DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

REFLECTIONS TOWNHOMES, an Arizona limited liability company, Plaintiff/Appellant, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation; and FIRST AMERICAN TITLE AGENCY, INC., an Arizona corporation, Defendants/Appellees.	1 CA-CV 09-0183 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. S1400 CV0200700674

The Honorable Mark W. Reeves, Judge

AFFIRMED

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B R O W N, Judge

¶1 Reflections Townhomes, LLC, ("Reflections") appeals the superior court's grant of summary judgment in favor of First American Title Insurance Company ("Insurance Company") on Reflections' breach of contract and negligence claims. Because there are no genuine issues of material facts regarding these claims, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Reflections is a manager-managed limited liability company which was formed for the purpose of developing certain real property located in Yuma County (the "property"). At the time of the events giving rise to this litigation, Kent Conlon was the manager of Reflections and Daniel J. Dinwiddie was a member.[2] Conlon and the other members of Reflections, the Robinsons, conveyed the property to Reflections in 2005.

¶3 Dinwiddie allegedly filed a fraudulent amendment to Reflections' Articles of Organization listing himself and "Conlin"[3] as managers of Reflections. In September 2006,

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[1] We view the facts in the light most favorable to Reflections as the party against whom summary judgment was entered. *Angus Med. Co. v. Digital Equip. Corp.,* 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

[2] The complaint alleges Dinwiddie "and/or" his family trust, of which Dinwiddie is a trustee, was a member of Reflections.

[3] In the original Articles of Organization, Conlon's last name is spelled "Conlin."

Dinwiddie entered into a contract agreeing to sell the property to Cactus West Developers, LLC ("Cactus West") for $3,762,900. Dinwiddie signed the contract as manager/member of Reflections. First American Title Insurance Agency, Inc. ("Escrow Agency") handled the escrow and Insurance Company issued a title insurance policy to Cactus West. The closing took place the following month but Reflections' true members were not notified of the purported sale. Dinwiddie received over $1,200,000 from the purported sale. The remaining $2,500,000 was held by Escrow Agency.[4]

¶4 After Reflections discovered the purported sale, Reflections and Cactus West negotiated an agreement in which Reflections agreed to sell the property to Cactus West for the $2,500,000 in escrow and an assignment of Cactus West's rights and claims.

¶5 On January 19, 2007, Reflections, through counsel, sent a letter to "First American Title Company. Aka First American Title Insurance Agency Inc." claiming the sale to Cactus West was fraudulent. Reflections demanded release of the $2,500,000 held in escrow and the $1,200,000 distributed to

[4] On October 18, 2006, Dinwiddie directed Escrow Agency to issue a check in the amount of $2,500,000 to Conlon. On November 11, Escrow Agency issued a stop payment on the $2,500,000 check. Thereafter, Escrow Agency stated it would hold the funds and wait for authorization from the managing members of Reflections on how to disburse.

Dinwiddie. The $2,500,000 was distributed to Reflections in February 2007.

¶6 On June 8, 2007, Reflections, in its own right and as assignee of Cactus West's rights, filed a complaint against Dinwiddie, Escrow Agency, and Insurance Company,[5] among others. The claims pertinent to Insurance Company were breach of contract for "failure of title" and negligence for failing to conduct a reasonable investigation of the property title.

¶7 Insurance Company filed a motion for summary judgment arguing there was no challenge to the title of the property held by Cactus West and that neither Reflections nor Cactus West filed a notice of claim as required by the title insurance policy. Regarding the negligence claim, Insurance Company argued the relevant statute did not provide a private right of action and Cactus West suffered no damages. After oral argument, the court issued an order granting the motion for summary judgment, reasoning as follows:

> [Insurance Company] did deliver a good and marketable [t]itle to Cactus West. No proper claim was ever made against title or proof of loss with regard to the marketability of title
>
> . . .

[5] Insurance Company was named as "First American Title Company, Inc."

> [Insurance Company] fulfilled its obligations in simply delivering a good and marketable title. Had title defects existed that led to the issuance of such policy, then [Insurance Company] would have been responsible for such defects pursuant to the terms of the policy. To be clear, the Court's findings and holdings pertain to [Insurance Company] and do not extend to or are binding against [Escrow Agency].

¶8 The court entered judgment dismissing the two claims against Insurance Company. Reflections timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Breach of Contract

¶9 A court properly grants summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Arizona Rule of Civil Procedure 56(c)(1). On appeal, we determine de novo whether genuine issues of material fact exist and whether the superior court erred in applying the law. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We will affirm a grant of summary judgment if the superior court was correct for any reason. *City of Tempe v. Outdoor Sys., Inc.,* 201 Ariz. 106, 111, ¶ 14, 32 P.3d 31, 36 (App. 2001). The interpretation of an insurance contract is a question of law we review de novo. *First American Title Ins. Co. v. Action*

Acquisitions, LLC, 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (2008).

