THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

FINAL REPLY BRIEF OF APPELLANT

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 Appellant

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2. DID THE TRIAL COURT ERR IN FINDING APPELLANT'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?

3. DID THE TRIAL COURT ERR IN FINDING THE APPELLANT IS NOT A BONA FIDE PURCHASER?

4. DID THE TRIAL COURT ERR IN FINDING THE APPELLANT DISCOVERED OR SHOULD HAVE DISCOVERED THE FACTS UNDERLYING HIS COMPLAINT AT THE TIME OF THE ISSUANCE OF THE TITLE INSURANCE POLICIES?

ADDITIONAL ISSUE RAISED BY RESPONDENT

"Is it proper for this court to affirm the trial court's ruling on the basis of lack of jurisdiction due to insufficiency of process and insufficiency of service of process, as argued by Respondent during the hearing on the Motion to Dismiss?" (Resp.'s Br. 1)

ARGUMENT

Respondent argues in its Initial Brief that "no excuse—not the speedy nature of residential transactions or the reliance on attorneys and insurance agents—will allow a purchaser to reap the benefits of the bona fide purchaser status when he willfully ignores the public records." (Resp. Br. 14) If this Court were to accept Respondent's theory, then a consumer of title insurance in South Carolina would be charged with the same standard of due diligence as an attorney or professional insurance agent. The Appellant, Mr. Segars, did not "willfully ignore the public records." He hired Respondent's agent to review a title abstract and to write an insurance policy. The gravamen of Appellant's Complaint is that Appellant purchased title insurance from Respondent's agent and in so doing, relied on the agent to conduct due diligence to ensure that the property was insured in a proper amount and against known harms. Appellant expected the agent to disclose and explain the material terms of the policy, such that Appellant could make an informed decision as to the adequacy of the policy.

1. STATUTE OF LIMITATIONS

Respondent argues that there is no factual inquiry as to the date of notice, because the issue at hand involves record notice. (Resp. Br. 11). Appellant stipulates and agrees that the matters which created the subject land use restrictions were of public record as of the purchase date. (Appellant Br. p. 6). However, the date of notice herein pertains not just to the land use restrictions, but also to the Policy terms, which were not known to Appellant on the

purchase date. The statute of limitations was not triggered on the purchase date. It triggered later, when Appellant discovered that the policy did not cover the risks Appellant presumed were covered.

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

The trial court's Order found that Appellant discovered or should have discovered the facts underlying his Complaint at the time of the issuance of the Policies. The Order based this finding on the supposition that all matters set forth in the Complaint were matters of public record at the time the Policies were issued. Respondent argues that the policy issuance triggered the statute of limitations because "all circumstances of which Appellant subsequently complained were in existence as of this date." (Resp. Br. 7). To the contrary, only the conflicting land use restrictions were in existence at the time the Policies were apparently issued. Appellant complained that the Policies themselves were "of no merit or value." (Complaint p. 7; R. p. 13, lines 17-18). Appellant did not know, and could not have reasonably ascertained, that the Policies were inappropriate at the time of issuance – in fact, Respondent did not provide Appellant with the Policy documents until some time after closing, and Appellant still does not possess complete Policy documents as of the date hereof.

Under the discovery rule, a cause of action in contract does not necessarily accrue at the time a contract is breached, but rather when the damage becomes ascertained. Santee

Portland Cement Co. v. Daniel Intern. Corp., 384 S.E.2d 693, 299 S.C. 269 (S.C. 1989). "If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury." Garner v. Houck, 435 S.E.2d 847, 849; 312 S.C. 481 (S.C. 1993) (Citing Santee, 299 S.C. 269, 384 S.E.2d 693 (1989); (See also Maher v. Tietex Corporation, 435 S.E.2d 847, 312 S.C. 481 (S.C.App. 1998).

Respondent maintains that the "trial court properly determined that when this particular Appellant actually learned of the 2003 plats or submitted a claim based on the 2003 plats is irrelevant." (Resp. Br. p. 8). However, the trial court's Order actually set forth no determination as to the relevancy of discovery. Given the particular facts of this case, conflicting allegations emerged as to when the Appellant knew or should have known the underlying causes of action. Therefore, when the Appellant actually learned of the plats and Policy terms is relevant and necessary to determine the trigger date for the statute of limitations, and this case is not ripe for a SCRCP Rule 12 motion to dismiss on this point.

