NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0501-14T3

ARIES INVESTMENTS, LLC,
and ARIES FINANCIAL, LLC,

Plaintiffs-Respondents,

v.

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant-Appellant,

and

ACCESS NEW JERSEY TITLE AGENCY, LLC,

Defendant,

and

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Third-Party Plaintiff-Appellant,

v.

DOUGLAS KAHAN, ESQ.,

Third-Party Defendant-Respondent,

and

HENRY THOMPSON, STEVEN SCHWARTZ, and
INFINITI COMMERCIAL GROUP, LLC,

Third-Party Defendants.

Argued November 9, 2015 – Decided August 2, 2016

Before Judges Carroll and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-711-10.

Robert L. Grundlock, Jr., argued the cause for appellant (Rubin, Ehrlich & Buckley, P.C., attorneys; Mr. Grundlock, on the brief).

Donald P. Jacobs argued the cause for respondents Aries Investments, LLC, and Aries Financial, LLC (Budd Larner, P.C., attorneys; Mr. Jacobs, on the brief).

Douglas Kahan, respondent, argued the cause pro se.

PER CURIAM

This appeal involves whether a lender is entitled to title insurance coverage where the underlying defaulting mortgage was the result of a fraud by the borrower, and the lender was not assigned the mortgage before it was declared void.

Following trial, the jury rendered a verdict in favor of lender, plaintiff Aries Financial, LLC, against title insurer, defendant First American Title Insurance Company, in the amount of $334,790.40. The jury also dismissed First American's third-party complaint against Douglas Kahan and Steven Schwartz for indemnification of costs associated with Kahan's alleged malpractice as a closing agent and Schwartz's alleged fraud as the broker in the loan transaction. On September 2, 2014, the

trial court entered final judgment memorializing the jury's verdict.

First American challenges: the denial of its motion for judgment made at the close of Aries Financial's case; jury instructions that a lender receives an insurable interest in property if it has a "reasonable expectation" of being insured; and the exclusion of certain evidence. First American also appealed from that part of the September 2, 2014 final judgment, which dismissed its third-party complaint against Kahan, but did not address this issue in its merits brief. The issue therefore is deemed waived. N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505-06 n.2 (App. Div.), certif. denied, 222 N.J. 17 (2015); Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2016). For the reasons that follow, we affirm.

I.

In September 2006, Schwartz, the sole proprietor of Infiniti Commercial Group, LLC, a company that brokered loans, sent Aries Financial a loan application for $399,750. A Hoboken property allegedly owned by Eileen Lorenzo and John Airey as joint tenants with an estimated value of $615,000, was listed as

collateral for the loan.[1] The loan purported to cover repairs for another property owned by Lorenzo and Airey. The loan was approved when a subsequent appraisal of the property satisfied the loan-to-value ratio.

Lawrence Ramaekers, one of Aries Financial's owners, testified that the loan would not be made until "a commitment for title insurance had been received." First American did so, issuing a commitment for title insurance in the amount of the loan, to "Aries Financial, LLC, its successors and/or assigns as their interests may appear[.]" The title commitment listed several requirements under Schedule B-Section 1 including:

> Documents satisfactory to us creating the interest in the land and the mortgage to be insured must be signed, delivered and recorded.
>
> a. Deed from John Airey and Eileen Lorenzo, Husband and Wife[2] to 13 Willow Terrace, LLC.[]
>
> b. Mortgage to be properly executed by 13 Willow Terrace, LLC.[,] in favor of Aries Financial, LLC, to secure the proposed loan in the amount of $399,750.00.

The loan closing was subsequently held on October 5, 2006, when Aries Financial wired the loan proceeds into Kahan's attorney trust account. Lorenzo did not appear at the closing;

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[1] The property was solely owned by Lorenzo.

[2] Lorenzo was actually Airey's grandmother-in-law.

Lorenzo had allegedly provided Airey with her power of attorney giving him authority to execute on her behalf the documents necessary to close the loan.[3] In accord with Aries Financial's lending requirements, the borrower was actually Willow Terrace, LLC, created solely for the transaction. According to Kahan, Willow Terrace was managed by Lorenzo and equally owned by Airey and Lorenzo.[4] The property was deeded to Willow Terrace by Lorenzo, signed by Airey on behalf of Lorenzo as attorney-in-fact, but not as "Husband and Wife," as required by the title commitment.

