COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2294 **Cir. Ct. No. 2010CV119**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

COMMUNITY CREDIT UNION,

PLAINTIFF-APPELLANT,

V.

AMERITITLE & ABSTRACT, INC. AND FIRST AMERICAN TITLE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Forest County: LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Community Credit Union appeals a summary judgment dismissing its claims against AmeriTitle & Abstract, Inc. and First American Title Insurance Company. Community Credit sued AmeriTitle and First

American after being denied access by adjacent landowners to a parcel it had foreclosed upon. Against AmeriTitle, Community Credit sought damages for alleged negligence in drafting a title commitment that included a temporary access easement in the property's legal description. Community Credit also sought coverage for lack of access to the property under the title policy issued by First American.

¶2 We conclude the circuit court properly granted summary judgment to AmeriTitle and First American. Because the easement passed by law to subsequent property owners, AmeriTitle was not negligent in including the easement in its title commitment. The easement would have provided Community Credit access as of the date of the title policy, which is all First American insured. Accordingly, we affirm.

BACKGROUND

¶3 Melvin and Kathy Flannery, along with Zachary Mullins, jointly owned real estate in Forest County. In September 2004, the Flannerys transferred their interests in the property to Mullins, who became the sole owner.

¶4 On December 15, 2004, Ron Seils granted Mullins an access easement. The agreement stated the easement was for ingress and egress to the parcel. After setting forth the easement's dimensions, the agreement stated: "SAID EASEMENT IS INTENDED TO BE A TEMPORARY EASEMENT FOR A PERIOD OF FIVE (5) YEARS TERMINATING ON 12/5/09."

¶5 On December 16, 2004, Mullins transferred his property to Jamie Flannery by quit claim deed. The deed did not explicitly mention the easement,

but included boilerplate language that the transfer includes "all appurtenant rights, title and interests."

¶6 In early 2008, Community Credit agreed to refinance Flannery's loan. On May 9, Community Credit obtained a title commitment from AmeriTitle.[1] The legal description of the insured property identified the easement and the fact that it was temporary and would terminate on December 5, 2009. A mortgage was drafted using the same legal description.

¶7 The title policy, issued on May 20, 2008 by First American, provided coverage for lack of access subject to numerous exclusions, including an exclusion for defects, liens, encumbrances, or other matters "attaching or created subsequent to Date of Policy …." It also used the same legal description as the commitment identifying the temporary easement.

¶8 Community Credit foreclosed on the mortgage and became titled owner of the property on June 8, 2009. Eventually, the surrounding landowners informed Community Credit that it did not have access to the premises.

¶9 Community Credit filed suit against AmeriTitle and First American. Community Credit proceeded on a negligence theory against AmeriTitle, asserting that AmeriTitle was "negligent in providing … a commitment showing an access easement to the premises when one did not exist in the name of the owner, Jamie

[1] "A title commitment is a document which describes the property as the title insurer is willing to insure it and contains the same exclusions and general and specific exceptions as later appear in the title insurance policy." ***First Am. Title Ins. Co. v. Dahlmann***, 2006 WI 65, ¶5 n.7, 291 Wis. 2d 156, 715 N.W.2d 609.

Flannery." Against First American, Community Credit sought indemnification for lack of access under the title policy.

¶10 AmeriTitle filed a motion for summary judgment and First American filed a motion to dismiss, which the circuit court later converted to a motion for summary judgment. *See* WIS. STAT. § 802.06(2)(b), (3).[2] The court concluded the easement had passed from Mullins to Flannery by operation of law and AmeriTitle was therefore not negligent by including the easement in the title commitment. With respect to First American, the court concluded the policy merely insured access as of the date of the policy, May 20, 2008. Because the lack of access was a condition created subsequent to that date and known to Community Credit, First American was not obligated to provide coverage.

DISCUSSION

¶11 We review a grant of summary judgment de novo. ***Borek Cranberry Marsh, Inc. v. Jackson Cnty.***, 2010 WI 95, ¶11, 328 Wis. 2d 613, 785 N.W.2d 615. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We address Community Credit's claims against AmeriTitle and First American separately.

