IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DALE HELMS and DEBRA J. HELMS,

Plaintiffs,

vs.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,

Defendant.

4:16-CV-3010

MEMORANDUM AND ORDER

This case arises out of a title insurance policy issued by the defendant, Old Republic Insurance Company, relating to 240 acres of land. Pursuant to the policy, the defendant agreed to indemnify the plaintiffs for losses sustained from discoverable defects in title. The plaintiffs submitted a claim under the policy when they discovered that 21.81 acres of their land were actually owned by the United States government. The defendant denied the claim. The plaintiffs then sued the defendant for breach of contract, and the defendant has filed a motion for partial summary judgment (filing 44). For the reasons discussed below, the defendant's motion will be granted in part, and denied in part.

BACKGROUND

The following facts are not meaningfully disputed. In 2011, the plaintiffs, Dale and Debra Helms, began negotiating for the purchase of 240 acres of land in Furnas County, Nebraska. Filing 46-3 at 34; filing 53-1 at 2. And by August 2012, the plaintiffs had signed a sales contract and were

proceeding to closing. Filing 46-3 at 36. Around this time, the plaintiffs sought to obtain title insurance for the property from the defendant. Filing 53-1 at 2. On September 11, the defendant issued a commitment for title insurance with policy limits of $513,520.00. Filing 53-1 at 10-12. This commitment, in essence, guaranteed that the defendant would issue a title insurance policy insuring against unmarketable title and other encumbrances following closing. Filing 53-1 at 10-12.

A few weeks later, on September 24, 2012, the plaintiffs closed on the property and exchanged $513,520.00 for fee simple title. Filing 46-3 at 39-40; filing 46-1 at 3. The plaintiffs recorded their property interest with the register of deeds on October 12. Filing 46-4 at 3; filing 46-1. And the title insurance policy became effective on October 15. Filing 46-1 at 1-2. The policy represented that the plaintiffs obtained marketable fee simple title and the property was free of any defects or encumbrances. Filing 46-1 at 1-2. The policy also insured, in relevant part, against:

> 1. Title being vested other than as stated . . . .
> 2. Any defect in or lien or encumbrance on the Title.
> . . .
> 7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
> 8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

Filing 46-1 at 1-2.

So, relying on the policy's assurances, the plaintiffs made several changes to the property for the purposes of making the property irrigable: they altered the drainage and landscape of the property, and installed a pivot irrigation system. Filing 46-3 at 81-82. But on May 23, 2013—before they actually began irrigating the property—the plaintiffs were notified that some of the modifications they had made, particularly changes involving drainage, had altered government property without appropriate authorization. Filing 49-5 at 41, filing 46-7 at 2-3. After some research, the plaintiffs learned that 21.81 acres of their property were actually owned by the government following a 1940s condemnation proceeding. Filing 53-1 at 1. The government's interest had been recorded with the register of deeds on May 31, 1949. But for some reason, the defendant had not disclosed, or discovered, this encumbrance.

Following this discovery, the plaintiffs claim they were required to undertake various expenses to restore the portion of the property owned by the government to its original 1940s status. Filing 46-3 at 82. In particular, the plaintiffs allege that were forced to undue many of the alterations they had made for the purposes of making the property pivot irrigable, including re-contouring drains, installing pivot bridges, and restructuring the surface of the land. Filing 46-3 at 126. The plaintiffs also contend that they were required to apply for a special use permit allowing their pivot irrigation system and cattle to cross the drains located on the government's property. Filing 46-3 at 120-121.

Because the government's interest in 21.81 acres of their property was not discovered by the defendant, the plaintiffs filed a claim with the defendant under the policy. Filing 7 at 4. The defendant denied coverage. So,

the plaintiffs filed suit, arguing that the defendant breached its contractual obligations by refusing to pay benefits under the policy. Filing 7 at 4.

STANDARD OF REVIEW

Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The movant bears the initial responsibility of informing the Court of the basis for the motion, and must identify those portions of the record which the movant believes demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial. *Id.*

On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *Id.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the evidence are jury functions, not those of a judge. *Id.* But the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* In order to show that disputed facts are material, the party opposing summary judgment must cite to the relevant substantive law in identifying facts that might affect the outcome of the suit. *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011). The existence of a mere scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could conceivably find for the nonmovant. *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 791-92 (8th Cir. 2011). Where the record taken

as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Torgerson*, 643 F.3d at 1042.

