

64261-8

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NO. 64261-8-I

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

DAVE ROBBINS CONSTRUCTION, LLC

Appellant,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY

Respondent.

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COURT OF APPEALS
STATE OF WASHINGTON

RESPONDENT FIRST AMERICAN TITLE INSURANCE
COMPANY'S AMENDED BRIEF

APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Deborah Fleck

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Table of Contents

I. Restatement of the Issue on Appeal.....	1
II. Restatement of the Case	1
III. Standard of Review	4
IV. Argument	5
1. The Superior Court Properly Granted FATIC’s Motion to Dismiss DRC’s Claims of Breach of Contract and Bad Faith.....	5
2. DRC’s “Marketability of Title” Argument is Misplaced and Fails as a Matter of Law	11
3. DRC’s New Facts and Arguments Should not be Considered on Appeal.....	14
V. Conclusion.....	15

Table of Authorities

Cases

Barstad v. Stewart Title Guar. Co., Inc., 145 Wn.2d 528, 534-535, 39 P.3d 984 (2002).....	7
Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469, 472, 53 P. 724, 725 (1898).....	15
Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995).....	5
Campbell v. Ticor Title Ins. Co., 209 P.3d 859, 861 (2009).....	5
Christal v. Farmers Ins. Co. of Washington, 133 Wn. App. 186, 191, 135 P.3d 479, 481 (2006).....	6
Ellingsen v. Franklin County, 117 Wn.2d 24, 810 P.2d 910, (1991).....	9,10
Empey v. Northwestern & Pacific Hypotheekbank, 129 Wash. 392, 393, 225 P. 226 (1924).....	12
Hatfield v. Columbia Federal Sav. Bank, 68 Wn. App. 817, 822, 846 P.2d 1380, 1383 (1993).....	4
Hebb v. Severson, 32 Wn.2d 159, 201 P.2d 156, 157 (1948).....	11,12
In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002).....	14
Kiniski v. Archway Motel, Inc., 21 Wn. App. 555, 560, 586 P.2d 502, 506 (1978), review denied; 91 Wn.2d 1023 (1979).....	5,6
Martin v. Municipality of Metropolitan Seattle, 90 Wn.2d 39, 40, 578 P.2d 525, 525 (1978).....	14
Miebach v. Safeco Title Ins. Co., 49 Wn. App. 451, 453, 743 P.2d 845 (1987), review denied, 110 Wn.2d 1005 1988)	6

Strong v. Clark, 56 Wn.2d 230, 352 P.2d 183 (1960).....	8
Womble v. Local Union 73, Int'l Bhd. of Elec. Workers, AFL-CIO, 64 Wn. App. 698, 700, 826 P.2d 224, review denied, 119 Wn.2d 1018, 838 P.2d 691 (1992)	4

Rules and Regulations

CR 12(b)(6)	1, 4
-------------------	------

Statutes

RCW 48.11.100.....	5
RCW 48.29.010(3)(a).....	5
RCW 48.29.010(3)(c).....	7
RCW 65.08.07.....	2, 3, 8

Secondary Authority

Washington Real Property Desk Book, Chapter 39, § 39.2.....	6
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I. RESTATEMENT OF THE ISSUE ON APPEAL

1. Whether the court properly granted First American Title Insurance Company's ("First American") motion to dismiss pursuant to Civil Rule 12(b)(6) because First American did not insure against loss that could result from property being located in a designated historical district, or loss resulting from buried artifacts being found on the property.

II. RESTATEMENT OF THE CASE

Dave Robbins Construction, LLC ("DRC") builds upscale homes and purchased five lots within Green Valley Estates, a six lot subdivision in King County, Washington. CP 4-5. At the time of purchase, DRC obtained preliminary commitments for title and title policies from First American for each of the five lots. CP 5. Neither the commitments nor the policies contained an exception for coverage indicating the lots were located within a historical district. CP 3, 5. DRC alleges that the historical district designation is of "public record," because the designation can be found in the Department of Historical and Archeological Preservation's database of historic properties. CP 5.

After purchasing the lots, DRC applied for building permits and began improvements. CP 5. In March of 2008, DRC received stop work orders for three of the five lots. The stop work orders required DRC to

obtain an archeological survey. CP 6. DRC claims the stop work orders were its first indication of the historical district designation. CP 6. After the stop work orders were in place, archeological artifacts were discovered on one of the lots, delaying development of all three lots. CP 6. After DRC obtained an archeological survey, the building permits were reinstated. CP 71.

