

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
)
) FOURTEENTH JUDICIAL CIRCUIT

William Loflin and Leslie Loflin,
Plaintiffs,

) Civil Action No. 2013-CP-07-1807

vs.

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

)
)
) Defendants.

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SC Court of Appeals

**ORDER GRANTING DEFENDANT
COUNSELLOR TITLE AGENCY,
INC.'S AMENDED MOTION FOR
SUMMARY JUDGMENT**

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CLERK OF COURT

This matter is before the Court on Defendant Counsellor Title Agency, Inc.'s ("Counsellor") Amended Motion for Summary Judgment. Counsellor's motion was filed on March 7, 2016 and the Court held a hearing on Counsellor's motion on June 13, 2016. Plaintiffs were represented at the hearing by Daniel A. Speights and A.G. Solomons, III, and Counsellor was represented by Robert E. Stepp. Following the hearing, the Court took Counsellor's motion under advisement and allowed the parties to submit additional briefs and supporting materials in support of their respective positions.

After hearing the arguments of counsel at the hearing and considering the briefs and other materials submitted by the parties in connection with the motion, the Court grants Counsellor's Amended Motion for Summary Judgment.

UNDISPUTED FACTS

The undisputed facts of this case may be summarized as follows. In February of 2002, Plaintiffs purchased Lot 108 in the Balsam Mountain Preserve Subdivision in Jackson County,

North Carolina. (Third Am. Compl. ¶¶ 10, 12.) According to Plaintiffs, the seller, BMP Development LP ("Balsam"), represented to Plaintiffs that Lot 108 "consisted of approximately 1.9 acres and that Balsam Mountain Road circumnavigated Lot 108." (Third Am. Compl. ¶ 10.) Upon completion of the closing, Balsam provided to Plaintiffs a deed to Lot 108 and an individual recorded plat of Lot 108. (Third Am. Compl. ¶ 13.) The recorded plat "reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108." (Third Am. Compl. ¶ 13.)

The deed to Plaintiffs incorporated the recorded plat and was recorded in Jackson County, North Carolina. (Third Am. Compl. ¶ 13.) Upon completion of the closing, Counsellor, in its capacity as agent for Chicago Title Insurance Company ("Chicago Title"), issued an owner's title insurance policy that insured, subject to the terms and exceptions stated therein, title to Lot 108 using the same legal description as was contained in the deed.

Plaintiffs allege that Balsam informed them in 2006 that, contrary to the deed and the recorded plat, Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road went through Lot 108 instead of around it. (Third Am. Compl. ¶ 20.) Plaintiffs allege that this configuration of Lot 108 is contained in an unrecorded plat. No plat or other document reflecting this configuration has ever been recorded in the public records. (Third Am. Compl. ¶ 20.) Plaintiffs contend that the true configuration of Lot 108 is shown on the unrecorded plat and represents an encroachment and/or trespass on Lot 108. (Third Am. Compl. ¶¶ 20-21.) Seven years after discovering these facts about their property, Plaintiffs filed their original complaint in this matter on July 18, 2013. Plaintiffs have since amended their complaint three times. With respect to Counsellor, Plaintiffs assert two causes of action: (1) breach of contract; and (2)

negligence. (Third Am. Compl. ¶¶ 147-155.) Now before the Court is Counsellor's Amended Motion for Summary Judgment.

LEGAL STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton, 377 S.C. at 197-98, 659 S.E.2d at 203. Instead, "[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 198, 659 S.E.2d at 203. "It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine." Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006). "Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper." Id.

Applying this standard to the undisputed facts of this case, the Court grants Counsellor's Amended Motion for Summary Judgment for the reasons discussed below.

CONCLUSIONS OF LAW

Counsellor has moved for summary judgment in this case on several separate grounds. (1) Counsellor argues Plaintiffs' claims against Counsellor are barred by the statute of limitations. (2) Counsellor argues Plaintiffs have not suffered any loss or damage because Plaintiffs have title to the property as insured and as conveyed. (3) Counsellor argues Plaintiffs' claims are barred because Plaintiffs consented to, acquiesced in, or failed to mitigate the damages they allege to have suffered and, as a result, no act or omission of Counsellor proximately caused any damage Plaintiffs allege. (4) Counsellor argues Plaintiffs' breach of contract cause of action fails because there is no evidence of any agreement between Plaintiffs and Counsellor beyond Counsellor's agreement to issue the title policy as agent for Chicago Title. Counsellor also argues that it cannot be liable to Plaintiffs under the title insurance policy and that Plaintiffs are not entitled to any relief under the policy in any event. (5) Counsellor argues Plaintiffs' negligence cause of action fails because Counsellor was not under any duty to advise Plaintiffs regarding coverage issues. The Court finds Counsellor is entitled to summary judgment on grounds 1, 2, 3, 4, and 5 and that each of these is independently sufficient to warrant summary judgment in Counsellor's favor.