DISCUSSION

The parties' dispute turns on a provision of the policy which governs the extent of liability, if any, for discovered defects: that the defendant shall pay "the Amount of Insurance" or "the difference between the value of the Title as insured and the value of the Title subject to the risk injured against by this policy." Filing 46-1 at 8. And while the parties agree that this is governing language, the parties disagree as to the appropriate method for valuing the title pursuant to that language—that is, the parties dispute which *use* of the land ought to be employed to value the 21.81 acres not owned by the plaintiffs. The parties also disagree as to whether consequential damages are appropriate under the policy language.

(A) VALUATION OF THE PROPERTY

As noted above, the policy's liability provision provides that the insurer shall pay the lesser of "the Amount of Insurance" or "the difference between the value of the Title as insured and the value of Title subject to the risk insured against by th[e] policy." Filing 46-1 at 8. But the terms of the policy provide no guidance for measuring the diminution in title value. And this lack of clear language relating to valuation is at the center of the parties' dispute: whether the land ought to be valued at its highest and best use, or whether the land should be valued in accordance with its actual use on the date that damages are measured.

The plaintiffs claim that at the time the defect in title was discovered, they had made improvements on the property for the purpose of irrigating it,

including the 21.81 acres of land owned by the government. Filing 46-3 at 70; filing 54 at 15. As such, the plaintiffs argue that those acres must be valued at their intended (and more valuable) irrigable use. Filing 54 at 15-16. The defendant, however, argues that at the time the defect was discovered, the plaintiffs were not yet irrigating any portion of land owned by the government. Filing 46-3 at 70. So according to the defendant, the property ought to be valued as non-irrigable land, as it was being used on the date the defect was discovered. Filing 46-3 at 70.

As both parties correctly point out, Nebraska courts have yet to express a preferred method for valuing the diminution in title resulting from a defect or encumbrance. Filing 45 at 8; filing 54 at 26. But other courts generally utilize one of two methods for determining the value of the insured's loss: either (1) the diminution in value as measured by the property's highest and best use; or (2) the diminution in value as measured by the actual use of the property on the date the defect was discovered, or the date the policy was issued.

The plaintiffs encourage the Court to adopt the former method—that is, valuation at the property's highest or best use. As support, the plaintiffs cite several cases utilizing an appraiser's testimony as to the highest and best use of the land for valuation of an insured's actual loss in the title insurance context. *Scott v. Chicago Title Ins. Co.*, No. 08 CV 3899 2010 WL 3823452 (Colo. Dist. Ct. May 3, 2010); *see George K. Baum Properties, Inc. v. Columbian Nat. Title Ins. Co.*, 763 S.W.2d 194 (Mo. Ct. App. 1988); *see also Regions Bank v. Chicago Title Ins. Co.*, No. 10-cv-80043, 2011 WL 709853, at *1 (S.D. Fla. Feb 22, 2011); *Bohr v. First American Title Ins. Co.*, No. 3:07-cv-741, 2008 WL 2977353, at *10 (M.D. Fla. July 30, 2008). But the defendant urges the latter method, pointing to various cases measuring an insured's

loss by the difference in market value of the property for the use to which the property was being put on the date the title defect was discovered, or the date the insurance policy was issued. *Overholtzer v. Northern Counties Title Ins. Co.*, 253 P.2d 116 (Cal. Dist. Ct. App. 1953); *see also Am. Title Ins. Co. v. E. W. Fin.*, 16 F.3d 449, 459 (1st Cir. 1994); *Hartman v. Shambaugh*, 630 P.2d 758 (N.M. 1981); *Happy Canyon Invest. Co. v. Title Insur. Co. of Minn.*, 560 P.2d 839, 843 (Colo. Ct. App. 1976).

The Court agrees with the plaintiffs and finds that the proper measurement for valuing the insureds loss is the highest and best use of the property. Indeed, the highest and best use standard is easily squared with general principles of land valuation under Nebraska law. The Nebraska Supreme Court has, consistently, allowed expert testimony as to the highest and best use of land for purposes of determining a parcel's value as it pertains to eminent domain proceedings, *see Hike v. State Dep't of Roads*, 846 N.W.2d 205, 218 (Neb. 2014); *Westgate Recreation Ass'n v. Papio-Missouri River Nat. Res. Dist.*, 547 N.W.2d 484, 495 (Neb. 1996); *Kohl v. State, Dep't of Roads*, 334 N.W.2d 173, 175 (Neb. 1983); *Harmony Lanes v. State, Dep't of Roads*, 229 N.W.2d 203, 207 (Neb. 1975), as well as for the valuation of real estate for tax purposes, *see US Ecology, Inc. v. Boyd Cty. Bd. of Equalization*, 588 N.W.2d 575, 581 (Neb. 1999); *Aloi v. Lincoln Cty. Bd. of Equalization*, No. A-08-59, 2008 WL 5413385, at *2 (Neb. Ct. App. Dec. 23, 2008) (affirming the Nebraska Tax Equalization and Review Commission's determination that the actual value of the real estate is based on its highest and best use, regardless of actual use). So, assuming the parties present proper testimony as to the highest and best use of the property that is not too speculative or conjectural,

see Pribil v. Koinzan, 665 N.W.2d 567, 572-74 (Neb. 2003), the difference in title value will be measured in accordance with its highest and best use.[1]

