VINCENT CONTESTABILE, Plaintiff, v. ATTORNEYS' TITLE INSURANCE FUND, INC., a Florida corporation, Defendant.

Circuit Court, 9th Judicial Circuit in and for Orange County.
Case No. 48-2013-CA-003972-O.
January 7, 2015.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE having come before this Court at 9:30 a.m., on December 3, 2014, on the Plaintiff, VINCENT CONTESTABILE's, Motion for Partial Summary Judgment, and the Court having heard the arguments of counsel, having reviewed the record and the supplemental memoranda of law submitted by each party, and being fully advised in the premises, this Court rules as follows:

This is an action for breach of contract and declaratory judgment in which the Plaintiff, VINCENT CONTESTABILE (the "Plaintiff"), seeks damages from the Defendant, ATTORNEYS' TITLE INSURANCE FUND, INC. ("ATIF"), for ATIF's failure to pay to the Plaintiff the amount the Plaintiff contends he is owed pursuant to a title insurance policy issued to him by ATIF.

It is undisputed that in June of 2007, the Plaintiff purchased approximately Two Hundred Fifty Three (253) acres of real property located along State Road 44 in Volusia County, Florida (the "Property"). In connection with this purchase, ATIF issued a title commitment to the Plaintiff that did not show any liens or encumbrances that would exist after the purchase of the Property. On or about June 13, 2007, ATIF issued and delivered to the Plaintiff an Owner's Title Insurance Policy Number 24163 (the "Title Policy"), insuring the title on the Property for $3,550,710.00. The Plaintiff is the named insured under the Title Policy for his fee simple interest in the Property.

In March of 2008, a surveying company hired by the Plaintiff when he was positioning the Property for development and resale discovered a recorded mobile home plat that appeared to cover approximately one third (1/3) of the Property (the "Plat"). The Plat was not disclosed, excepted, or otherwise referenced in the Title Policy. ATIF received actual notice of the Plat and the resulting title defect in April of 2008 and undertook the handling of the title claim (the "Title Claim"). ATIF decided to resolve the Title Claim by retaining counsel for the Plaintiff to petition Volusia County to vacate the Plat. ATIF decided not to pursue litigation to resolve the defect or to pay the Plaintiff the policy limits, which are alternative options for the insurer under the Title Policy.

ATIF retained Rob Simon, Esq., and the law firm of Winderweedle, Haines, Ward & Woodman, P.A. ("WHWW"), on April 30, 2008, to represent the Plaintiff and to try to cure the title defect. WHWW filed the Petition for Vacation on or about March 10, 2009, approximately eleven (11) months after ATIF received notice of the discovery of the Plat. Several months thereafter, the Plaintiff was told that, in order to remove the Plat, the Plaintiff would be required to convey an easement on the Property to Volusia County, Florida. The Plaintiff executed this easement (the "Easement") on September 16, 2010, which was recorded at O.R. Book 6519, Page 1071, of the Official Records of Volusia County, Florida, on September 27, 2010.

Volusia County then issued Resolution Number 2010-124, vacating the Plat, which was recorded at O.R. Book 6519, Page 1059, of the Official Records of Volusia County, Florida, on September 27, 2010, approximately two and one half (2 ½) years after discovery of the Plat and initiation of the Title Claim. As a result, the Plaintiff claims that the value of the Property fell by approximately $2,000,000.00 by the time the title defect was cured, and the Plaintiff has other damages or actual losses, such as carrying costs, that are compensable under the Title Policy and the facts of this case.

I. Coverage

a. The Easement

It is not disputed that the Plaintiff was required to give an easement on the Property to Volusia County in fee simple in order for Volusia County to agree to vacate the Plat. As such, the Easement is covered as a loss or expense under the Title Policy, there are no valid coverage defenses, and the Plaintiff is entitled to compensation from the Defendant for having to provide the Easement in order for the title defect to be cured and the Title Claim to be resolved. The amount of such compensation remains to be determined by the jury in this action.

b. The Title Claim

The Plaintiff also seeks summary judgment on the issue of coverage in regard to the underlying Plat. In support, the Plaintiff points to record evidence indicating that ATIF continuously treated the Title Claim as a covered claim from the time it received notice of the title defect. Specifically, the Plaintiff has presented multiple letters from ATIF to the Plaintiff throughout the course of the Title Claim in which ATIF repeatedly admitted and confirmed that the Title Claim was covered. The Plaintiff also relies upon various statements made by ATIF in its First Amended Answer and Defenses and its Responses to Plaintiff's First Set of Interrogatories, which acknowledge that ATIF treated the Title Claim as a covered claim.