AmeriTitle

¶12 Community Credit first claims the circuit court erred by finding AmeriTitle not negligent under WIS. STAT. § 706.10(3). This requires us to

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

interpret and apply that statute, which are questions of law. *See* ***Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals***, 2006 WI 86, ¶14, 292 Wis. 2d 549, 717 N.W.2d 184.

¶13 Community Credit's negligence claim is based on its allegation that AmeriTitle provided "a commitment showing an access easement to the premises when one did not exist in the name of the owner, Jamie Flannery." Thus, Community Credit's claim rests on the premise that Mullins' easement was not transferred to Flannery, either by deed or operation of law.

¶14 AmeriTitle asserts its title commitment was accurate because the easement passed to Flannery under WIS. STAT. § 706.10(3). That statute provides:

> In conveyances of lands words of inheritance shall not be necessary to create or convey a fee, and every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance.

Id.

¶15 AmeriTitle contends that our supreme court's decision in ***Borek*** is dispositive and holds that an easement always follows the dominant estate under WIS. STAT. § 706.10(3). That is not entirely accurate. In ***Borek***, Carl Nemitz purchased an easement from Jackson County giving him water flowage and sand removal rights to adjacent land. ***Borek***, 328 Wis. 2d 613, ¶4. When Nemitz later sold his adjacent property, the deed also purported to transfer the easement. ***Id.***, ¶6. The County later objected, arguing that certain rights were nontransferable because they had been granted to Nemitz alone and not his "heirs, and assigns." ***Id.***, ¶2. The issue in ***Borek*** was whether the absence of such words of inheritance

was intended to impose restrictions on the transferability of Nemitz's easement. The issue was not whether an easement is presumed to follow the dominant estate.

¶16 Nonetheless, we now conclude that WIS. STAT. § 706.10(3) codifies the well-established rule that when an owner conveys the dominant estate, he or she is also presumed to have conveyed any appurtenant interests in the servient estate. "Where an easement is appurtenant to an estate, it follows every part of the estate into the hands of those who purchase or inherit the estate, as long as the burden on the servient estate is not increased." ***Gojmerac v. Mahn***, 2002 WI App 22, ¶25, 250 Wis. 2d 1, 640 N.W.2d 178. An easement passes by subsequent conveyance of the dominant estate, even without express mention in the conveyance. ***Id.*** (citing ***Krepel v. Darnell***, 165 Wis. 2d 235, 245, 477 N.W.2d 333 (Ct. App. 1991)). Subsection 706.10(3)'s presumption—that "every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance"—is fully consistent with these principles.[3]

¶17 Thus, the remaining question is whether the easement here was appurtenant. An appurtenant easement ties the rights and obligations of the servitude to the ownership and occupancy of a particular unit or parcel of land. ***Gojmerac***, 250 Wis. 2d 1, ¶18. In contrast, an easement held in gross does not run with the land and is either personal to an individual, or may be transferred by assignment or delegation. ***Id.***, ¶18 n.5. The language of the easement is key. ***Id.***,

[3] Community Credit puts forth the frivolous argument that an easement is not an interest in land. "An easement is, by definition, 'an interest in land which is in the possession of another.'" ***Garrett v. O'Dowd***, 2009 WI App 146, ¶7, 321 Wis. 2d 535, 775 N.W.2d 549 (quoting ***Eckendorf v. Austin***, 2000 WI App 219, ¶7, 239 Wis. 2d 69, 619 N.W.2d 129).

¶24. Here, the agreement states that the easement was to provide ingress and egress to what was Mullins' parcel. Although the easement was temporary, nothing in the agreement suggested it was for Mullins' benefit alone.[4] We conclude the easement was appurtenant and passed from Mullins to Flannery.[5] Thus, AmeriTitle was not negligent for drafting a title commitment listing the easement.

