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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Jericho State Capital Corp. of Florida, Plaintiff,
v.
Chicago Title Insurance Company, Defendant.

C/A: 2013-CP-26-05530

Lynx Jericho Partners, LLC, Plaintiff,
v.
Chicago Title Insurance Company, Defendant.

C/A: 2015-CP-26-01084
(Consolidated with the above case)

ORDER CONSIDERING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter is before me as Special Referee to consider Defendant's Second Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment.

Defendant Chicago Title Insurance Company moves for summary judgment, arguing:

1. As to Plaintiff Lynx Jericho Partners, LLC ("Lynx Jericho"), its claim under the lender's title insurance policy fails because Lynx Jericho released the insured mortgage in full, thereby terminating coverage under Policy Condition 9(c).
2. Before releasing its mortgage interest, Lynx Jericho failed to foreclose on its note and mortgage. This failure precludes recovery under the lender's title policy.
3. The Property has since been sold in its entirety, making foreclosure now

impossible.

4. As to Plaintiff Jericho State Capital Corp. of Florida ("Jericho State"), coverage under Section 2(c) of its policy was reduced to $0 when Jericho State obtained title to the Property through foreclosure with a credit bid exceeding the amount owed on its note.

5. Even if summary judgment were denied on the foregoing grounds, Defendant contends it should be determined as a matter of law that the date of loss for both Lynx Jericho and Jericho State was when the foreclosure sale process was completed.

Plaintiffs move for summary judgment, arguing:

1. Lynx Jericho may pursue its claim for damages even though it did not foreclose on the Property because the proper date to measure damages under South Carolina law is the policy date, not a foreclosure date.

2. Jericho State's foreclosure of its second mortgage and subsequent ownership of the Property did not result in any equity interest, and therefore its bid is not a payment under Section 2(c).

3. Lynx Jericho may pursue its claim for damages even though it satisfied the first mortgage because it made its claim during the policy period for damages suffered prior to satisfaction.

FACTS

Ordinance 88-202 ("the Ordinance") was adopted on July 2, 2002, by the Horry County Council amending the official map of Horry County to show the future locations of a proposed highway. On July 25, 2006, Peachtree Properties bought approximately 131 acres of waterfront

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property ("Property") in the Socastee Township in Horry County, South Carolina. It financed $18,520,000 through a first mortgage to RE Loans, which was later assigned to Lynx Jericho, and a second mortgage in the amount of $4,263,888 to Jericho State. Defendant issued lender title insurance policies in the amounts of $17,071,873.33 as to the first mortgage, and $4,263.888 as to the second mortgage (collectively referred to herein as "Policies") dated that same date. The Policies did not take exception to the future location of the proposed highway on the Horry County Map which traversed a portion of the Property.

Peachtree Properties went into default and Jericho State filed to foreclose on its second mortgage on June 8, 2007, almost a year after closing. On February 26, 2008, a Master's Deed was issued to Jericho State due to its $9,000,000.00 winning foreclosure bid, with Jericho State taking ownership subject to the first mortgage. The indebtedness on the second mortgage at the time of sale was $7,490,031.71, $1,509,968.29 less than the winning bid. A year after the issuance of the Master's Deed, on February 26, 2009, Jericho State filed a title insurance claim on its lender's title insurance policy. Defendant denied the claim on December 9, 2009, and a lawsuit challenging that denial was filed on July 29, 2011.

As to the Lynx Jericho first mortgage, a condemnation action was filed by the South Carolina Department of Transportation on December 15, 2009. On November 14, 2014, a jury awarded $2,100,000.00 just compensation to Jericho State, the owner of the property, for the taking of a portion of the Property. Jericho State released its interest in the judgment net proceeds to Lynx Jericho as first mortgage holder in the amount of $1,941,737.32. The condemnation action caused the first mortgage to be discharged as a matter of law over the condemned property; but it remained a valid first mortgage lien over the remainder of the Property.

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On June 21, 2013, Lynx Jericho submitted a title insurance claim by letter on its lender's title insurance policy. Defendant denied the claim, and Lynx Jericho filed a lawsuit challenging that denial on February 12, 2015. By Orders entered on February 13, 2015, and November 13, 2015, the cases were consolidated and referred to me as Special Referee.