Where the "pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials . . . on file show there is no genuine issue as to any material fact . . . the moving party is entitled to a judgment as a matter of law." *Estate of Githens v. Bon Secours-Maria Manor Nursing Care Center, Inc.,* 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1482a]. Where a party admits a fact in its pleadings, such fact is judicially admitted for purposes of the pending litigation. *See Carvell v. Kinsey,* 87 So. 2d 577, 579 (Fla. 1956); *Kaplan v. Morse,* 870 So. 2d 934, 938 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1007b] ("When a party admits an allegation, he is bound by it, and no further proof of the fact is required."). ATIF has admitted in its pleadings and elsewhere that the Title Claim is covered under the Title Policy.

Although ATIF has recently raised an argument and defense in this action under the Marketable Record Title Act, Chapter 712, *Florida Statutes* ("MRTA"), this Court is not persuaded that MRTA had, or has, any effect on the Plat or the Title Claim. ATIF contends that the Plat was in fact extinguished or otherwise eliminated by MRTA and did not actually encumber the Property when it was discovered in 2008. However, ATIF has not, and cannot, establish that MRTA did in fact apply to this particular Plat and absolutely extinguished it by operation of law. Further, if ATIF wanted to utilize MRTA in regard to the Plat and Title Claim, ATIF admits that it would have had to initiate some sort of judicial action when the Plat was first discovered in order to determine whether the Plat had been extinguished by MRTA and, if so, to establish clear title to the Property. Also, ATIF admits that it would have had to get a judicial decree to confirm that MRTA applies. It is undisputed that ATIF never pursued any judicial action or got any court order entered determining that the Plat was not a title defect. The title defect has now been cured by a non-judicial procedure implemented by ATIF. As such, ATIF cannot now avoid coverage by asserting MRTA as a defense.

Additionally, ATIF has waived, and is otherwise estopped from raising, any argument or defense under MRTA which would effectively deny coverage of the Title Claim under the proposition that MRTA had already eliminated the Plat when it was discovered in 2008. Florida law recognizes an important exception to the general rule that doctrines of waiver and estoppel may not be used to create insurance coverage. *Doe v. Allstate Ins. Co.,* 653 So. 2d 371, 373 (Fla. 1995) [20 Fla. L. Weekly S135a]. Specifically, "when an insurance company assumes the defense of an action, with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage." *Cigarette Racing Team, Inc. v. Parliament Ins. Co.,* 395 So. 2d 1238, 1239-40 (Fla. 4th DCA 1981) (citations omitted). The doctrine of promissory estoppel may be used to create insurance coverage when the refusal to do so would sanction fraud or injustice. *Kissimmee Utilities v. Fla. Municipal Ins.,* 686 So. 2d 766 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D220a].

When an insurer receives and undertakes the handling of an insurance claim, the insurer "has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."*Doe* at 374. ATIF's own Title Policy also imposes a similar duty of diligence.[1] In consideration for the insurer's duty to handle the claim with proper care and diligence, '[t]he insured has a reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer." *Id*. If an insured has surrendered control to the insurer over the handling of the claim, then the insurer must assume a duty to exercise control and make appropriate decisions. *Boston Old Colony Ins. Co. v. Gutierrez,* 386 So. 2d 783, 785 (Fla. 1980). Even if an insurer *erroneously* undertakes the handling of an insured's claim, "and the insured, as required, relies upon the insurer to the insured's detriment, then the insurer should not be able to deny the coverage which it earlier acknowledged." *Doe*, 653 So. 2d at 374.

When ATIF received notice of the Plat and the Title Claim, it acknowledged (through correspondence as well as its own actions) that the Plat was a previously undisclosed and undiscovered encumbrance on the Property. ATIF retained counsel on behalf of the Plaintiff to vacate the Plat. ATIF did not indicate to the Plaintiff that it was providing coverage or otherwise taking action in regard to the Plat under a reservation of rights. ATIF, in its sole discretion, opted to resolve the Title Claim by petitioning Volusia County to vacate the Plat. The Plaintiff relied upon this decision, as he was required to under the law and under the Title Policy, based on the understanding that the Title Claim was covered. The purpose of title insurance is to deal with title defects such as the Plat. This is presumably the very reason the Plaintiff purchased the Title Policy.

