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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

NORTHERN CALIFORNIA COMMUNITY
DEVELOPMENT CORPORATION,

Plaintiff and Appellant,

v.

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant and Respondent.

C084779

(Super. Ct. No. 164915)

Plaintiff Northern California Community Development Corporation (Northern California Community Development) had a security interest in two lots in the Feather River Bluffs subdivision in Oroville. This appeal arises from a dispute over the scope of title insurance policies that insure the deeds of trust recorded against the two lots. Northern California Community Development contends the trial court erred in granting First American Title Insurance Company's (First American) motion for summary judgment. Specifically, appellant argues the trial court failed to consider evidence in

opposition to summary judgment, including an earlier determination the lots were landlocked, which it contends resulted in unmarketable title and a lack of a right of access, and triggered an obligation to pay under the title insurance. Because Northern California Community Development has failed to demonstrate reversible error, we affirm the judgment.

I. BACKGROUND

In 1980, a subdivision map was recorded for the Feather River Bluffs subdivision, but the project apparently did not progress. The property was eventually sold to new developers, including Michael Orr, who constructed some homes but did not complete the subdivision.

In 2008, Orr obtained two \$195,500 construction loans from Golden Valley Bank secured by deeds of trust recorded against lots 54 and 55. The deeds of trust are insured by title insurance policies issued by First American.

As relevant to this appeal, the policies provide that First American insures against loss or damage sustained by the insured because of “[a]ny defect in or lien or encumbrance on the title;” “[u]nmarketability of the title;” or “[l]ack of a right of access to and from the land.” “The following matters are expressly excluded from the coverage of this Policy and the Company will not pay loss or damage, costs, attorneys’ fees or expenses which arise by reason of: [¶] 1.(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to [¶] (i) the occupancy, use, or enjoyment of the land; [¶] (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; [¶] (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; [¶] . . . [¶] (b) Any governmental police power not excluded by (a) above [¶] . . . [¶] 3. Defects, liens, encumbrances, adverse claims, or other matters: [¶] (a) created, suffered, assumed or agreed to by the insured claimant; [¶] (b) not known to the Company, not

recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this Policy.”

In March 2013, the Oroville Economic and Community Development Corporation (Oroville Community Development) entered into a nonrecourse loan purchase agreement with Golden Valley Bank to acquire the two construction loans for one dollar each. Golden Valley Bank assigned its interests in the deeds of trusts for lots 54 and 55 to Oroville Community Development. In the loan purchase agreement, Golden Valley Bank disclaimed any representation or warranty “as to the existence or value of any collateral” for the loans and disclosed that “there are material limitations and conditions to further development of the Property. Development of the Subdivision is not complete in that common area construction and the development and entitlement processes are not complete, and the Subdivision has not received final governmental approval for the sales of lots and homes in the Subdivision to the general public.”

In March 2014, American West Bank filed a lawsuit against Northern California Community Development, Oroville Community Development and others to declare the Feather River Bluffs subdivision invalid because it was never properly created, and for partition. Northern California Community Development tendered the defense of the action to First American under the title insurance policies. First American denied Northern California Community Development’s tender because the allegations of the action did not fall within the insuring provisions of the loan policies and were excluded from coverage.

Oroville Community Development and Northern California Community Development had the same president, Eric Almquist. In September 2014, Northern California Community Development recorded assignments of deeds of trust dated July 2013 and executed by Almquist assigning Oroville Community Development’s interest in the deeds of trust to lots 54 and 55 to Northern California Community Development.

In 2015, the court in the underlying action found that the Feather River Bluffs subdivision was never completed and that partition by sale was the appropriate means of partition because, unless sold as one unit, the owners would not be able to realize the current economic value of their interests. In its decision, the court noted all the parcels in the subdivision “are landlocked.” This was apparently in reference to the developers’ failure “to install necessary improvements such as roads”¹ The court later determined the fair market value of the parties’ respective interests in the subdivision. The court appointed a referee to oversee the sale of the subdivision, and it was sold pursuant to a stipulation specifying Northern California Community Development would receive \$20,000 for its interests in lots 54 and 55. The court ultimately entered a final judgment of partition.

First American denied a subsequent attempt by Northern California Community Development to seek coverage under the title insurance policies based on its alleged losses from the sale and the court’s ruling that Bluffs Drive is not a city street.

Northern California Community Development filed this action against First American based on its alleged failure to defend and indemnify Northern California Community Development under the title insurance policy. After the trial court ruled on First American’s demurrer and motion to strike portions of the complaint, only Northern California Community Development’s causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing remained.

First American moved for summary judgment as to these two remaining causes of action on the grounds that the underlying action did not fall within the insuring provisions of the loan policies and was also expressly excluded from coverage under exclusions 1(a), 1(b), 3(a) and 3(b). First American also argued Northern California Community

¹ The court had previously issued a supplemental order stating it found that no street within the subdivision was validly dedicated to the City of Oroville.

Development's cause of action for breach of the implied covenant of good faith and fair dealing failed because First American acted reasonably and with proper cause in denying Northern California Community Development's claims.