A previous Order granting Defendant's first motion for summary judgment was appealed, and the South Carolina Court of Appeals affirmed in part, reversed in part, and remanded the matter for further proceedings. *See Jericho State Capital Corp., v. Chi. Title Ins. Co.*, 431 S.C. 437, 848 S.E.2d 572 (Ct. App. 2020). Defendant's pending summary judgment motions relate to the Policies' Conditions and Stipulations, and not the Exclusions which were addressed in the prior motion, and which were the subject of the appeal. Plaintiffs' motions relate to their entitlement as a matter of law to the payment of their covered losses under the Policies.

Counsel for all parties acknowledged at oral argument on the current motions that there are no genuine issues as to any material fact. The matter now turns on how the law applies to those facts.

ANALYSIS

A. The Policies are not ambiguous.

Before turning to the core issue of the date of loss, I will first address the issue of ambiguity in the Policies. Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (1999). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* The court must enforce, not write, contracts of insurance

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and must give policy language its plain, ordinary, and popular meaning. *Id.* "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

Lynx Jericho and Jericho State argue that the date of loss is the date of the Policies, relying on *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). In *Whitlock*, an owner's policy case, the South Carolina Supreme Court rejected the widely adopted rule in *Overholtzer v. Northern Counties Title Insurance Co.*, 253 P.2d 116 (Cal. Dist. Ct. App. 1953). *Whitlock* held that loss under a one- to four-family residential policy was measured as of the date of the policy, not the date of discovery of the title defect, because the relevant policy provision was ambiguous. The court found the term "actual loss" in the residential owner's policy (not a loan policy) to be ambiguous, stating "[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling." *Id,* 399 S.C. at 613, 732 S.E. 2d at 627. The residential owner's policy in *Whitlock* did not define actual loss and set forth no method of valuation; therefore, the court found the residential owner's policy to be ambiguous and construed it in the light most favorable to the insured.

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The *Whitlock* holding is a reasonable one for an owner title policy. Once a title defect is discovered, the owner has incurred an actual monetary loss: the reduction in its fee simple interest in the property. An owner's title insurance policy insures against loss arising from defects that diminish the fee simple interest in the property. Upon a subsequent sale, any known defect would be reflected in the market price, effectively incorporating the diminished value into the transaction—which determines the owner's actual monetary loss—and thus enabling the policy to fulfill its indemnity purpose by valuing that loss. By setting the date of loss as the policy date, the process in determining the diminished value is immediately available to the owner without requiring an immediate sale.

A lender's title insurance policy is fundamentally different. A lender suffers a covered loss only if the note is not repaid. The discovery of an insured-against lien or other title defect does not trigger recognition of an actual monetary loss. A property owner can continue to pay on the note and mortgage until it is paid off. A casualty loss or condemnation proceeding can generate funds which are paid to the lender to reduce or pay-off the mortgage. A lender can choose to forestall a foreclosure proceeding depending upon favorable and unfavorable real estate and financial market conditions.

Section 7 of the Policies unambiguously states:

> 7. DETERMINATION AND EXTENT OF LIABILITY.
>
> This policy is a **contract of 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 and only to the extent herein described.
>
> (a) The liability of the Company under this policy shall not exceed the least of:
>
> ****

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(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.

(Emphases added.) *See* Exhibit C (REL Policy); Exhibit E (Jericho State Policy). Although a date for determining loss is not set out in the policy, the provision requires "actual monetary loss or damage." That phrase is not ambiguous. It is clear and precise, and logically excludes speculative, imprecise, and conjectural loss or damage.

Defendants' reliance on *Whitlock* in this lender's policy case is misplaced because under an owner's policy the extent of liability can be determined once the title defect is discovered. Until an actual monetary loss is incurred under a lender's policy, the extent of Defendant's liability to Plaintiffs cannot be determined per the plain, unambiguous terms of the policy.

B. <u>The Date of Loss under a lender's title insurance policy is not the policy date.</u>

Defendant asserts that Lynx Jericho has not sustained a determinable loss because the date of loss under the REL Policy is the date of foreclosure, and Lynx Jericho has never foreclosed. This issue also bears on the Jericho State second mortgage, because if the date of loss were the policy issuance date, the analysis of that claim would need to account for that timing.