In the twelve months post-closing, the loan payments[5] were made from Kahan's escrow account. As the thirteenth month approached, Aries Financial sent a letter to Lorenzo reminding her that the money held in the escrow account would soon be

[3] Initially, Lorenzo appeared at the closing with a non-notarized power of attorney, and was advised by Kahan that it was unacceptable to close the loan. Lorenzo left the closing and returned with a power of attorney purportedly signed by Lorenzo and notarized by Henry Thompson, which Kahan deemed satisfactory.

[4] In actuality, Willow Terrace's operating agreement states "it is the intention of the Member [Airey] that the Company has been formed as a single member limited liability company, and therefore, if this Agreement is executed by a husband and wife, then their membership interest shall be held as entirety property, with full rights of survivorship."

[5] Interest-only payments were due.

depleted, and she, pursuant to the terms of their loan agreement, would be required to make the monthly interest payments thereafter. In response, Candice London at Aries Financial received a call from Lorenzo's daughter stating that Lorenzo never borrowed money for this loan.

To eliminate her obligation to repay the loan and void the mortgage on the property, Lorenzo filed suit in the Law Division[6] against Airey, Aries Investments, Aries Financial, Worldwide Financial Resources, Inc., Access New Jersey Title Agency,[7] and Kahan. In turn, Aries Investments and Worldwide filed a third-party complaint against Thompson, the notary who purportedly witnessed Lorenzo's signature on the power of attorney. On December 17, 2008, the court entered an order for judgment voiding: the fraudulent power of attorney; the deed between Lorenzo and Willow Terrace; and the mortgage and adjustable rate note between the borrower, Willow Terrace, signed by Airey, in his individual capacity, and as attorney in fact on behalf of Lorenzo, and the lender, Worldwide.[8]

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[6] The suit was filed in the Hudson County Vicinage.

[7] Access New Jersey, First American's authorizing agent, issued the title commitment to Aries Financial in the amount of $399,750.

[8] Criminal charges were brought against Airey and Thompson that resulted in their conviction.

In September 2009, Aries Investments and Aries Financial filed the subject complaint in Monmouth County against First American and Access New Jersey seeking to enforce the title insurance and recover $399,750, the loan amount. In response, First American filed a third-party complaint against Kahan, Thompson, Schwartz, Infiniti and Worldwide.[9]

Thereafter, on April 20, 2011, First American was granted partial summary judgment against Aries Investments.[10] However, First American's similar requests against Aries Financial and Kahan were denied.

At jury the ensuing trial, Aries Financial presented the testimony of five witnesses: Ramaekers, Kahan, Schwartz, Rita Buscher[11] and its expert, Alfred Santoro. It was revealed that Aries Financial was created by Ramaekers, Albert London, and Carl Gallo, to make loans to LLCs in New York. To do business in New Jersey, the owners formed Aries Investments to buy loans from Worldwide, which was licensed to issue loans in New Jersey. The Aries companies would identify borrowers and perform the

[9] Defaults were entered against Infiniti and Thompson. Claims against Worldwide were voluntarily dismissed.

[10] On June 30, 2011, Aries Financial and Aries Investments' reconsideration motion was denied.

[11] Buscher, former Assistant Vice President Claims Counsel for First American, handled the claim for title insurance filed by Aries Financial and Aries Investments.

loan evaluations. If the Aries companies decided to buy the loan, they would advance the money to Worldwide to lend.[12] Kahan served as closing agent for Aries Financial in New York and New Jersey. He would form an LLC, in this case Willow Terrace, to serve as borrower and conduct the loan closing.

Here, the mortgage to Worldwide from Willow Terrace was subsequently assigned to Aries Investments, though Aries Financial had funded the loan and was the insured lender on the title commitment. While the assignment was not notarized and could not be recorded, First American deemed it to be an effective transfer of interests from Worldwide to Aries Investments. Following repeated requests from First American, and after the mortgage was voided in the Hudson County action, a "duly executed" notarized assignment from Worldwide to Aries Investments was forwarded to First American.

