THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-0931
Appellate Case No. 2012-212732

Thaddeus F. Segars,

Petitioner,

v.

Fidelity National Title
Insurance Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Michael W. Mogil (SC Bar #11933)
Mogil Law Firm
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
Tel. (843)785-8110

Attorney for Petitioner

Thaddeus F. Segars (the "Petitioner") submits this Petition for Writ of Certiorari to the Honorable Court pursuant to South Carolina Rules of Appellate Procedure Rule 242 on the grounds that there are novel issues of law raised in his appeal which have not been addressed within the opinions of the Court of Appeals or Circuit Court herein, or under South Carolina law.

The undersigned counsel for Petitioner hereby certifies that a Petition for Rehearing was timely made before the Court of Appeals, and that the Rehearing was denied by Order entered April 24, 2014. The Petition for Rehearing raised the following primary issues:

A. The Order granting a motion to dismiss was premature, because Petitioner might have prevailed on at least one theory of the case were the case to proceed;

B. The trigger date for the statute of limitations was the date on which Petitioner learned that its claim was denied by Respondent, because prior to that time Petitioner neither knew, nor should have known, that Respondent would assert that its policy did not cover the risks;

C. Alternatively, that the statute of limitations was tolled by the filing of cases in 2008 or, in equity, the 2011 case should have been held to relate back to the 2008 cases;

D. Petitioner was a bona fide purchaser of the subject insurance policies and therefore entitled to a discovery date later than the policies' origination dates;

Historically, and certainly as of December, 2002, the size of home that an owner was permitted to build on undeveloped oceanfront property on the beach side of Hilton Head Island was impacted by ocean-side setback lines as established by the Office of Coastal Resource Management ("OCRM"). When read together with the Town of Hilton Head Island Land Management Ordinance ("LMO"), the OCRM line limited the available building envelope attendant to the Lot 2 and Lot 3 Singleton Beach subdivision to approximately 1,500 square feet.

Prior to 2004, when Segars entered into his contracts, there was ongoing negotiation and discussion between the Town of Hilton Head Island, the OCRM and other interested parties and owners such that it was generally believed that the OCRM line was about to move landward, and thus permit full size residential construction on the Lots. In fact, a Plat entitled "Boundary Reconfiguration of Singleton Beach Place Extension Comprising Parcels 10, 10A (2 Parcels), 10B, 10C, 10 D, 10H, 10N (2 parcels) 350 and 359 dated November 12, 2002" was recorded on January 29, 2003 in Plat Book 91 at Page 90 in the Office of Register of Deeds for Beaufort County (the "January 29 Plat"). The January 29 Plat showed a "proposed OCRM line" moving out towards the ocean on Lots 2 and 3, and thus increasing their potential building envelope.

Segars relied on the January 29 Plat in forming his understanding of the building envelope for Lot 2 and Lot 3. (R. p. 9, line 3-4). As such, and in reliance on the January 29 Plat and general knowledge of events transpiring in the OCRM negotiations, Segars proceeded to contract for Lot 2 and Lot 3 and to ultimately close on those transactions later in 2004 as set forth below.

Unbeknownst to Segars and his various partners, a corrective Plat was filed on November 20, 2003 in Plat Book 96 at Page 90 (the "November 20 Plat"), and then a second corrective Plat entitled "Boundary Reconfiguration of Singleton Beach Place Extension Comprising Parcels 10, 10A (2 Parcels), 10B, 10C, 10 D, 10H, 10N(2 parcels) 350 and 359 dated December 4, 2003" was filed on December 15, 2003 and recorded in Plat Book 96 at Page 160 (the "December 15 Plat"). The November 20 Plat and the December 15 Plat removed the designation of a "proposed OCRM line" and thus kept the OCRM line at its then current location for Lot 2 and Lot 3. As a result, the building envelope for each Lot remained limited by the historical OCRM line.

