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New York Trial Court Dismisses Fraud Counterclaim Filed Against Title Insurance Company

A trial court in New York has rejected a counterclaim filed against a title insurance company in a case brought by the title insurer against an agent and an individual who signed a personal guaranty.

The Case

As the court explained, Harold Tischler obtained a loan and gave a mortgage on property located at 4316 17th Avenue in Brooklyn, New York. Title insurance for the mortgage was obtained from Brookwood Title Agency LLC, a policy issuing agent; the policy was underwritten by Chicago Title Insurance Company.

On November 22, 2011, a New York trial court issued an order cancelling the mortgage, voiding the conveyance of the property, and restoring the property to a sister of Harold Tischler. Upon the cancellation of the mortgage, Chicago Title satisfied its obligations to the mortgage lender.

Thereafter, Chicago Title sued Brookwood and Mendel Zilberberg, asserting that Brookwood had breached its duty to Chicago Title, as Chicago Title's agent, and that Zilberberg had breached a personal guaranty he had signed in favor of Chicago Title. Chicago Title also sought indemnification from both defendants.

During the course of the litigation, the trial court decided that Zilberberg's personal guaranty encompassed the indemnification claims brought by Chicago Title. An intermediate appellate court affirmed that holding, reasoning that "in the first clause of the guaranty, Zilberberg guaranteed Brookwood's performance of its obligations under the issuing agency contract. Since that contract included an obligation to indemnify, such indemnification obligation was covered under the guaranty."

Thereafter, Brookwood and Zilberberg filed an amended answer to Chicago Title's complaint. They also asserted a counterclaim of fraud against Chicago Title, based on their assertion that Chicago Title had represented that the guaranty was limited to escrow funds and that it did not include indemnification.

Chicago Title moved to dismiss the counterclaim.

The Court's Decision

The court granted Chicago Title's motion.

In its decision, the court explained that a party can succeed on a claim of fraud by demonstrating that "there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages."

The court then pointed out that Zilberberg presumably had read the guaranty and had signed it. Thus, the court found, he had been "afforded an opportunity to review the terms of the guaranty and the extent of its reach." Consequently, according to the court, Zilberberg could not establish justifiable reliance on any alleged misrepresentation by Chicago Title because he had been given the ability to read the guaranty.

Moreover, the court continued, there also was "no showing" that Chicago Title had engaged in any "fraud, duress or some other wrongful act."

The court stated that the "true basis for the counterclaim" against Chicago Title was the fact that two courts – the trial court initially followed by the intermediate appellate court – had interpreted the guaranty as encompassing Chicago Title's indemnification claim. Whether Zilberberg believed that the guaranty should not have been read so broadly and whether Zilberberg would not have signed the guaranty if he had known of this broad interpretation did "not constitute fraud on the part of Chicago Title," the court concluded.

The case is *Chicago Title Ins. Co. v. Brookwood Title Agency LLC*, 2020 N.Y. Slip Op. 32942(U) (Sup. Ct. Kings Co. Sept. 4, 2020).

Insureds' Transfer of Property to Their Own LLC Terminated Title Insurance Policy, California Appellate Court Affirms

An appellate court in California, affirming a trial court's decision, has ruled that the transfer of property by insureds to a limited liability company of which they were the sole members terminated the title insurance policy that had been issued to the insureds – and that rescission of the property transfer did not reestablish coverage under the title insurance policy.

The Case

Soon Han Pak and Chung Huyk Pak (together, the "Paks") purchased commercial property (the "Property") in Los Angeles in 2003. In connection with that purchase, the Paks acquired a title insurance

policy from First American Title Insurance Company and they were the named insureds under the title insurance policy.

Five years later, the Paks formed a limited liability company (the "LLC"). The Paks were the sole members of the LLC and were jointly responsible for its management.

Later that year, the Paks recorded a quitclaim deed transferring the Property to the LLC. The quitclaim deed represented that "[t]he grantors and grantees in this conveyance are comprised of the same parties who continue to hold the same proportional interests" in the Property.

