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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 308499

Superior Court No. 09 2 01656 3

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

C 1031 Properties, Inc.

Appellant

v.

First American Title Insurance Company

Respondent

APPELLANT'S REPLY BRIEF

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I. TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

I. INTRODUCTION.....3

II. ARGUMENT.....3

A. Title Company argues that the “title policy does not cover power poles and power lines encumbering the subject property”, contending the following.....3

1. Title Company argues C 1031 violated a condition of the Preliminary Commitment precluding coverage.....3

2. The Title Company next contends that C 1031’s knowledge regarding the closing of the sale excludes coverage for the subject encumbrance.....4

3. Title Company argues that “knowledge” is synonymous with constructive knowledge.....5

4. The Title Company contends that the plain meaning of the title policy controls.....5

5. The Title Company contends that coverage is excluded because C 1031 assumed and agreed to the easement that precipitated the purported loss.....8

6. Title Company contends coverage is excluded because the easement resulted in no loss or damage.....9

7. The Title Company contends the loss or damage is not measured by diminution in market value.....9

B. C 1031’s argument involving the Consumer Protection Act.....10

C. The Title Company contends that the Trial Court properly limited C 1031’s discovery.....10

D. The Trial Court improperly excluded C 1031’s expert testimony.....11

E. C 1031 is Entitled to Attorney’s Fees and Costs at Trial Court and Appeal.....11

III. CONCLUSION.....12

II. Table of Authorities

Cases

Hertog v. City of Seattle, 88 Wn.App. 41, 943 P.2d 1153 (1997).....11

In Re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996), reversed in
148 Wn.2d 788, 64 P.3d 22 (2003).....11

Michak v. Transnation Title Ins. Co., 108 Wn.App. 412, 31 P.3d 20
(2001).....5 & 10

Miebach v. Safeco Title Ins., 49 Wn.App. 451, 743 P.2d 845 (1987).....9

Rules

CR 26(b)(2) 11

I. INTRODUCTION

The issue in this case is whether coverage exists under a title insurance policy where it is undisputed that a recorded easement was missed by the title company. The insured saw the power lines, but did not know of any recorded easement, thus purchasing title insurance and relying on their policy.

The parties request that the Court of Appeals interpret the policy language and salient facts to determine coverage.

II. ARGUMENT

C 1031 Properties, Inc., a Washington corporation, (C 1031) Petitioner, hereby submits a reply to Respondent, First American Title Insurance Company's (Title Company), Reply Brief, addressing each issue individually.

A. Title Company argues that the "title policy does not cover power poles and power lines encumbering the subject property", contending the following:

1. Title Company argues C 1031 violated a condition of the Preliminary Commitment precluding coverage, (Brief, P. 13).

As a general principle, coverage exists under the title policy not the preliminary commitment. The preliminary commitment is an offer of

coverage; the actual coverage exists under the contractual title policy. The

Title Insurance Policy, Paragraph 15 states as follows:

15. LIABILITY LIMITED TO THIS POLICY;
POLICY ENTIRE CONTRACT.

(a) This policy, together with all endorsements, if any, attached to it by the company is the entire policy and contract between the insured and the company, (CP 45).

Here, the title company policy by its contractual terms excludes any reference to the Preliminary Commitment for Title as being the insuring or governing agreement.

2. The Title Company next contends that C 1031's knowledge regarding the closing of the sale excludes coverage for the subject encumbrance, (Brief, P. 18).

Here the Title Company contends that by C 1031 signing the Closing Agreement and escrow instructions, the Addendum to PSA, and the PSA, created actual knowledge of the power lines and power poles, and under the Preliminary Commitment for Title, recovery is precluded. C 1031 responds as it has hereinabove that the title policy, according to the insuring agreement, is the only written document that controls. The Preliminary Commitment for Title is not involved nor does it govern coverage issues. The Title Company confuses seeing the power lines, as having knowledge of the recorded easement. It is not uncommon for power lines to cross properties without obtaining an easement. C 1031

conceded that it saw the power lines prior to closing, but had assumed that the easement did not exist or was not recorded, because following closing C 1031's Agent immediately contacted Washington Water Power Company (now Avista) to move the poles, (CP 32). It is at this point that Avista advised C 1031 they had a recorded easement, (CP 396-399) (CP 462, 458, 453-456).

