

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Thomas P. and Desiree J. Lyons,  
Plaintiffs,

v.

Fidelity National Title Insurance Company as  
successor by merger to Lawyers Title  
Insurance Corporation, Bobby Gene Martin,  
and The Security Title Guarantee Corporation  
of Baltimore,  
Defendants.

) IN THE COURT OF COMMON PLEAS  
) OF THE FIFTEENTH JUDICIAL CIRCUIT  
)  
) Case No. 2012-CP-26-05222

**ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT**

FILED  
HORRY COUNTY  
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JULIE HUBBARD  
CLERK OF COURT

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment. The parties presented oral arguments on May 15, 2013, at the Horry County Courthouse. After hearing the arguments of counsel, reviewing the memoranda and other documents submitted to the Court, and the applicable authority, the Court hereby grants Plaintiffs' Motion for Partial Summary Judgment as set forth below.

#### FACTUAL BACKGROUND

The property subject to this dispute (Subject Property) is located in Horry County, South Carolina, and fronts on the Intracoastal Waterway. The Subject Property consists of a residential lot approximately three tenths of an acre in area upon which was formerly located a residence made up of a mobile home onto which a number of extensions and additions had been added over the years.

Plaintiffs purchased the property in two separate transactions. On May 5, 2005, for the stated consideration of \$240,000, Plaintiffs purchased what had been described as lot 1 on a plat of lots 1, 2, and 3 dated August 24, 1970, recorded in the public land records for Horry County. The second transaction closed on October 28, 2005, at which

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time and for the stated consideration of \$100,000, plaintiffs purchased an approximate 30 foot by 120 foot strip of property which formerly had been a portion of adjacent lot 2 as shown on the August 24, 1970 plat. The entirety of the Subject Property, i.e., lot 1 acquired in May 2005 and the portion of lot 2 acquired in October 2005, is shown as lot 1 on a plat dated August 24, 2005, and recorded in the public land records for Horry County.

In conjunction with the first transaction, Fidelity National Title Insurance Company (Fidelity) issued the Lyons an owners' title insurance policy in the amount of the purchase price. In conjunction with the second transaction, Security Title Guaranty Company of Baltimore (STGC) issued the Lyons an owners' title insurance policy in the amount of the second transaction purchase price. These policies are substantively identical.

In 1931, a predecessor-in-interest of plaintiffs conveyed to the State of South Carolina what is generally described as a spoils easement over the Subject Property and adjacent property. This easement is recorded in the land records of Horry County and was available for title examination before the issuance of the policy. The spoils easement was given so as to provide for the construction and maintenance of what became the Intracoastal Waterway.

On or about November 4, 2003, the Horry County Council adopted Resolution R-143-03, (no-build resolution) which provided as follows:

Horry County Council resolves to authorize the issuance of building permits to repair, remodel or replace existing structures within the spoil easements along the Intracoastal Waterway, but to otherwise continue the policy of denying building permits in this area. Mobile homes within the spoil area may only be replaced with mobile homes.

Plaintiffs assert Horry County refused to issue a building permit to build a residence on the subject property due to the no-build resolution.

This suit<sup>1</sup> followed in which Plaintiffs assert a contract action against Fidelity and STGC under their title policy and for bad faith in failing to pay the claim. Plaintiffs' motion for partial summary judgment is directed to their contract actions only and not their bad faith claims.

### STANDARD OF REVIEW

In considering summary judgment, the Court must view the facts in the light most favorable to the non-moving party. *Koester c. Carolina Rental Ct., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. When there is conflicting evidence on some material issue, the court may not grant summary judgment. *See Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010).

### ANALYSIS

#### Liability

Plaintiffs assert that Defendants are liable in contract for damages due to the existence of the spoilage easement and no-build resolution. Defendants argue by way of

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<sup>1</sup> It is worth noting that Plaintiffs' neighbors recently litigated this same issue involving the same spoils easement, no-build resolution, and title insurance policy language before United States District Judge Bryan Harwell who granted partial summary judgment in favor of the insureds. *Whitlock v. Stewart Title Guaranty Co.*, 2011 WL 4549367 (D.S.C. 2011).

affirmative defense that Exclusion 1 in the policy excludes coverage in this case. That exclusion provides:<sup>2</sup>

In addition to the exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:

- land use
- improvements on the land
- land division
- environmental protection

**This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.**

**This exclusion does not limit the zoning coverage described in Items 12 and 13 of the covered title risks.**

(emphasis added).