Under the loan agreement, the first year's interest on the loan was escrowed to prevent a default during the first year. If the borrower was unable to refinance by the end of the first twelve months, payments were to be made to Aries Financial starting in the thirteenth month. Santoro opined that title

[12] This method of lending is known as "table funding" wherein the loan originator forms a relationship with a lender to provide the funds for closing. Thereafter, the lender takes an assignment of the loan.

insurance was "in place" when: a title insurance commitment was issued; the closing took place; the premium was paid; and the documents were accepted and recorded by the title agent. He further stated that there was an insurable interest in the title transaction even if the underlying documents were determined to be ineffective; moreover, forgery of a document was a covered peril of title insurance.

Additionally, Santoro testified that an insurable interest can still exist even when a mortgage is not recorded because "it's the expectation of the insured that once he hands those documents over to the title insurance agent, and that once he has the benefit of this commitment in front of him, that insurance will be issued." Thus, he opined that title insurance was issued in this case and that the mortgage assigned to Aries Investments was insured from the time of the closing. Additionally, Santoro opined that the absence of a deed from Airey and Lorenzo, as "husband and wife," to Willow Terrace, as required by the title commitment, was the fault of the title agent, Access New Jersey.

At the close of Aries Financial's case, First American moved for an involuntary dismissal pursuant to Rule 4:37-2 on the grounds that Aries Financial did not have a mortgage as required by the title commitment, nor an assignment, and

therefore had no insurable interest. The trial judge denied the motion, ruling it was up to the jury as the fact-finder to determine the existence of an insurable interest.

First American presented the testimony of six witnesses: Albert London, Thompson, Stuart Reiser, Kahan, Lawrence Fineberg, and Candice London by reading into the record portions of her deposition testimony. Fineberg, a title insurance expert, opined that Aries Financial had no title insurance on the property because there was no recorded assignment of mortgage transferring ownership of the mortgage from Worldwide. He admitted, however, that there were two assignments of mortgage from Worldwide to Aries Investments, neither of which was recorded.

Fineberg acknowledged that an insured's reasonable expectation of an insurable interest is a factor in determining whether title insurance is provided. He, however, maintained that Aries Financial's expectation that it had obtained or was obtaining an insurable interest — on the basis of which it advanced $399,750 — was not reasonable because there was no mortgage in favor of Aries Financial. Moreover, he testified that a forged mortgage, in and of itself, does not establish an insurable interest.

Reiser, First American's legal malpractice expert, accused Kahan of multiple violations of the Rules of Professional Conduct, and committing a crime by practicing in New Jersey without a license. Albert testified that "Aries Investments really didn't exist." Rather, he stated that Aries Financial was the operating company; Aries Financial was the entity that borrowed the money for the lending operations with all the income going to it.

As noted, the jury reached a verdict in favor of Aries Financial in the amount of $334,790.40 and in favor of Kahan and Schwartz, dismissing First American's third-party complaint of indemnification of costs associated with Kahan's alleged malpractice and Schwartz's alleged fraud in the loan transaction. This appeal followed.

II.

We first address First American's contention that its motion for directed verdict should have been granted.[13] Specifically, First American argues the court erred because: 1) Aries Financial failed to demonstrate that it held an insurable

[13] In its brief, First American mischaracterizes the motion as a Rule 4:40-1 motion for judgment. In fact, it was a motion for involuntary dismissal under Rule 4:37-2(b). Regardless, the evidential standard for deciding a motion pursuant to either rule is the same. Verdicchio v. Ricca, 179 N.J. 1, 30 (2004).

interest in the property; and 2) it misconstrued the title commitment between Aries Financial and First American.

A motion for involuntary dismissal is premised "on the ground that upon the facts and upon the law the [non-moving party] has shown no right to relief." R. 4:37-2(b). The motion shall be denied if "'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor' of the party opposing the motion[.]" Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (alteration in original) (quoting Rule 4:37-2(b)). If a court, "'accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom,' finds that 'reasonable minds could differ,' then 'the motion must be denied.'" ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 510-11 (2014) (quoting Verdicchio, supra, 179 N.J. at 30).