3. Title Company argues that "knowledge" is synonymous with constructive knowledge.

The Title Company argues that a person has actual knowledge of a fact when he or she is subjectively aware of its existence, *citing Michak v. Transnation Title Ins. Co.*, 108 Wn.App. 412, 31 P.3d 20 (2001), reversed in 148 Wn.2d 788, 64 P.3rd 22 (2003). In *Michak*, the Court of Appeals reversed the lower Court when the title company had changed the description of an easement between the issuance of the Preliminary Report and the issuance of the final Title Insurance Policy. The Court of Appeals reversed the Superior Court's dismissal of the title company and remanded the case for trial. The title company appealed to the Supreme Court and it reversed the Court of Appeals. The Supreme Court held that though the insured did not read the agreement, he was nevertheless charged with having read it and was therefore bound by it.

Here the title policy defined actual knowledge on Page 2 of the policy, Paragraph 1:

DEFINITION OF TERMS . . . (f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the title.

As one can observe, actual knowledge excludes constructive knowledge. Actual knowledge does not include matters of public records. There is no question under the definition that actual knowledge does not cover items of public record.

Further under the definition on Page 3 of the policy, (f) constructive knowledge cannot be imputed to an insured by reason of the public records. It is the title company's position that in their Title Policy the definition of "knowledge" includes constructive knowledge. This interpretation is not supported by their own definition as set out in Paragraph (f), hereinbefore quoted.

4. The Title Company contends that the plain meaning of the title policy controls, (Brief, P. 23).

It claims the plain meaning of the language in the Exclusions from coverage shields it from liability because Douglass failed to inform them, in writing, that the power lines were present on the property. This

contention fails. This was an insurance policy to protect the title of the property. The only encumbrances Douglass was obligated to inform the Title Company, were encumbrances that he knew to adversely affect the title. Because he did not know the power lines created an easement, he had no way of knowing the title was affected.

The Title Company misconstrues the interpretation of coverage when the easement is recorded. Under Exclusions of Coverage, Page 2, Paragraph 3, the policy provides:

(3) Defects, Liens, Encumbrances, Adverse Claims, or other matters . . . (b) not known to the company, not recorded in public records at date of the policy, but known to the insured Claimant, and not disclosed in writing to the company by the insured Claimant prior to the date the insured Claimant became an insured under the policy;

The key to the above exclusion from coverage is “not recorded in public records at the date of the policy”. This exclusion only applies if the easement is not recorded. Here, the easement was of record in the public records at the date of the policy so that the Avista easement is not excluded from coverage.

Here, it is undisputed that neither C 1031, nor any of its agents, knew of the recorded easement prior to closing of the transaction. When

C 1031 asked Avista to move their power lines, the easement came to light. Avista then notified C 1031 of its existence subsequent to closing.

Since the easement was of record, it does not fall within the exclusion. The only other exceptions from coverage are contained in Schedule B, and the first five exceptions under Schedule B deal with all unrecorded documents. If the document is recorded, the first five exceptions do not apply. The last two exceptions under Schedule B, items 6 and 7, are not relevant to these proceedings.

5. The Title Company contends that coverage is excluded because C 1031 assumed and agreed to the easement that precipitated the purported loss.

The Title Company contends because C 1031 saw the power lines and poles that C 1031 assumed and agreed to its purported loss. The facts do not support the Title Company's argument. Mr. Whipple, Agent for C 1031, stated in his deposition that he saw the power lines. After reviewing the title, which did not report an easement for any power line, Mr. Whipple stated that he relied upon the Title Insurance Report and the Policy to conclude that there was not an easement of record resulting from the power line, (CP 396-399). Harlan Douglass, owner of C 1031 Properties, indicated that he had no knowledge of the Washington Water Power easement prior to the closing, (CP 31-33). All parties relied upon the title, which failed to report the recorded easement. This is sheer

negligence on the part of the Title Company that misled C 1031. C 1031 did not agree to assume the encumbrance.

