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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3968-12T1

HEALTHCARE EMPLOYEES FEDERAL
CREDIT UNION,

Plaintiff,

v.

GMAC MORTGAGE CORPORATION,

Defendant-Appellant/
Cross-Respondent,

and

STEWART TITLE GUARANTY COMPANY,

Defendant-Respondent/
Cross-Appellant,

and

REAL ESTATE ESCROW COMPANY, INC.,
VIOLET MILLER, Individually and
as the Closing Agent for Stewart
Title and/or Real Estate Escrow
Company, Inc., ESTATE OF ARMONDO J.
MASSIMO, a/k/a, A. JOSEPH MASSIMO,
and CARTER APPRAISAL SERVICES, INC.,

Defendants.

Argued July 30, 2014 – Decided March 24, 2015

Before Judges Waugh and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No. L-
2228-08.

Hallman B. Eady (Bradley Arant Boult Cummings LLP), of the Alabama bar, admitted pro hac vice, argued the cause for appellant/cross-respondent (Fleischer, Fleischer & Suglia, attorneys; Nicola G. Suglia and Allison L. Domowitch, of counsel; Mr. Eady and R. Aaron Chastain (Bradley Arant Boult Cummings LLP), of the Alabama Bar, admitted pro hac vice, of counsel; Mr. Chastain, on the briefs).

Andrew P. Zacharda argued the cause for respondent/cross-appellant (Tompkins, McGuire, Wachenfeld & Barry, LLP, attorneys; Mr. Zacharda, of counsel and on the briefs).

The opinion of the court was delivered by

WAUGH, J.A.D.

Defendant GMAC Mortgage Corporation (GMAC) appeals the Law Division's January 9, 2013 and March 14, 2013 orders dismissing its negligence claims and awarding what it argues are insufficient damages for its contractual claims against defendant Stewart Title Guaranty Company (Stewart). Stewart cross-appeals, arguing that the contractual claim should also have been dismissed. We affirm as to liability issues, but reverse as to damages and remand for further proceedings consistent with this opinion.

I.

We discern the following facts and procedural history from the record on appeal.

The present litigation has its origin in GMAC's refinancing of a mortgage on property in Bethlehem Township owned by Armando J. Massimo. After Massimo defaulted on the loan, it was discovered that he had taken out a substantial loan from Advantage Bank (Advantage) approximately four months prior to the GMAC closing, but that the mortgage related to the Advantage loan had not been recorded until six days before the GMAC closing. The existence of the Advantage mortgage was not revealed by the title search performed for the GMAC closing and, because no notice of settlement had been filed before the filing of the Advantage mortgage, the GMAC mortgage was not entitled to the priority then provided by N.J.S.A. 46:16A-4.[1]

A.

GMAC retained defendant Real Estate Escrow Company, Inc. (REEC) to conduct the Massimo closing, which took place in April 2003. REEC acted as Stewart's agent with respect to the title insurance.

On March 20, defendant Violet Miller, REEC's principal, sent a closing protection letter (CPL) to GMAC on behalf of

[1] Prior to their repeal in 2012, N.J.S.A. 46:16A-4 and N.J.S.A. 46:16A-5 provided that a document, such as a mortgage, filed after the filing of a notice of settlement is subject to a mortgage, or other document, described in the notice so long as the mortgage described is filed within forty-five days of the notice.

Stewart. It named REEC as Stewart's issuing agent. The CPL provided, in relevant part:

> When title insurance of Stewart Title Guaranty Company is specified for your protection in connection with the closing of the real estate transaction in which you are to be a lender secured by a mortgage of an interest in land, [Stewart], subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with that closing when conducted by the above named issuing Agent . . . of Stewart . . . when such loss arises out of:
>
> > 1. Failure of the Issuing Agent . . . to comply with your written closing instructions to the extent that they relate to (a) the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such title or lien . . . .

REEC issued a title commitment on behalf of Stewart. Although the commitment is undated, Miller testified during her deposition that it was issued sometime around March 20.

Miller also testified that schedule B of the title commitment, which is not part of the record, required the filing of a notice of settlement before the closing. She acknowledged that she failed to file the notice, but asserted that a title rundown had been performed shortly before the closing.

GMAC's loan closing instructions to REEC, dated April 7, provided that the mortgage obtained at the closing "must be insured as a valid [f]irst [l]ien," subject only to exceptions noted on the title binder. GMAC's closing instructions did not, however, require the filing of a notice of settlement or the performance of a rundown prior to closing.

At the closing, Massimo executed a promissory note to GMAC in the principal amount of $606,000. Of that amount, $502,512.04 was used to pay off Massimo's pre-existing mortgage from SIB Ivy Mortgage Corp. (SIB Ivy). He also signed a mortgage to secure the note. Upon completion of the closing, REEC issued the Stewart title insurance policy to GMAC. The policy insured the GMAC mortgage as a first-priority lien in the amount of $606,000.

