DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WENIMA DEVELOPMENT, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation, Defendant/Appellee.	1 CA-CV 11-0749 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-053341

The Honorable Michael R. McVey, Judge

AFFIRMED

Walker & Harper, PC — Payson
by Michael J. Harper
Attorneys for Plaintiff/Appellant

Gust Rosenfeld, P.L.C. — Phoenix
by Matthew D. Bedwell
Scott A. Malm
Adam L. Wilkes
Attorneys for Defendant/Appellee

H O W E, Judge

¶1 Wenima Development, L.L.C. ("Wenima") appeals from a grant of summary judgment on its breach of contract and bad faith claims against Lawyers Title Insurance Corporation ("Lawyers"). Finding no genuine dispute of material fact or legal error, we affirm the judgment.

BACKGROUND[1]

¶2 Wenima purchased undeveloped real property ("the Property") in Apache County from Wenima Village, L.P. ("Village") in April 2002. Village's general partners, Larry Chavez ("Chavez") and Dennis Silva ("Silva"), executed a deed purporting to transfer title to Wenima. Lawyers' predecessor in interest, Transnation Title Insurance Company, contemporaneously issued a title insurance policy (the "Policy") in the amount of $1,250,000.

¶3 The Policy provided indemnity coverage for loss or damage from "[a]ny defect in . . . the title," but excluded coverage for defects "resulting in no loss or damage to the insured claimant." Defects "created, suffered, assumed or agreed to by the insured claimant" were also excluded.

¶4 In July 2005, Wenima sued Village over alleged misrepresentations concerning access to the Property. The

[1] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

ensuing settlement required Wenima and Village to arbitrate any disputes about the settlement agreement.

¶5 Village moved to enforce the settlement, claiming that Wenima had delayed in drafting the settlement agreement and had injected new issues. Wenima countered that since the settlement conference it had learned that Chavez had filed for bankruptcy years before the property transfer. This development called "into question whether Chavez had any authority to act on behalf of the Partnership or bind the Partnership in any manner in connection with this action." But Village's counsel affirmed on July 17, 2007, that Silva could execute the settlement agreement and ratify all transactions. The court then found that the settlement agreement was binding.

¶6 Based upon Wenima's continuing concerns, the superior court referred the parties to arbitration to determine whether a receiver was needed to enforce the settlement agreement or the transaction. Wenima then learned that the other deed signatory, Silva, had also filed for bankruptcy before the transaction.

¶7 Wenima argued in the arbitration proceeding that because Chavez and Silva were disqualified as partners before the Property's purchase and their partnership had dissolved, neither had the authority to execute the settlement agreement. Wenima argued that upon the filing of bankruptcy, a general partner ceases to act on behalf of the partnership, and further,

that a limited partnership is dissolved if the partnership has no general partners.[2] The arbitrator agreed with Wenima, ruling that Village could not "deliver clear title" to the property.

¶8 Wenima's counsel notified Lawyers of the arbitrator's ruling and asserted claims "stemming from the failure of title to the insured property." Lawyers ultimately accepted Wenima's claim, subject to Wenima's compliance with the Policy's notice provision.

¶9 Nevertheless, Wenima sued Lawyers for breach of contract, breach of the covenant of good faith and fair dealing, and lack of access to two insured parcels. The parties each moved for partial summary judgment on Wenima's breach of contract and bad faith claims. The trial court granted Lawyers' motion for partial summary judgment on Wenima's claims of breach of contract and breach of the covenant of good faith and fair dealing, finding that Wenima had no claim against Lawyers

[2] Village's partnership agreement provided that upon the occurrence of an event of insolvency, the partnership shall not be continued unless, within ninety days, any remaining General Partners so elect. Here, Silva and Chavez were Village's only general partners. Village's partnership agreement provided that in this circumstance, the business of the partnership shall only be continued if, within ninety days, all remaining limited partners unanimously elect for it to be continued. This did not occur. Wenima also relied on Arizona Revised Statute ("A.R.S.") sections 29-323(4)(b) (a general partner ceases to act in that capacity upon filing a voluntary bankruptcy petition); 29-344(4) (a limited partnership is dissolved when there is no general partner unless the limited partners agree to continue the partnership).

because Wenima (1) created the alleged defect in the title itself by affirmatively raising the title issue with the arbitrator; (2) failed to promptly notify Lawyers about the alleged title defect; and (3) suffered no monetary loss from the alleged defect in the title.

¶10 The parties settled the remaining issues, and the superior court entered a final judgment dismissing the breach of contract and bad faith claims with prejudice. This appeal followed.

DISCUSSION

¶11 Wenima contends that the trial court erroneously granted Lawyers' motion for summary judgment. We review the grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). The de novo standard likewise applies to the superior court's interpretation of contracts. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). We view the facts in the light most favorable to Wenima as the party against whom summary judgment was entered. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242, ¶ 7, 256 P.3d 635, 639 (App. 2011).