Upon receiving notice of the Plat, ATIF knew or should have known that MRTA was a potential avenue through which to address the Plat and its effect on the Property. The documents relied upon by ATIF in multiple requests for judicial notice (which ATIF has filed in an attempt to establish the basis for its MRTA defenses and arguments in this action) are all public records recorded in Volusia County, Florida. All of these public records existed, and indeed were recorded, even before the Plaintiff put ATIF on notice of the Title Claim. Stated another way, there was no new information presented to ATIF after the Title Claim was made that would change its analysis as to the application of MRTA. If, as ATIF now contends, the Plat was in fact extinguished by MRTA, ATIF knew or should have known in 2008 that it could assert and utilize MRTA to cure the title defect. ATIF did not lack access to any knowledge or information to preclude it from conducting the same MRTA analysis at the time it received notice of the Plat in 2008.

ATIF made the decision to engage in a non-judicial cure and required its insured to go through the plat vacation process. Further, the Plaintiff has presented letters written to

him in which ATIF explicitly demanded that the Plaintiff cooperate with the plat vacation process in order to protect his rights under the Title Policy, and ATIF controlled the manner in which the title defect was cured. Accordingly, the Plaintiff actually and properly relied upon ATIF to control the method of the cure. Further, it is undisputed that the Plaintiff has been prejudiced as a result of ATIF's handling of the Title Claim. Most clearly, the Plaintiff was prejudiced by giving up the Easement to Volusia County in order to have the Plat vacated and the title defect cured. The Plaintiff also alleges that he has suffered additional substantial damages as a result of ATIF's control over and handling of the Title Claim. As such, the Plaintiff has established that his Title Claim is a covered claim, and summary judgment is granted in favor of the Plaintiff as to the issue of coverage in regard to the Plat.

II. Measure of Damages

a. "Actual Loss"

The Plaintiff also seeks summary judgment on the issue of the proper measure of damages in this case. This Court must first look to the Title Policy to determine the appropriate measure of damages. The first page of Title Policy states that it insures "against *loss or damage*, not exceeding the amount of insurance stated in Schedule A [$3,550,710.00], and costs, attorneys' fees and expenses which [ATIF] may become obligated to pay hereunder, sustained or incurred by the insured by reason of . . . "[a]ny defect or lien or encumbrance on such title . . . or [u]nmarketability of such title." (Emphasis added.)

Pursuant to Paragraph 6(a) of the Title Policy, ATIF's liability is limited to the lesser of "the actual loss of the insured claimant" or $3,550,710.00. The parties agree that the maximum exposure under the Title Policy is $3,550,710.00, but, because it is not defined in the Title Policy, the meaning of "actual loss" in this case is disputed by the parties. The Plaintiff contends that the definition of "actual loss" should be construed broadly and based upon the plain meaning of those words. ATIF, however, contends that the damages in this case are limited to only the difference in value of the Property with the Plat at the time the Plat was discovered, and the value of the Property without the Plat at that same point in time. The terms "actual loss" and "damage" are not defined in the Title Policy.

In an insurance dispute, as a matter of law, insuring or coverage clauses are to be construed in the broadest possible manner to effect the greatest extent of coverage. *Union American Ins. v. Maynard,* 752 So. 2d 1266 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D648a]. Where any language in an insurance policy is subject to differing interpretations, the policy language must be construed liberally in favor of the insured and strictly against the insurer. *State Farm Fire Ins. v. CTC Dev.*

Corp., 720 So. 2d 1072 (Fla. 1998) [23 Fla. L. Weekly S527a]. If an insurer intends to limit its liability in a specific manner, “it [is] incumbent upon [the insurer] to do so unambiguously.” *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]. As such, where a “limitation of liability clause is susceptible to differing interpretations, that clause is ambiguous . . . [and a court must] construe the ambiguity against the drafter in favor of the insured.”*Id.* at 35-36.

The Title Policy in this case does not define the term “actual loss” or “damage,” nor does it specify how the “actual loss” should be calculated. Further, the Title Policy contains no language imposing any of the limitations of liability which ATIF has proffered. The purpose of compensation for a breach of contract is to restore the injured party to the condition he would have been had the contract been performed and the breach not occurred. See, e.g., 17 Fla. Jur 2d Damages §28. “The damages recoverable by one injured by a breach of contract are those that are the natural and proximate result of the breach, or that, in the ordinary course of events, would naturally result from a breach, and can be reasonably said to have been contemplated by the parties at the time the contract was made.” 17 Fla. Jur 2d Damages §26.

