STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Balsman Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

ORDER GRANTING CHICAGO TITLE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before this Court on June 13, 2016, for a hearing of the Defendant Chicago Title Insurance Company's Motion for Summary Judgment filed July 14, 2015. Present at the hearing were G. Hamlin O'Kelley, III, for Chicago Title Insurance Company, Daniel A. Speights and A. Gibson Solomons, III, for the Plaintiffs.[1] For the reasons stated herein, the Motion is GRANTED.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of

[1] Motions by the Defendants Coward, Hicks & Siler, P.A., J.K. Coward, Jr., and Counsellor Title Agency, Inc., were heard at the same time and are addressed by separate Orders of this Court.

a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd by* 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Here, the material facts are not in dispute and, based upon those undisputed facts, Chicago Title Insurance Company is entitled to judgment as a matter of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiffs are the owners of Lot 108 in the Balsam Mountain Preserve development located in Jackson County, North Carolina. (Third Amended Complaint, ¶ 13) The Plaintiff William Loflin purchased this property in 2002 for $495,000.00. (*Id.* at ¶ 10) Chicago Title Insurance Company (hereinafter "Chicago Title") issued the Plaintiff a title insurance policy (the "Policy") for Lot 108.[2] (Third Amended Complaint. at ¶ 5). At the time of the closing in 2002, Lot 108 was not staked. (*Id.* at ¶ 10) During the closing, the Plaintiffs received a deed to Lot 108 and a copy of the only recorded plat reflecting that Lot 108 consisted of 1.837 acres. (*Id.* at ¶ 13). The only recorded plat also showed that the Balsam Mountain Preserve Round went around Lot 108. (Third Amended Complaint, *id.* at 10) The plat was recorded in Jackson County, North Carolina, in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (*Id.* at ¶13.) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (the "Recorded Plat")(*Id.* at 13). The deed conveyed Lot 108 as shown on the Recorded Plat. (*Id.*) The Plaintiffs have

alleged that they purchased Lot 108 as shown on the Recorded Plat. (*Id.*) The Title Insurance Policy issued to the Plaintiffs by Chicago Title insured the Plaintiffs' title to Lot 108 containing 1.837 acres as referenced in the Recorded Plat in Jackson County, North Carolina. (*Id.* at ¶ 13).

Four years after the closing, in 2006, the Plaintiffs claim that BMP Development informed them that, contrary to the duly recorded deed and duly recorded plat, Lot 108 only contained 1.4 acres and that Balsam Mountain Preserve Road went "through" their property as shown on an unrecorded plat. (*Id.* at ¶ 20). Although allegedly discovered in 2006, the Loflins did not file suit until 2013. (Complaint, July 18, 2013). The Plaintiffs claim the unrecorded plat shows both the reduced acreage and the Balsam Mountain Preserve Road going through their Lot 108. (Third Amended Complaint, *id.* at ¶20) According to the Complaint, there is no recorded plat or deed showing the reduced acreage or Balsam Mountain Preserve Road going through Lot 108. (*Id.*) The Plaintiffs claim that there is a trespass and encroachment upon their property by way of this unrecorded plat, which they discovered in 2006. (*Id.* at ¶ 16)

In 2012, six years after discovering this unrecorded plat, the Plaintiffs informed Chicago Title of the unrecorded plat. (*Id.* at ¶ 20). In response, Chicago Title advised that based upon a title search, the only recorded deed and the Recorded Plat did not show any impairments to the Plaintiff's title and denied the claim. (*Id.*)

The Plaintiffs have asserted breach of contract and negligence actions against Chicago Title and Counsellor Title Agency, Inc. (*Id.* at ¶¶ 147-151) The Plaintiffs claim they entered into a contract with Chicago Title to "investigate and insure lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances and fraud." (*Id.* at ¶ 148). In addition, they allege that Lot 108 contains 1.4 rather than 1.837 acres and there is a road dissecting the property as shown on an unrecorded plat, rather than what is shown on the

hicago Title issued lenders' policies of title insurance for refinances of the property at later dates. (*Id.*)

recorded plat. (*Id.* at ¶ 149) There are no specifics alleged as to how Chicago Title breached its contract. The claim for negligence states that Chicago Title knew or should have known the risks associated with Lot 108 and either allowed exposure to such risk or negligently failed to ascertain and insure against such risks. (*Id.* at ¶ 153-155). The Plaintiffs claim they are entitled to the full value of their property and consequential damages. (*Id.* at ¶155). These are the only claims against Chicago Title.

