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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 2020-CA-7042
DIVISION: CV-B

ANTHONY J. KARASEK, a/k/a TONY KARASEK, and BARBARA KARASEK,

Plaintiffs,

v.

INTERVEST CONSTRUCTION OF JAX, INC., a Florida corporation, KURT R. WALCHLE and MELISSA WALCHLE, BROADWATER OF JACKSONVILLE HOMEOWNERS ASSOCIATION, Inc., a Florida corporation, STEWART TITLE GUARANTY COMPANY, LANDON BLAIR, A&J LAND SURVEYORS, INC., and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, a governmental agency,

Defendants.
_____/

ORDER GRANTING STEWART TITLE GUARANTY COMPANY'S MOTION TO DISMISS COUNT III OF PLAINTIFFS' SECOND AMENDED COMPLAINT

This matter came before the Court for a hearing on Defendant Stewart Title Guaranty Company's Motion to Dismiss Count III of Plaintiffs' Second Amended Complaint (the "Motion"). A hearing on the Motion was held on August 9, 2021, at which counsel for the parties were present. The Court reviewed the Motion, Plaintiffs' response in opposition to the Motion, and the Court file, heard arguments of counsel and considered the relevant authority. For the reasons set forth herein, Stewart Title's Motion is granted, with prejudice.

I. Introduction

Plaintiffs own Lot 29 in the platted Broadwater subdivision. (Second Am. Compl. ¶ 10, Ex. B). Adjacent to Plaintiffs' property on the eastern boundary line is a conservation easement known as "Tract F," which is owned by Defendant Broadwater of Jacksonville Homeowner's Association, Inc. ("BHOA"). (Second Am. Compl. ¶ 8, Ex. F). The Broadwater subdivision was developed in 1998 by Defendant Intervest Construction of Jax, Inc. ("Intervest"), which built a bulkhead along the waterfront edge of Plaintiffs' property. The bulkhead is partially on Plaintiffs' property and partially on Tract F.

In 2018, Plaintiffs began repairs on the existing bulkhead following hurricane damage and constructed "an additional link of bulkhead which extended from the existing bulkhead towards the street." (Second Am. Compl. ¶ 16). In connection with that process, Plaintiffs learned that the eastern part of the bulkhead was not on their property line. With full knowledge that the planned bulkhead was not on their property line, Plaintiffs nevertheless proceeded to replace the damaged original bulkhead and add the "additional link" of bulkhead to the street. (Second Am. Compl. ¶ 21). As a result, the land within Plaintiffs' new bulkhead includes approximately 323 square feet of Tract F, owned by BHOA. (Second Am. Compl. ¶ 18). It is this disputed "sliver of land" west of the bulkhead which Plaintiffs seek ownership of herein. (Second Am. Compl. ¶ 18).

In this action, Plaintiffs seek to reform their deed such that the Lot 29 property boundaries would be expanded to include this "sliver of land" currently owned by BHOA. Plaintiffs contend that when Intervest developed the Broadwater subdivision more than 20 years ago, Intervest believed the bulkhead ran along the Lot 29 boundary and therefore intended to convey fee simple ownership of all the bulkheaded land, not just the land described in the platted Lot 29 boundaries.

In addition to seeking reformation of their deed nunc pro tunc to May 5, 1998 to convey the disputed property to Plaintiffs, Plaintiffs have asserted the following claims: (1) promissory estoppel, breach of oral agreement, breach of written agreement, and quiet title claims against BHOA; (2) tortious interference with a business relationship by Defendant Landon Blair, alleging that Blair (Plaintiffs' next-door neighbor) interfered with an agreement between Plaintiffs and BHOA to convey the disputed land to Plaintiffs; (3) common law fraud, breach of warranty of title, and contractual indemnity against Defendants Kurt and Melissa Walchle (the formers owners of Plaintiffs' property from whom Plaintiffs purchased the property in 2008); (4) negligence by Intervest in failing to accurately plat the subdivision in 1998 so that the entire bulkhead was on Plaintiffs' property and not on the conservation easement; (5) negligence against Defendant A&J Land Surveyors, Inc. in failing to depict the bulkhead on the adjacent property on its 1998 survey of Plaintiff's property; and (6) breach of contract against Stewart Title for failing to reimburse Plaintiffs for all damages "incurred by [Plaintiffs] to protect their interest in the Subject Property, and specifically, to acquire a fee simple interest in all of the property to which [Plaintiffs] were originally entitled to acquire." (Second Am. Compl., ¶¶ 62, 65).

II. Breach of Contract Claim Against Stewart Title

A. Attachments to Plaintiffs' Second Amended Complaint

It is axiomatic that when ruling on a motion to dismiss, a trial court is limited to the four corners of the complaint, including any attached or incorporated exhibits, and must assume the allegations in the complaint to be true and construe all reasonable inferences therefrom in favor of the non-moving party. *Skupin v. Hemisphere Media Group, Inc.*, 314 So. 3d 353, 355 (Fla. 3d DCA 2020). "When a party attaches exhibits to the complaint those exhibits become part of the pleading and the court will review those exhibits accordingly." *Ginsberg v. Lennar Florida*

Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d DCA 1994). However, the trial court is not bound by plaintiff's interpretation of the attached exhibits. *Id.* Indeed, "the conclusions of the pleader, as to the meaning of the exhibits attached to the complaint, are not binding on the court. Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." *Id.*

This Court must therefore consider all documents attached to Plaintiffs' Second Amended Complaint, including the deeds, surveys and title insurance policy at issue. A review of those materials compels dismissal of Plaintiffs' claim against Stewart Title with prejudice, as no further amendment of the complaint would change the boundaries of Plaintiffs' property or the language of the title insurance policy at issue.

B. Stewart Title Policy

The plain language of the title policy at issue states that it insures only the "land described or referred to in Schedule A," which is described as "Lot 29, BROADWATER, according to the plat thereof as recorded in Plat Book 51, pages 50, 50A through 50N of the current public records of Duval County, Florida." (Second Am. Compl., Ex. E). Plaintiff attached as Exhibit G to their Second Amended Complaint the original 1998 survey done by Defendant A&J Land Surveyors, Inc. which clearly shows the boundary of Plaintiffs' property, and shows that the wood bulkhead extends beyond Plaintiffs' property. In other words, the original survey refutes Plaintiffs' assertion that Lot 29 includes the entire bulkhead or bulkheaded land. Additionally, Plaintiffs attached as Exhibit C to their Second Amended Complaint a survey they had done in January 2020 which plainly shows that the "sliver of land" Plaintiffs seek title to here is a part of Tract F. It is therefore undisputed that the property Plaintiffs seek ownership of here is not within the boundary lines of Lot 29, but rather is a part of Tract F.

Paragraph 1(d) of the Conditions and Stipulations of the title policy states that "[t]he term 'land' does not include any property beyond the lines of the area described or referred to in Schedule A...." Because the "sliver of land" sought by Plaintiffs in this action extends beyond the lines of Lot 29 and into the adjacent Tract F, that property in Tract F is not insured by the policy. Stewart Title therefore has no obligation or liability to Plaintiffs for the Tract F parcel.

Plaintiffs contend that the Stewart Title policy "provides coverage to the Karaseks in order to protect and insure their fee simple interest in not only the Subject Property, but also the 'sliver of land' at issue," and that Stewart Title therefore owes Plaintiffs all damages "incurred by the Karaseks to protect their interest in the Subject Property, and specifically, *to acquire a fee simple interest* in all of the property to which the Karaseks were originally entitled to acquire." (Second Am. Compl., ¶¶ 62, 65)(emphasis supplied). Plaintiffs' claim is refuted by the plain language of the attached policy. The title policy does not insure land in which Plaintiffs may subsequently acquire an interest. It insures the land within the boundaries of Lot 29, as set forth in Schedule A. Nothing more, nothing less. As Tract F is beyond those boundaries, the title policy does not insure the disputed "sliver of land" on Tract F to which Plaintiffs' seek fee simple title here.

C. Adverse Possession Claim

Plaintiffs claim an ownership interest in the disputed "sliver of land" by way of adverse possession under color of title pursuant to a recorded instrument. (Second Am. Compl., ¶ 19). Plaintiffs assert that the prior owners, the Walchle Defendants, acquired fee simple title to the disputed "sliver of land" via adverse possession because (a) the Walchles lived on the property from 1998-2008 without interference from anyone, (b) they considered the disputed land to be theirs, and (c) they watered, irrigated and improved the disputed land. Plaintiffs therefore assert that when the Walchles subsequently sold their home to Plaintiffs in 2008, they also sold Plaintiffs

the disputed sliver of land on Tract F. The theory continues that because Plaintiffs had then purchased the property from the Walchles, that Stewart Title should have known that the Walchles may have had an (unasserted) adverse possession claim to the disputed land such that Stewart Title's insurance policy also includes the disputed Tract F land as part of Plaintiffs' property. Plaintiffs' theory fails by the plain language of Florida Statute 95.16.

In support of their claim that they, and the Walchles before them, obtained title to the disputed property by adverse possession under color of title, Plaintiffs rely on *Dadd v. Houde*, 176 So. 3d 347 (Fla. 3d DCA 2015). However, Plaintiffs' reliance is misplaced. As that opinion makes clear ("Section 95.16, as it appears today in the Florida Statutes, would compel affirmance"), it was interpreting the 1974 version of Section 95.16, Florida Statutes, which the Supreme Court had held to mean that "one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and protected by a substantial enclosure." *Id.* at 349 (*quoting Seddon v. Harpster*, 403 So. 2d 409, 411 (Fla. 1981)). However, the 1987 amendment to Section 95.16, Fla. Stat. superceded *Seddon*. *See Seton v. Swann*, 650 So. 2d 35, 37 (Fla. 1995).

The version of Section 96.16 applicable to this case "requires, as a first step, that the instrument upon which the claim of title is founded must be recorded in the official county records and describe the disputed property. Only then can a court consider under section 95.16 (2) whether a party adversely possessed certain property." *Id.* at 38. Because Plaintiffs' title does not describe any of the disputed adjacent property, they cannot meet the first requirement and cannot claim adverse possession by color of title.

By extension, Plaintiffs' claim against Stewart Title for failing to defend their fee simple title interest in the disputed land necessarily fails. As fee simple title to the disputed property had

not vested in either the Walchles or Plaintiffs by adverse possession under color of title in 2008 when the title policy was issued, it was not insured by the Stewart Title policy.

D. Encroachment vs. Fee Simple Claim

In paragraph 62 of their Second Amended Complaint, Plaintiffs state "no matter whether this dispute between the Karaseks and BHOA is considered an 'encroachment,' 'overlap,' 'boundary line dispute' or any other matter which would be disclosed by an accurate survey, [Stewart Title's] title insurance policy provides coverage to the Karaseks in order to protect and insure their fee simple interest in not only the Subject Property but also the 'sliver of land' at issue." Although the remainder of Plaintiffs' allegations do not state a claim for coverage for encroachment remedies, but rather assert an entitlement to fee simple interest in the Tract F land owned by BHOA, Stewart Title sought clarification from Plaintiffs regarding whether they also seek indemnity from Stewart Title for costs associated with remedying encroachment.

To the extent Plaintiffs' claim against Stewart Title could also be read as attempting to assert coverage for costs to remedy the encroachment of the bulkhead onto Tract F (and requesting Stewart Title reimburse expenses related to that coverage), Stewart Title conceded that encroachment *may* be covered under the policy, noting that encroachment could be cured physically by removing the bulkhead and installing it on the Lot 29 boundary line, or legally by way of an easement from BHOA.

During the hearing on the Motion, the Court inquired of Plaintiffs' counsel whether Plaintiffs had intended to assert a claim in their Second Amended Complaint against Stewart Title to indemnify Plaintiffs for costs associated with remedying the encroachment of their bulkhead onto Tract F. Plaintiffs' counsel expressly advised the Court that Plaintiffs did not intend to state

a claim for encroachment coverage and were not interested in further amending their complaint to include such a claim.

It is therefore **ORDERED** that Defendant Stewart Title Guaranty Company's Motion to Dismiss Count III of Plaintiffs' Second Amended Complaint is **GRANTED**. Count III of Plaintiffs' Second Amended Complaint is dismissed with prejudice.

DONE AND ORDERED this 9th day of September, 2021, in Jacksonville, Duval County, Florida.

KATIE L. DEARING
CIRCUIT COURT JUDGE

Copies to counsel of record via electronic filing.