Segars and his partners proceeded to close on the two parcels in separate transactions. Title insurance for both properties was bound with Fidelity National Title Insurance Company. In June, 2004, Lot 2 closed at a purchase price of $1,600,000 with a first mortgage loan in amount of $1,440,000. In August, 2004, Lot 3 closed at a purchase price of $1,800,000 with a first mortgage loan in amount of $1,620,000. Segars was a personal guarantor on both loans. In both transactions, the same law firm acted both as buyer's counsel and as Fidelity's title agent.

At some point after the closings, in or around late 2005, Segars and his partners discovered that the OCRM line had yet to be relocated towards the ocean as proposed on the January 29 Plat. As a result of the various OCRM regulations and Town of Hilton Head Island ordinances, unless or until the OCRM line moved landward, the only permissible potential use of the Lots would have been construction of a home of between 1500 and 1800 square feet, or possibly some other non-construction related uses, such as picnics or parking.

At the same time, the Declaration of Covenants, Conditions, and Restrictions for Singleton Place (the "Covenants") prohibited construction of a residence of less than 2,500 square feet. Therefore, at the actual time of purchase of both Lots, and at the time the title insurance policies in question were allegedly issued, Lot 2 and Lot 3 were restricted by competing regulations such that no conforming residence could be constructed. Thus, the Lots had no practical use due to the conflicting restrictions.

Until this discovery, Segars and his partners had assumed the OCRM line had already relocated towards the ocean, based on a recorded Plat that suggested that the OCRM line had moved or was moving to its future location. They believed that they would be able to construct a residence of approximately 4,000 square feet. The purchase price they paid was based on that intended use. As a result, the value of the lots, when purchased, was substantially less than the face value of the title insurance policies issued to the owners of the lots.

The loan for Lot 3 was refinanced in 2006. Both purchase money loans went into default in 2008, resulting in foreclosures against both of the subject Lots. As a result of the foreclosures, Segars lost his entire investment in both Lot 2 and Lot 3, and also suffered residual liability for the deficiency balance due on the loan secured by Lot 3. The value of those losses is the largest component of the damages for which Segars seeks insurance coverage in his underlying lawsuit.

In or about September, 2010, the OCRM line officially moved ocean-ward for the purpose of the Singleton Beach development and as a result of the negotiated settlement between OCRM, the Town and the Lot owners at Singleton Beach, the Lots are presently

eligible for regular residential development based on their full size. However, this resolution came late for Segars, who had been unable to sell the Lots, or carry their interest, taxes and other costs through the period between 2004 through 2009, and thus had lost his investment. For these reasons, Segars claimed in his lawsuit(s), and claims now, that the Lots were not marketable during the coverage period.

Segars is informed and believes that at some point, a final Owner's Title Insurance Policy for each Lot was issued by Fidelity's agent, but Petitioner avers that he has never received the original insurance policies for either Lot. Rather, portions of the policies were provided to him during the period after his discovery that the line had moved in late 2005 thorough the pendency of the 2008 lawsuits, in the form of Policy Numbers, such that Petitioner to was able to assert demands for coverage against Fidelity. In or about 2006, Petitioner sent such demands by letter to Fidelity. Ultimately, Fidelity denied coverage. In July of 2008, Petitioner filed and served lawsuits against Fidelity seeking title insurance coverage.[1] It is unclear whether the Lot 3 Final Policy was actually issued in 2004, as there are indications that the policy documents themselves may have been generated at a later time. The Lot 2 Policy produced during the 2008 lawsuit was and is missing the standard coverage page, and is therefore incomplete. The Lot 3 Policy, as attached to Respondent's Motion for Summary Judgment filed in the 2008 cases, was dated June, 2004. However, that Lot 3 Policy appears to be written on a form issued by Fidelity and designated, "6/06," which Petitioner understands would refer to a form generally circulated by Fidelity on or after June,

---

1 Segars v. Carroll and Fidelity National Title Insurance Company, 2008-CP-07-02579 was brought in connection to losses on Lot 3, and Segars v. Richardson Street Partners, Gaughf and Fidelity National Title

2006. Thus, Petitioner questions whether the Lot 3 Policy was in fact issued in 2004. Further discovery on this issue was precluded when the lower court entered its Order in the present case.