The property's historical district designation status can be found in the Department of Historical and Archeological Preservation's database of historic properties. This status is not a matter covered by the title insurance policies because the designation was not recorded with the county auditor's office. The database is not a "public record" as defined by the policies. The policies define "public record" as the records where real property documents are recorded to impart constructive notice:

Public Records: Records established under state statutes 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 environmental protection liens filed in the records of the clerk of the United States District court for the district where the Land is located.

Washington's Recording Act, RCW 65.08.07, imparts constructive notice of matters pertaining to real property. Real property documents in Washington are recorded with the recording officer of the county where

the property is situated. RCW 65.08.07. In this case, recorded information regarding the subject lots is with the King County Recorder's Office. No information regarding the historical district designation was recorded with the King County Recorder.

Furthermore, the policies specifically exclude from coverage one's inability to obtain a building permit.

Exclusions from Coverage

The following matters are expressly excluded from the coverage of this policy, and the company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reasons of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to the building and zoning) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the Land...or the effect of any violation of these laws, ordinances, or governmental regulations.

(b) Any governmental police power.

CP 21, 30.

The exclusions from coverage make sense considering title insurance insures *title* to the property, i.e., that the insured owns the property and that no other parties with properly recorded interests, other than those disclosed in the policy, hold some right or interest pertaining to title of the property, such as a deed of trust, ownership interest, or an easement.

Title insurance does not insure or otherwise represent the *nature* of the property – whether it is buildable, historical, or that artifacts are buried underground. Such property characteristics, and any alleged loss resulting from those characteristics, are not covered by title insurance pursuant to the terms of the policy and applicable law.

Pursuant to Civil Rule 12(b)(6) First American respectfully requests this Court affirm the finding of the Superior Court and dismiss DRC's claims, which include claims for breach of contract and bad faith. Dismissal is appropriate as the facts alleged by DRC do not support actionable claims against First American. DRC's alleged losses are not covered by the title insurance policies.

III. STANDARD OF REVIEW

First American's motion to dismiss involves pure questions of law for which the standard of review is *de novo*. *Womble v. Local Union 73, Int'l Bhd. of Elec. Workers, AFL-CIO*, 64 Wn. App. 698, 700, 826 P.2d 224, *review denied*, 119 Wn.2d 1018, 838 P.2d 691 (1992).

In ruling on a motion to dismiss for insufficiency of evidence the court must accept as true the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. *Hatfield v. Columbia Federal Sav. Bank*, 68 Wn. App. 817, 822, 846 P.2d 1380, 1383 (1993). Dismissal under CR 12(b)(6) is appropriate, however,

where, as here, the complainant cannot prove any set of facts consistent with the complaint that would entitle it to relief. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

IV. ARGUMENT

1. The Superior Court Properly Granted First American's Motion to Dismiss DRC's Claims of Breach of Contract and Bad Faith

The statutory definition of title insurance is contained in RCW 48.11.100:

Title insurance is insurance of owners of property or others having an interest therein, against loss or encumbrance, or defective title, or adverse loss or encumbrance, or defective titles, or adverse claim to title, and services connected therewith.

A title policy is “any written instrument, contract, or guarantee by means of which title insurance liability is assumed.” RCW 48.29.010(3)(a). Title insurance has been defined by Washington case law as “[a]n agreement to indemnify against loss arising from a *defect in title to real property*, usu[ally] 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) (Emphasis added); *see also Kiniski v. Archway Motel, Inc.*, 21 Wn. App. 555, 560, 586 P.2d 502, 506 (1978), *review*

denied, 91 Wn.2d 1023 (1979) (title insurance is a guaranty of the accuracy of a company search and *record title* on a specific property.”).

Insurance policies are to be construed in accordance with the general rules applicable to all other contracts. *Miebach v. Safeco Title Ins. Co.*, 49 Wn. App. 451, 453, 743 P.2d 845 (1987), *review denied*, 110 Wn.2d 1005 (1988). No special contract rules apply to contracts for title insurance. Accordingly, courts must construe an insurance policy as a whole, giving full force and effect to *each clause*. *Christal v. Farmers Ins. Co. of Washington*, 133 Wn. App. 186, 191, 135 P.3d 479, 481 (2006). Where policy language remains clear and unambiguous, courts enforce the provisions as written and do not modify the policy or create ambiguity where none exists. *Christal*, 133 Wn. App. at 191.

As the policies here are clear and unambiguous the court need not modify them or create ambiguity where none exists. DRC attempts to distort the definition of title insurance and fails to recognize that title insurance only insures title to real property. Title insurance does not insure particular property characteristics such as whether the property is buildable or whether or not it has an historical designation.

