COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-508

STEWART TITLE GUARANTY COMPANY

vs.

ROBERT E. KELLEY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, title insurer Stewart Title Guaranty Company (Stewart), and defendant Attorney Robert E. Kelley and his law firms (Kelley)[2] entered into a retainer/agency agreement (the agreement) in 1994 whereby Kelley was to act as Stewart's limited agent for the purpose of issuing title insurance policies to owners and lenders in connection with real estate transactions. This appeal arises from a negligence action brought by Stewart against Kelley seeking indemnification with respect to five closings between 2002 and 2006. On appeal, Kelley argues that the motion judge erred in granting summary

[1] Law Offices of Robert E. Kelley and RKelley-Law, P.C.

[2] At various times relevant hereto Attorney Kelley maintained his law practice as the Law Offices of Robert E. Kelley and, subsequently, as RKelley-Law, P.C. References to Kelley shall be intended to encompass these entities as well. The final judgment entered jointly and severally as to all defendants.

judgment in favor of Stewart, and dismissing Kelley's counterclaims.[3] We affirm.

Discussion. "On appeal, we review the motion judge's grant of summary judgment de novo." Molina v. State Garden, Inc., 88 Mass. App. Ct. 173, 177 (2015), citing Twomey v. Middleborough, 468 Mass. 260, 267 (2014). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Molina, supra, citing Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974) (quotation omitted). "We may affirm the entry of summary judgment on any ground supported by the record." Molina, supra. "To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Jupin v. Kask, 447 Mass. 141, 146 (2006), citing Nolan & Sartorio, Tort Law § 11.1 (3d ed. 2005). "Plaintiffs have the burden of proving every element of their negligence claim." Bernal v. Weitz, 54 Mass. App. Ct. 394, 396 (2002), citing Ulwick v. DeChristopher, 411 Mass. 401, 408 (1991).

[3] Kelley does not appeal from the grant of summary judgment with respect to three of the indemnification claims.

1. Wigfall closing. Kelley argues that the motion judge erroneously allowed summary judgment in favor of Stewart regarding the Wigfall closing. We disagree. Kelley and Stewart entered an agency agreement that imposed a duty of reasonable care upon Kelley in connection with real estate transactions as a limited agent for Stewart. Kelley was aware that issuing title insurance for a property that was encumbered without express, written consent from Stewart was a breach of contract. Kelley breached its duty of care in 2002, when Kelley issued the Wigfall title insurance policy because the property was encumbered by a prior mortgage and two attachments, which were duly recorded in the Plymouth County Registry of Deeds.[4] Kelley's failure to discover the encumbrances to the title resulted in Stewart's financial loss of $89,720.20.[5] See Jupin, 447 Mass. at 146; Bernal, 54 Mass. App. Ct. at 396. Taking Kelley's contentions of fraud in the underlying transaction as true, Molina, 88 Mass. App. Ct. at 177, Kelley was not relieved of its duty to use reasonable and appropriate care during title

[4] The agreement explicitly states that Kelley shall be liable to Stewart for any loss incurred under "any policy issued pursuant to this [a]greement occasioned by any fraud, intentional act, or omission or negligence of [Kelley] in the performing of his undertaking hereunder, including . . . any loss resulting from an error in the examination of the title."

[5] Kelley "concedes all of Stewart's financial documentation as its appropriately stated losses."

examination and issuance of the insurance policy. See Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 77, 84 (1984) (affirming finding of negligence where attorney retained to certify good and marketable title failed to report possible tax liens on subject property). Cf. Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 143-144 (1937) (insured may bring suit where motor vehicle insurer was negligent in fulfilling its duty to defend).