¶10 In an action for breach of contract, the plaintiff bears the burden of proving the breach of contract and resulting damages. *Chartone, Inc. v. Bernini,* 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004). The contract at issue here is the title insurance policy between Insurance Company and Cactus West.

¶11 Reflections argues the court erred in finding that Insurance Company delivered a good and marketable title to Cactus West. Reflections, through Conlon, signed a deed conveying the property to Cactus West in January 2007. The deed, however, was not delivered to Cactus West until May 2007, after Cactus West executed the assignment of rights. It is undisputed Cactus West currently holds marketable title to the property. Thus, Insurance Company argues there is no defect upon which a claim can be made under the policy. We agree.

¶12 The only claim against Cactus West's title to the property was apparently by Reflections prior to January 2007, although this is not clearly established by the record. Yet, Reflections ultimately agreed to sell the property to Cactus West. There is no evidence showing any other claim was made against Cactus West's title. Reflections argues it did not ratify or authorize Dinwiddie's purported sale of the property.

Instead, Reflections contends there were two transactions; the fraudulent Dinwiddie sale in October 2006 and the sale by Reflections to Cactus West in 2007. Reflections, however, submitted no evidence showing Cactus West obtained a new title insurance policy for the 2007 sale. Therefore, Insurance Company did what it was required to under the contract—insure marketable title to the property. *See Action Acquisitions*, 218 Ariz. at 398, ¶ 11, 187 P.3d at 1111 (explaining a title insurance policy is an agreement by the insurer to insure against losses caused by claims against the insured's title to real property).

¶13 Nevertheless, Reflections appears to argue that title was unmarketable at the time of the Dinwiddie sale and remained unmarketable until May 2007 when Reflections delivered the deed conveying the property to Cactus West. Thus, we must determine whether there is any genuine issue of material fact regarding Insurance Company's liability for the allegedly unmarketable title between October 2006 and May 2007.

¶14 To establish a claim on an insurance policy, a claimant must prove the happening of an event covered by the policy and that notice was given to the insurer pursuant to the terms of the agreement. *Pacific Indemn. Co. v. Kohlhase,* 9 Ariz. App. 595, 597, 455 P.2d 277, 279 (1969). The policy at issue provides:

> The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable.

Additionally, the policy requires proof of loss or damage and for such proof to be signed, sworn and submitted within 90 days after the insured ascertains the facts giving rise to the damage. If an insurer is prejudiced by the failure to file prompt notice or the required proof of loss, the insurer has no liability under the policy. Reflections contends the January 19, 2007, letter sufficiently complies with the policy's notice of claim requirement.[6] We disagree for several reasons.

¶15 First, the letter was sent on behalf of Reflections, not Cactus West, which was the insured under the policy. Reflections asserts the letter was made as an assignee of Cactus West; however, the letter does not state Reflections was making

[6] Reflections also argues a second letter sent on January 22 was a proper notice because it "specified title insurance claims." The January 22 letter merely makes a request for the $2,500,000 and threatens to report "First American Title" to the State of Arizona, citing A.R.S. § 20-1581 (2002) as authority. Section 20-1581 addresses the revocation of licenses of title insurance agents. There is no genuine issue of material fact that this letter does not comply with the policy's notice requirements.

a claim as an assignee of Cactus West.[7] Moreover, the assignment of rights was not effective at the time the letter was written. In its opening brief, Reflections contends the assignment of rights was effective "on or before January 19, 2007," while in its reply brief Reflections contends the assignment was effective "on or before January 7, 2007." However, the assignment was signed on May 31, 2007 and states "Assignment made, effective on signing below." Further, the record reveals negotiations between Reflections and Cactus West regarding the assignment were still ongoing as of May 3, 2007. Thus, the assignment was not effective in January as Reflections alleges.

¶16 Further, even if Reflections properly asserted rights as assignee of Cactus West, the letter does not constitute a sufficient notice of claim. The letter does not mention the title insurance policy or even indicate a claim was being made on the policy. Additionally, the letter does not contain the policy number, nor is it sworn as required by the policy. Because the letter failed to comply with the policy

[7] The letter stated that Cactus West had retained counsel and requested that the funds be turned over to Reflections "as part of a separate settlement Reflections Townhomes LLC has reached with Cactus West." The letter also explained that Reflections agreed to sell the property to Cactus West in exchange "for a sum of money" and the assignment of Cactus West's rights against Insurance Company. Finally, the letter stated: "On behalf of Reflections Townhomes LLC we demand that you restore the funds improperly paid to Mr. Dinwiddie[.]" There is no claim made on behalf of Cactus West.

requirements, the court did not err in determining there was no valid claim or proof of loss against the policy. Accordingly, summary judgment was proper on Reflections' breach of contract claim.