Respondent further argues that the terms of the Policies "had nothing to do with the underlying claims---the claims were based on a conflict created by the public records." (Resp. Br. p. 8). However, the claims were only partially based on the conflicting regulations. The emphasis of Appellant's claims is that Respondent breached its contract by denying coverage and that Respondent is vicariously liable for the ineffective policies issued by its agent, and further, that Respondent is liable for its agent's failure to explain the meaning of the policies being issued, or the consequence of findings within the underlying title abstract. Thus, Appellant's claims arose either when Respondent denied coverage, or when Appellant

discovered that the Policies did not insure against the matters unknown to him, matters which defeated any use or value for the property.

Respondent argues that a reasonably prudent person should know the terms of the policy as of the date the policy is issued. (Resp. Br. p. 8). Appellant avers that it is the duty of an insurance agent to ensure that the policy terms are disclosed and explained to the insurance consumer.[1] The insurance policies in question are complicated legal documents, which set forth covered risks and exceptions. A lay person might understand portions of the initial coverage terms, but the list of exceptions and exclusions refer to complicated legal terminology and to documents and matters outside of the four corners of the policy which even sophisticated consumers would have difficulty understanding without the guidance of the insurance agent or attorney. For instance, the exceptions at issue in this case are as follow:

> "10. Easements, set-back lines and other matters as shown on the plats recorded in Plat Book 26 at Page 198, Plat Book 86 at Page 90, Plat Book 91 at Pages 94, 96 & 97 and Plat Book 96 at page 160.

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1 The National Association of Insurance Commissioners developed a Title Insurance Agent Model Act. Although the Model Act has not been adopted in South Carolina, it provides insight as to how other jurisdictions approach the question of an insurance agents treatment of policyholders. For instance, with regards to the issuance of an owner's title insurance policy covering the resale of owner-occupied residential property, the Model Act provides:

> "[...] a title insurance report shall be furnished to the purchaser-mortgagor or its representative as soon as reasonably possible prior to closing. If the report cannot be delivered prior to the day of closing, the title insurer shall document the reasons for the delay. The report furnished to the purchaser-mortgagor shall incorporate the following statement on the first page in bold type:
>
> > Please read the exceptions and the terms shown or referred to herein carefully. The exceptions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered. It is important to note that this form is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.

Title Insurance Agent Model Act, Model Regulation Service—July 2003, pp. 12-13.

11. Restrictions and easements as recorded in Deed Book 90 at page 147, Book 1704 at Page 2601, Book 1704 at Page 2605, Book 1887 at Page 2252, Book 1887 at Page 2258, Book 1887 at Page 2272, aforesaid records."

(Lot 2 Policy Exceptions; R. p. 82).

Appellant alleges that Respondent's agent did not disclose these exceptions to Appellant at the time the Policy was purchased or at any time prior thereto. Had these matters been explained, Appellant would have been made aware not only of the exemptions, and the need to do further investigation as to what the revised and re-recorded plats of record meant, but also of the conflicting land use restrictions that caused the property to be unfit for Appellant's intended use. Appellant alleges that it would have been inadequate for Respondent's agent to merely disclose the terms (which Appellant alleges his agent failed to do); rather, it was incumbent upon the agent to explain the impact of the terms to the Appellant. Appellant alleges that the agent did neither, and Appellant suffered damages as a result.

Appellant's Complaint states a cause of action for vicarious liability. (Complaint pp. 7-8; R. pp. 13-14). Although the trial court's Order does not expressly address the vicarious liability claim, the omission does not preclude Appellant from raising this issue on appeal, because the omission forms the foundation of the trial court's findings. Appellant engaged Respondent's agent to conduct all necessary inquiry and examination prior to the purchase closing and title insurance issuance. As the Policies were eventually discovered to be ineffective due to the agent's failure to conduct due diligence, Respondent may be held vicariously liable for its agent's negligent acts. In this case, nothing in the bare allegations of

the Complaint reflect that Appellant was anything but reasonably prudent. It was Respondent's agent who failed to disclose material matters of public record, and the agent who drafted and issued an ineffective insurance policy.