In 2017, the property across the street from the Paks' Property was acquired by a group of third parties including Gage & 62nd LLC; C&W Investment, LLC; Centerwa Investments, LLC; and Yousef Golbahary (collectively, "Gage"). The next year, Gage informed the Paks that a portion of the Paks' Property was burdened by a non-exclusive irrevocable easement in Gage's favor. According to Gage, the easement granted it the right to use a parking lot on the Property and the right to allow its customers to park there. The Paks maintained that they had not been aware of the easement when they had purchased the Property.

The Paks notified First American of Gage's claims and made a claim under the title insurance policy. First American denied coverage, explaining that the quitclaim deed from the Paks to the LLC had divested the Paks of any estate or interest in the Property and accordingly that the policy's coverage – which only continued in favor of an insured so long as the insured retained an estate or interest in the land – had lapsed.

Gage subsequently sued the LLC and the Paks, asserting causes of action for quiet title and declaratory relief in connection with use of the easement. Gage served a lis pendens regarding its claims and recorded it in Los Angeles County.

The Paks tendered the Gage lawsuit and the lis pendens to First American, seeking a defense.

In addition, the Paks (in their capacities as the sole members of the LLC) sent a letter to themselves (in their individual capacities) asking that the Paks (in their personal capacities) rescind the quitclaim deed or, failing that, indemnify and defend the LLC in the Gage lawsuit. The Paks and the LLC subsequently signed an agreement rescinding the quitclaim deed, a copy of which the Paks provided to First American.

First American again denied coverage under the title insurance policy, explaining that the policy had been voided by the quitclaim deed from the Paks to the LLC and that the rescission agreement could not and did not revive coverage.

The Paks sued First American, contending among other things that it had breached its obligations under the title insurance policy by refusing to defend the Paks against Gage's claims.

The trial court ruled in favor of First American.

The trial court found that the title insurance policy ceased to be in force when the Paks transferred the Property to the LLC. The trial court reasoned that an LLC and its members were distinct and that the Paks, as LLC members, did not have the requisite interest in the property held by the LLC.

The court also rejected the Paks' rescission argument, explaining that the Paks had not cited any authority demonstrating that the rescission of a quitclaim deed revived a terminated title insurance policy.

The Paks appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court noted that Condition 2 of the title insurance policy stated that coverage under the policy "shall continue . . . in favor of an insured only so long as the insured retains an estate or interest in the land. . . ." The appellate court then held that Condition 2 "unambiguously terminated" the policy when the Paks transferred the Property to the LLC.

The appellate court reasoned that the policy's schedule stated that the estate or interest in land that the policy covered was a fee interest, and that the fee interest had been fully transferred to the LLC by quitclaim long before the Paks had filed their insurance claim with First American.

The appellate court added that because a limited liability company was "an independent legal entity" and the members of a limited liability company had "no interest, much less a fee interest, in the company's property," the transfer of the Property to the LLC triggered Condition 2 and terminated the title insurance policy.

The appellate court then held that although the subsequent rescission of the quitclaim deed restored the Paks and the LLC to their pre-contract statuses vis-à-vis each other, the rescission "did not erase the consequences and effects of originally executing the quitclaim deed, including the violation of Condition 2 and termination of coverage." Rescission of a contract such as a quitclaim deed, the appellate court concluded, did not mean that every action the parties took during the pendency of the contract was "erased from history."

The case is *Pak v. First American Title Ins. Co*., No. B297647 (Cal. Ct. App. Nov. 24, 2020).

Appellate Court Upholds Decision in Favor of Title Insurer in Easement Case

An appellate court in Michigan has affirmed a trial court's decision in favor of a title insurance company in a case brought by property owners stemming from a dispute over an easement.

The Case

Peter and Irina Horwood acquired title to property in Green Oak Township, Michigan, via warranty deed and purchased a title insurance policy from North American Title Insurance Company. The Horwoods' property bordered property owned by their neighbors, the Roses, and access to a portion of the Horwoods' property only was available by crossing part of the Rose property. Accordingly, the legal description of the Horwoods' property stated that the land was "subject to an easement for a 33-foot roadway to be used in common with others."