The Court of Appeals in this case stated that "[t]itle insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to 'place the insured in the position he thought he occupied when the policy was issued.' *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013)." *Jericho State Capital Corp.*, 431 S.C. at 444, 848 S.E.2d at 576. This statement cannot be read as a determination that the policy issuance date is the date of loss. As

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noted above, the distinction between an owner's and a lender's policy is important: an owner's title insurance policy insures the owner's interest in the property against covered defects existing as of the policy date, while a lender's title insurance policy protects only the lender's security interest, and the priority and enforceability of its mortgage. The two policies insure different parties for different risks, even when based on the same title examination. On the date of policy issuance, then, the both lenders were placed in the position of having title insurance policies which indemnified them against **actual monetary loss and damage** should a title defect become known. Contrary to Plaintiffs' position, that is not at odds with the Court of Appeals' statement of placing "the insured in the position he thought he occupied when the policy was issued." The date of determining the extent of that loss is a separate matter and should not be conflated with placing an insured in a position of having an indemnity policy in place if and when an actual loss or damage is sustained or incurred in the future.

An insured lender that has not yet taken title cannot prove that any defect in the title will cause it to suffer a loss and a claim is not ripe until the lender has taken title to the property. *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App.4th 972, 984, 24 Cal.Rptr.2d 912, 920 (Cal. App. 1993 "At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time." *Id.*, 20 Cal.App.4th at 984, 24 Cal.Rptr.2d at 920. "[A] lender suffers loss only if the note is not repaid." *Id.*, 20 Cal. App. 4th at 983, 24 Cal.Rptr.2d at 919. "[I]n the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure." *Id.*, 20 Cal. App. 4th at 984, 24 Cal.Rptr.2d at 920.

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The *Karl* court also cited with approval language from *Blackhawk Prod. Credit v. Chicago Title,* 144 Wis.2d 68, 423 N.W.2d 521 (1988), distinguishing between the insured interests of an owner versus a lender and commenting on arguments by policyholders about impairment of their security because of the title defect:

> "Defining and measuring actual loss under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower's title. The fee interest of an owner is immediately diminished by the presence of lien since resale value will always reflect the cost of removing the lien. **A mortgagee's loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate**." (423 N.W.2d at p. 525, emphasis added.)
>
> Thus, generic statements about measuring the loss by the "diminishment in security" are misleading, because the inadequacy of the security becomes relevant only if the debt is unpaid, necessitating resort to the security.

Karl, 20 Cal. App. 4th at 982, 24 Cal.Rptr.2d at 918.

The Fifth Circuit Court of Appeals in *First American Bank v. First American Transportation Title Ins. Co.*, 759 F.3d 427 (5th Cir. 2014) concluded that the lender title policy in its case—which contained nearly identical language to the Policies here—unambiguously required valuation as of the date of the foreclosure sale.

> Although Louisiana courts have not addressed this issue, a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date. These courts have reasoned that this date is appropriate because the foreclosure is when the insured actually incurs a covered loss.
>
> Although date-of-discovery is the majority rule for owners' policies, its use is generally justified on the ground that the owner of property suffers a loss immediately upon discovery of a defect, a rationale that is also not applicable to mortgagees." *Id.,* 759 F.3d at 433-434. "The most appropriate date to use in calculating [the policyholder's] losses is the date of the foreclosure sales, as that is when [the policyholder] incurred covered losses."

Id., 759 F.3d at 433-434.

Plaintiffs cite cases from other jurisdictions to support their argument that the policy dates are the dates for determining their losses. In *Citicorp Sav. v. Stewart Title Guar. Co.*, 840 F.2d 526 (1988), a 2-1 decision applying Illinois law, the majority found an ambiguity because the lender title insurance policy failed to provide a date of loss. The majority also noted that tender of a deed curing the title defect was not a substitute for the lender's financial loss due to a possible decline in property value. ("[D]amages are not payable in real estate, any more than they are payable in potatoes or colored beads." *Id.*, 840 F.2d at 530.) By contrast, payments in money for covered losses under the lender title insurance Policies were available in this case if Plaintiffs could show actual monetary loss or damage. The majority in *Citicorp Sav.* also noted that the land may have been devalued over time, a concern not present in this record, especially given the Plaintiff's right to seek a post-foreclosure claim for any indemnity against actual losses incurred, as South Carolina allowed in the *Preservation* case discussed in more detail below.