None of the Plaintiffs' claims may stand as set forth below as follows:

I. THE PLAINTIFFS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS AS TO ALL CAUSES OF ACTION

The Plaintiffs' claims are barred by the applicable statute of limitations. The Plaintiffs have asserted claims against Chicago Title for breach of contract and for negligence. (Third Amended Complaint, ¶¶ 147-155). The applicable statute of limitations for both causes of action is three years. S.C. Code Ann. §15-3-530. The "discovery rule" governs and runs on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 645 (1996). At the time a party should realize his injury is attributable to someone else's actions, the statute begins to run. *Republic Contr. Corp. v. South Carolina Dep't of Highways & Pub. Transp.*, 332 S.C 197, 503 S.E.2d 761 (1998). As established in their Third Amended Complaint, the Plaintiffs learned in 2006 that contrary to their deed and recorded plat there was a potential encroachment on their property, that there was less acreage than they thought they had, and that Balsam Mountain Road went through instead of around their property. (Third Amended Complaint, ¶20). Yet, the Plaintiffs failed to file suit until July, 2013, well beyond the three year statute of limitations. Accordingly, the Chicago Title is entitled to judgment as a matter of law under the applicable statute of limitations.

II. THE PLAINTIFFS HAVE NO CLAIMS FOR DAMAGE DUE TO AN UNRECORDED PLAT AS THEY HAVE TITLE TO THE PROPERTY AS INSURED AND CONVEYED PURSUANT TO THE RECORDED PLAT IN JACKSON COUNTY, NORTH CAROLINA

The Plaintiffs took title to their property based upon the only plat recorded in Jackson County, North Carolina, recorded in in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (Third Amended Complaint, *id.* at 10) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (*Id.* at 13). At the hearing of this matter, no one disputed that this is the only plat recorded in Jackson County, North Carolina, surveying the Plaintiffs' property. As this property is in North Carolina, North Carolina substantive law as to recording must apply. According to North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property. *See* N.C.G.S.A. §47-18. Unless an interest is "of record", it cannot be enforced against any subsequent purchaser. *Id.*; *see Hill v. Pinelaw Memorial Park*, 292 S.E.2d 779 (N.C. 1981). By enacting Section 47-18, the intent of the North Carolina General Assembly was that prospective purchasers should be able to rely only on the public record. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 208 (N.C. Ct. App. 1984). It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942). If no interest is recorded, it is not enforceable against subsequent purchasers. *Id.* In this matter, the unrecorded plat cannot create any encumbrance and cannot create any damages for the Plaintiffs by this Defendant as it has no impact upon the Plaintiffs' title to their property. Accordingly, Chicago Title is entitled to judgment as a matter of law.

III. THE PLAINTIFFS CLAIMS MUST FAIL AS A MATTER OF LAW AS TO THEIR CAUSE OF ACTION AGAINST CHICAGO TITLE FOR BREACH OF CONTRACT AS SET FORTH IN THE TWENTIETH CAUSE OF ACTION