A. Plaintiffs' claims against Counsellor are barred by the statute of limitations.

The Court finds the statute of limitations expired well before Plaintiffs commenced this action and, as a result, Counsellor is entitled to summary judgment. The statute of limitations for both causes of action asserted by Plaintiffs against Counsellor is three years. S.C. Code Ann. § 15-3-530. Pursuant to the discovery rule, the statute of limitations begins to run on the date "the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action [has arisen]." Dean v. Ruscon, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

“The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson v. Bank of America, N.A., 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). “The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed.” Id.

“Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all.” Binkley v. Burry, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002) (internal quotations omitted). A plaintiff’s ignorance of the “full extent of the damage is immaterial” in setting the accrual date. Dean, 321 S.C. at 365, 468 S.E.2d at 647. The statute begins to run when a party should realize his injury may be attributable to some other party’s action. Republic Contracting Corp. v. S.C. Dept. of Highways & Pub. Transp., 332 S.C. 197, 208, 503 S.E.2d 761, 767 (1998). “[U]nder South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations.” Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (2004). Likewise, the discovery of new evidence is irrelevant to the running of the statute. Tanyel v. Osborne, 312 S.C. 473, 475, 441 S.E.2d 329, 331 (Ct. App. 1994) (finding statute of limitations began to run when motorist witnessed events causing loss rather than date upon which he discovered evidence to support claim).

In determining the date the statute of limitations commences to run, “[t]he focus is upon the date of discovery of the *injury*, not the date of discovery of the *wrongdoer*.” Wiggins v.

Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (emphasis added); see also Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 335 (1981) (finding plaintiff on notice when pistol accidentally and unexpectedly discharged, and thus was possibly defective). The running of the statute is not delayed until all available legal theories are developed. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987) (finding statute of limitations began to run when plaintiff witnessed events at hospital, rather than when a later full theory of recovery was developed after reviewing hospital's records).

In this case, the undisputed facts establish that Balsam told Plaintiffs no later than 2006 that, contrary to the deed and the recorded plat, (1) there was a possible encroachment on Lot 108, (2) the property may contain only 1.4 acres, and (3) Balsam Mountain Preserve Road apparently went through the property instead of around it. (Third Am. Compl. ¶ 20.) On that date, a reasonable person would have reason to believe that some right of his may have been invaded or that some claim against another party might exist. Binkley, 352 S.C. at 297-98, 573 S.E.2d at 844-45. At that time, the statute of limitations commenced to run. Plaintiffs did not file the instant case until July of 2013, well beyond the three-year statute of limitations period. The Court therefore finds that Plaintiffs' causes of action are barred by the statute of limitations and Counsellor is entitled to summary judgment as a matter of law.

Plaintiffs argue the statute of limitations did not commence to run until 2012 when they allegedly discovered that the road going through their property existed before the closing, which they say gave rise to a claim against Counsellor. The Court rejects Plaintiffs' argument because it is contrary to the above-cited and well-established South Carolina law that the statute of limitations begins to run on the date the Plaintiff discovers the injury, not the identity of a wrongdoer, or when a full blown theory of recovery is developed. There is no dispute that both

the nature and extent of Plaintiffs' injuries were known to them in 2006 and the statute began to run at that time. The statute expired years before this action was brought against Counsellor in 2013.

B. Plaintiffs have not suffered any loss or damage because Plaintiffs have title to the property as insured and as conveyed.

The basis of Plaintiffs' complaint in this case is that Lot 108 is not as it was represented to Plaintiffs at the closing of their purchase. Specifically, Plaintiffs complain the lot is smaller than they were told it was and that the road Plaintiffs were told circumnavigates the property actually goes through it. Applicable law establishes conclusively, however, that Plaintiffs' legal title to Lot 108 is as reflected in the recorded deed and plat and remains today as they understood it to be at the closing of their purchase. As a result, the Court holds as a matter of law that Plaintiffs have not suffered any loss or damage with respect to their title and summary judgment in Counsellor's favor is required.

