The State of South Carolina
In the Supreme Court

ORIGINAL

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-05222
Appellate Case No. 2013-002137

Opinion No. 5365 (S.C. Ct. App. Dec. 2, 2015)

THOMAS P. and DESIREE J. LYONS,

Respondents,

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,

Of Whom The Security Title Guarantee Corporation of Baltimore is the Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 21, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a county no-build resolution appeared in the "public record" and was available for title examination when a policy of title insurance was issued by Security Title Guarantee Corporation of Baltimore?

2. Did the Court of Appeals err in holding that a zoning resolution imposing a land restriction was a defect in title triggering coverage under the Petitioner's title insurance policy?

3. Did the Court of Appeals err in finding that that the Respondents did not fail to mitigate their damages thus negating coverage under Petitioner's title insurance policy?

STATEMENT OF THE CASE

The real property (the Property) at issue is a residential lot located in Horry County, which previously held a mobile home with numerous extensions and additions. Op. at 1. The Property had been encumbered since 1932 by a properly recorded easement allowing for the construction and maintenance of the Intracoastal Waterway. R. at 54 – 60.

The Lyons purchased the Property in two separate transactions. On May 5, 2005, they purchased a lot (Lot 1) for $240,000, along with a title insurance policy from Lawyers Title Insurance Corporation (Lawyers Title). R. at 24 – 27 and 29 – 34. On October 28, 2005, the Lyons purchased a portion of a lot (Lot 2) adjacent to

Lot 1 for $100,000. R. at 36 – 39 and 41 – 44. In conjunction with this transaction, they purchased a title insurance policy from The Security Title Guarantee Corporation of Baltimore (Security Title). R. at 46 – 52.

Lots 1 and 2 were subsequently combined into the Property at issue, which is shown as "Lot 1" on a plat dated August 24, 2005, and recorded with the Horry County Register of Deeds. Br. of App. at 3. The closing attorney did not except to the easement in either title policy. R. at 29 – 34 and 46 – 52.

On July 3, 1930, Congress enacted the River and Harbor Act, which provided for the construction of the Atlantic Intracoastal Waterway. Op. at n.3. In 1931, our General Assembly passed an act to provide for rights-of-way for the construction project. Op. at n.4. On August 17, 1932, the governor executed a deed to the land that was to be the Intracoastal Waterway which included a spoils easement that encompassed the Property. R. at 54 – 60. The easement was filed in the Horry County Register of Deeds on September 17, 1932. R. at 60.

Subsequently, in the early 1980s the Corps of Engineers transferred management of the spoils easement to Horry County which, in 2003, passed a "no-build" resolution. R. at 62 – 76 and 2. The resolution authorized issuance of building permits to repair, remodel or replace existing structures within the easements, but denied permits for stick-built structures. R. at 2. Horry County allowed mobile homes to be replaced within the spoils area. Id.

A mobile home with several additions was located on the Property when the Lyons purchased the Property. R. at 203. The Lyons applied for a building permit in 2011, but it was denied due to the "no-build" resolution. R. at 203. The Lyons then removed the existing mobile home from the Property and listed it for sale for $539,000.00. R. at 221. A potential purchaser offered the Lyons $475,000.00 for the property in September 2006, but the Lyons did not accept the offer. R. at 6.

When the Lyons' claims under their title policies were denied, this suit followed. This appeal was filed after the trial court granted the Lyons' motion for partial summary judgment on the Lyons' action on the contract and the title company's motion to reconsider was denied. R. at
1 – 8 and 9.

The Court of Appeals affirmed the judgment of the circuit court. Thomas P. and Desiree J. Lyons, Respondents, 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, Of whom The Security Title Guarantee Corporation of Baltimore is the Appellant, Op. No. 5365 (S.C. Ct. App. filed Dec. 2, 2015). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN FINDING THE DEFINED TERM "PUBLIC RECORDS" AMBIGUOUS AND SHOULD HAVE HELD THAT A COUNTY NO-BUILD RESOLUTION DID NOT APPEAR IN THE "PUBLIC RECORDS" AS DEFINED IN PETITIONER'S TITLE INSURANCE POLICY AND ALSO THAT THE RESOLUTION WAS UNAVAILABLE FOR TITLE EXAMINATION WHEN THE POLICY WAS ISSUED.

Security Title contends that Exclusion 1 of its policy is not ambiguous and the policy terms exclude zoning coverage. The Court of Appeals found that the terms of the policy were ambiguous and that the exclusion did not apply. Op. at 7. As noted in the opinion, Exclusion 1 states, in pertinent part, that the policy excludes from coverage

> 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.

.... R. at 7.

The Court of Appeals also noted certain covered risks assumed by the insurer. "The Covered Title Risks section of the policy provides that the policy covers certain listed title risks if the listed risk affects title on the policy date. The Covered Title Risks include but are not limited to the following:

> 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.

... Id.