¶18 Community Credit also asserts summary judgment was inappropriate because AmeriTitle failed to present "any affidavits from the parties to the Deeds or the Easement Agreement showing any intent related to the transfers." However, the parties' intent is primarily drawn from what is written in the deed or agreement. *See* ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). Based on the agreement's plain language, we have concluded the parties intended to create an appurtenant easement. That easement passed by operation of law from Mullins to Flannery. No genuine issue of material fact exists. The circuit court properly granted AmeriTitle's motion for summary judgment.

First American

¶19 Community Credit next argues the circuit court improperly granted summary judgment to First American. Community Credit's appeal involves a substantive component and a procedural component. Substantively, Community Credit contends the court erroneously concluded it was not covered by the title

[4] Further, Community Credit does not argue the temporary nature of the grant rendered it anything less than an easement.

[5] In addition to passing by operation of law, the deed from Mullins indicated that Flannery would receive "all appurtenant rights, title and interests."

policy. Procedurally, it contends the court did not provide sufficient notice before converting First American's motion to dismiss to a motion for summary judgment.

¶20 We first consider Community Credit's challenge to the circuit court's interpretation of the title policy. Title insurance policies are subject to the same rules of construction as are generally applicable to insurance contracts. ***First Am. Title Ins. Co. v. Dahlmann***, 2006 WI 65, ¶24, 291 Wis. 2d 156, 715 N.W.2d 609. An insurance policy is construed according to what a reasonable person in the position of the insured would have understood the words to mean. ***Id.*** We will not adopt a construction of a policy that entirely neutralizes one provision if the contract is susceptible to another construction that gives effect to all of its provisions and is consistent with the general intent of the parties. ***Id.*** Construction of the insurance policy presents a question of law. ***Id.***

¶21 Title insurance policies are unique in the world of insurance. ***Id.***, ¶27. Their purpose is to "indemnify the insured for impairment of its interest due to failure of title as guaranteed in the title insurance report." ***Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.***, 144 Wis. 2d 68, 78, 423 N.W.2d 521 (1988). That is, title insurance protects against losses sustained in the event a specific contingency, such as the discovery of a lien or encumbrance affecting title, occurs. ***Id.*** Because title insurance is largely based on a search of public records to ascertain pre-existing defects, the insurer is in the unique position of being able, through its own work, to eliminate claims. ***Dahlmann***, 291 Wis. 2d 156, ¶27.

¶22 Community Credit argues the plain language of the title policy guaranteed a right of access to and from the land. The insurance policy provides:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY … insures, as of Date of Policy shown in Schedule A, against loss or damage … sustained or incurred by the insured by reason of:
>
> ….
>
> 4. Lack of a right of access to and from the land[.]

Community Credit contends that, by this provision, First American agreed to indemnify it for lack of access occurring any time during the period of indebtedness.

¶23 As the circuit court recognized, the plain language of the policy does not support Community Credit's contention. The policy includes numerous exclusions. Exclusion 3(d) states that there is no coverage for defects, liens, encumbrances, adverse claims, or other matters "attaching or created subsequent to Date of Policy …." The policy was dated May 20, 2008. At that time, Community Credit would have had access to the property by virtue of the easement. Community Credit first lacked access to the property when the easement expired on December 5, 2009. Because the lack of access was created subsequent to the date of the title policy, First American is not obligated to provide coverage.

¶24 Because of this, we must reject Community Credit's attempt to shape a broad rule about the construction of title insurance policies. Community Credit cites foreign law for the proposition that a title policy's legal description

can never limit the policy's guarantee of access.[6] *See* ***Denny's Rests., Inc. v. Security Union Title Ins. Co.***, 859 P.2d 619, 625-26 (Wash. Ct. App. 1993). However, it is exclusion 3(d), not the policy's legal description, which abrogates coverage in this case. Thus, we have no need to consider whether a title policy's legal description may limit coverage for lack of access.[7]

¶25 Community Credit also argues exclusion 3(d) is ambiguous. However, its argument on this point is circular and conclusory. It argues that notwithstanding the exclusion, First American was "aware that access was limited to five years and KNOWINGLY issued an unlimited, no exceptions policy with coverage for loss due to access." Community Credit further argues this purported "no exceptions" policy creates ambiguity as to whether the policy was intended to cover access for the entire mortgage term. Contrary to this assertion, the policy included numerous exclusions. Exclusion 3(d) is applicable here.