In another case from Illinois cited by Plaintiffs, *CitiMortgage, Inc. v. Absolute Title Servs.*, U.S. Dist. WL 1108249 (2012), the court relied on *Citicorp Sav. v. Stewart Title Guar. Co.*, to find ambiguity and denied the lender summary judgment. No finding of ambiguity exists in this case.

Plaintiffs also cite to *Equity Income Partners LP v. Chi. Title Ins. Co.*, 2012 U.S. Dist. LEXIS 126495 (D. Ariz., Sept. 6, 2012) (*see also* 2012 U.S. Dist. LEXIS 198059 (D. Ariz. November 13, 2013) for the subsequent decision on motion for reconsideration), a federal district court case from Arizona, ruling in favor of a lender who took the position that the date of loss should be the date of discovery of the defect, and not the date it foreclosed on the

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property and obtained title through a full credit bid. That court cited *Karl v. Commonwealth Land Title Ins.,* then found, in relying on *Citicorp Sav. of Illinois v. Stewart Title Guar. Co*, that the title insurer should bear the loss of any market decline by using the date of the policy issuance rather than the date of foreclosure, noting that ambiguities should be construed against the insurer. Again, no finding of ambiguity exists in this case.

Plaintiffs also rely on *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981), which states: "Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on the title [that] are in existence at the time the insured takes title." However, Firstland offers little guidance here. It involved an owner's policy rather than a lender's policy, and the Supreme Court denied the owner's claim, holding that the policy did not insure against the defect in question. The case does not hold that the policy issuance date is the date of loss; rather, it confirms that the defect or encumbrance must exist at the time the policy is issued—a condition that is not disputed here. It does not address the date of loss issue.

Plaintiff's reliance on *Chicago Title Insurance Co. v. 100 Investment Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), is also unpersuasive because it does not address the date of loss issue or any other dispositive question in this case. *100 Investment*, applying Maryland law, involved an owner's policy and turned on issues of warranty of title (or lack thereof) in subsequent conveyances from an insured owner's title, as well as the scope of coverage for losses occurring during the policy period. The holding aligns with the reasoning outlined above regarding an owner incurring a covered loss and being entitled to make a claim. The court in *100 Investment* rejected a "claims-made" approach to owner's policies, holding instead that an owner could pursue covered losses arising during the policy period even if the claim was filed later. That case primarily

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addressed the insurer's duty to defend in litigation over title defects while the insured owned the property—issues not present here, which involves lender title insurance policies.

As noted, this case presents a novel question of first impression in South Carolina. At oral argument, counsel for all parties candidly acknowledged that the prevailing rule in most United States jurisdictions is that the date of loss under a lender's title insurance policy is the date of the foreclosure sale. In contrast, the minority view treats the date of loss as either the policy's issuance date or another point in time, such as when the title defect is first discovered. Having carefully considered all authorities submitted by counsel, the majority rule is found to be more persuasive and is adopted here. The majority rule is more convincing because it reflects the indemnity nature of a lender's title insurance policy rather than treating it as a guaranty. A lender's policy does not promise to eliminate the risks—or the value of those risks—posed by title defects outright; instead, it indemnifies the lender for actual, quantifiable loss resulting from such defects. Until the lender's security interest is impaired in a concrete way—such as through foreclosure or another forced sale that extinguishes or reduces the debt—there is no ascertainable loss to indemnify. Moreover, borrowers may continue to make payments despite title defects, preserving the lender's repayment stream and avoiding any real loss. By tying the date of loss to foreclosure or comparable events, the majority rule ensures that indemnity obligations are triggered only when an actual, measurable loss occurs.

C. <u>The foreclosure of the second mortgage with a successful bid in excess of the amount due under the title policy resulted in no actual monetary loss or damage to the policyholder</u>.

Defendant asserts that coverage under the Jericho State second policy was reduced to $0 because the foreclosure sale price exceeded the amount due on the Jericho State note. The foreclosure brought $9,000,000.00—reflecting Jericho State's own successful bid—while the

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amount owed under the note was $7,490,031.71. The South Carolina Supreme Court in *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013) (cited by the Court of Appeals in this case), addressed this very issue of how coverage is determined under a lender's title policy when a note is paid through a foreclosure sale. There, the insured lender obtained a $3,075,000.00 mortgage secured by three properties and insured with a policy face amount of $3,075,000.00. One parcel was sold and partially released from the mortgage by agreement. Following default by the borrower, the mortgage on the second parcel was found to be defective, with the parcel having been sold to a third party in a sale that would have provided $345,335.00 to the insured lender if the mortgage were valid. The insured lender foreclosed and purchased the remaining parcel with a credit bid of $3,250,000.00 when the total debt outstanding was $3,641,190.00.

The insured lender then filed a title insurance claim for the $345,335.00 that it was unable to recover due to the title defect on the second parcel. Section 2(a) of the *Preservation Capital* title policy controlled and governed "situations in which the insured lender, after default, acquires all or part of the collateral via foreclosure." Section 2(c) of the title policy sets the determination for the amount of insurance[1]:

> (c) *Amount of Insurance:* The amount of insurance after the acquisition [shall not] exceed the least of:
>
> > (i) the amount of insurance stated in Schedule A; [or]
> >
> > (ii) the amount of principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in

[1] Section 2(c) of the Jericho State Policy is identical to Section 2(c) of the Preservation Capital title policy.

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> the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, ***but reduced by the amount of all payments made.***

Id. at 313, 751 S.E.2d at 258 (emphasis added). Applying these provisions, the South Carolina Supreme Court recognized that the amount of coverage was reduced under Section 2(c) by the winning bid amount at the foreclosure sale, but also that more remained due under the *Preservation Capital* note after the foreclosure sale—$391,190.00.[2] Because the note was not paid in full through foreclosure, coverage remained for the insured lender's loss. *See id.* at 318, 751 S.E.2d at 261 ("coverage would be limited to $452,731.48, as that amount is less than the $3,075,000 policy limit.").

Preservation Capital also rejected an argument that payment of more than the *face amount* of the title policy under Section 9(b) reduced the coverage to zero. In rejecting this argument, the court noted, "an insured mortgagee's coverage should continue after he purchases the mortgaged property at foreclosure **provided there remains unpaid principal indebtedness."** *Id.* at 319, 751 S.E.2d at 261 (citing *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095, 1097–98 (Me. 1997) (emphasis added)).[3] Accordingly, the Court determined the insured lender's loss was covered **where some unpaid principal indebtedness remained**.

Applying the *Preservation Capital* analysis of Section 2(c) here reduces the coverage

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[2] The Court noted this amount "appreciated to $452,731.48 by gaining interest from the date of foreclosure until the entry of judgment in this action." *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260–61.

[3] *Hodas* reached the same conclusion with respect to Condition 2(c):

> After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues ***provided there remains unpaid principal indebtedness***. Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit. *Hodas*, 696 A.2d at 1097–98 (emphasis added).

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amount under the Policy to $0 because, unlike the *Preservation Capital* foreclosure sale, the Jericho State foreclosure sale satisfied the debt in full. In this case, Section 2(c) of the Jericho State Policy states the amount of insurance after acquiring the Property via foreclosure shall not exceed the lesser of the $4,263,888.00 policy limit or the amount of unpaid principal indebtedness secured by the Jericho State Mortgage, coupled with interest and expenses, but reduced by the amount of all payments made. Here, after Jericho State acquired the Property, the borrower no longer owed anything under the Jericho State Note, which was paid in full ($9,000,000.00 foreclosure sale price vs. $7,490,031.71 due under the note). Jericho State's coverage therefore was reduced to $0 under Section 2(c) of the Jericho State Policy, consistent with *Preservation Capital*.

Although I previously found an issue of fact existed concerning this full payment defense, discovery conducted since the prior ruling revealed that was not the case. Jericho State admits to the amounts owed under the Jericho State Note and its payment at the foreclosure sale. *See* Exhibit G (Answers to Chicago Title's First Requests for Admission). There is no factual dispute that Jericho State bid $9 million on a debt of $7,490,031.71, and the record does not show the borrower owed anything more after the foreclosure sale.

