.2d at 201. Here, the court's review is thus de novo.

B. THE COURT ERRED IN GRANTING FIRST AMERICAN'S MOTION UNDER CR 12(b)(6).

The trial court erred in granting First American's Motion to Dismiss under CR 12(b)(6). That section provides in pertinent part as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(6) failure to state a claim upon which relief can be granted. . .

CR 12(b)(6).

CR 12(b)(6) motions "should be granted only sparingly and with care." *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citations omitted). A dismissal under CR 12(b)(6) "is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Bravo*, 125 Wn.2d at 750. Indeed, "[a]ny hypothetical situation

conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Id.* As such, "[h]ypothetical facts may be introduced to assist the court in establishing the 'conceptual backdrop' against which the challenge to the legal sufficiency of the claim is considered." *Id.*

In order for a complaint to survive a motion for dismissal on the ground that it fails to state a claim upon which relief may be granted, the legal basis for the claim should be stated. *Orwick v. City of Seattle*, 103 Wn.2d 249, 255, 692 P.2d 793 (1984). Courts should dismiss a claim under CR 12(b)(6) only "when it appears beyond reasonable doubt that no facts justifying recovery exist." *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Moreover, courts presume the truth of all allegations in the complaint when considering a motion to dismiss. *Kinney v. Cook*, 159 Wn.2d at 842. A complaint will survive a motion to dismiss "if any set of facts could exist that would justify recovery." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *affirmed on rehearing* 113 Wn.2d 148, 776 P.2d 963 (1989).

Here, dismissal was not appropriate because Appellant had a valid cause of action for breach of contract. DRC purchased title insurance policies with First American, which First American sold and agreed to insure. DRC presumed these policies were accurate and insured

marketable title. The policies failed to disclose vital information and further failed to insure against the loss of an unmarketable title. As a result, DRC has suffered damages.

C. THE COURT ERRED IN DISMISSAL AS A VALID CAUSE OF ACTION EXISTS FOR BREACH OF CONTRACT WHEN RESPONDENT FAILED TO INSURE MARKETABLE TITLE AND FAILED TO DISCLOSE VITAL INFORMATION

In Washington, insurance policy interpretation is a pure question of law. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002). The court must give the terms of the policy a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Id.* (internal quotation omitted). If the policy language on its face is fairly susceptible to two different but reasonable interpretations, ambiguity exists, and the court will apply the interpretation most favorable to the insured. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (cited in *Petersen-Gonzales v. Garcia*, 86 P.3d 210 (2004)).

“It must not be forgotten that the purpose of insurance is to insure, and that the construction should be taken which will render the contract operative rather than inoperative.” *Schroeder v. Royal Globe Ins.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983) (citations omitted). “A construction which contradicts the general purpose of the contract or results in a

hardship or absurdity is presumed unintended by the parties. The language [of a policy] must be construed so as to give the insured the protection which he reasonably had a right to expect; and to that end any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in his favor.” *Schroeder*, 99 Wn.2d at 68 (citations omitted).

In the instance of title insurance, it has been described as “[a]n agreement to indemnify against loss arising from a defect in title to real property, usually issued to the buyer of the property by the title company that conducted the title search.” *Campbell v. Ticor Title Ins. Co.*, 209 P.3d 859, 861 (2009). In this case, the title insurance policy was to protect against losses due to an unmarketable title and governmental regulations restricting use of the property. The title insurance policy failed to disclose vital information, which was a matter of public record. As a result of these actions, DRC suffered damages and should be permitted to pursue a cause of action for breach of contract and bad faith for First American’s failure to insure the property. Thus, dismissal was not appropriate.

i. First American failed to insure marketable title to DRC

The title insurance policy issued by First American specifically provided that it would cover any loss due to unmarketable title. The title policy defines unmarketable title as follows: “Title affected by an alleged

or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.” See Title Policy Definition of Terms (1)(k), p.2, CP 21. See also CP 44. However, the policy is silent as to the definition of marketable title.

Within Washington, “marketable title” has been described as “one that is free from reasonable doubt and such as reasonably well informed and intelligent purchasers, exercising ordinary business caution, would be willing to accept.” *Hebb v. Severson*, 32 Wn.2d 159, 166, 201 P.2d 156, 159 (1948). Washington courts have defined it as the ability of the purchaser of land to hold title with security, and without doubt, that the title is secure and he may hold title to the land peacefully, without the anxiety that the land he has invested money in may be taken away or have its marketable value disturbed or diminished. *Hebb v. Severson*, 32 Wn.2d at 166-167, citing *Empey v. Northwestern & Pacific Hypotheekbank*, 129 Wash. 392, 225 P. 228.

“A ‘marketable title’ is one which can be readily sold to a reasonable prudent purchaser or mortgaged to a person of reasonable prudence. It is title enabling one to be reasonably sure, if he or she wishes to sell it, that no flaw or doubt will arise to disturb its marketable value.”

92 C.J.S. Vendor and Purchaser § 326. “Marketable Title” has been held to be synonymous with “Perfect Title” or title that is in fact free from any reasonable objection. 92 C.J.S. Vendor and Purchaser § 325.

In the present case, DRC did not have marketable title to the subject properties. As an innocent bona fide purchaser of real property DRC purchased five lots for the purpose of building upon those lots. However, it is clear due to the discovery of Native American artifacts and the GRGHD, that DRC was significantly burdened in the general course of construction. In fact, DRC was not able to complete construction due to governmental restrictions and building requirements that are not present in a non-historical designated area. These additional restrictions and requirements, if known, clearly present an objectionable basis to a potential purchaser to forego a real estate purchase and sale transaction. This is even more prevalent in the case of a purchaser intending to build upon the property.

These types of restrictions and requirements are even mandated under Washington law to be made as part of disclosure by a seller in the purchase and sale transaction of real property between a seller and buyer. See RCW 64.06.015 (unimproved real property) and RCW 64.06.020 (improved real property). Amongst other disclosures these include “any study, survey project, or notice that would adversely affect the property”

and any “unusual restrictions on the property that affect future construction or remodeling.” See RCW 64.06.015 (G), (I). The quoted section is under the heading “Title” on the disclosure form. Thus, a condition of title exists which DRC must have disclosed had it been able to proceed with the construction and sale of the houses. This is a condition which should have been disclosed by title.

ii. The GRGHD Designation Was A Public Record, Which Was Not Unduly Burdensome For First American To Check.

The title insurance issued by First American states it covers any loss due to governmental regulation or building requirements should notice be recorded in Public Records. See Title Policy Covered Risks (5), p. 1, CP 20. First American claims that GRGHD was not a matter of public record falling within the definition of Public Records.

Within the policy, “Public Records” are defined as follows:

Records established under state statute at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), “Public Records” shall also include, for example, environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

Title Policy Definition of Terms (i), p. 2, CP 21. See also subsection 1(f), CP 44. Here, DRC would have thus expected public records to include

historic designations such as the one at issue here. Language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). Thus, a purchaser such as DRC would anticipate and in fact did anticipate that any matter of public record, including a historical designation, would show up as an exception to title or contain a reference on the deed.

In this instance, the GRGHD was identified as an historic site and kept with public records via state statute – at the time the policy was issued. The Washington Department of Archaeology and Historic Preservation, (a governmental and public agency), is entrusted with establishing and maintaining a list of historical sites pursuant to provisions RCW 27.34.220, and RCW 27.53 (state statutes), which were promulgated significantly prior to the issue of these policies. Because the GRGHD was a matter of public record many years prior to the development of the property, and that designation significantly impaired the title and use of property by DRC, First American had a specific duty to disclose this information. First American insured against the losses described herein, and it would not have been unduly burdensome for it to check the historical site records with the Washington Department of Archaeology

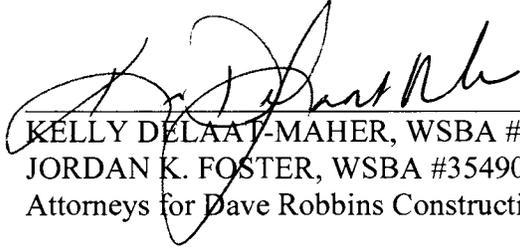
and Historic Preservation. The trial court erred in determining otherwise, under a Motion to Dismiss pursuant to CR 12(b)(6).

IV. CONCLUSION

Dismissal was not appropriate. The action should be remanded to the court for trial on the merits.

RESPECTFULLY SUBMITTED this 22 day of January, 2010.

MAHER AHRENS FOSTER SHILLITO PLLC



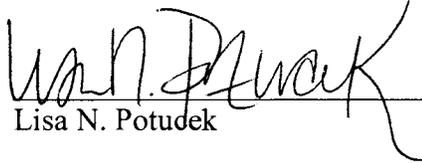
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CERTIFICATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Appellant's Brief to counsel of record as follows:

Erin Stines Bishop White & Marshall 720 Olive Way, Suite 1301 Seattle, WA 98101-1801	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Delivered by Legal Messenger <input type="checkbox"/> Overnight Mail via Federal Express <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> E-mail Transmission

DATED this 22 day of January, 2010, in Tacoma, WA.



Lisa N. Potudek