But the defendant suggests that the highest and best use standard runs afoul from the rule applied by the majority of jurisdictions. Filing 45 at 11 n.1. This interpretation is informed, at least in part, by the California District Court of Appeals' decision in *Overholtzer*, 253 P.2d 116. Filing 45 at 11. The defendant reads *Overholtzer* as standing for the proposition that the insureds' loss must be measured by the use to which the property is being devoted on the date the defect is discovered. Filing 45 at 11. But this reading of *Overholtzer* fails to consider one important detail: in utilizing the use of the land on the date the defect was discovered, the court did not expressly reject the highest and best use standard. *Id.* at 130; *see also* Joyce Palomar, *Title Ins. Law* § 10:17 (2017). To the contrary, the court applied the more valuable, industrial use.

The court explained that "[w]hen a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective." *Overholtzer*, 253 P.2d at 130. So, the court reasoned "[t]he policy necessarily looks to the future." *Id.* When the purchaser improves the property and then, in the future, discovers the defect, he should be reimbursed for the "diminution in value of the property as it then exists, in this case with improvements." *Id.*

The same logic applies here. The plaintiffs acquired what they believed, and the title insurance company guaranteed, was fee simple title. And fee

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[1] The Court acknowledges the defendant's pending motion to exclude expert testimony of the plaintiff's appraiser, Alan Svoboda. Filing 47. But the Court will not address that motion at this time.

simple title would generally allow the plaintiffs to develop their property with no restrictions or limitations. *See Sterner v. Nelson*, 314 N.W.2d 263, 269 (Neb. 1982). It is with that understanding that the plaintiffs installed a pivot irrigation system, applied to Frenchman Cambridge Irrigation District to add the land into the irrigation district, sought approval for irrigation by the Bureau of Reclamation, transferred surface water rights, recontoured the land, and installed various drains for the purposes of pivot irrigating the property. Filing 46-3 at 64; filing 46-3 at 82. But, once the plaintiffs became aware of the government's interest, they were no longer able to develop, without government approval, those 21.81 acres of land for irrigation.[2] Instead, they were forced to restructure the drains, install pivot bridges, and recontour the surface of the land for purposes of restoring the land back to its original state. Filing 46-3 at 76. And this inability to develop their property as intended, based solely on the defect in title, is precisely the kind of reliance title insurance seeks to protect against. Palomar, *supra*, § 10:17 ("The risk of loss of the insured's investment due to a title defect belongs with the title insurer); *see also* filing 46-1 at 1-9.

So it is fair then, that the insured receive a damage award for the difference in valuation as measured by the highest and best use of that

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[2] The Court acknowledges the defendant's contention that the plaintiffs have suffered no actual loss because they were able to acquire a special use permit to irrigate the portions of their property actually owned by the government. But the Court finds that this strengthens, rather than weakens, the plaintiffs' claim that the value of the 21.81 acres ought to be valued as irrigable land. Indeed, no longer are the plaintiffs' alleged damages "based on guesses and speculation" as the defendant contends Filing 45 at 18. Rather, the plaintiffs' alleged damages are, in large part, based on the value of the property as the plaintiffs would have utilized it had they actually owned the 21.81 acres of land in fee simple, as the policy guaranteed.

property. Palomar, *supra*, § 10:17 (citing *Scott*, 2010 WL 3823452, at 28-29 ("Where, as here, the property at issue was in the process of being developed at the time the defect was discovered, it is proper to consider the value of the property at its highest and best use and take into account the development value of the property.")); *Bohr*, 2008 WL 2977353, at *10. Accordingly, the Court finds that the most appropriate method for valuing the land is competent appraisal testimony as to the highest and best use of the land. And because issues of material fact exist pertaining to the estimated value of the highest and best use of the property, the defendants' motion for partial summary judgment will be denied on these grounds.

(B) CONSEQUENTIAL DAMAGES

Next, the plaintiffs argue that the terms of the policy also cover consequential damages as a result of the unknown defect in title. Filing 54 at 28-29. But as the defendant points out, and the Court agrees, the language of the policy does not provide for consequential damages. Filing 45 at 13.