The Roses later claimed that the Horwoods did not have an easement and alleged that the Horwoods had illegally trespassed on their property, spun the tires of a pickup truck while holding a middle finger up, caused damage to the Roses' septic field and trees, removed portions of the Roses' fence, planted vegetation, and placed cameras on the property line facing the Roses' house.

The Roses filed an eight-count complaint against the Horwoods for quiet title, trespass, malicious destruction of property, conversion, negligence, invasion of privacy, intentional infliction of emotional distress, and injunctive relief.

The Horwoods sought a defense from North American Title for all counts.

In response, North American Title determined that it could defend against only counts I and VIII and that the only covered risk implicated by the Roses' complaint was that the Horwoods would not have access to and from the property. Further, North American Title noted that the title insurance policy specifically exempted risks that occurred after the policy date and risks that were created, allowed, or agreed to by the Horwoods.

North American Title subsequently negotiated a settlement agreement whereby the Roses agreed to dismiss their complaint in exchange for a 50 percent reduction in the size of the easement. Although the Horwoods' personal lawyer advised them against signing the agreement, North American Title reminded the Horwoods that it had a contractual right under the title insurance policy to negotiate a settlement and that it had the right to terminate coverage if the Horwoods did not cooperate with the settlement.

The Horwoods signed the settlement agreement and then filed suit against North American Title. They contended that North American Title had breached the title insurance policy and they sought injunctive relief. The Horwoods also argued that North American Title should reimburse them for the lost value of the reduced easement.

The trial court agreed with North American Title that only one covered risk applied in this case: the risk that the Horwoods did not have actual vehicular and pedestrian access to and from the property.

Therefore, the trial court held that counts II to VII of the Rose complaint were not based on any covered risks under the title insurance policy and were excluded as deliberate actions of the Horwoods.

The trial court also concluded that North American Title did not owe a duty to compensate the Horwoods for the reduced size of the easement because the size of the easement was not insured and the Horwoods still had access to their property.

The Horwoods appealed, arguing that the following covered risks also applied:

- "Someone else owns an interest in Your Title";
- "Someone else has rights affecting Your Title because of leases, contracts, or options";
- "Someone else has a right to limit Your use of the Land"; and
- "Your Title is defective because of a defective judicial or administrative proceeding."

The Horwoods argued that these covered risks applied because the easement fell under the definitions of "title" and "land" in the title insurance policy.

The Appellate Court's Decision

The appellate court affirmed the trial court's ruling in favor of North American Title.

In its decision, the appellate court explained that the title insurance policy issued by North American Title defined "land" as "the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property" and defined "title" as "the ownership of Your interest in the Land, as shown in Schedule A."

Moreover, the appellate court continued, the title insurance policy separately defined easement as "the right of someone else to use the Land for a special purpose."

The appellate court then ruled that, based on "the plain language of the title insurance policy," the easement was considered a separate term that did not fall under the definitions of "land" or "title." Because the easement was not the Horwoods' "land" or "title" for purposes of the title insurance policy, the covered risks identified by the Horwoods were "inapplicable," the appellate court found.

The appellate court added that even if the covered risks identified by the Horwoods were implicated by counts II to VII of the Rose complaint, the trial court had not erred by determining that coverage for those counts was specifically excluded under the policy. The appellate court explained that the alleged actions that gave rise to counts II to VII of the Rose complaint all were based "on risks specifically incurred by [the Horwoods'] conduct, not the title itself," and that the title insurance policy exempted from coverage risks that were created or allowed by the Horwoods.

In particular, the appellate court pointed out that North American Title "did not assume the risk that [the Horwoods] would purposefully enter onto Rose property, spin the tires of their truck, stake off the easement, remove portions of the Roses' fence, destroy portions of the Roses' septic field and tree roots, and place trail cameras on the property line." The appellate court also noted that the Horwoods' alleged actions had occurred after the policy date, which also was specifically exempted under the title insurance policy. Thus, counts II to VII of the Rose complaint "were excluded from coverage under the title insurance policy," the appellate court held.