The Plaintiffs have alleged that the contract at issue is the policy of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc., in 2002 (the "Policy) (*Id.* at ¶ 5) The Plaintiffs have acknowledged that the Policy was issued (*Id.*) The Plaintiffs have acknowledged that their deed references the Recorded Plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 13-14) The Policy complies with the deed and recorded plat and insures that title which the Plaintiffs have and have had since 2002. (*Id.* at ¶ 13-14). There are no allegations stated in the Third Amended Complaint that support any breach of the contract by this Defendant as the Plaintiffs received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Plaintiffs' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." In their lengthy Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment, there are no case law or other citations supporting this allegation of investigation and insurance for Lot 108 being protected from "all risks". Further, Chicago Title relies on its agents and does no investigations. There has been no evidence or testimony produced to support those allegations. The Plaintiff's own allegations state that their deed referenced the recorded plat. In the deposition of Cynthia Baines, claims counsel for Chicago Title, counsel for the Plaintiffs asked the following questions:

> Q. Okay. Do you understand that Mr. and Ms. Loflin claim responsibility of a Chicago title even if there's no problem with record title?
> A. That seems to be their allegation.

(Baines Depo, pp. 11, ll. 22-25).

> Q. Are you personally familiar with a lawsuit brought by an insured against Fidelity in which the insured claims that there should have been coverage but the record title was good – even though the record title was good?
> A. This case.

(Baines Depo; p. 14)(copies of these pages attached).

By this very questioning of the Plaintiffs' counsel, it is acknowledged that the title of record in this matter is good as recorded in Jackson County, North Carolina. To this very day, there is no other plat to search or rely on by Chicago Title or its agents in issuing a title insurance policy. There is simply no breach by Chicago Title as the Plaintiffs received the title referenced in both their recorded deed and the Recorded Plat referenced in that deed.

None of the enumerated "Covered Title Risks" in the Policy are triggered by the Plaintiffs' allegations related to the unrecorded plat or by any evidence presented to this Court at the time of the hearing of this matter or in the Plaintiffs' Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment submitted to this Court after the hearing on June 13, 2016.

The Title Insurance Policy states:

This Policy overs the following title risks, if they affect your title on the ***Policy Date***

1. *Someone else owns an interest in your title.*
2. *A document is not properly signed, sealed, acknowledged, or delivered.*
3. *Forgery, fraud, duress, incompetency, incapacity, or impersonation.*
4. *Defective recording of any document.*
5. *You do not have legal right of access to and from the land.*
6. *There are restrictive covenants limiting your use of the land.*
7. *There is a lien on your title because of: (a) a mortgage or deed of trust; (b) a judgment, tax or special assessment; (c) a charge by a homeowner's or condominium association.*
8. *There are liens on your title arising now or late for labor and material furnished before the Policy Date – unless you agreed to pay for the labor and material.*
9. *Others have rights out of leases, contracts, or options.*
10. *Someone else has an easement on your land.*
11. *Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan.*
12. *You are forced to remove your existing structure – other than a boundary wall or fence- because:*
    - *it extends on to adjoining land or on to any easement*
    - *it violates a restriction shown in Schedule B*
    - *it violates an existing zoning law.*

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.

(Policy, Owner's Coverage Statement)(emphasis added).

The Policy also contains Exclusions that states the insured is not insured against loss, costs, attorneys' fees and expenses resulting from the following:

3. Title Risks:
• that are created, allowed or agreed to by you
• that are known to you, but not to us, on the Policy Date – unless they appeared in the public records
*• **that first affect your title after the Policy Date** - this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.*

(Policy, Exclusions)(emphasis added).

None of the Title Risks set forth in the Owner's statement of coverage are triggered, and, perhaps more importantly, the allegations of the unrecorded plat affect title after the Policy Date, meaning they are specifically excluded from coverage under the Policy. As stated above and here again, the Plaintiffs' title is as shown on the Recorded Plat and only on the Recorded Plat. Therefore, there is no coverage, and, accordingly, no breach of contract.

IV. THE PLAINTIFFS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE POLICY AND FAIL TO ALLEGE ANY CAUSE OF ACTION FOR ANY BREACH OF THAT CONTRACT

Title insurance is retrospective, not prospective. The Plaintiffs received the benefit of their title issuance and there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.** *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is

unique in that it is retrospective, not prospective. *Firstland Village Assoc.*, *id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save the insured harmless from any loss through defects, liens, or encumbrances that may affect or burden the insured's title when the insured takes it. *Id.*

Here, the Plaintiffs allege that the title Policy insured Lot 108, containing 1.837 acres as described in the deed and recorded plat, which they received title for at their closing in 2002. The Plaintiffs admit that the recorded deed references the Recorded Plat with the correct acreage and showing the road going around their property. It was not until 2006, four years after the closing, that the Plaintiffs claim to have learned of the alleged unrecorded plat showing a different acreage and a different configuration of Balsam Mountain Preserve Road. At the time the Plaintiffs took title, there were no encumbrances of record, and the Plaintiffs received good title to their land. Further, there is no reference to the so-called unrecorded plat, meaning there can be no coverage to have been breached. *See Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996) (holding Chicago Title could not have breached a contract where there was no coverage for a fourteen acre tract of land). As in *Christensen*, where there is no coverage, there is no breach.

Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat. To the contrary, the Plaintiffs have alleged in Paragraph 10 of their Amended Complaint that they received a duly executed deed to Lot 108 referencing a recorded plat showing 1.837 acres transferred and Balsam Mountain Preserve Road going around Lot 108. (Plaintiffs' Third Amended Complaint, ¶ 13) There was no lien, encumbrance, defect or other matter recorded at the time the Plaintiffs' Policy was issued that could have been

discovered at the time of closing. (*Id.* ¶13). Instead of protecting the insured against matters that may arise during a stated period *after* the issuance of the policy, a title policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)

In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Plaintiffs' own allegations make that clear. Accordingly, there is no breach of contract by Chicago Title and Chicago Title is entitled to judgment as a matter of law.

V. THERE IS NO LIABILITY FOR ANY NEGLIGENCE CLAIM WHERE THE PLAINTIFFS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE PLAINTIFFS FROM UNRECORDED MATTERS, NO TITLE SEARCH WOULD REVEAL UNRECORDED MATTERS, AND NO EXPERT HAS ESTABLISHED ANY DUTY OR BEACH THEREOF

The Plaintiffs have alleged that Chicago Title is negligent since it "knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks." (Plaintiffs' Third Amended Complaint, ¶ 153) By their own allegations, no title search could have revealed that there was an unrecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013). There has been no expert witness named nor testimony provided that Chicago Title has been negligent in the denial of any claims. The only allegation in the Third Amended Complaint relating to the time of issuance of the policy is that

the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Plaintiffs' Third Amended Complaint, ¶ 13). There can be no negligence where the Plaintiffs' allegations fail to show how Chicago Title could have breached any duty to the Plaintiffs at the time the policy was issued as was required by the recorded documents on file in Jackson County, North Carolina.

Chicago Title denied the Plaintiffs' claim regarding the unrecorded plat discovered in 2006, a copy of which is not part of the Plaintiffs' Amended Complaint. The Plaintiffs' own pleadings make clear that this is an item discovered four years after the policy was issued. There can be no breach of a duty of care here for a failure to investigate something that was not of public record and issued after the policy. *Preservation Capital Consultants, LLC, id. at*, 406 S.C. 309, 751, S.E.2d 256 (2013) The policy at issue, referenced as the First Insurance Contract, insures Lot 108, with 1.87 acres, without a road going through it based upon the recorded plat from 2002. Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc., id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* There can be no negligence in failing to ascertain and insure risk when those risks arise four years after the policy was issued and remain unrecorded. Accordingly, the claims against Chicago Title should be granted judgment as a matter of law; therefore it is hereby

ORDERED, that the Defendant Chicago Title Insurance Company be awarded a judgment as a matter of law in this matter and is hereby dismissed from this action with finality; and

IT IS SO ORDERED!

Beaufort, South Carolina
6-15, 2016

The Honorable Carmen T. Mullen
Presiding Judge of the Fourteenth Circuit