B. Negligence

¶17 To establish a claim for negligence, a plaintiff must prove that a defendant has a duty to conform to a particular standard of care, the defendant breached that duty, a causal connection exists between the defendant's breach and the plaintiff's injury, and actual damages. *Gipson v. Kasey,* 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). A court decides whether a duty exists as a matter of law. *Id.* Although the remaining elements are usually factual issues for the jury, summary judgment may be granted if no reasonable juror could conclude the defendant breached the standard of care or that plaintiff's damages were proximately caused by the defendant's conduct. *Id.* at ¶ 9 n.1.

¶18 Reflections contends that Insurance Company was negligent by failing to conduct a reasonable examination of title pursuant to A.R.S. § 20-1567 (2002). Section 20-1567(A) provides:

> No policy or contract of title insurance shall be written . . . until the title insurer has caused to be conducted a reasonable examination of the title and has caused to be made a determination of

> insurability of title in accordance with sound underwriting practices for title insurers.

According to Reflections, a reasonable examination of title would have revealed (1) the amendment to the articles of organization was forged, (2) Dinwiddie's fraudulent actions, (3) that the property could not be sold without authorization from Reflections, (4) that Reflections' members never authorized the sale, and (5) Conlon's signature "was missing" and/or invalid. Assuming for purposes of this decision that Insurance Company had a duty to Reflections, summary judgment was proper because there was no breach of such duty.[8]

¶19 A title insurer searches public records to identify title defects or encumbrances. *Action Acquisitions, LLC*, 218 Ariz. at 398, ¶ 11, 187 P.3d at 1111; *see also*, *Moore v. Title Insurance Co. of Minn.*, 148 Ariz. 408, 411-12, 714 P.2d 1303, 1306-07 (App. 1985). Reflections does not argue Insurance Company failed to search public records. Further, none of the alleged defects are matters of public record. For instance, the misspelling of Conlon's name in the fraudulent amendment to the articles of organization would not necessarily be a "red flag"

[8] Based on our conclusion, we need not address Insurance Company's arguments that the relevant statute did not provide a private right of action and Cactus West suffered no damages. *See City of Tempe,* 201 Ariz. at 111, ¶ 14, 32 P.3d at 36 (appellate court may affirm a grant of summary judgment if it is correct for any reason).

to Insurance Company because Conlon's name was also misspelled in the original articles of organization. According to the record in this case, Conlon conveyed an interest in the property to the Robinsons, and then Conlon and the Robinsons conveyed the property to Reflections. Dinwiddie, as a purported manager of Reflections, conveyed the property to Cactus West. Additionally, the title insurance policy was issued on October 19, 2006, the same day the deed signed by Dinwiddie was recorded. Thus, the Dinwiddie deed (and the lack of Conlon's signature thereon) would not have been in the public record when Insurance Company conducted its title search. Similarly, the lack of authorization from Reflections' true members would not have been in the public record when Insurance Company did its title search. Finally, none of the alleged defects pertain to the title of the property.[9] Specifically, the issue of whether

[9] To the extent Reflections appears to argue Insurance Company is guilty of negligence *per se* for violating a statute enacted for the protection and safety of the public, we disagree. *Good v. City of Glendale,* 150 Ariz. 218, 221, 722 P.2d 386, 389 (App. 1986). Reflections contends that Insurance Company's actions violate A.R.S. § 20-1567. As discussed above, Reflections submitted no issue of material fact that Insurance Company failed to examine the title. Further, none of the statutes Reflections cites under Title 29 impose a duty on a title insurance company for the actions alleged herein. *See* A.R.S. § 29-653 (discussing limited liability company property); A.R.S. § 29-654(C) (stating an act by a manager or member of a limited liability company that does not carry on business in a usual way does not bind the company); and A.R.S. § 29-657 (imposing liability for false statements in articles of organization).

the sale should have closed without proof of Dinwiddie's authority is an issue that pertains to the Escrow Agency, and not the Insurance Company, as the Insurance Company only insured for risks relating to whether Reflections had good and marketable title.

¶20 Reflections' negligence claim against Insurance Company also fails under the express terms of the policy. The policy excludes from coverage claims which are not shown by public record and those ascertainable "by making inquiry of persons in possession" of the property. The policy also contains the following limitation of liability clause:

> Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

Thus, any claim against Insurance Company, including negligence, is limited to the policy. *See 1800 Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202-04, ¶¶ 7-21, 196 P.3d 222, 224-26 (2008) (upholding a limitation of liability clause in a contract between an engineering firm and a construction developer, concluding it was not contrary to public policy). As discussed above, Reflections has no valid claim under the policy.

¶21 Finally, we reject Reflections' argument that Insurance Company breached its fiduciary duties, because such

argument is premised upon Insurance Company acting as an escrow agent, not a title insurance company.

C. Attorneys' Fees

¶22 Insurance Company requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003). In our discretion, we award Insurance Company its reasonable attorneys' fees and costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶23 For the foregoing reasons, we affirm the superior court's grant of summary judgment in favor of Insurance Company.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge