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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

BAPCO LLC, *Plaintiff/Appellant*,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Defendant/Appellee.

No. 1 CA-CV 18-0345
FILED 10-29-2019

Appeal from the Superior Court in Maricopa County
No. CV2017-051906
The Honorable Aimee L. Anderson, Judge *Retired*

AFFIRMED

COUNSEL

Kozub Kloberdanz, Scottsdale
By Daniel L. Kloberdanz
Counsel for Plaintiff/Appellant

Fidelity National Law Group, Phoenix
By Patrick J. Davis & Jamey A. Thompson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Judge Peter B. Swann joined.

P E R K I N S, Judge:

¶1 BAPCO LLC challenges the superior court's ruling allowing Fidelity National Title Insurance Company ("Fidelity") to reform a title insurance policy issued by a predecessor-in-interest to reflect two liens senior to BAPCO's lien. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Diversified Lending Group ("Diversified") made a $250,000 loan to Steven Nickolas secured by a deed of trust on a property located in Scottsdale (the "Loan" and the "Deed of Trust," respectively). The Deed of Trust was recorded in December 2006 and provides, in relevant part,

> THIS SECURITY INSTRUMENT IS SUBORDINATE TO AN EXISTING FIRST LIEN(S) OF RECORD.

At that time, the property was subject to two senior recorded deeds of trust: one held by Countrywide Bank in the principal amount of $869,500 and one held by MERS ("CIT Group") in the principal amount of $143,000. Lawyers Title Insurance Corporation ("Lawyers Title") issued a title insurance policy (the "Policy") for the Loan that did not identify either the Countrywide lien or the CIT Group lien.

¶3 In August 2016, BAPCO purchased a portfolio of Diversified assets in a receivership sale and received an assignment of the Loan and the Deed of Trust. BAPCO made a claim under the Policy approximately three months later demanding that Lawyers Title or Fidelity, the current insurer under the Policy, either act to remove the Countrywide and CIT Group liens or pay the $250,000 policy limits. Fidelity declined, stating that Diversified "knew of the Prior [Deeds of Trust] and, rather than pay them off, agreed to have the Insured [Deed of Trust] recorded in third position." It also provided a copy of the closing instructions and stated that

> [T]he failure to carry the proper exceptions forward from the Commitment was merely a clerical error and the Company

> hereby revises the Policy to reflect the exceptions consistent with the instructions and agreement.

¶4 BAPCO sued Lawyers Title and Fidelity, alleging breach of the Policy and bad faith. Fidelity counterclaimed for declaratory relief and for reformation of the Policy, alleging the failure to include the two senior liens in the Policy "was the result of mutual mistake." On the parties' cross-motions for summary judgment, the superior court ruled for Fidelity and allowed the Policy to be reformed. BAPCO timely appealed; we have jurisdiction following the entry of final judgment pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 In reviewing the superior court's rulings on the parties' cross-motions for summary judgment, we review questions of law *de novo* but review the facts in a light most favorable to BAPCO, against whom summary judgment was granted. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191 (App. 1994). The court should grant summary judgment only if it finds there are no genuine issues of material fact and that one party is entitled to judgment as a matter of law. *Grain Dealers Mut. Ins. v. James*, 118 Ariz. 116, 118 (1978). Summary judgment would be inappropriate "if the facts, even if undisputed, would allow reasonable minds to differ." *Nelson*, 181 Ariz. at 191.

I. Fidelity Presented Admissible Evidence Supporting Reformation

¶6 BAPCO contends Fidelity presented no admissible evidence to show Lawyers Title and Diversified—the original parties to the Policy—made a mutual mistake justifying reformation. Our review of the record suggests otherwise.

¶7 Insurance policies may be reformed like other contracts. *A.I.D. Ins. Services v. Riley*, 25 Ariz. App. 132, 135 (1975). Before reformation can be granted, the party seeking it must present clear and convincing evidence that (1) a mutual mistake was made by the parties in drafting the instrument and (2) the parties had a meeting of the minds on a definite intention before the instrument was drafted. *Phil Bramsen Distrib. v. Mastroni*, 151 Ariz. 194, 198 (App. 1986).

¶8 Fidelity introduced an initial title commitment reflecting three senior liens on the property at the time of the Loan, including the Countrywide and CIT Group liens, and requesting indemnification for the first lien, a 2003 lien held by IndyMac Bank, FSB. It further introduced an

amended title commitment that removed the IndyMac lien but again listed the Countrywide and CIT Group liens. It also introduced recording instructions listing the two senior liens and stating that the lien BAPCO would later acquire "will be in 3rd position." Finally, Fidelity introduced a November 30, 2006 letter from Diversified to Equity Title in which Diversified acknowledged it was "aware that the loan extended to . . . Nickolas . . . must record in the 3rd position." Each of these documents are consistent with the Deed of Trust's express language that it was "SUBORDINATE TO . . . EXISTING FIRST LIEN(S) OF RECORD."

¶9 BAPCO contends Fidelity did not establish proper foundation for these documents, having not offered any supporting testimony. BAPCO does not dispute, however, that it obtained the escrow file from Equity Title Agency, nor did it challenge the custodian of records affidavit that accompanied the production. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 214, ¶ 19 (App. 2012) ("The purpose of a custodian's affidavit is to authenticate evidence"); *see also* Ariz. R. Evid. 803(6), 902(11) (providing for the authentication of records via a certification by the records custodian). Moreover, BAPCO did not raise any other objections to these documents, nor did it offer any affirmative evidence to suggest any of them were inaccurate or inauthentic. We thus reject BAPCO's contention that there was no admissible evidence supporting reformation.

II. BAPCO's Assignee Status Is Irrelevant

¶10 BAPCO next contends notice of the Countrywide and CIT Group liens cannot be imputed to it as an assignee of the Policy. BAPCO relies on the Policy's definition of "insured," which includes

> [E]ach successor in ownership of the indebtedness . . . (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land)[.]

BAPCO also cites the Policy definition of "knowledge," which requires

> [A]ctual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

Under these two definitions, BAPCO contends it "is not subject to the defenses that [Fidelity] may make against the original lender . . . as long as . . . BAPCO does not have actual knowledge of the defect in title." We construe the Policy provisions according to their plain and ordinary meaning and, in doing so, seek to enforce the parties' intent. *First Am. Title Ins. v. Johnson Bank*, 239 Ariz. 348, 350, ¶ 8 (2016).

¶11 BAPCO offered affidavit testimony from its managing member to show it did not have actual knowledge of the Countrywide or CIT Group liens when it purchased the Loan and the Deed of Trust. Even assuming this is true—as we must in reviewing a grant of summary judgment—Fidelity only sought reformation of the Policy to reflect the existence of the two liens. BAPCO's lack of actual knowledge has no bearing on whether a mutual mistake occurred in the drafting of the Policy—a process in which BAPCO had no role. BAPCO, as assignee, stands in the shoes of Diversified.

III. The Policy Does Not Prohibit Reformation

¶12 BAPCO also contends Section 14(c) of the Policy prohibits reformation. It provides that

> No ***amendment of or endorsement to*** this policy can be made except by a writing endorsed hereon or attached hereto signed by . . . a validating officer or authorized signatory of the Company.

(emphasis added). We reject BAPCO's contention because amendment and endorsement are not the same thing as reformation.

¶13 Reformation is an equitable remedy that, if granted, as to the parties typically relates back to the date of the original instrument. *Cal. Cas. Ins. v. State Farm Mut. Auto. Ins.*, 185 Ariz. 165, 170 (App. 1996). Whether reformation affects the rights of a third party like BAPCO hinges on whether it had "notice of the mistake or of facts which should put them on inquiry notice." *Id*. (citation omitted); *see also 3502 Lending, LLC v. CTC Real Estate Serv.*, 224 Ariz. 274, 277, ¶ 16 (App. 2010) ("Notice of facts and circumstances which would put a [person] of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose.") (quoting *Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495, 500 (App. 1997)). Here, as noted above, the Deed of Trust states that it is "SUBORDINATE TO AN EXISTING FIRST LIEN(S) OF RECORD." This language placed BAPCO on inquiry notice that the Deed of Trust was not in first position. *See 3205 Lending*, 224 Ariz. at 277,

¶ 16 ("although a party need not search for such facts, that party also 'may not willfully ignore information at hand which would lead to the discovery of . . . adverse claims") (quoting *Valley Nat'l Bank v. Avco Dev. Co.*, 14 Ariz. App. 56, 61 (1971)).