B. Appellant is entitled to equitable tolling of the statute of limitations because public policy and interests of justice demand that the 2011 case filing relates back to the filing of the 2008 cases.

The 2008 cases were dismissed by consent and without prejudice pursuant to SCRCP 41(a)(1)(B). (Stipulations of Dismissal; R. p. 37 and 53). In Hooper v. Ebenezer Senior Services and Rehabilitation Center, 659 S.E.2d 213, 377 S.C. 217, 231 (S.C.App. 2008), this Court examined the precedents found in South Carolina and numerous foreign jurisdictions to set forth a nuanced context for the doctrine of equitable tolling. Although the case is distinguishable, the standard set forth may be applied here. The Hooper court found, *inter alia*, equitable tolling is available where a plaintiff is unable to obtain vital information bearing on the existence of his claim, despite all due diligence. Id at 232. In the present matter, Appellant alleges that he was unable to obtain vital information concerning the Policy terms, albeit the policies themselves, despite his due diligence. Further, the filing of the 2008 cases themselves tolled the statute of limitations, as Respondent was timely put on notice of its claims in 2008. Thus, Appellant's re-filing of this case in 2011, approximately one year after the stipulation of dismissal of the 2008 cases was within a reasonable time such that the filing relates back to the tolling of the statute of limitations caused by the 2008 cases.

C. Appellant is a bona fide purchaser entitled to a later discovery date, because he pursued his duty to inquire with due diligence by retaining Respondent's professional services to examine the applicable public records and only learned of Respondent's failure to do so after damages became known.

Appellant is entitled to bona fide purchaser status precisely because he justifiably relied on Respondent's agent to conduct the required due diligence and Respondent's agent either failed to do the due diligence or, alternatively, failed to explain the import of the findings to Appellant, as alleged in the Complaint. Appellant only learned of Respondent's failure to conduct due diligence when the land use restrictions, and thus his damages, became known to Appellant. Respondent argues that no South Carolina precedent grants Appellant the protections of a bona fide purchaser without notice under these circumstances. (Resp.'s Br. 14). However, the facts as plead by Appellant in this case justify the Court establishing precedent in a doctrine and subject matter rarely addressed by the Court in reported opinions. Such a precedent would be consistent with the underlying principals of bona fide purchaser protection.

2. SERVICE WAS EFFECTIVE OR, IN THE ALTERNATIVE, RESPONDENT WAIVED ITS OBJECTION TO PERSONAL JURISDICTION

Respondent further argues, pursuant to Rules 208(b)(2) and 220(c) SCRAP, that the trial court's decision should be affirmed on jurisdictional grounds including insufficient process and insufficient service of process. (Resp.'s Br. 14). Respondent argues that Appellant did not name the proper party, did not address the summons to an authorized person, and did not execute service at a proper address. (Resp.'s Br. 15-16). As discussed below, given the circumstances of the case and Respondent's own acts, service was effective to establish the court's jurisdiction in this matter.

Under South Carolina law, exacting compliance with Rule 4 is not required to effect

service of process. *See, ex.* BB & T v. Taylor, 633 S.E.2d 501, 369 S.C. 548 (S.C. 2006). "Rather, [the Court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* (*Citing* Roche v. Young Bros., Inc. of Florence, 456 S.E.2d 897, 318 S.C. 207 (S.C. 1995)). The Roche court found that Rule 4, SCRCP serves at least two purposes: it confers personal jurisdiction on the court, and assures the defendant of reasonable notice of the action. Id. at 210.