North Carolina statutory law renders unrecorded interests in land invalid against subsequent purchasers of the property. ¹ N.C.G.S.A. § 47-18. Thus, unless an interest or encumbrance appears in the public record, it is not enforceable against a person who acquires the land. "[A] purchaser must examine the public registry. If he finds no record [of a defect in title], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail." Hill v. Pinelawn Mem'l Park, Inc., 292 S.E.2d 779, 782 (N.C. 1981). "The General Assembly, by enacting [§ 47-18] clearly intended that prospective purchasers should be able to safely rely on the public records." Schuman v. Roger Baker & Assocs., Inc.,

¹ Because the real property that is the subject of this action is located in North Carolina, the Court finds North Carolina law controls as to matters of title and therefore controls the duties of a person conducting a title examination of that property. Otherwise, South Carolina law controls in this case.

319 S.E.2d 308, 311 (N.C. App. 1984); see also Chrysler Credit v. Burton, 599 F. Supp. 1313, 1318 (M.D.N.C. 1984). As explained by the North Carolina Supreme Court in Turner v. Glenn, “[a] purchaser is chargeable with notice of the existence of [an encumbrance] only if a proper search of the public record would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents.” 18 S.E.2d 197, 201 (N.C. 1942). “The law contemplates that a purchaser of land will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose.” Hensley v. Ramsey, 199 S.E.2d 1, 2 (1973). “A purchaser is put on notice of any fact or circumstance affecting his title which is reasonably disclosed by the *instruments* in his line of title.” Chrysler Credit, 599 F. Supp. at 1318 (citing Turner, 18 S.E.2d 197 (N.C. 1942)) (emphasis in original).

Because interests in North Carolina land that are not reflected in the public record are not enforceable against subsequent purchasers for value, the Court finds the unrecorded plat at issue in this case cannot operate to diminish or encumber the estate that Plaintiffs received in their deed and, therefore, cannot legally burden Lot 108. The unrecorded plat about which Plaintiffs complain has not diminished Plaintiffs’ title to the property. Therefore, as a matter of law, Plaintiffs have suffered no damages resulting from an alleged diminution of their title to Lot 108 at the hands of Counsellor and therefore Counsellor is entitled to judgment as a matter of law.²

²Because the Court concludes the unrecorded plat has no legal effect under North Carolina law, Plaintiffs may have valid claims against any persons or entities that are acting in derogation of Plaintiffs’ title. Shuman, 319 S.E.2d at 311; Stephenson v. Jones, 316 S.E.2d 366 (N.C. App. 1984) (holding that secret, hidden, and unregistered trusts will not defeat a bona-fide purchaser for value).

C. Plaintiffs' breach of contract claim against Counsellor fails because, as a matter of law, Counsellor cannot be liable to Plaintiffs under the title insurance policy.

In their breach of contract cause of action, Plaintiffs seek to recover benefits under the contract of title insurance they entered into with Chicago Title. Plaintiffs allege Counsellor agreed "to investigate and insure that Lot 108 was protected from all risks set forth herein, including but not limited to, easements, encumbrances, and fraud." (Third Am. Compl. ¶ 148.) Plaintiffs further allege that "[i]n contradiction to the Insurance Contracts, Lot 108 contains 1.4 rather than 1.87 acres, and is and has been since before the Closing encumbered and encroached upon by a road dissecting the property." (Third Am. Compl. ¶ 149.) Plaintiffs conclude that Counsellor (and Chicago Title) breached the insurance contract by "refusing to provide [Plaintiffs] any relief from the damages caused by the insured risks." (Third Am. Compl. ¶ 150.)

The Court finds Plaintiffs do not have a breach of contract cause of action against Counsellor, either pursuant to the insurance policy itself or based upon the alleged agreement by Counsellor to perform services for Plaintiffs beyond those typically performed by a title insurance agent. With respect to the insurance policy itself, Counsellor is not a party to that contract. Counsellor is not the insurer under the owner's title insurance policy as the guarantor of that insurer. It is undisputed that Counsellor served only as the agent for Chicago Title, the insurer, in the issuance of the policy. "[W]here an agent enters into a contract for a known principal, while acting within his authority as such agent, he is not personally liable on the resultant contract." Keeshan v. Eau Claire Co-op. Health Centers, Inc., C.A. No. 3:05-3601-MBS, 2007 WL 2903962, at *23 (D.S.C. Oct. 2, 2007) (citing Skinner & Ruddock, Inc. v. London Guarantee & Acc. Co., 239 S.C. 614, 124 S.E.2d 178, 180 (1962)); Green v. Indus. Life & Health Ins. Co., 199 S.C. 262, 18 S.E.2d 873 (1942). "The liability, if any, for a breach of such

contract is that of the principal alone.” *Id.* Therefore, any claim by Plaintiffs under the insurance policy itself would be a claim against Chicago Title, not against Counsellor.