The Final Polices ultimately produced by Fidelity appear to provide affirmative title insurance coverage for the losses suffered by Petitioner. The policies also appear to limit or exclude coverage through reference to title-industry standard exceptions from coverage. Ultimately, the issue that spawns the instant litigation is whether the title policies issued to Segars provide insurance coverage for matters which Fidelity claims are excepted in its contracts, but which were neither explained to Segars by Fidelity or Fidelity's agent, nor known to Segars at the time of closing. Fidelity argues that these specific exceptions from coverage override the general grant of coverage set forth in Covered Risks. Segars argues that the stated exceptions from coverage are vague and incomplete, and as such unenforceable when contrasted to the general coverage depicted in the Covered Risks and as expected by an insured when purchasing title insurance. Finally, Segars argues that unless the specific exceptions from coverage were explained by Fidelity or Fidelity's agent, an insured consumer would have no reasonable expectation that his or her coverage was limited by the policy itself, or the nature or extent of such limitations.

ARGUMENT

1. THE TITLE INSURANCE POLICY COVERS LOSSES SUCH AS THOSE ALLEGED BY THE PETITIONER

Of the copies of policies that were produced to Petitioner or are in his possession,

---

Insurance Company, 2008-CP-07-02791 sought recovery for damages stemming from Lot 2.

insurance companies to issue policies, and charge for those policies which provide limited coverage or no insurance coverage for risks known exclusively to the company and its agents. This is essentially what happened to Segars. This result is unconscionable and contrary to public policy.

2. FIDELITY IS VICARIOUSLY LIABLE FOR ITS AGENT'S FAILURE TO ADEQUATELY DISCLOSE THE TERMS AND LIMITATIONS OF COVERAGE

"The modern doctrine of respondeat superior makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." South Carolina Ins. Co. v. James C. Greene and Co., 348 S.E.2d 617, 290 S.C. 171, 179 (S.C.App. 1986) (Citing Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (Ct.App.1984)). "[U]nder the doctrine of respondeat superior, the principal is liable in addition to the agent, not by reason of his consent to be liable, but by operation of law." Id. at 183 (Citing Reynolds v. Witte, 13 S.C. 5 (1879)). To determine whether an insurance company should be held vicariously liable for the acts of an agent, this Honorable Court has looked to the whether the statutory definition provided by South Carolina Code of Laws is applicable. Republic Textile Equipment Co. of South Carolina, Inc. v. Aetna Ins. Co., 360 S.E.2d 540, 293 S.C. 381, 386 (S.C.App. 1987).

South Carolina law recognizes an insured's prerogative to rely on the expert knowledge of the agent or broker in cases involving the failure of an insurance agent or broker to maintain or procure insurance. See Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486, 253 S.C. 411 (1969). An insurance client may recover from the agent the loss sustained as a result of the agent's failure to procure the desired coverage, if the actions of the agent

warranted the client's assumption that he was properly insured by the coverage desired. Republic, 293 S.C. at 389 (Citing Karam v. St. Paul Fire & Marine Ins. Co., 281 So.2d 728, at 730-731, 72 A.L.R.3d 697, at 700 (La.1973)). "The cited authorities state the applicable general principles to be that, where an insurance agent or broker, with a view toward being compensated, undertakes to procure insurance for a member of the public, the law holds the agent or broker to the exercise of good faith, and reasonable skill, care and diligence in performing the obligation." Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. at 421.

Here, Petitioner alleges that if Respondent's agent had exercised due care in explaining the meaning and effect of the exceptions and exclusions for coverage listed in the Title Policy, and in further explaining the discovery of recently recorded Plats of Record that compromised Petitioner's belief and understanding that the OCRM line had moved, then Petitioner and the insurance agent would have realized that the Lots were unable to be developed when Petitioner purchased them in 2004. Such knowledge would certainly have dissuaded Petitioner from purchasing the subject properties for the prices paid. (R. p. 12, lines 7-9). Furthermore, had the agent exercised due care, he would have fully informed Petitioner of the policy terms, including all coverages and exceptions. Again, such knowledge would have had a substantial impact on Petitioner's decision on whether or not to purchase the Lots or the insurance coverage.

Insurance brokerage has been described by this Court as a business that entails "many complications, requiring, for its safe conduct, not only expert knowledge, but such knowledge as can be acquired only by experience in the business." La Tourette v. McMaster, 104 S.C. 501, 89 S.E. 398 (S.C. 1916). Despite his experience in real estate, Petitioner

possessed no expert knowledge or experience in the insurance business. Instead, he relied on the knowledge and experience of Respondent's agent. Further, the actions of Respondent's agent warranted Petitioner's assumption that he was properly insured by desired coverage. Still, Petitioner did not "abandon all care." *See* Doub v. Weathersby-Breeland Ins. Agency, 233 S.E.2d 111, 268 S.C. 319, 327 (S.C. 1977) ("Riddle-Duckworth recognizes that an insured cannot abandon all care, 253 S.C. at 423, 171 S.E.2d 486, as plaintiff did in this case."). Indeed, Petitioner undertook to review the January 23 Plat himself, prior to contracting to purchase the Lots, and hired an experienced real estate attorney and title insurance agent prior to closing. (R. p. 9, lines 3-4). . It was reasonable for Petitioner to expect that Fidelity' agent would conduct a thorough title search, and report any issues or potential pitfalls to the Petitioner prior to closing and prior to issuing title insurance, and to explain the insurance coverage. At the time, Petitioner had conducted his own review of the January 23 Plat and determined that the OCRM revisions would enable the development of a suitable residence on the Lots. This was the knowledge to which his due diligence led him. The subsequent November and December Plats were knowledge falling beyond the range of his inquiry and which his due diligence did not disclose. However, it is knowledge that Fidelity's agent, could have discovered, or possibly did discover if the title policies are in fact contemporaneous statements of the knowledge of the insurance underwriter. Segars' contention is that if the new Plats were discovered as set forth in the policies he ultimately received, then it was the duty of an insurance agent to explain to him the scope and import of the policy exceptions that exclude coverage for losses flowing from those Plats and underlying matters, a duty for which Fidelity is vicariously liable.

3. PETITIONER WAS A BONA FIDE PURCHASER PROTECTED BY THE DISCOVERY RULE.

Petitioner avers that he did not receive his owner's title insurance policy for Lot 3 until 2008, and for Lot 2 until late 2009, through discovery and motion practice in the 2008 Cases. As of today, Petitioner has not received complete copies of the Policies, despite requests. As stated above, the Lot 2 Policy that has been produced does not have a standard exceptions page. The Lot 3 Policy appears to have been printed on a form that might not have existed until June, 2006, based on the notations on the form itself. Thus, it might have been impossible for that policy to have existed in that manner in 2004. The events leading to the creation and distribution of the policy can only be discovered if this case is remanded for trial.

The statute of limitations begins to run when a cause of action first arises. Here, the cause of action arose when Respondent denied Petitioner's claim under the Policies, in 2006 and/or 2007. Under South Carolina law, although it is rarely employed, equitable tolling is available where a plaintiff actively pursued his remedies by filing a defective pleading during the statutory period. Hooper v. Ebenezer Senior Services and Rehabilitation Center, 659 S.E.2d 213, 377 S.C. 217, 232 (S.C.App. 2008). Equitable tolling is also available where a plaintiff is unable to obtain vital information bearing on the existence of his claim, despite all due diligence. Id. Both conditions apply to the present action, because the Petitioner actively pursued his remedies by filing two actions during the statutory period, and because he was unable to obtain vital information concerning the Policies, despite his due diligence.