Finally, the appellate court rejected the Horwoods' argument that because North American Title had "forced" them into the settlement agreement with the Roses, North American Title should be held liable for the lost value of the easement resulting from the agreement. The appellate court pointed out that the Horwoods cited no authority that supported this assertion. The appellate court also found that there was "no evidence" that the Horwoods had been "forced" to sign the settlement agreement.

Indeed, the appellate court noted, under the terms of the title insurance policy, North American Title had the option to negotiate a settlement and withdraw representation if the Horwoods chose not to cooperate with the negotiated settlement agreement. After North American Title reminded the Horwoods of those terms, they chose, against the advice of their own lawyer, to sign the settlement agreement. Therefore, North American Title "had no duty to reimburse [the Horwoods] for the reduced size of the easement," the appellate court concluded.

The case is *Horwood v. North American Title Ins. Co*., No. 350840 (Mich. Ct. App. Dec. 22, 2020).

Federal Court Dismisses Duty-to-Indemnify Portion of Insurer's Coverage Suit Against Title Insurer

The U.S. District Court for the Middle District of Florida has dismissed, without prejudice, the duty-to-indemnify portion of an insurance coverage action brought by an insurance company against a title insurance company to which it had issued a professional liability insurance policy, pending resolution of the underlying lawsuit against the title insurer.

The Case

A putative class action lawsuit in Florida alleged that Baywalk Title Inc., a title insurance company, had improperly charged Antoni Kruk a closing fee when he purchased real estate in Pinellas County, Florida. Kruk contended that the real estate contract required that the seller, not the buyer, pay the closing fee.

Seeking to represent a class of potentially "thousands" of individuals, Kruk brought claims against Baywalk for negligence, gross negligence, breach of fiduciary duty, and unjust enrichment.

RLI Insurance Company, which had issued a professional liability insurance policy to Baywalk, filed a lawsuit in a federal district court in Florida seeking a declaration that it did not owe a duty to defend or indemnify Baywalk in the Kruk action. RLI contended that, because the policy did not cover "dispute[s] over any fees . . . charged . . . by" Baywalk, it did not provide coverage for the Kruk lawsuit, which sought disgorgement of allegedly unauthorized closing fees.

RLI also alleged that coverage was barred by policy exclusions for claims:

- Involving "the gaining by [Baywalk] of any personal profit, remuneration or advantage to which [it] was not legally entitled";
- Based on "conduct by [Baywalk] that is criminal, fraudulent, dishonest or with the intent to cause damage"; and
- Stemming from "any actual or alleged violation of any . . . unfair trade practices, consumer protection, or other similar law."

Baywalk moved to dismiss the portion of RLI's action seeking a declaration that RLI owed no duty to indemnify Baywalk in the Kruk lawsuit. Baywalk contended that the duty-to-indemnify portion of the RLI case was premature because the Kruk suit remained pending and no judgment had been entered against Baywalk. Baywalk did not seek dismissal of the duty-to-defend portion of RLI's action.

The Court's Decision

The court granted Baywalk's motion.

In its decision, the court explained that, under Florida law, an insurer's duty to defend an insured was separate and distinct from the question of whether an insurer had a duty to indemnify the insured against the imposition of damages. The court added that the duty to defend was determined "solely by the allegations of the complaint in which the insured has been sued."

By contrast, the court continued, to determine whether there was a duty to indemnify, a court had to look at "the actual facts, not only those that were alleged in the state court complaint." For a duty to indemnify to arise, the court said, the insurance policy "must cover the relevant incident." Put differently, the court stated that an insurer's duty to indemnify was "not ripe for adjudication unless and until the insured or putative insured has been held liable in the underlying action."

The court decided that RLI's request for a declaration as to indemnification was "premature" because the Kruk action was still pending. If Baywalk was found not liable in the Kruk action, there would

be “no damages to indemnify.” Thus, the court concluded, the duty-to-indemnify portion of RLI’s case had to be dismissed without prejudice, pending the resolution of the Kruk action.