In *Safeco Title Ins. Co. v. Reynolds,* 452 So. 2d 45, 47-48 (Fla 2d DCA 1984), the court held:

It is a well-settled and fundamental rule that an insured [owner or mortgagee] is entitled to recover the *actual loss* or damage sustained from a defect, lien or encumbrance affecting his title which is not excepted from the policy's coverage. There are two basic measurements for determining an insured owner's actual partial loss because of an encumbrance or encroachment not disclosed, with their particular application dependent upon the nature of the undisclosed burden and whether the burden can be removed: (1) diminution in market value (as stated above), and (2) the amount necessary to remove the existing encumbrance.

Emphasis added and citations omitted.

These two basic measurements of actual loss or damage are the ones that, under Florida law, would normally result from an insurer's breach of a title insurance policy by failing to indemnify the insured for its partial loss (as distinguished from a complete failure of title) as a result of a covered title defect, whether as the ordinary consequence of such breach, or as a consequence which may be presumed to have been in the contemplation of the parties at the time they made the contract as the natural and proximate result of the breach. The Plaintiff's actual loss and damages because of the undisclosed encumbrance or encroachment is limited to those damages recognized in *Safeco Title,* above.

b. *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co.*

The Plaintiff also argues that, regardless of how the terms “actual loss” and “damage” are defined, he is entitled to damages as a result of ATIF's separate and distinct breach of the Title Policy through its failure to cure the subject title defect in a diligent manner. This Court is also persuaded by this distinct argument and, upon a showing that ATIF failed to act diligently in curing the subject title defect, such failure constitutes a separate breach of the Title Policy, and the Plaintiff's damages may not then be limited by the Title Policy. By electing to cure the title defect through non-judicial means, ATIF incurred a duty under the Title Policy to act diligently and to cure the defect within a reasonable time. If the Plaintiff can prove to the jury that ATIF failed to do so, then the Plaintiff will be entitled to all damages without any limitation under the Title Policy.

The Plaintiff relies upon the leading case on this issue: *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla., Inc.,* 2011 WL 2313206 (S. D. Tex. June 9, 2011). The facts in *Premier Tierra* are strikingly similar to the present case. Although *Premier Tierra* was initiated and decided in Texas, the court conducted its analysis solely under Florida law. *Id.* at *2. Since the court found that “Florida law has the ‘most significant relationship' with the insurance policy, and thus Florida substantive law applies to this action,” this Court finds that *Premier Tierra* is very persuasive in the instant case. *Id.* In applying Florida law, the court in *Premier Tierra* found that the Florida Supreme Court had not dispositively addressed the damages issue when a title insurer undertakes its own cure, so the court explained that it would necessarily formulate its decision under relevant Florida law, including decisions from intermediate Florida appellate courts. *Id.* The court, however, found no case directly addressing the issue involved here. *Id.* This Court is also unaware of any Florida cases directly addressing this unique issue. As such, this Court will follow *Premier Tierra,* as it is persuasive authority in this case.

In *Premier Tierra,* the plaintiff, Premier Tierra Holdings, Inc. (“Premier”), brought a claim against its title insurer, Ticor Title Insurance Company of Florida, Inc. (“Ticor”), for Ticor's failure to diligently cure title defects encumbering the insured property. *Id*. at *1. Premier discovered two previously unknown title defects on the insured property in March of 2009 and notified Ticor of the defects. *Id*. Ticor decided to endeavor to cure the first defect -- using its own resources and without pursuing litigation -- in April of 2010. *Id.* Premier sought “damages in the amount of the decrease in fair market value from March of 2009 (when Premier initially [discovered the title defects]) to the summer of 2010 (when Ticor cured the title defects).” *Id.*

The court in *Premier Tierra* held that when a title insurer undertakes to resolve a title defect pursuant to a title policy, a provision in the policy requiring the insurer to do so

in a diligent or timely manner constitutes a contractual obligation of the insurer. *Id*. at *5. In applying Florida law, the court found that, "[a]lthough the Florida Supreme Court has not addressed this particular controversy, that court has clearly articulated . . . 'that insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer.'" *Id*. at *4 (quoting *Penzer v. Transp. Ins. Co.,* 29 So. 3d 1000, 1005 (Fla. 2010) [35 Fla. L. Weekly S73a]). The court in *Premier Tierra* found that, in choosing to resolve the claim itself, Ticor became contractually obligated to do so "diligently," pursuant to the title policy's terms. *Id*. at *5. In addressing Premier's claim for losses that occurred as a result of Ticor's delay in curing the title defects, the court found that, to the extent that Ticor had breached its duty to act diligently, Premier was entitled to all measurable compensatory damages resulting from that breach. *Id.* at *9.