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[6] Strictly speaking, a title policy does not guarantee title or access. "[T]he only duty undertaken by a title insurance company in issuing a policy of insurance is to indemnify the insured up to the policy limits against loss suffered by the insured if the title is not as stated in the policy." ***Greenberg v. Stewart Title Guar. Co.***, 171 Wis. 2d 485, 493, 492 N.W.2d 147 (1992).

[7] Accordingly, there is also no need to address the meaning of a particular clause within the title policy's definition of "land." "Land" means

> the land described or referred to in Schedule (A) [the legal description], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, *but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.*

(Emphasis added.) Community Credit contends this clause means the inclusion of a temporary easement in the legal description has no effect on coverage for lack of access. As we have stated, it is exclusion 3(d), not the legal description, that precludes coverage in this case.

¶26 Community Credit also maintains that factual disputes preclude summary judgment. However, the factual issues it identifies are bereft of materiality. Community Credit contends these factual disputes arise in "three main areas": the parties' intent, the clarity with which the policy language was communicated to Community Credit, and Community Credit's reliance on its interpretation of the policy. As we have explained, intent is inferred from the four corners of the policy. ***Rikkers***, 76 Wis. 2d at 188. If the policy is unambiguous—as we have already determined—then First American's explanation of the policy language to Community Credit, as well as Community Credit's own interpretation of the policy, is immaterial.

¶27 Even if we were to delve into these matters, we would agree wholeheartedly with the circuit court's analysis of Community Credit's knowledge and expectations:

> The plaintiff is experienced and sophisticated in these matters. They had knowledge that at the time the "Policy" was issued, ingress and egress to the "Property" was provided by an easement that would expire on December 5, 2009. The "Policy" does not say that there were multiple points of access or that access was guaranteed for all times. It says that as of the date of the policy, there was access. It then advises that the access is limited and due to expire on December 5, 200[9].

The circuit court correctly determined that none of the alleged factual disputes trumped the plain language of the policy.

¶28 Procedurally, Community Credit argues the circuit court converted First American's motion to dismiss to a motion for summary judgment without sufficient notice. If matters outside the pleadings are considered by the circuit court in deciding a motion to dismiss, the motion is treated as one for summary judgment. WIS. STAT. § 802.06(2)(b), (3). The court must provide both parties

with reasonable notice that it will or might convert the motion, although the court need not request additional briefs or affidavits. ***Alliance Laundry Sys. LLC v. Stroh Die Casting Co.***, 2008 WI App 180, ¶20, 315 Wis. 2d 143, 763 N.W.2d 167. "Reasonable notice is that which informs the nonmoving party of the conversion or likelihood of conversion so that they are not taken by surprise." ***Id.*** What constitutes reasonable notice depends on the circumstances. ***Id.***

¶29 We first note Community Credit failed to raise the issue of reasonable notice with the circuit court. At the motion hearing, the court clearly indicated it had considered affidavits and other matters outside the pleadings and was treating First American's motion to dismiss as one for summary judgment. The court specifically asked counsel for Community Credit if he wished to be heard on that issue. Counsel declined and proceeded to address the summary judgment methodology. In the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objection for review. ***Air Wis., Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980). Community Credit did not object or request further time to respond to First American's motion.

¶30 We would reject Community Credit's procedural argument on its merits, too. Community Credit attached more than one hundred pages of supplemental material to its memorandum in opposition to First American's motion to dismiss. These attachments included an appraisal and other documents relating to the refinancing. The circuit court noted that Community Credit's memorandum also referred to an affidavit filed in opposition to AmeriTitle's motion for summary judgment. Thus, it appears that Community Credit invited the circuit court to consider matters outside the pleadings in resolving First

American's motion to dismiss. We have no obligation to review invited error. ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 642-43, 566 N.W.2d 158 (Ct. App. 1997).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.