6. Title Company contends coverage is excluded because the easement resulted in no loss or damage.

The Title Company contends that C 1031 did not suffer any damages, and that was the basis and reason for its rejection of the claim. At the Summary Judgment Hearing, the Title Company did not present any expert testimony concerning damages, but merely denied any damages occurred. Subsequent to the Summary Judgment Hearing, the Title Company employed an appraiser who came in with an estimated damage of \$34,200.00. C 1031 came in with an appraisal of \$60,000.00, (CP 162-165). The Title Company's argument that there was no damage is untenable.

7. The Title Company contends the loss or damage is not measured by diminution in market value.

The amount of damages in title insurance cases is generally the actual loss to the insured. *Miebach v. Safeco Title Ins.*, 49 Wn.App. 451, 454, 743 P.2d 845 (1987).

Page 3, Paragraph 8, of the policy states:

8. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered

loss or damage by reason of matters insured against
by this policy. . . .

The Title Company contends that an Affidavit from an expert Real Estate Appraiser was not necessary to controvert the Affidavit of C 1031's expert regarding damages. It cites in support *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003). That case is not authority to support the Title Company's position, because the damage issue was not involved in that case. The issue involved in that case was merely whether or not the Title Company had the right to amend its Preliminary Commitment for Title Insurance in issuing the final policy.

B. C 1031's argument involving the Consumer Protection Act.

The Title Company is correct that C 1031 did not address any claims under the Consumer Protection Act or Unfair Claims Settlement Act, in its Motion for Summary Judgment. C 1031 agrees this issue is not before the Court.

C. The Title Company contends that the Trial Court properly limited C 1031's discovery.

The Title Company contends that C 1031 did not prove that the Trial Court abused its discretion in denying the Motion to Compel Discovery. The Title Company's objections were:

- (a) Discovery was beyond the scope of pleadings;

- (b) Attorney- Client privilege;
- (c) Trade Secrets (CP 821-823).

The scope of discovery is broad and is subject to narrow exceptions. *Hertog v. City of Seattle*, 88 Wn.App.41, 943 P.2d 1153 (1997). CR 26 allows for discovery of anything material to the litigation, except for things protected by privilege. *In Re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), reversed in 148 Wn.2d 788, 64 P3d 22 (2003). C 1031 claimed prejudice. None of the three objections made by the Title Company are relevant. The Trial Court abused its discretion because the Court permitted the Title Company to avoid producing insurance data contrary to CR 26(b)(2).

D. The Trial Court improperly excluded C 1031's expert testimony.

The fact that the Court created issues of fact in the Summary Judgment Order is the basis for seeking an expert to controvert the questions of fact created by the Court. C 1031 contends that this contention is only valid on the part of C 1031 if the Court on this appeal upholds the Trial Court's Summary Judgment creating the three issues of fact.

E. C 1031 is Entitled to Attorney's Fees and Costs at Trial Court and Appeal.

The Title Company contends C 1031 is not entitled to attorney's fees. Page 3, Paragraph 8(c) of the Title Insurance Policy reads as follows:

(c) In addition to the extent of liability under (a) and (b), the company will also pay those costs, attorney's fees, and expenses incurred in accordance with Section 5 and 7 of these conditions.

C 1031's loss is insured under the policy, and accordingly C 1031 is entitled to attorney's fees. C 1031 is also entitled to attorney's fees under citations in its opening brief.

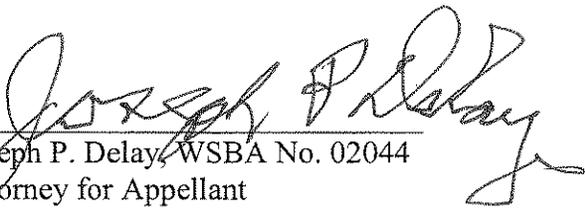
III. CONCLUSION

C 1031 is entitled to reversal of the Summary Judgment Order as to all of the issues of fact created by the Trial Court, and is entitled to a Summary Judgment for \$60,000.00, plus reasonable attorney's fees to be fixed by the Court. C 1031 also seeks attorney's fees on appeal.

Dated this 29 day of October, 2012.

Respectfully Submitted.

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