Kelley raised as a defense that he hired a very reputable title examiner for this title review. At oral argument, Stewart appropriately conceded that the particular title examiner was reputable. Nonetheless, Stewart argues that, while a shortcoming in the performance of the examiner may create rights for Kelley against the examiner, the examiner's good reputation is not a defense to an action for negligence by Stewart against Kelley. We agree. As the Supreme Judicial Court explained in Real Estate Bar Assn. for Mass., Inc. v. National Real Estate Information Servs., 459 Mass. 512, 535-536 (2011), while investigation of a property's records is commonly performed by nonlawyers for real estate attorneys, a "determination of marketable title" is the practice of law and must be performed by an attorney.

Kelley also argues that summary judgment was improper where expert testimony was not offered on the issues of negligence and

causation. This is one of the rare situations when "expert testimony is not essential where the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge or experience to recognize or infer negligence from the facts." Glidden v. Terranova, 12 Mass. App. Ct. 597, 598 (1981). Kelley himself testified that this was "pretty blatant." As the motion judge properly found, no genuine issues of material fact remained, and summary judgment was properly allowed. See Molina, 88 Mass. App. Ct. at 177; Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974).

2. Option One closing. Kelley argues that Stewart failed to establish that no genuine issues of material fact remained regarding the Option One closing. We disagree. "[T]he court does not pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts." Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986) (quotation omitted).

Here, it is undisputed that Kelley mailed sufficient funds to close out a previous line of credit with Citizens Bank, so that the Option One mortgage would be the senior mortgage on the property. Kelley avers that it was his office's policy to accompany such a payoff with a letter instructing the lender to close the line of credit and to keep a copy of such a letter in the file. It is undisputed that Kelley does not have a copy of

a letter instructing Citizens to close the line of credit. He also was not the attorney who closed this loan and he affirmatively testified that his office was in crisis during the time this loan closed. It is undisputed that Citizens did not close the line of credit and the borrower thereafter withdrew additional funds, resulting in a loss to Stewart of $58,869.04.

Stewart correctly responds that it has produced undisputed evidence of negligence: that Kelley was negligent either in not sending the letter or in failing to maintain a copy of the notice, both of which were in violation of Kelley's office policy.[6] Either way, Kelley's failure to retain a copy of the letter deprived Stewart of the material it needed to establish that the credit line was closed, and thereby to extinguish the Citizens claim without additional expense. See Bernal, 54 Mass. App. Ct. at 396. See also Callahan, 18 Mass. App. Ct. at 84. Additionally, Kelley's violation of its own policy to keep such a letter in the client file falls into the category of neglect so obvious that expert testimony is not required. Glidden, 12 Mass. App. Ct. at 598.

[6] Attorney Kelley stated at oral argument that it is "the practice of the firm when the lender sent documentation to ask for [the equity line of credit] to be closed out, then the letter would be sent." He further stated that it was the firm's policy to keep a copy of the letter in the file. However, Kelley was not able to produce a copy of the letter from the file.

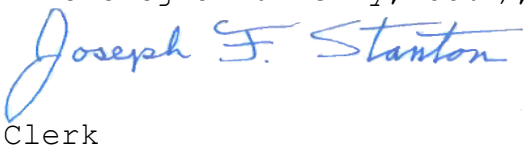
3. Counterclaims. Kelley argues that the motion judge erroneously granted summary judgment to Stewart, dismissing Kelley's counterclaims. We disagree. The moving party, here Kelley, may satisfy its burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

Kelley's counterclaims rest upon his assertion that Stewart acted improperly in accepting an employee of Kelley as an agent, thereby facilitating that employee's departure along with a valuable paralegal. After a thorough review of the summary judgment record, we agree that Kelley failed to present sufficient evidence to show that Stewart owed Kelley a fiduciary duty with respect to Kelley's employees. The agency agreement was mutually nonexclusive, so that Kelley could represent other title insurers and Stewart could designate other attorneys and representatives to issue its policies. Kelley offered no evidence that Stewart acted in bad faith or with intent to harm Kelley. The judge correctly allowed summary judgment dismissing

the counterclaims on this record.

Judgment affirmed.

By the Court (Green, Wolohojian & Henry, JJ.[7]),



Clerk

Entered: May 3, 2016.

[7] The panelists are listed in order of seniority.