Security Title believes that the Court of Appeals erred in interpreting the term "public records" as the term is defined in the policy. The Court of Appeals noted that zoning designations are part of the public record citing Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 169, 714 S.E.2d 869, 876 (2011). Op. at 8. While zoning records may be available to the public, the policy defines "public records" as "*title records* that give constructive notice of matters affecting *your title – according to the state statutes* where you land is located." R. at 49, Definitions (emphasis added). Zoning regulations affect use of the property, not title. Zoning regulations do not give notice of matters affecting title, ownership, or other matters encumbering real estate. "[R]ecording [under the recording act – S.C. Code Ann. § 30-7-10] amounts to notice...." Spence v. Spence, 368 S.C. 106, 119,

638 S.E.2d 869, 876 (2006), quoting Epps v. McCallum Realty Co., 139 S.C. 481, 499, 138 S.E. 297, 303 (1927).

One can own property and not be able to use it for a particular purpose. See McMaster v. Strickland, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991). When taken in context, the policy unambiguously defines "public records". "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement and (2) is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Laser Supply and Services, Inc. v. Orchard Park Associates, 676 S.E.2d 139, 144 (Ct. App. 2009) citing Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). There was no evidence that the resolution was on file in the public records affecting title to real estate as defined in the policy. Accordingly, the court misapprehended the terms of the policy by finding ambiguity by designating zoning regulations as a "public records" within the meaning of the policy.

Security Title respectfully submits the Court of Appeals' erroneous interpretation of the title insurance policy's defined phrase "public records" presents of novel question of law of great importance to South Carolina's real

property jurisprudence generally and South Carolina real estate practitioners in particular which should be reviewed and reversed by this Court.

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT A ZONING RESOLUTION IMPOSING A LAND RESTRICTION WAS NOT A DEFECT IN TITLE TRIGGERING COVERAGE UNDER THE PETITIONER'S TITLE INSURANCE POLICY.

Security Title believes that the Court of Appeals misapprehended the terms of the policy when it found that zoning regulation, a land use restriction, triggered coverage under the policy. Op at 9. The Court of Appeals found that the since the term "single-family residence" was not defined by the policy, the Horry County "no-build" resolution in its zoning regulations prohibited the Lyons from constructing a stick built house on the property and thus triggered coverage under the policy. Op. at 9.

However, the Lyons can use the property as a single-family residence if they would be willing to live in a mobile home. The no build resolution does not prohibit placing mobile homes on the property.

Since title insurance policies are written based on attorney's title opinions and, according to the Court of Appeals, the term "public records" includes zoning regulations, the opinion imposes new, heretofore unknown duties on real estate lawyers. The Court of Appeals' misapprehension of the terms of the policy, and consequential mistaken application, renders it virtually impossible for a real estate attorney to rely on long established title examination practices to write title

insurance on real estate. The Court of Appeals by implication imposes a duty for the title examiner now to certify zoning regulations, which in this particular case is particularly impractical and harsh since resolutions are not indexed. Further, public records are in a variety of state and county offices and can limit use of property.

The Court of Appeals also profoundly expands the extent of coverage of the title insurance policy because a title insurance policy insures title, not use. And since the court notes that the policy insures that one can use the property for a single-family residence, one should also note that many people use mobile homes for single-family residences, a permitted use on the Lyons' property. Finally, the Court of Appeals' opinion alters the terms of the policy by interpreting it to insure a prohibited use because the term "single-family dwelling" is taken out of its proper context to mean any type of dwelling rather than designated uses permitted by the government.

Security Title respectfully submits the Court of Appeals' erroneous interpretation of the title insurance policy's phrase "single-family dwelling" presents of novel question of law of great importance to South Carolina's real property jurisprudence generally and South Carolina real estate practitioners in particular which should be reviewed and reversed by this Court.

3. THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE LYONS FAILED TO MITIGATE THEIR DAMAGES AFTER DISCOVERING THAT THEY COULD NOT BUILD A STICK BUILT RESIDENCE ON THE PROPERTY BUT COULD HAVE SOLD THE PROPERTY AT A PROFIT.

Even if coverage was triggered, and the terms of the policy are ambiguous, Security Title believes that the Court of Appeals erred in finding that the Lyons did not mitigate their damages by refusing an offer to purchase the property because the Lyons would have earned a profit from a sale of the property.

The trial court's ruled that, in effect, after learning of a defect in title, the Lyons would have exerted themselves unreasonably by selling the property. Op. at 9-10. The Court of Appeals also opined that the properly recorded spoil easement prevented the Lyons from giving a buyer a clear title. Op. at 10. Security believes that both the trial court and this court erred in its rulings because the Lyons' had a duty to mitigate their damages under the terms of the policy, and both courts speculated in their factual findings that the buyer would not have taken the property subject to the easement. R. at 10.

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Quail Hill, LLC v. Cty. Of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (quoting Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)).

There is no dispute that the Lyons never allowed the potential purchaser to make his/their own decision to buy or not to buy the property. One can do no more than speculate whether the easement would have prevented the sale. Security Title believes that the Lyons' own decision to list the Property for sale belies a conclusion that they would have exerted themselves unreasonably by selling the Property at a profit. Thus, by failing to perform their contractual duty to mitigate their damages under the terms of the policy, as well as refusing the opportunity to reap a substantial profit after their own decision to list the Property for sale, the Lyons' claim should be dismissed for their failure to mitigate their damages. Therefore, the trial judge should not have granted the motion for summary judgment in favor of the Lyons for their failure to mitigate their damages.

Security Title respectfully submits the decision of the Court of Appeals in this respect is contrary to prior mitigation of damages and summary judgment decisions of this Court which should be reviewed and reversed.

CONCLUSION

For the reasons stated above, Security Title requests this Court to grant this petition for certiorari.

Respectfully submitted,

February 19, 2016

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Defendants,

Of whom The Security Title Guarantee Corporation of Baltimore is the Petitioner.

CERTIFICATE OF SERVICE

I certify that I am an agent of Ray Coit Yarborough, Jr. and served the Petition for Writ of Certiorari to counsel of record for the Respondents in the above captioned action

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