The "Covered Title Risks" of the policy state that the policy covers "the following title risks, if they affect your title on the Policy Date": "10. Someone else has an easement on your land ... 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law. 14. Other defects, liens or encumbrances."

The policy defines "easement" as "the right of someone else to use your land for a special purpose." It defines "public records" as title records that give constructive notice of matters affecting your title-according to the state statutes where your land is located."

The policy does not define "single-family residence."

<sup>2</sup> In the interest of saving the Court from reinventing the wheel, today's Order restates much of Judge Harwell's summary of the policy's terms.

The Court holds as a matter of law that Exclusion 1 does not exclude coverage in the instant case. The spoilage easement and the no-build resolution appeared in the public record at the policy date. Defendants argue that the no-build resolution was not in the "public record" as defined in the policy. Plaintiffs argue that the Horry County Council resolution is indeed a public record. The Court holds that the term may be fairly and reasonably understood either way; thereby, the Court construes the term against the drafter and interprets the policy in favor of providing coverage. *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975); *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435, 174 S.E. 402 (1934); *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63, 433 S.E.2d 813 (Ct. App. 1994).

The same analysis is true for the term "single-family residence," which, unlike public record, is not defined in the policy at all. The parties dispute whether a mobile home is a single-family residence as the term is used in the policy. This Court holds that single-family residence is also an ambiguous term and construes Covered Title Risk 13 to provide coverage because Plaintiffs cannot use the land as a single-family residence due to the existing zoning law preventing them from building a site-built home on the property.

Defendants have also asserted two additional affirmative defenses, namely, the expiration of the three year statute of limitations for contract actions found in S.C. Code Section 15-3-530(1) and Plaintiffs' failure of their duty to mitigate damages. Defendants assert that Plaintiffs first became aware of the spoilage easement after receiving a letter dated October 20, 2006, from the Army Corps of Engineers informing them of a disposal easement held by the United States on or adjacent to the area Plaintiffs planned to

construct a dock, followed by another letter dated March 19, 2007, stating the same. South Carolina Code Section 15-3-530(1) provides a three-year limitations period for contract actions, which begins to accrue when "the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct." *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575-576, 593 S.E.2d 624, 627 (Ct. App. 2004) (citations omitted). Here, there is some evidence Plaintiffs knew or should have known, either directly or by imputation of knowledge from their dock-constructing agent, *see Crystal Ice Co. of Cola., Inc. v. The First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979), of the spoils easement as early as October 2006, more than three years before this action was filed.

Plaintiffs in response argue that Defendants' policies are "sealed" instruments and, therefore, subject to a twenty year limitations period pursuant to S.C. Code Section 15-3-520(b), rather than the three-year limitations period of Section 15-3-530(1). Both policies have an imprint of the respective corporation's seal and Fidelity's seal even includes the word "SEAL." Defendants argue that these seals in themselves do not amount to making the documents sealed instruments. The Court holds the policies are indeed sealed instruments and that the twenty-year statute of limitations applies.

Defendants also argue that Plaintiffs failed to mitigate their damages due to the fact that Plaintiffs refused to accept a \$475,000 offer for the property made when the Plaintiffs listed the property for sale between September 12, 2006, and September 12, 2007. It is settled law that "a party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid

damages." *Baril v. Aiken Regional Medical Centers*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002) (citing *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 354 S.E.2d 405 (Ct. App. 1987)). However, it cannot be said that after the discovery of an easement held by the United States that prevents construction of a dock, the law requires one to sell the entire property or be thwarted from bringing suit against his title insurance company at a later date; such a requirement would call for a party to exert himself unreasonably.

#### Damages

Plaintiffs argue they are entitled to a judgment against the defendants for the full amount of the policies, to wit, \$340,000. They argue, given their inability to use the property for a single-family residence, that the policies insure this loss to the full value of the policies. This Court disagrees. The spoilage easement and no-build resolution have not rendered the property useless or completely unmarketable. *See Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 411-412, 661 S.E.2d 62, 65-66 (2008) (citing *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991)).


Rather, this Court holds that damages are to be calculated based on the diminution in value caused by the title defects, measured from the date the property was purchased. *Whitlark v. Stewart Title Guaranty Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). Because the amount of the diminution in value is a genuine issue of material fact, summary judgment is not appropriate as to damages. *See Stanley*. Further hearing will be necessary to establish the amount of damages.

**CONCLUSION**

THEREFORE, Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED as to Defendants' liability, but DENIED as to the amount of damages.

IT IS SO ORDERED.

July 8, 13  
Pageland, South Carolina

  
The Honorable Paul M. Burch  
Presiding Judge