Generally speaking, courts have ordered title insurers to pay consequential damages in two situations: (1) under the insurers' obligation to pay for the insured's actual loss; and (2) when the insurer failed to indemnify or defend the title according to policy terms. Palomar, *supra*, § 10:18. In the second situation, as is the case here, "[w]here a covered loss occurs and the issue is what amount the insurer must pay to perform its contract to indemnify, policy terms govern." *Id.* (citing *First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833, 839 (5th Cir. 2009); *Miller v. Ticor Title Ins. Co.*, 93 P.3d 88, 91 (Or. Ct. App. 2004)). So, unless the language of the policy specifically provides for consequential damages, they will not be available.

The relevant policy language states that the defendant insures "against loss or damage not, exceeding the Amount of Insurance[.]" Filing 46-1 at 1. Section 8 also reiterates that the parties entered into a contract for "indemnity against actual monetary loss or damage sustained or Incurred by the insured Claimant who has suffered loss or damage by reason of matters insured against by this policy." Filing 46-1 at 8. And the policy allows recovery of costs and attorney's fees associated with litigating under the terms of the policy. Filing 46-1 at 8. But the policy does not, at any point, mention or contemplate consequential damages.

Under Nebraska law, if the terms of the policy are clear, they are to be accorded their plain and ordinary meaning. *Farm Bureau Ins. Co. v. Witte*, 594 N.W.2d 574, 581-82 (Neb. 1999). And a plain reading of "actual loss or damage" demonstrates that consequential loss or damages are not encompassed by that language. *See First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833, 838 (5th Cir. 2009) (finding that the insured is not entitled to recover consequential damages when the policy terms only mention "actual loss or damage"). Indeed, "actual loss" is defined as "[a] loss resulting from the real and substantial destruction of insured property." *Id.*; *see also* Actual Loss, *Black's Law Dictionary* (10th ed. 2014). And "actual damages" are "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 916 (8th Cir. 2000); *see United States v. Wilfong*, 551 F.3d 1182, 1187 (10th Cir. 2008); *see also* Actual Damages, *Black's Law Dictionary* (10th ed. 2014). But "consequential loss" is "[a] loss arising from the results of damage rather than from the damage itself." *First Am. Bank*, 585 F.3d at 838; *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co.*, No. 01 Civ. 8213, 2003 WL 22004888, at *6 (S.D.N.Y. Aug. 25, 2003); *see*

also Consequential Loss, *Black's Law Dictionary* (10th ed. 2014). And "consequential damages" are damages that that "do not flow directly and immediately from an injurious act but that result indirectly from the act." *Rain & Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp.*, 426 F.3d 976, 981 (8th Cir. 2005); *see Buddy's Plant Plus Corp. v. CentiMark Corp.*, 604 F. App'x 134, 139 (3d Cir. 2015); *see also* Consequential Damages, *Black's Law Dictionary* (10th ed. 2014).

So, the Court finds that a plain reading of the policy language allowing for "actual monetary loss or damage" does not allow for the recovery of consequential damages. Filing 46-1 at 8. As such, the defendant's motion for partial summary judgment is granted on these grounds.

CONCLUSION

In sum, the Court finds that the defendant is not entitled to summary judgment, as the appropriate measure of damage is the highest and best use, and issues of material fact remain relating to the estimated value of the highest and best use of the property. The Court does find, however, that the defendant is entitled to summary judgment on the issue of consequential damages as the plain language of the policy does not allow for the recovery of consequential damages.[3]

The Court has considered the defendant's motion for oral argument (filing 59), and the motion will be denied. *See* NECivR 7.1(d).

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[3] Rule 56 allows the Court to grant summary judgment as to some issues but not as to others. *See* Fed. R. Civ. P. 56(a). Upon doing so, the Court may "enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute," and thereby treat such a fact "as established in the case." Fed. R. Civ. P. 56(g).

IT IS ORDERED:

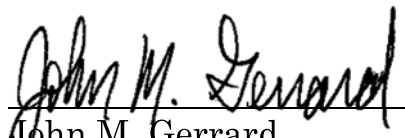
1. The defendant's motion for partial summary judgment (filing 44) is granted in part, and denied in part, as set forth above.

2. The defendant's motion to replace exhibit (filing 50) is granted.

3. The defendant's motion for oral argument (filing 59) is denied.

Dated this 11th day of January, 2018.

BY THE COURT:



John M. Gerrard
United States District Judge