The court reasoned that damages resulting from a breach of the contractual obligation to diligently and timely cure title defects under the title policy are distinct from damages resulting solely from the title defect, and the insured is therefore entitled to compensation for all damages resulting from the insurer's breach of contract, even if such damages are greater than the maximum coverage amount in the title policy. *Id*. at *9. The court held as follows: *"[A] title insurer who has materially breached its covenant to act with reasonable diligence in curing title defects cannot require its insured to comply with other contract terms, such as policy loss limitations when the insurer is paying the claim according to the policy's terms." Id.* (Emphasis added.) Stated otherwise, when a title insurer fails to act diligently in curing a title defect, the insured is entitled to "all foreseeable damages resulting from the title insurer's breach of contract, including consequential and incidental damages." *Id*. (quoting JOYCE PALOMAR, TITLE INSURANCE LAW § 10:18 (2010 ed.)); *see also Burks v. Louisville Title Ins. Co*., 95 Ohio App. 509, 514 (Ohio Ct. App. 1953).

The *Premier Tierra* court is not the only court that has reached this conclusion. "[C]ourts routinely and properly order consequential damages 'as part of the standard measure of damages for breach of contract when an insurer failed to indemnify or act to defend or clear the title *according to policy terms*.' " *First American Title Ins. Co. v. Columbia Harbison, LLC,* 2013 WL 1501702, at *9 (D. S.C. April 11, 2013) (quoting JOYCE PALOMAR, TITLE INSURANCE LAW § 10:18 (2012-2013 ed.)) (emphasis added). Further, the damages an insured is entitled to as a result of a title insurer's breach of contract may also include lost profits from lost sales due to a defect in title. *Columbia Harbison,* 2013 WL 1501702, at *9;*La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp.,* 2007 WL 3024242, at *4 (M.D. Fla. Oct. 15, 2007) (citing *Safeco Title Ins. Co. v. Reynolds,* 452 So. 2d 45, 48 (Fla. 2d DCA 1984) (holding that lost profits are recoverable as "actual loss" in a title insurance case)); *see also Burks,* 95 Ohio App. at 513-14 (finding that the insured's recoverable damages

resulting from the title insurer's breach of contract included consequential damages naturally arising from the breach and were not limited to “the value of the parcel as to which the title failed”)).

Just as the title policy in *Premier Tierra* imposes upon the insurer a duty to act with “reasonable diligence” when resolving a title claim, Paragraph 7 of the Title Policy in the instant case states that ATIF shall remove a title defect “within a reasonable time” of notification of the defect. Pursuant to the terms of the Title Policy, once ATIF chose to cure the title defect itself, the Plaintiff's damages could only possibly be limited if ATIF cures the title defect *“within a reasonable time.”*

The determination of whether ATIF failed to cure the title defect within a reasonable time is a question of fact for the jury in this case. At this point, the Plaintiff simply seeks partial summary judgment on the proper measure of damages that he may present to the jury. The Plaintiff is entitled to all damages because of the undisclosed encumbrance or encroachment which constitute an “actual loss” as defined in *Safeco Title,* above. Further, upon a jury's finding that ATIF failed to cure the title defect within a reasonable amount of time, the Plaintiff's damages will not be limited to the actual loss caused by the undisclosed encumbrance or encroachment as defined in *Safeco Title,* but to the actual loss caused by the delay limited only by the policy limits of $3,550,710.00. Further, summary judgment is granted in favor of the Plaintiff as to the issue coverage for the Plat and liability for the Easement.

ATIF has asked for summary judgment in its Response. Therefore, ATIF's Motion for Summary Judgment, as contained in its Response, is denied. Further, ATIF's defense to the Plaintiff's MPSJ is identical to its argument in its own First Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Marketable Record Title Act), which was filed on September 19, 2014.

As such, it is hereby:

ORDERED AND ADJUDGED as follows:

1. The Plaintiff's Motion for Partial Summary Judgment is GRANTED in part as set forth above.

2. ATIF's First Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Marketable Record Title Act) is DENIED. The hearing on ATIF's First Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Marketable Record Title Act), scheduled for 10:30 A.M., on January 29, 2015, is cancelled.

3. Summary judgment is entered in favor of the Plaintiff and against ATIF in regard to any and all coverage and liability defenses raised in ATIF's Amended Answer.

4. This matter will proceed to a jury trial on the issue of the Plaintiff's actual losses and damages as set forth above.

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[1]Section 3(c) of the Title Policy states that ATIF should “do any . . . act which in its opinion may be necessary or desirable to establish the title . . . as insured” with “*undue delay*.”

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