The GMAC mortgage was recorded on May 9. Almost immediately after the closing, GMAC sold the note and mortgage to plaintiff Healthcare Employees Federal Credit Union (Healthcare). GMAC continued to service the loan, through its nominee Mortgage Electronic Registration Systems, Inc. (MERS).

B.

In or around March 2005, after Massimo defaulted on the GMAC mortgage, MERS instituted a foreclosure action against Massimo. A title report prepared in connection with the

foreclosure revealed Massimo's $1,250,000 mortgage to Advantage, which was dated November 22, 2002, but was not recorded until April 2, 2003, over four months later and just six days before the GMAC closing. Based on the title problem caused by the Advantage mortgage, MERS submitted a claim under the title policy to Stewart in May 2005.

Advantage answered the foreclosure complaint and asserted the priority of its mortgage. Stewart retained counsel to litigate against Advantage on behalf of GMAC. In May 2006, the Chancery Division equitably subordinated the Advantage mortgage, granting GMAC's mortgage first-priority status in the amount of $502,512.04, the amount of the GMAC loan used to pay off the SIB Ivy mortgage. The General Equity judge concluded that Advantage would be unjustly enriched if its priority were upheld as to the amount of that mortgage because Advantage had agreed with Massimo to grant priority to the mortgage used to pay off the SIB Ivy mortgage. However, Advantage's mortgage retained its priority as to the remainder of its loan to Massimo.

Massimo died in May 2006. The property was subsequently left vacant and suffered damage as a result.

In September 2008, Healthcare filed suit against GMAC, Stewart, REEC, Miller, the Estate of Armondo J. Massimo, and Carter Appraisal Services, Inc., alleging that GMAC breached its

agreement with Healthcare and that Stewart negligently failed to perform its obligations under the title policy. In April 2009, GMAC answered and cross-claimed against Stewart for breach of contract, negligence, and vicarious liability for the alleged negligence of REEC and Miller.

In the interim, GMAC acquired the Massimo property at a sheriff's sale on December 17, 2008. As of February 2009, the property was valued at $375,000. In April, GMAC sold the property for $384,900. It retained $92,319 for its costs and expenses and forwarded the remainder, $262,995.66, to Healthcare.

In December 2009, Healthcare filed a motion for summary judgment, seeking recission of its purchase of the mortgage or indemnification by GMAC. GMAC in turn sought summary judgment on its claims against Stewart.

The motion judge heard arguments on both motions in April 2010. He granted Healthcare's motion. With respect to GMAC's claims against Stewart, the judge granted summary judgment in its favor on the contractual indemnification claim, but denied the motion as to GMAC's negligence and vicarious liability claims.

The motion judge entered judgment in favor of Healthcare on October 13, awarding it $511,755.05 in damages. The damages

consisted of (1) $333,987.83 for the remaining principal amount due on the note;[2] (2) $48,471.44 in legal fees; and (3) $129,295.78 in interest. GMAC paid the judgment in full.

In October 2011, GMAC and Stewart filed cross-motions for summary judgment regarding the calculation of damages owed by Stewart to GMAC and on GMAC's still-pending negligence and vicarious liability claims. A second judge heard oral argument on those motions in January 2013. He dismissed GMAC's negligence and vicarious liability claims against Stewart and awarded GMAC $103,487.96 on its contractual damages claim against Stewart. That amount is the difference between the insured amount of the loan and the amount of the equitable first lien imposed by the Chancery Division. The motion judge also awarded GMAC $511,755 in damages plus interest from REEC and Miller based on their negligence. The judge subsequently entered the March 14 order, which included prejudgment interest. This appeal and the cross-appeal followed.

II.

GMAC argues that the second motion judge erred in calculating damages and by dismissing its negligence and

[2] $612,060 minus $15,076.51 for principal payments made by Massimo prior to default, minus the $262,995.60 received from GMAC following its sale of the property.

vicarious liability claims against Stewart. In its cross-appeal, Stewart contends that the first motion judge erred in granting summary judgment to GMAC on its contractual indemnification claim and that the second motion judge in January 2013 erred in calculating damages.

A.

We review a grant of summary judgment under the same standard as the motion judge. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). "[T]he legal conclusions undergirding the summary judgment motion itself" are reviewed "on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

N.J.S.A. 17:46B-1 defines title insurance, in relevant part, as "insuring, guaranteeing or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, defects in or the unmarketability of the title to said property, guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property." In Sandler v. New Jersey Realty Title Insurance Co., 36 N.J. 471, 478-79 (1962), the Supreme Court characterized "[a] title insurance policy [as] a contract of indemnity under which the insurer for a valuable consideration agrees to indemnify the

insured in a specified amount against loss through defects of title to, or liens or encumbrances upon realty in which the insured has an interest." Title policies are "liberally construed in favor of the insured and strictly construed against the insurer." Id. at 479. Nevertheless, courts are not free to write a better policy for the insured than the one purchased. Last v. W. Am. Ins. Co., 139 N.J. Super. 456, 460 (App. Div. 1976).