¶12 Wenima argues that genuine issues of material fact existed about whether it created the title defect, gave sufficient notice of its claim under the title insurance contract, and suffered a loss because of the defect. We need not

resolve the first two arguments because we find, as did the trial court, that Wenima suffered no loss from the alleged defect in the title.

¶13 In any breach of contract action, the plaintiff must show the existence of a contract, breach of the contract, and resulting damages. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004). A breach of contract claim fails unless the plaintiff proves that it suffered a loss and the amount of that loss. *Id.*; Joyce Palomar, *Law of Distressed Real Estate* § 42:21 (2012) (the insured has the burden to establish that it has sustained "a loss as a result of a title defect, and the amount of that loss or damage").

¶14 The Policy between Wenima and Lawyers also explicitly recognizes this. It states that it is a "contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy . . . ." The Policy excludes "[d]efects, liens, encumbrances, adverse claims or other matters . . . resulting in no loss or damage to the insured claimant." Thus, Wenima was entitled to indemnification only against actual loss or damage. *See Skousen v. W.C. Olsen Inv. Co.*, 149 Ariz. 251, 253, 717 P.2d 930, 932 (App. 1986) (holding that contractual terms "to save harmless" or "hold harmless" protect only against actual loss or damage); *see also*

Falmouth Nat. Bank v. Ticor Title Ins. Co., 920 F.2d 1058, 1062-63 (1st Cir. 1990) (explaining that the mere existence of a defect covered by a title policy does not justify recovery absent evidence of actual loss); *see generally Hauskins v. McGillicuddy*, 175 Ariz. 42, 51, 852 P.2d 1226, 1235 (App. 1992) (explaining that "agreements to indemnify against liability do not require proof of actual payment while agreements to indemnify against loss or damage do").

¶15 Wenima has not sustained actual losses within the Policy's terms. Wenima remains in possession of the Property and is listed on the title. The parties who were able to challenge title——Village's former limited partners——have not, and may now be unsuccessful in doing so. *See Gertz v. Selin*, 112 Ariz. 562, 564, 544 P.2d 1077, 1079 (1976) ("A principal may be estopped to deny the agent's authority where he has allowed others to detrimentally rely on the apparent authority of the agent.").

¶16 Should Wenima attempt to market the Property, Lawyers has agreed to defend against any third-party attack on title and to insure any sale in the same amount of the Policy. Lawyers has also offered to engage counsel to file a quiet title action, should the need arise. To date, no third party has attempted any such attack or filed a lis pendens.

¶17 The only losses Wenima claims are attorneys' fees incurred from litigating with Village, interest on loans Wenima

took out after discovering the alleged defect, and lost profits from development delays. None of these losses derives from a third-party challenge to title, and thus Wenima cannot recover for them. *See generally First Am. Title Ins. Co. v. Action Acquisitions, L.L.C.*, 218 Ariz. 394, 400, ¶ 28, 187 P.3d 1107, 1113 (2008) ("Title insurance principally protects against unknown and unknowable risks caused by third party conduct . . . ."); *see also Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 641 & n.4, 925 P.2d 1354, 1358 & n.4 (App. 1995) (holding that damages consisted of the difference in property value resulting from the defect and declining to adopt an "out of pocket" loss standard).

¶18 To counter the trial court's rejection of its claimed losses, Wenima invokes *Shada v. Title & Trust Co. of Florida,* 457 So.2d 553 (Fla. Ct. App. 1984), *abrogation recognized in Chicago Title Ins. Co. v. Commonwealth Forest Invs., Inc.*, 494 F.Supp.2d 1332 (M.D. Fla. 2007). Its reliance upon *Shada* is misplaced. The *Shada* insured initiated a quiet title action after the insurer refused to do so, and the court found the refusal caused an actual loss. *Id*. at 555-56. Even assuming that a defect exists here, this case is distinguishable because

Lawyers offered to bring an action to quiet title.[3] Accordingly, we affirm the court's grant of summary judgment on this basis.

CONCLUSION

¶19 We affirm the grant of summary judgment to Lawyers. In addition, we award Lawyers a reasonable attorneys' fee on appeal pursuant to A.R.S. § 12-341.01(A) upon compliance with Arizona Rule of Civil Appellate Procedure 21(A).

___/s/_____
RANDALL HOWE, Judge

CONCURRING:

__/s/_____
MAURICE PORTLEY, Presiding Judge

__/s/_____
PATRICIA A. OROZCO, Judge

[3] Wenima's other authority, *Griffith v. Safeco Title Ins. Co.*, does not discuss whether the policy covered the losses claimed. 812 P.2d 420, 422 n.2 (Or. Ct. App. 1991).