The purpose of title insurance is to provide assurance to purchasers of real property that their *ownership* is safe and secure. *Washington Real Property Desk Book*, Chapter 39, § 39.2. Title insurance

companies possess *no duty* to search and disclose *any* potential title defects when issuing preliminary commitments for title insurance, whether that certain item is a covered matter, or not. *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 534-535, 39 P.3d 984 (2002).

The statement contained in a preliminary commitment for insurance is merely an offer to issue the title insurance subject to the stated conditions. RCW 48.29.010(3)(c). Significantly, the Legislature established that a preliminary commitment is *not* a representation of the condition of title, but a “statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.” RCW 48.29.010(3)(c); *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 536, 39 P.3d 984 (2002). Accordingly, all of the DRC’s claims based upon the allegation that First American *should have* included any certain item in its commitments fail. The only relevant issue is whether or not DRC has suffered a loss that is actually covered by the terms and conditions of the subject policies.

Any loss suffered by DRC is not covered by the title policies because the loss is not a “Covered Risk” provided in the policies. A “Covered Risk” is explained in the policies as one “...that has been created or attached or has been *filed or recorded in the Public Records*.... CP 20, 29. Accordingly, First American only provided coverage from

losses that might result from certain documents that were recorded in “Public Records,” but were not shown in the policies under a specific exception. Real property documents in Washington are recorded with the recording officer of the county where the property is situated. RCW 65.08.07. Accordingly, when an instrument involving real property is properly recorded, it becomes notice to all world of its contents. *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960).

“Public Records,” as defined by the policies, are records where real property documents are recorded to impart constructive notice. Absent from this definition are databases like the Department of Historical and Archeological Preservation’s database of historic properties.

Because the historical designation was not recorded and because designations of this nature do not, as a matter of law, provide constructive notice to anyone, there is no coverage.

There is no contractual obligation to make “a phone call to the Department of Historical and Archeological Preservation” or perform a “web search” as DRC suggests. Whether such an additional search is “unduly burdensome” is not the issue before this Court.

By DRC’s own admission, the historical designation at issue can only be discovered by investigating and searching records maintained by

the Department of Historical and Archeological Preservation's database of historic properties, not the King County Recorder's Office. CP 5. Documents maintained by the Department of Historical and Archeological Preservation do not, as a matter of law, provide constructive notice to anyone. Accordingly, there is no coverage under the title policies for any loss resulting from the historical nature of the property. First American has no duty to search records contained in these types of offices in order to determine or describe the nature of real property. Title insurance policies do not cover losses resulting from such property characteristics.

Ellingsen v. Franklin County, 117 Wn.2d 24, 810 P.2d 910, (1991) is directly on point. In *Ellingsen*, the court examined the issue whether a conveyance of an easement gives constructive notice to a bona fide purchaser when that conveyance is "recorded and filed" in the county engineer's office, but is not recorded with the county auditor. *Ellingsen*, 117 Wn.2d at 25. The court held that "recording and filing" in the county engineer's office does not give constructive notice. *Ellingsen*, 117 Wn.2d at 25. The court reasoned as follows:

To import constructive notice from every piece of paper or computer file in every government office, from the smallest hamlet to the largest state agency, would wreak

havoc with the land title system. As a matter of fact, it would render impossible a meaningful title search.

Ellingsen, 117 Wn.2d at 29-30.

Even if DRC's alleged loss was a "Covered Risk" under the policies, there is no coverage because damage from such loss is excluded from coverage pursuant to the provisions relating to government use restrictions and police powers. These exclusions provide that unless there is a recorded document giving notice of government restrictions, the restrictions are not covered matters.

The exclusions apply here because a government agency, the Department of Historical and Archeological Preservation, designated the subject property as a historical site in its database but no designation was recorded with the King County Recorder. Further, the loss claimed resulted from a governmental agency's refusal to issue a building permit. Losses resulting from these types of actions are specifically excluded from coverage.

Exclusion under these circumstances makes sense in light of the fact title insurance coverage is an indemnity against matters that affect title that are recorded at the recorder's office, not use restrictions like zoning imposed by constantly changing (over time and jurisdiction) laws and regulations, enforced by governmental agencies. First American is not

liable for breach of contract losses related to or resulting from the historical nature of the property.

Similarly, because the historical designation is not a covered matter, there are no facts to support a claim for bad faith. DRC's claim for bad faith should likewise be dismissed.

2. DRC's "Marketability of Title" Argument is Misplaced and Fails as a Matter of Law

DRC next alleges that coverage under the policies is warranted because First American failed to provide DRC with "marketable title." Opening Brief, p. 13. In support of its argument DRC cites two Washington cases applying the definition of "marketable title." DRC equates "marketable title" to "perfect title." Opening Brief, p. 16. Neither of these cases, however, support DRC's argument here.