We apply the same standard as the trial court when we review a trial court's grant or denial of a Rule 4:37-2(b) motion. Id. at 511. Under this standard, we "must examine the evidence, together with legitimate inferences which can be drawn therefrom, and determine whether the evidence could have sustained a judgment in favor of the party who opposed the motion." Craggan v. IKEA USA, 332 N.J. Super. 53, 61 (App. Div.

2000) (quoting Tannock v. N.J. Bell Tel., 223 N.J. Super. 1, 6 (App. Div. 1988)). Ordinarily, a motion for involuntary dismissal should be denied if the case rests upon the credibility of a witness. Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:37-2(b) (2016).

To assess whether the trial court properly denied First American's motion, we must determine if Aries Financial had an insurable interest in the property that was fraudulently mortgaged and not properly assigned to Aries Financial. What constitutes an insurable interest in property was addressed by our Supreme Court in Miller v. New Jersey Insurance Underwriting Association, where it held:

> With respect to real estate, an insurable interest need not rise to the level of legal or equitable title. In the past, New Jersey courts have recognized that an insured retains an insurable interest as long as he has a reasonable expectation of deriving pecuniary benefit from the preservation of the property or would suffer a direct pecuniary loss from its destruction.
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> [82 N.J. 594, 600 (1980) (emphasis added) (citing Trade Ins. Co. v. Barracliff, 45 N.J.L. 543, 549-51 (E. &. A. 1883)).]

In other words, the test of an insurable interest in real property is "whether the insured has such a right, title or interest therein, or relation thereto, that he will be benefited by its preservation and continued existence or suffer a direct

pecuniary loss from its destruction or injury by the peril insured against." Arthur Andersen LLP v. Fed. Ins. Co., 416 N.J. Super. 334, 350 (App. Div. 2010) (quoting Balentine v. N.J. Ins. Underwriting Ass'n, 406 N.J. Super. 137, 141-42 (App. Div. 2009)).

The common factor between all cases in which an insurable interest is found is the "existence of a cognizable relationship" between the insured and the property that offers the basis for the insured to gain a direct pecuniary benefit from the property or suffer a direct pecuniary loss if the property is damaged. Id. at 351. As such, an insurable interest in property has been found on the basis of equitable title, without a showing of absolute ownership thereof. See, e.g., P.R. De Bellis, Inc. v. Lumbermen's Mut. Cas. Co., 77 N.J. 428, 431-33, 437-38 (1978) (the holder of a certificate of sale of seized property who took possession of the premises, later redeemed by its prior owner and destroyed in a fire, has an insurable interest in the property); Balentine, supra, 406 N.J. Super. at 143-45 (a nominal owner listed as an additional insured on a policy held an insurable interest even though the owner did not pay property taxes, insurance premiums, utilities, or other expenses for the premises); 495 Corp. v. N.J. Ins. Underwriting Ass'n, 173 N.J. Super. 114, 128-29 (App. Div.

1980), aff'd, 86 N.J. 159, 169 (1981) (a mortgagee in possession by foreclosure has an insurable interest); Hyman v. Sun Ins. Co., 70 N.J. Super. 96, 97-98, 101-02 (App. Div. 1961) (an assignee of a mortgage payment "without recourse" held an insurable interest in mortgagee's property in the amount of the payment due even though the assignment was not recorded until after a fire destroyed the property).

Applying the standard for an involuntary dismissal under Rule 4:37-2 as to whether Aries Financial had an insurable interest covered by title insurance provided by First American, we conclude the trial court was correct in not dismissing Aries Financial's claim and allowing the jury to decide the issue. Reasonable minds could determine that Aries Financial had an insurable interest.

Viewing the evidence favorable to Aries Financial, the company had a "cognizable relationship" to the property. See Arthur, supra, 416 N.J. Super. at 351. Aries Financial provided the funds to Worldwide to lend to the borrowers, and expected its interests to be protected by the title insurance commitment, which it paid for and received from First American.

Furthermore, a title insurance policy is a contract that safeguards a landowner against loss created by defective title to the land. Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J.

72, 82 (2008) (citing Sandler v. N.J. Realty Title Ins. Co., 36 N.J. 471, 478-79 (1962)). To recover under the title insurance policy, the defect must have existed at the time the insurance was acquired. Ibid. (citing 11 Couch on Insurance 3d § 159:5 (1998)). Although the deed did not state that the property was conveyed to Willow Terrace by Airey and Lorenzo, as husband and wife, per the title commitment, and a properly notarized assignment of the mortgage to Aries Investments was not provided before the mortgage was voided, reasonable minds could have found that Aries Financial expected to have an interest in the property before the fraud was revealed. It paid for a policy and received a commitment. Thus, the evidence was sufficient to defeat a motion for involuntary dismissal.

First American next contends that the trial court erred in instructing the jury concerning Aries Financial's reasonable expectation of title insurance coverage. We disagree.

The judge charged the jury:

> If a policy exists or should have been issued, the insurance coverage depends upon the reasonable expectations of the party who is insured . . . . A lender receives an insurable interest in property if it has a reasonable expectation of a monetary gain from the property being preserved or a direct monetary loss from its destruction.

First American objected to the second portion of this language, with counsel stating: "I don't believe that a lender's

reasonable expectation has anything at all to do with obtaining an insurable interest. A lender only obtains an insurable interest if it has a mortgage in the property."

After hearing arguments from both counsel, the judge denied the objection, stating: "I believe to leave that out would substantially [handicap[14]] the jury in assessing the . . . opinions . . . that both experts have presented and considering the facts that have been presented in support of the plaintiff's burden. The plaintiff, through Mr. Ramaekers's testimony[,] has addressed those expectations."

"In civil matters, the trial court should give an instruction that appropriately guides the jury on the legal basis of a plaintiff's claim or a defendant's affirmative defense, so long as there is a reasonable factual basis in the evidence to support that claim or defense." Walker v. Costco Wholesale Warehouse, ___ N.J. Super. ___, ___ (App. Div. Apr. 1, 2016) (slip op. at 13). "Jury charges 'must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them [.]'" Velazquez v.

[14] The trial transcript stated "handcuff," which we believe was either a misquote by the transcriber or misstatement by the judge.

Portadin, 163 N.J. 677, 688 (2000) (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)).

Here, the trial court's jury charge was consistent with the law and the evidence presented. As noted, under Miller, a person or entity retains an insurable interest in property based on "a reasonable expectation of deriving pecuniary benefit from the preservation of the property or would suffer a direct pecuniary loss from its destruction." Miller, supra, 82 N.J. at 600. The evidence justifies the charge that Aries Financial may have had an insurable interest in the property because: 1) Aries Financial funded the loan to Willow Terrace; 2) First American issued a title commitment to Aries Financial through its authorized agent, Access New Jersey; 3) First American sent a closing letter to "Aries Financial, LLC, its successors or assigns[;]" 4) Aries Financial paid a premium to First American for the policy; 5) Aries Financial proceeded with the loan without knowledge of the forged signature and false notarization on the power of attorney; 6) Aries Financial suffered economic loss as a result of the forgery; and 7) First American did not refund the premium, even after the mortgage was declared void. Additionally, a jury could determine that First American led Aries Financial to believe that the technical imperfections it perceived when reviewing Aries Financial's documents for title

insurance would be cured if Aries Financial would provide First American a notarized assignment of the mortgage to Aries Investments. Accordingly, we conclude that the disputed charge was not an error.

Lastly, First American asserts that the trial court erred by excluding the following evidence: 1) an email from C. London to Kahan advising that Aries Financial had been contacted by Lorenzo's daughter right after the closing and was informed that Lorenzo did not authorize Airey to obligate Lorenzo on the loan and mortgage her interest in the property; 2) a statement from Aries Investments' reconsideration brief that Aries Investments was the real lender; and 3) a portion of the trial court's decision granting summary judgment against Aries Investments stating that there was no evidence supporting the conclusion that Aries Financial either funded the loan to Airey or was in possession of the mortgage instrument. After our review of the record, we conclude the trial court's evidentiary rulings were a proper exercise of its discretion, Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008), and First American's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.