¶14 BAPCO also contends reformation was improper because it was a bona fide purchaser of the Loan and the Deed of Trust. A bona fide purchaser is one who purchases property for value without actual or constructive notice of a prior unrecorded interest. *Delo v. GMAC Mortg., L.L.C.*, 232 Ariz. 133, 138, ¶ 18 (App. 2013) (citing *First Am. Title Ins. v. Action Acquisitions, LLC*, 218 Ariz. 394, 398, ¶ 12 (2008)). Again, the Deed of Trust states that there were preexisting recorded interests. BAPCO thus was not a bona fide purchaser. *See Davis v. Kleindienst*, 64 Ariz. 251, 258–59 (1946) ("[A] purchaser who has brought to his attention circumstances which should have put him on inquiry which if pursued with due diligence would have led to knowledge of an adverse interest in the property, is not a bona fide purchaser.").

IV. Fidelity Did Not Contend the Initial Title Commitment Superseded or Modified the Policy

¶15 BAPCO next contends the initial title commitment discussed above cannot supersede or modify the terms of the Policy, citing *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, 744 F. Supp. 778 (E.D. Mich. 1990). The issue in that case was not whether a title policy should be reformed to reflect senior recorded liens, but "whether the 'knowledge or intimation' language contained in the commitment or the 'actual knowledge' standard described in the policy define Lawyers Title's obligations under the agreement." *Id*. at 782. The court determined that "the terms of the [title] commitment and mortgage title insurance policy . . . make clear that the latter was intended to supersede the former." *Id*. at 783.

¶16 Fidelity does not contend the initial title commitment superseded or modified the Policy; it instead offered it as evidence of a mutual mistake in the drafting of the Policy. *Cf. United Cal. Bank v. Prudential Ins. Co. of Am*., 140 Ariz. 238, 266 (App. 1983) ("The acts of the parties themselves, before disputes arise, are the best evidence of the meaning of doubtful contractual terms."). *Lawyers Title* thus is not persuasive.

V. Reformation Does Not Violate A.R.S. § 20-1591 (2019)

¶17 BAPCO also contends "Fidelity's acts in purporting to add title exceptions that are outside the written title policy violate[] . . . A.R.S. §

20-1591." Section 20-1591 is intended to "ensure that title insurers utilize policy forms approved by the director of insurance." *United Cal. Bank*, 140 Ariz. at 276. But it expressly exempts "[a]ll specific defects in title that may be ascertained from an examination of the risk and excepted in reports, binders or policies." A.R.S. § 20-1591(B)(2). Fidelity did not need Department of Insurance approval to reform the Policy to reflect the Countrywide and CIT Group liens. *See United Cal. Bank*, 140 Ariz. at 276 ("[A.R.S. § 20-1591] does not require title insurers to obtain state approval of particular coverages in individual policies.").

¶18 We thus conclude that the superior court did not err in granting summary judgment to Fidelity. We need not address BAPCO's arguments that (1) its rights in the Loan and Deed of Trust are not time-barred; (2) it suffered a compensable loss under the Policy; and (3) the Loan was not satisfied or converted into stock in an earlier transaction. *See KB Home Tucson, Inc. v. Charter Oak Fire Ins.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014) ("We will affirm summary judgment if it is correct for any reason supported by the record.").

VI. Attorney Fees on Appeal

¶19 Fidelity requests its attorney fees and costs incurred in this appeal pursuant to A.R.S. §§ 12-341.01(A) and -341. Fidelity is the successful party, and BAPCO's claims arise out of the Policy. We thus will award Fidelity reasonable attorney fees and taxable costs upon compliance with ARCAP 21.

CONCLUSION

¶20 We affirm the judgment.

AMY M. WOOD • Clerk of the Court
FILED: JT