In *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156, 157 (1948), cited to by DRC, sellers of real property instituted an action to compel specific performance of a contract to purchase real property. The purchasers argued, among other things, that the seller's failure to disclose a protective restriction excused them from their contract to purchase. *Hebb*, 32 Wn.2d at 163. The court roundly rejected the sellers' argument that a title company's willingness to indemnify a buyer against loss from an encumbrance cures a defect in the title. *Hebb*, 32 Wn.2d at 170. The

court's analysis of marketable title was entirely unrelated to any analysis of title insurance. Rather, it centered on whether the purchaser had the right to rescind a contract where the seller had covenanted to convey title by warranty deed free of encumbrances and then was unable to do so. *Hebb*, 32 Wn.2d at 172.

The court in *Empey v. Northwestern & Pacific Hypotheekbank*, 129 Wash. 392, 393, 225 P. 226 (1924) addressed a similar set of facts as presented in *Hebb*. In *Empey* a suit was brought to rescind a contract for the sale of real property and to recover monies paid. The court in *Empey*, like the Court in *Hebb*, does not discuss, much less apply, the concept of marketable title in relation to title insurance policies.

In citing these irrelevant cases, DRC appears, however, to attempt to bootstrap First American into the same contractual obligations as a seller of real property. First American, however, did not sell the subject lots to DRC. Rather, First American sold only title insurance policies containing contractual language which is unique to title insurance and altogether different than the contractual language found in a contract to sell real property. First American is not responsible for any potential claims that DRC may have against its seller.

To the extent that DRC relies on the definition of "unmarketable title" provided for in the policies that reliance is misplaced. DRC confuses

the notion of marketability of title with fair market value. There is no evidence in the record to support the theory that the lots are not marketable or that they could not be sold.¹ Rather, DRC seems only to suggest that the lots are less valuable and were costing it more to develop because of the historical designation. First American, however, did not contract to cover a loss of this nature. Title companies, unlike real estate developers like DRC, are not in the business of speculating on the values of property.

Furthermore, the inclusion of the “unmarketable title” provision in the policies does not expand the scope of the search First American agreed to perform in issuing the policies. First American’s search requirements are specifically outlined in the policies. If certain documents were recorded with King County, but were not shown under the policies under a specific exception, DRC might have coverage for losses. As that is not the case, DRC has failed to establish a basis for coverage.

¹ DRC relies solely on the new fact, introduced by its counsel in its Opening Brief, that the lots were foreclosed as a result of the historical designation. This information is unsupported by the evidence and not mentioned in DRC’s complaint. Nonetheless, this information is insufficient to establish any argument. These facts should not be considered by the court.

3. DRC's New Facts and Arguments Should not be Considered on Appeal

DRC inappropriately introduces new information in its Opening Brief that is not already part of the record. These new “facts” center on representations that the subject lots have been “lost to foreclosure to Kitsap Bank.” Opening Brief, p. 1, 4. For the first time in this lawsuit DRC also claims in its Opening Brief DRC that the foreclosures are “primarily as a result of the events outlined in the underlying Complaint in this matter.” Opening Brief, p. 1.

New facts, and arguments relating to those new facts, cannot be considered for the first time on appeal. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002); *Martin v. Municipality of Metropolitan Seattle*, 90 Wn.2d 39, 40, 578 P.2d 525, 525 (1978). Accordingly, new information regarding the status of the subject lots and DRC should not be considered by this Court. Furthermore, statements regarding DRC's inability or unwillingness to make payments on bank loans secured by the subject lots are unrelated to the issue of title insurance.

Even if the court considers these new facts and arguments it is worth noting that DRC has failed to provide any evidence that the lots were foreclosed. Statements of counsel alone are irrelevant and

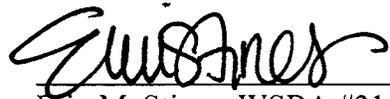
immaterial. *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469, 472, 53 P. 724, 725 (1898).

Furthermore, although irrelevant, given our troubled real estate market it is entirely possible that DRC would not have profited from building and selling luxury homes and that foreclosure was inevitable regardless of the historical designation. To draw the conclusion that the historical designation, and no other factors, led to foreclosure of the properties is highly speculative, immaterial and entirely unsupported by the record.

V. CONCLUSION

For all of these reasons, First American respectfully requests this Court affirm the finding of the Superior Court and dismiss DRC's claims for breach of contract and bad faith.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.



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