The only evidence of any agreement between Plaintiffs and Counsellor relates to the issuance of the title policy. Therefore, Plaintiffs’ allegation that Counsellor agreed “to investigate” can refer only to an investigation necessary to issue the title insurance policy. Title examiners investigating title to land in North Carolina are not required to look for information that is not publicly available. *See, e.g., Stern v. Lee*, 20 S.E. 736, 743 (N.C. 1894) (recognizing prospective purchasers are not required to hire “detectives,” but instead may rely on the public record). Rather, “[i]n order to give a title opinion, an abstractor must make a careful . . . search of the *public* records.” *Burkhead*, 146 S.E.2d at 805 (emphasis added). A title examiner’s duty to investigate title is limited to a review of matters appearing in the public record, absent a specific agreement to do more. *Hill*, 282 S.E.2d at 782 (holding that title protection requires examination of the public registry only); *Beach & Adams Builders, Inc. v. Northwestern Bank*, 220 S.E.2d 414, 416 (N.C. App. 1975) (recognizing title examiner’s right to rely on public record); *Burkhead v. Farlow*, 146 S.E.2d 802 (N.C. 1966) (holding that a title abstractor must examine public records).

Plaintiffs complain Counsellor failed to investigate title by failing to discover a plat that by Plaintiffs’ own admission has never been made part of the public record. Because the duty of title examiners does not extend to matters that are not in the public record at the time of their search, and because the Third Amended Complaint does not allege and Plaintiffs have not identified any evidence that supports a finding of any special agreement by which Counsellor undertook to do more than examine the public record, the Court concludes Plaintiffs’ breach of contract cause of action against Counsellor fails as a matter of law.

D. Plaintiffs' breach of contract claim against Counsellor fails because, even if Counsellor could be liable under the title insurance policy, Plaintiffs are not entitled to any relief under the policy.

As set forth above, the Court concludes there is no basis upon which Counsellor, as title insurance agent, may be held liable to Plaintiffs under the title insurance policy itself. However, even if Plaintiffs were able to set forth a theory upon which such liability may exist, the Court finds Counsellor still would be entitled to summary judgment because Plaintiffs are not entitled to any relief under the policy. The Court has entered a separate order granting summary judgment in favor of Chicago Title and the Court incorporates that order herein by this reference.

E. Plaintiffs' negligence claim against Counsellor fails because Counsellor was not under any duty to advise Plaintiffs regarding coverage issues.

Plaintiffs' negligence cause of action alleges Counsellor was under a duty "to investigate and recommend an insurance policy to protect [Plaintiffs] from reasonably foreseeable risks" and that Counsellor "negligently failed to select a policy to insure [Plaintiffs] from the risks which Chicago has denied are covered by the Insurance Contract." (Third Am. Compl. ¶ 154.) Plaintiffs' argument concerning the duties of an insurance agent is contrary to applicable law.

"An insurance agent is under no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005); Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 333, 574 S.E.2d 502, 509 (Ct. App. 2002); Trotter v. State Farm Mut. Auto Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (holding that the agent was under no duty to advise an insured about an exclusion in the policy sold to the insured). Plaintiffs have not alleged or established that there was any agreement by Counsellor to advise Plaintiffs regarding the title insurance policy they were purchasing. Despite having submitted two affidavits from Mr. Loflin, Plaintiffs

have not identified for the Court any facts in the record that would support such an inference, such as the payment of additional consideration beyond payment of the title insurance premium, a clear request for advice by the insured, a clear agreement by Counsellor to provide that advice, or a course of dealing pursuant to which Counsellor provided that advice to Plaintiffs over a long period of time. See Trotter, 377 S.E.2d at 347.

Because Counsellor was not under any duty to make any recommendation to Plaintiffs and because Plaintiffs have not alleged circumstances from which such a duty can be inferred, Plaintiffs' negligence cause of action against Counsellor fails as a matter of law.

CONCLUSION

Having considered all of the evidence submitted and arguments raised, both at the hearing and through submitted briefs and materials, the Court finds Counsellor is entitled to judgment as a matter of law in this case on each of the grounds addressed above. Accordingly, Counsellor's Amended Motion for Summary Judgment is granted.

IT IS SO ORDERED.



The Honorable Carmen T. Mullen
Presiding Judge

Beaufort, S.C.

8-15, 2016