In Walter Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517, 535 (1989) (second alteration in original), the Supreme Court held that,

> [i]n this state, the rule has been that a title company's liability is limited to the policy and that the company is not liable in tort for negligence in searching records. Underlying that rule is the premise that the duty of the title company, unlike the duty of a title searcher, does not depend on negligence, but on the agreement between the parties. Booth v. New Jersey Highway Auth., 60 N.J. Super. 534 (Law Div. 1960); see also Caravan Prods. Co. v. Ritchie, 55 N.J. 71, 74 (1969) (under title policy, "the liability to [the insured] is contractual and does not depend on negligence"); Enright v. Lubow, 202 N.J. Super. 58, 67 (App. Div. 1985) (contractual "nature of a title insurance policy and a title report" precludes negligence liability); [13 M. Lieberman, New Jersey Practice § 222, at 142 (3d ed. 1966)] ("no question of negligence is involved" under title policy); [Powell, On Real Property § 1041 at 92-28 (1987 ed.)] ("Under the contract of insurance, no question of negligence can arise . . . .").

> If, however, the title company agrees to conduct a search and provide the insured with an abstract of title in addition to the title policy, it may expose itself to liability for negligence as a title searcher in addition to its liability under the policy. Trenton Potteries Co. v. Title Guar. & Trust Co., 176 N.Y. 65, 68 N.E. 132, 135 (1903).

After canvassing out-of-state cases allowing negligence claims under title policies, the Court concluded that

> [a]lthough we recognize that an insured expects that a title company will conduct a reasonable title examination, the relationship between the company and the insured is essentially contractual. See Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985). The end result of the relationship between the title company and the insured is the issuance of the policy. To this extent, the relationship differs from other relationships conceivably sounding in both tort and contract, such as the relationship between physician and patient, to which plaintiff alludes. Although the relationship between physician and patient is contractual in its origins, the purpose of the relationship is to obtain the services of the physician in treating the patient. The patient reasonably expects the physician to follow the appropriate standard of care when providing those services. By contrast, the title company is providing not services, but a policy of insurance. That policy appropriately limits the rights and duties of the parties.
>
> From this perspective, the insured expects that in consideration for payment of the premium, it will receive a policy of insurance. The insurer's expectation is that in exchange for that premium it will

> insure against certain risks subject to the terms of the policy. If the title company fails to conduct a reasonable title examination or, having conducted such an examination, fails to disclose the results to the insured, then it runs the risk of liability under the policy. In many, if not most, cases conduct that would constitute the failure to make a reasonable title search would also result in a breach of the terms of the policy.
>
> The expectation of the insured that the insurer will conduct a reasonable search does not necessarily mean that the insurer may not limit its liability in the title commitment and policy. If the company may not so limit its liability, then it would be exposed to consequential damages resulting from its negligence. Under general contract principles, however, consequential damages are not recoverable unless they were within the specific contemplation of the parties. Donovan v. Bachstadt, 91 N.J. 434, 444-45 (1982). Another difference is that in an action under the title policy, the insured may establish a cause of action for breach of contract without establishing that the title company breached the standard of care appropriate for a reasonable title search. In an action in tort for the failure to conduct such a search, the insured would be required to establish the appropriate standard of care applicable to title searching.
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> [Id. at 540-41.]

However, the Court also recognized that a title insurance company "could be subject to a negligence action if the 'act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to

insure title.'" Id. at 541 (quoting Brown's Tie & Lumber Co. v. Chi. Title Ins. Co., 764 P.2d 423, 426 (Idaho 1988)).

The normal measure of damages under a title insurance policy is "the difference between the value of the property insured as it was with the defect insured against, and its value as it would have been if there had been no such defects." 9 John Alan Appleman & Jean Appleman, Insurance Law and Practice § 5216 (1981); see also RTC Mortg. Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co., 58 F. Supp. 2d 503, 534 (D.N.J. 1999); Green v. Evesham Corp., 179 N.J. Super. 105, 109 (App. Div.), certif. denied, 87 N.J. 422 (1981).

B.

With those legal principles in mind, we turn first to the issue of liability.

There can be no real argument that GMAC has a valid claim under the title policy itself, inasmuch as GMAC did not receive the "valid [f]irst [l]ien" guaranteed by the policy. Due to REEC's failure to file a notice of settlement, the Advantage mortgage, which was recorded just prior to the GMAC closing, had priority over GMAC's mortgage.