The case is *RLI Ins. Co. v. Baywalk Title Inc.*, No: 8:20-cv-1143-MSS-AEP (M.D. Fla. Nov. 2, 2020).

Claims Against Title Insurer Were Barred by Ruling in Prior Lawsuit, Court Rules

A federal district court in Idaho has granted a title insurer’s motion for summary judgment, finding that claims against the title insurer for breach of the title insurance policy and for bad faith were barred by the doctrine of issue preclusion.

The Case

As the court explained, Roger and Barbara Stephens owned 270 acres of property on the west side of the highway in Bear Lake County, Idaho, and 83 acres on the east side of the highway. The Stephenses decided to sell the property on the west side of the highway and engaged Northern Title Company of Idaho, Inc., to begin the title work, which included preparing a legal description of the property.

Steven B. Cummings became interested in purchasing the property. He received copies of the purchase contract and the commitment for title insurance, both of which contained an erroneous legal description of the property by including the property on both sides of the highway and two additional parcels that the Stephenses did not own. Based on this legal description, Cummings alleged that he believed he was buying property on both sides of the highway.

Northern Title recorded a warranty deed granting Cummings property on both the east and west sides of the highway, but excluding the property that the Stephenses did not own. After discovering its mistake, Northern Title re-recorded the warranty deed, excluding the property on the east side of the highway, without Cummings’ consent. Northern Title sent Cummings an Owner’s Policy for Title Insurance that had been issued by Stewart Title Guaranty Company. The legal description of the insured property listed only the property on the west side of the highway.

Cummings sued Mr. Stephens and Northern Title. He alleged that Northern Title had breached the escrow agreement, breached the Idaho Escrow Act, breached its duty of good faith and fair dealing, acted negligently, and breached the title insurance policy.

The trial court awarded $50,000 to Cummings for Northern Title’s negligence but dismissed the remainder of his claims. The trial court found that Northern Title and Cummings had understood all along that the sale only included property west of the highway. The trial court also found that Cummings

was not entitled to any property east of the highway and that he had no right to recover any value for property east of the highway.

In 2014, the Idaho Supreme Court affirmed the trial court's ruling, except that it reversed the award of damages against Northern Title.

In March 2015, Stewart Title received written notice of Cummings' claim under the title insurance policy stemming from the transaction with the Stephenses.

Then, in December 2015, Cummings sued Stewart Title, asserting claims for breach of the title insurance policy and for bad faith.

Stewart Title moved for summary judgment. It argued, among other things, that Cummings' claims for breach of the title insurance policy and for bad faith were barred by the doctrine of issue preclusion.

The Court's Decision

The court granted Stewart Title's motion, finding that Cummings' claims for breach of the title insurance policy and for bad faith were barred by the doctrine of issue preclusion.

In its decision, the court explained that Cummings' claims for breach of the title insurance policy and for bad faith against Stewart Title turned on whether he could establish that he was supposed to have received property east of the highway as part of his purchase of the Stephenses' property. That issue, the court said, had been resolved in Cummings' lawsuit involving Northern Title and the doctrine of issue preclusion barred the court from reconsidering it in Cummings' lawsuit involving Stewart Title.

Issue preclusion, the court observed, prevented parties from bringing or having to defend a claim or to re-litigate an issue resolved in a prior suit.

Here, the court found:

- Cummings had a "full and fair opportunity" to litigate whether he owned the eastern property in the earlier case;
- The issue decided in the prior litigation was identical to the issue presented in Cummings' lawsuit against Stewart Title;
- The issue sought to be precluded by Stewart Title actually had been decided in the prior litigation;
- There had been a final judgment on the merits in the prior litigation; and
- Cummings had been a party to the prior litigation.

Because the question of whether Cummings could establish that he was supposed to have received property east of the highway as part of his purchase of the Stephenses' property already had been fully litigated in state court, Cummings could not relitigate the issue in his suit against Stewart Title, the court concluded.

The case is *Cummings v. Stewart Title Guaranty Co*., No. 4:15-cv-00599-BLW (D. Idaho Nov. 17, 2020).