The trial court granted First American's motion for summary judgment. It explained, "[Northern California Community Development] has failed to establish that there are triable issues of material fact supporting its contention that First American breached the loan policies of title insurance or the implied covenant of good faith and fair dealing, and [Northern California Community Development]'s claims are barred as a matter of law on all of the grounds raised and argued by First American, including that the underlying action for which [Northern California Community Development] seeks defense and indemnity did not fall within the insuring provisions of the title policies [citation], and, even if it had, said action and the claimed defect is excluded from coverage under the title policies as assumed and agreed to by [Northern California Community Development] and as a governmental regulation relating to the use of the land or a separation in ownership of which the land is or was a part [citation]."

The trial court entered judgment accordingly, and this appeal followed.²

II. DISCUSSION

A. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law."

(*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment "bears the burden of persuasion

² On August 3, 2017, we denied First American's motion to dismiss the appeal, which was based on lack of standing on the part of Eric Almquist and lack of timeliness on the part of Northern California Community Development. We stated, "[I]berally construed, the notice of appeal filed May 26, 2017, is deemed to give notice that appeal is taken by Northern California Community Development Corporation, and not by Eric Almquist."

that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; see also Code Civ. Proc., § 437c, subd. (p)(2).) The defendant “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) Once the defendant meets its initial burden, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Ibid.*)

We must also keep in mind “ ‘[a] judgment or order of the lower court is *presumed correct*’ ” and “ ‘error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “Under this principle, [appellant] bear[s] the burden of establishing error on appeal, even though [respondent] had the burden of proving its right to summary judgment before the trial court. [Citation.] For this reason, our review is limited to contentions adequately raised in the [appellant’s] briefs.” (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 645.)

B. *The Trial Court’s Order*

Northern California Community Development contends we must reverse the trial court’s order granting summary judgment because the court did not consider any of its evidence. In support of its contention, Northern California Community Development selectively cites a single sentence in the trial court’s order. We emphasize those portions of the statement Northern California Community Development omits: “*Pursuant to Code of Civil Procedure Section 437c(g), the specific evidence relied upon by the Court in granting summary judgment is the evidence identified in First American’s separate statement of undisputed material facts filed in support of its motion for summary judgment, as follows:*” (Italics added.) This statement is unremarkable. In fact, it is contemplated by the statute referenced by the court: “Upon the grant of a motion for summary judgment on the ground that there is no triable issue of material fact, the court

shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists.” (Code Civ. Proc., § 437c, subd. (g).) The fact the court did not use any of Northern California Community Development’s evidence to explain the reasons it granted First American’s motion does not mean the court improperly failed to consider Northern California Community Development’s evidence at all. Northern California Community Development’s argument is without merit.

C. Collateral Estoppel

Northern California Community Development argues the trial court erred in granting summary judgment in favor of First American because the underlying action established the unmarketability of the property and that it was landlocked. “Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1.) Northern California Community Development has not established that even the first requirement is met.

Northern California Community Development appears to confuse marketability of *title*, which is covered by the title insurance policy, with marketability of *land*, which was discussed in the underlying action. “ ‘One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable.’ ” (*Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, 651.)

In *Hocking v. Title Insurance & Trust Co.*, *supra*, 37 Cal.2d 644, the plaintiff purchased two unimproved lots in a subdivision that did not meet the city’s requirements

for the issuance of a building permit. (*Id.* at pp. 645, 647.) The plaintiff made a claim under a title insurance policy that similarly insured against losses or damages sustained “(1) by reason of title to the lots not being vested in plaintiff in fee simple, (2) by reason of unmarketability of plaintiff’s title, (3) by reason of any defect, lien or encumbrance on such title.” (*Id.* at p. 646.) Our Supreme Court explained that “[a]lthough it is unfortunate that plaintiff has been unable to use her lots for the building purposes she contemplated, it is our view that the facts which she pleads do not affect the marketability of her *title* to the land, but merely impair the market *value* of the property. She appears to possess fee simple title to the property for whatever it may be worth; if she has been damaged by false representations in respect to the condition and value of the land her remedy would seem to be against others than the insurers of the title she acquired. It follows that plaintiff has failed to state a cause of action under the title policy.” (*Id.* at p. 652.) Northern California Community Development cites no authority suggesting the issues litigated in the underlying action actually relate to marketability of title.

Likewise, the fact that in the underlying action the court found that Bluffs Drive was not a dedicated city street is not the same as finding a lack of right of access to the lots. “[W]hen one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law.” (*Danielson v. Sykes* (1910) 157 Cal. 686, 689.)

Moreover, even if the lack of roads did impact the marketability of title or create a lack of a right of access such that the policies would otherwise provide coverage, Northern California Community Development does not cite to or address the exclusions

from coverage referenced by the trial court in granting First American's motion for summary judgment. This is insufficient to establish reversible error.

D. Breach of Contract

Northern California Community Development asserts it created a triable issue of fact regarding whether First American breached its contract by not representing Northern California Community Development in the underlying case. For the reasons set forth above, Northern California Community Development has failed to demonstrate that First American had an obligation to do so.

III. DISPOSITION

The judgment is affirmed. Respondent First American Title Insurance Company shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

BLEASE, J.