Although Stewart was able to obtain an equitable first lien for GMAC to the extent of $502,512.04, that was not the entire amount outstanding on the GMAC loan to Massimo at the time of

his default. Consequently, we reject Stewart's assertion that, under Section 8(a) and Exclusion 3(c) of the policy, it completely fulfilled its obligation to GMAC by filing suit against Advantage and establishing the priority of a portion of the GMAC mortgage. Stewart obtained only a partial first lien and therefore failed to satisfy its entire obligation to GMAC under the policy.

Stewart's CPL, which was issued to GMAC by REEC as Stewart's agent, provides that, when the real estate closing is "conducted by the above named issuing Agent," Stewart will "reimburse you for actual loss incurred by you in connection with that closing," resulting from, among other things, "[f]ailure of the [i]ssuing [a]gent . . . to comply with your written closing instructions to the extent they relate to (a) the title to said mortgage on said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land . . . ." (emphasis added).

GMAC's closing instructions to REEC required that the mortgage be insured as a valid first lien, and the mortgage was so insured. GMAC did not, however, require the filing of a notice of settlement or a title run down in its closing instructions. Consequently, REEC's failure to file a notice of settlement and perform an adequate title run down was not a

covered loss under the terms of the CPL. That is so whether the obligations set forth in the CPL are viewed as purely contractual or whether they could trigger the type of "dut[y] voluntarily assumed by the insurer in addition to the mere contract to insure title," envisioned by Walter Rogge, supra, 116 N.J. at 541 (internal quotation marks omitted). Had GMAC required the filing of a notice of settlement, the result might have been different.[3]

As a result, we conclude that GMAC had no viable negligence or vicarious liability claims against Stewart and that the second motion judge did not err in dismissing them. In addition, the first motion judge appropriately granted summary judgment in favor of GMAC as to liability on its contract claim.

C.

We now turn to the issue of damages. As noted above, the normal measure of damages under a title insurance policy is the difference between the value of the property insured as it was with the defect insured against, and its value as it would have

[3] Although we need not address the issue of damages in the event there had been a negligence claim under the CPL, we nevertheless note that the CPL provides that Stewart will reimburse GMAC for "actual loss" caused by REEC's failure to comply with the instructions contained in GMAC's closing letter, but that the amount of damages is, in any event, limited by the a subsequent section of the CPL to the amount of the insurance provided by the title policy.

been if there had been no such defects. Stewart's policy, however, contains a specific damage-limitation provision that includes two other methods of calculation and requires use of the calculation that results in the smallest dollar amount.

Section 7(a) of the policy provides[:]

> (a) The liability of [Stewart] under this policy shall not exceed the least of;
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> > (i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;
> >
> > (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
> >
> > (iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

Title insurance is intended to indemnify against loss or damage sustained by reason of defects of title, including unknown, intervening liens. It does not guarantee either that

the mortgaged premises are worth the amount of the mortgage note at the time the loan is taken out, at the time of default, or at the time of foreclosure, nor does it insure against "carrying charges and the lost time value of foreclosure proceeds." See RTC Mortg. Trust, supra, 58 F. Supp. 2d at 534. In addition, it does not cover consequential damages, unless they are contemplated by the parties, Donovan, supra, 91 N.J. at 444-45, which is not the case here.

As a result, only damages caused by the title defect that was insured against are recoverable. The date on which the amount of damages is calculated is subject to the provisions of the policy. See Morris v. Chelsea Title & Guar. Co., 12 N.J. Misc. 428, 430 (Sup. Ct. 1934). Section 8 of the policy contains the following provision:

> (b) In the event of any litigation, including litigation by [Stewart] or with [Stewart's] consent, [Stewart] shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

GMAC's damages must, therefore, be determined as of May 26, 2006, the date on which the Chancery Division established GMAC's limited, equitable priority, but preserved the priority of the remainder of Advantage's mortgage.

The amount of damages awarded by the second motion judge, which was based on the policy amount, appears excessive because he did not deduct the amount of principal paid by Massimo prior to his default. Consequently, we remand to the Law Division for calculation of damages. The appropriate damages would be the difference between the principal owed to GMAC on May 26, 2006, and $502,512.04, plus the accrued interest on that amount. However, if the value of the Massimo property had, as of that date, declined below the amount of the total outstanding principal due on the GMAC loan, the amount of damages should be reduced to reflect that decline. If the value was below $502,512.04 on that date, there would be no damages. Any subsequent decline in the value of the house would not adversely affect GMAC's right to recover that amount.

In summary, we affirm the orders on appeal as they relate to liability, vacate the damages award against Stewart in favor of GMAC, and remand to the Law Division for calculation of damages consistent with this opinion.

Affirmed in part, vacated and remanded in part.