Jericho State asserts that it purchased the Property subject to an $18,000,000.00+ first mortgage, which it claims makes the equity less than the $9,000,000.00 winning bid. However, the facts are clear that Jericho State paid $9,000,000.00 for what it admits is a second-place lien, the lien position insured by Chicago Title and the lien position with which Jericho State started. The Jericho State Policy excluded the senior REL Mortgage, and Jericho State took the Jericho State second mortgage subject to the REL first mortgage. Accordingly, its $9,000,000.00 winning bid reduced the coverage under the Jericho State Policy to $0.

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South Carolina public policy also supports the application of *Preservation Capital*. In South Carolina, "a plaintiff can have but one satisfaction of his debt." *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). Allowing Jericho State a recovery beyond the satisfaction of its note at the foreclosure would violate this principle. Additionally, South Carolina disfavors any activities or practices that have the effect of "chilling" the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be "particularly jealous of the integrity of judicial sales" and all such judicial sales "must be made on free, fair and competitive bidding."). Allowing Jericho State to bid more than the amount due on the Jericho State Note and still claim a loss under the Jericho State Policy would allow a hypothetical insured lender to bid one dollar more than a third party whose bid would otherwise satisfy the note in full and still claim a loss under a loan policy of title insurance. *Preservation Capital*, *Ayers*, and *Ex parte Keller* do not allow such an outcome.

Accordingly, the amount of insurance under the Jericho State Policy is reduced to $0, and Chicago Title does not owe Jericho State anything under the Jericho State Policy.

D. <u>The first mortgage no longer encumbers any of the Property.</u>

Paragraph 9(c) of the Conditions and Stipulations ("Condition 9(c)") in the Defendant's Policies provides:

> 9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY
>
> ****
>
> (c) Payment in full by any person ***or the voluntary satisfaction or release*** of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

(Emphasis added). Paragraph 2(a) of the Conditions and Stipulations ("Condition 2(a)") in

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the REL Policy provides:

> 2. CONTINUATION OF INSURANCE
>
> (a) After Acquisition of Title This coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insurers; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

Conditions 9(c) and 2(a) are not ambiguous and should be given their plain meaning. The record is clear that as of December 22, 2023, Lynx Jericho had completely released the insured first Mortgage, which no longer encumbers any of the Property through three separate transactions involving partial releases related to what the parties refer to as the Western Remainder, Eastern Remainder, and Southern Remainder of the Property, and a completed condemnation action in which a jury determined the value of the taking. These transactions constitute "voluntary satisfaction[s] or release[s] of the insured mortgage," which "terminate all liability of the Company" under the plain language in the REL Policy. Accordingly, Defendant's liability under the REL Policy is terminated.

Also, the Condition 2(a) exception in Condition 9(c) does not apply to Lynx Jericho. Prior to the releases of the REL first mortgage, Lynx Jericho never foreclosed and therefore cannot be "an insured who acquires all or any part of the estate or interest in the land by foreclosure, [etc.]" or "a transferee of the estate or interest so acquired."

Defendant's counsel candidly admits that there do not appear to be any cases directly

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on point in South Carolina but does cite cases from around the country in support of termination of coverage under a loan policy of title insurance after a voluntary, complete satisfaction or release of an insured mortgage. *See Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016) (construing an identical condition 9(c)); *RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014) (construing materially similar policy language to Condition 9(c) of the Policies); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010) (construing an identical condition 9(c)); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005), *aff'd*, 843 N.E.2d 327 (Ill. 2006) (construing an identical Condition 9(c)). I have reviewed those cases and find them to support the conclusion that the Defendant's liability under the REL Policy is terminated.

CONCLUSION

Defendant's liability under the first and second mortgage title policies are terminated, and Defendant does not owe Plaintiffs any amounts. Accordingly, Plaintiffs' motions for summary judgment are denied, and Defendant's second motion for summary judgment is granted.

IT IS SO ORDERED.

Karl A. Folkens, Special Referee

Florence, South Carolina
July 7, 2025

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