Although a party may make an appearance in a matter for the purpose of contesting personal jurisdiction, the party may not simultaneously object to jurisdiction and present defenses on the merits of the case, because "[b]y asserting the additional claims, the defendant "implicitly acknowledges jurisdiction of the court because the court has no authority to dispose of these issues without jurisdiction of the person of [the defendant]." Dunbar v. Vandermore, 369 S.E.2d 150 (S.C.App. 1988) (Citing Smalls v. Weed, 291 S.C. 258, 353 S.E.2d 154 (S.C.Ct.App.1987)). The Fourth Circuit interpreted the South Carolina Court of Appeals' decision in Smalls as follows: where a defendant appeared and asserted two claims which went to the merits, in addition to his jurisdictional objection, the defendant had waived personal jurisdiction. Maybin v. Northside Correctional Center, 891 F.2d 72 (4th Cir. 1989).

In the present case, Appellant sufficiently complied with Rule 4 to the extent that the Court had personal jurisdiction of the Respondent and the Respondent had notice of the proceedings. Appellant also sent copies of the Summons and Complaint to Respondent's

business address in Florida and to the attorney who had represented Respondent in the Appellant's prior actions, and who in fact responded and represents Respondent in the subject actions and this appeal. While this method of service was not in exact compliance with the SCRCP, it provided Respondent sufficient notice of the proceedings which it did in fact receive. Respondent waived its objection to personal jurisdiction when it filed its Answer asserting general defenses to Appellant's Complaint, plus nine (9) affirmative defenses. (Answer pp. 5-7; R. pp. 19-20). Therefore, under Dunbar and Smalls, by asserting the additional defenses, Respondent implicitly acknowledged jurisdiction of the court. Therefore, service of process was effective to put Respondent on notice, and jurisdiction was conferred when Respondent voluntarily appeared and alleged defenses to the merits of the case.

CONCLUSION

Appellant asks this Honorable Court to find that when insurance agent sells title insurance to a consumer, the agent, acting on behalf of its principal, has a duty to disclose and explain all material terms of the policy to the extent that the consumer fully ascertains the extent and limitations of coverage. Further, Appellant asks the Court to find that when an insurance company issues title insurance of a sum certain value based on its agent's determination of the value of the underlying property, then there shall be a presumption that the insurance agent conducted due diligence and reasonable inquiry into all the matters of title record that may affect the property's value, and to disclose those matters to the insured, such that a consumer may justifiably rely on the fact that the actual value of the property is

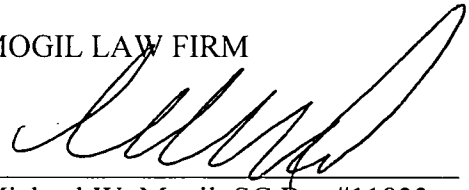
approximately equal to the property's insured value from a title record perspective. Finally, Appellant avers that such justifiable reliance on the agent's due diligence should give the consumer bona fide purchaser status in a subsequent claim against the insurance company arising from any reduction in property value due to a condition relating to the property that could have been ascertained and disclosed to the consumer by the insurance agent at the time the policy was issued.

For the reasons stated, this Court should reverse the judgment of the Circuit Court, and remit this matter for further trial on the merits.

Dated: May 29, 2013

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

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RULE 211 CERTIFICATION

I, Michael W. Mogil, undersigned attorney for the Appellant in the above-captioned case, hereby certify that the Final Brief and Final Reply Brief are identical to the briefs previously served under Rule 208, except: (1) references in the initial briefs have been revised to indicate where the material appears in the Record on Appeal; and (2) obvious typographical errors and misspellings which were contained in the initial briefs are corrected. No other changes have been made.

Michael W. Mogil (SC Bar #11933)
Mogil Law Firm
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Hilton Head Island, SC 29928
Tel. (843)785-8110
Attorney for Appellant

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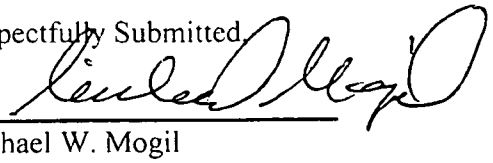
CERTIFICATE OF SERVICE

I, Michael W. Mogil, do hereby certify that on the June 4, 2013, I served true and accurate copies of the Appellant's Final Brief, Final Reply Brief, Record on Appeal and Rule 211 Certification in the above matter, by depositing copies of the same in the U.S. Mail, first class postage prepaid, and addressed to:

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

June 4, 2013

Respectfully Submitted,



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Hilton Head Island, SC 29928
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