Even if Petitioner is deemed to have constructive notice of his losses late 2005, he did

not physically obtain his insurance policies until 2008. Further, Petitioner again argues that the filing of the 2008 Cases tolled any statute of limitations, and the re-filing of the cases, as re-stated in Case No. 2011-CP-07-00931, relates back to the statute of limitations tolling caused by the 2008 Cases.

The Circuit Court found that Petitioner "is not a bona fide purchaser because sufficient record notice was available as of the date of the issuance of the policies to charge him with a duty to inquire, which if pursued with due diligence, would have supplied him with knowledge of the restrictions and plats." (R. p. 5, lines 6-11). On the issue of record notice, this Court has found:

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or interest in the property. (Citations omitted). There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Id. Constructive or inquiry notice in the context of a real estate transaction "often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Spence v. Spence 628 S.E.2d 869, 368 S.C. 106, 117-119 (S.C. 2006 "[B]ut constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which

that diligence might not disclose." Black v. Childs, 14 S.C. 312, 321-22 (1880). The South Carolina Supreme Court has also found that, given the speedy nature of residential real estate contracts today, it is not feasible to expect a buyer to be able to research the title of the property they are buying before entering into a contract. Slack v. James, 614 S.E.2d 636, 639; 364 S.C. 609 (S.C. 2005).

Instead, purchasers regularly rely on the expertise of real estate attorneys who in South Carolina also serve as insurance agents to perform the due diligence that is required prior to the closing of a real estate transaction. Petitioner in this case relied on Fidelity's title agent and specifically relied on their certification as to the insurability of the property in his decision to purchase. Petitioner further asserts that he could not have been on full notice of his claims until he received the final versions of his insurance policies, during discovery, in or about 2008. And thus, the gravamen of Petitioner's argument on appeal—that he relied on Fidelity's insurance agent and its issuance of a title insurance policy insuring marketable title and that Petitioner could build and use and sell his property.

CONCLUSION

For the reasons argued herein, Petitioner Thaddeus F. Segars respectfully requests that the Honorable Court grant his Petition for Writ of Certiorari.

Dated: May 27, 2014

Respectfully Submitted,

MOGIL LAW FIRM

Michael W. Mogil, SC Bar #11933
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
Tel. 843-785-8110

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-0931
Appellate Case No. 2012-212732

Thaddeus F. Segars,

Appellant,

v.

Fidelity National Title
Insurance Company,

Respondent.

CERTIFICATE OF SERVICE

I, Michael W. Mogil, do hereby certify that May 27, 2014, I served a true and accurate copy of the Petition for Writ of Certiorari in the above matter by depositing same with the U.S. Postal Service, addressed to:

Amy P. Hunt
Horack Talley
301 S. College St., Ste. 2600
Charlotte, NC 28202

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

May 27, 2014

Respectfully Submitted,

Michael W. Mogil
Mogil Law Firm
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
(843) 785-8110

MOGIL
LAW FIRM

MICHAEL W. MOGIL
mmogil@mogillaw.com

2 Corpus Christie Place • Suite 303
Hilton Head Island, SC 29928
T 843-785-8110 F 843-785-9676
www.mogillaw.com

May 27, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Thaddeus Segars v. Fidelity National
Appellate Case No. 2012-212732

Dear Ms. Kitchings,

Enclosed for filing, please find copies of the Petition for Writ of Certiorari and Certificate of Service.

Thank you for your attention in this matter.

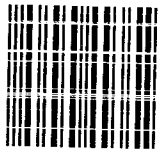
Very Truly Yours,

MOGIL LAW FIRM

Michael W. Mogil

Cc: Amy P. Hunt

1000



29211

U.S. POSTAGE
PAID
HILTON HEAD ISL.S
29928
MAY 27, '14
AMOUNT

$1.61
00018589-06

LAW OFFICE OF MICHAEL W. MOGIL, P.A.
2 Corpus Christie Place, Suite 303
Hilton Head Island, SC 29928

RECEIVED

MAY 29 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211