

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PULLUM WINDOW CORP.,

Plaintiff,

V

RANDY M. DEPREZ CUSTOM BUILDER,  
INC., RANDY M. DEPREZ, DEBORAH  
DEPREZ, DEPREZ-PASCOE INVESTMENTS,  
INC., RITA A. PASCOE LIVING TRUST,  
COMMUNITY BANK OF DEARBORN,

Defendants,

and

FIDELITY BANK,

Defendant/Third-Party  
Plaintiff/Appellant,

v

PHILIP F. GRECO TITLE COMPANY,

Third-Party Defendant,

and

CHICAGO TITLE INSURANCE COMPANY,

Third-Party Defendant/Appellee.

UNPUBLISHED  
December 21, 2010

No. 294335  
Oakland Circuit Court  
LC No. 2008-093505-CH

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Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant/Third-Party Plaintiff/Appellant, Fidelity Bank, appeals as of right the trial court's grant of summary disposition in favor of Third-Party Defendant/Appellee, Chicago Title Insurance Company (Chicago Title), in the action involving a title insurance contract. Because the language of the title insurance contract was clear and unambiguous, Fidelity Bank has not presented a question of material fact on this record, and we affirm.

The real property involved in this matter is a site condominium development called the Paint Creek Country Club Estates (Paint Creek) located in Oxford, Michigan. Paint Creek Development Group, LLC originally began construction on certain site condominiums within Paint Creek in 2003. On November 9, 2005, Deprez-Pascoe Investments, Inc. (Deprez-Pascoe) purchased 17 condominium units in Paint Creek from the Paint Creek development Group, LLC. The 17 units were identified as follows: 3, 9, 16, 19, 25, 31, 34, 35, 45, 55, 72, 80, 85, 87, 90, 93, and 96. Deprez-Pascoe financed the purchase via a mortgage it secured from Fidelity Bank<sup>1</sup> in the amount of \$1,907,600. In furtherance of the loan transaction, Fidelity Bank procured a commitment for title insurance from Chicago Title. The title insurance policy identifies Chicago Title as the insurer, Fidelity Bank as the insured, the date of the title insurance policy as December 6, 2005, and the amount of title insurance as \$1,907,600. The title policy language states as follows in relevant part:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

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7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

- (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
- (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance

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The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

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<sup>1</sup> At the time of the transaction, Community Bank of Dearborn granted the mortgage, however, now, Community Bank of Dearborn is known as Fidelity Bank.

Thereafter, four separate companies recorded construction liens against Unit 31. Stock Building Supply recorded its construction lien on August 3, 2007 in the amount of \$72,862.14 and noted that it first provided labor or material for an improvement at Unit 31 on April 13, 2007. Norco Contracting Inc. recorded its construction lien on October 19, 2007 in the amount of \$7,130.00 and noted that it first provided labor or material for an improvement at Unit 31 on June 5, 2007. Smede-Son Steel recorded its construction lien on August 7, 2007 in the amount of \$5,247.11 and noted that it first provided labor or material for an improvement at Unit 31 on April 6, 2007. Pullum Window Corp. recorded its construction lien on August 15, 2007 in the amount of \$24,347.73 and noted that it first provided labor or material for an improvement at Unit 31 on May 31, 2007.

In January 2008, Stock Building sought to foreclose its construction lien. Norco Contracting and Smede-Son Steel both followed suit asserting cross-claims to foreclose their own liens. Fidelity Bank submitted a claim to Chicago Title under the title insurance policy in February 2008. The following month Chicago Title denied the claim citing the policy language and indicating that the lien claimants provided the subject work and materials post-policy. Before the parties to the foreclosures began discovery, Fidelity Bank settled with the Stock Building Supply, Norco Contracting, and Smede-Son Steel.<sup>2</sup>

Several months later, in August 2008, Pullum Window Corp. instituted litigation to foreclose its construction lien. Fidelity Bank again submitted a claim to Chicago Title under the title insurance policy that Chicago Title again denied stating that Pullum Window Corp first provided labor and services post-policy and therefore the lien was excluded from coverage. Shortly thereafter, Fidelity Bank filed a third-party complaint against Chicago Title alleging several counts including breach of contract, promissory estoppel, specific performance, and declaratory judgment. The trial court granted summary disposition in favor of Chicago Title on all counts. As a result, Fidelity Bank settled with Pullum Window Corp. in the amount of \$24,347.73. Fidelity Bank now appeals as of right.

We review a motion for summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A trial court should grant a motion brought pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). The nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions,

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<sup>2</sup> Fidelity Bank paid Stock Building Supply \$63,000, Norco Contracting \$4,991, and Smede-Son Steel \$3,936.

admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

“An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties.” *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). An insurance contract should be read as a whole, with meaning given to all terms. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715, 706 N.W.2d 426 (2005). A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). “Clear and unambiguous language may not be rewritten under the guise of interpretation[.]” *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). And, “[c]ourts must be careful not to read an ambiguity into a policy where none exists.” *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

Fidelity Bank first argues that the trial court erred when it held that the title insurance policy provided no insurance coverage for liens for services, labor, or materials. Chicago Title responds that the clear and unambiguous language of the title policy states that construction liens are covered only if they arise from work contracted for or commenced before the effective date of the policy and thus, the construction lien at issue is not within the scope of coverage. Again, the relevant title policy language states as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

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7 Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

- (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
- (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance . . . .

The date of the title insurance policy is December 6, 2005. Section 7(b) is inapplicable to the circumstances of this case. The record evidence indicates that Fidelity Bank fully disbursed the mortgage proceeds at closing on November 9, 2005 and that those proceeds were used to acquire the land, not to make improvements to the land. Furthermore, Christopher E. Westphal, vice president at Fidelity Bank, explicitly testified at his deposition that the loan proceeds were not used to finance the improvements that are the subject of the four constructions liens.

With regard to section 7(a), Chicago Title provides evidence that all four liens at issue state explicitly that the lien claimants first provided labor or material at Unit 31 *after* December 6, 2005. Stock Building Supply's lien states that it first provided labor or material for an improvement at Unit 31 on April 13, 2007. Norco Contracting Inc.'s lien states that it first provided labor or material for an improvement at Unit 31 on June 5, 2007. Smede-Son Steel's lien stated that it first provided labor or material for an improvement at Unit 31 on April 6, 2007. Pullum Window Corp.'s lien stated that it first provided labor or material for an improvement at Unit 31 on May 31, 2007. Additionally, there is record evidence that Randy Deprez Custom Homes, Inc. contracted for trusses from Stock Building Supply on April 9, 2007 and windows from Pullum Window Corp. on April 26, 2007. There is no record evidence regarding when Randy Deprez Custom Homes, Inc. or anyone else contracted for labor or materials from either Norco Contracting Inc. or Smede-Son Steel.

Furthermore, Chicago Title refers us to Section 6 of the Exclusions from Coverage portion of the title insurance policy which states as follows:

6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

Chicago Title asserts that the language in the exclusionary clause is clear and unambiguous and thus, insurance coverage relating to the four construction liens is not only outside the scope of the insuring provisions but also expressly excluded by Section 6 of the Exclusions from Coverage portion of the title insurance policy.

Fidelity Bank as the nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial with regard to the evidence showing that labor or materials were first furnished, or contracted for, *prior to* the date of the contract, December 6, 2005. *Quinto*, 451 Mich at 362. In that vein, Fidelity Bank has provided documentation in the form of a permit history report issued by the Charter Township of Oxford Building Department with regard to Unit 31. The report lists the project as "LOT 31, NEW HOME CONSTRUCTION, PAINT CREEK COUNTRY CLUB." The report shows the owner as Randy Deprez, the contractor as Randy Deprez Custom Builder Inc., and the type of project as residential. It is undisputed that the condominium units in Paint Creek were site condominiums. The report shows that the Township of Oxford completed four inspections on Unit 31 between May 13, 2003 and October 21, 2003, prior to the date of the title insurance policy, December 6, 2005:

Date	Inspector	Type	Result	Type/Description	Result Description
5/13/2003	Tim Berger	B11	001	Post Hole Or Trench Footing  1. TOP SOIL@ INTERIOR OF HOUSE MUST BE REMOVED BEFORE [PLACING OF] SLAB	OK-Passed
5/15/2003	Tim Berger	B10	001	Basement Footing	OK-Passed
6/2/2003	Tim Berger	B20	001	Backfill  1. GARAGE LEAD WALL MAY BE VIOLATING SIDE YARD SETBACK.  2. SURVEYOR VERIFICATION OF PLACEMENT REQUIRED.  3. BACKFILL MAY BE PLACED AFTER CERTIFICATION OF SIDE YARD SETBACK.	OK-Passed
10/21/2003	Tim Berger	B11	001	Post Hole or Trench Footing	OK-Passed

This report seems to indicate that physical improvements to the real property at Unit 31 occurred prior to the date of the mortgage issued by Fidelity Bank on November 9, 2005 as well as prior to the date Chicago Title issued the title insurance policy, December 6, 2005. Fidelity Bank uses the information contained in this report to support its assertion that its claims against Chicago Title “ultimately relate to the priority of Plaintiff Fidelity’s Mortgage as compared to the four Subject Construction Liens.” In order to advance this contention, Fidelity Bank recalls the well-established principle that a construction lien arising under the Construction Lien Act *relates back* to the date of the first actual physical improvement to the property and has priority over all interests recorded after the first actual physical improvement. MCL 570.1119(3); *MD Marinich, Inc v Nat’l Bank*, 193 Mich App 447, 454; 484 NW2d 738 (1992).

But Fidelity Bank’s argument is merely a smokescreen. This case is not about whether the four construction liens had priority over Fidelity Bank’s mortgage under the statutory mandates of the Construction Lien Act—Fidelity Bank sought redress for breach of contract in its complaint. This case is only about the interpretation of the insurance agreement at issue. For

purposes of *lien priority* under the Construction Lien Act, indeed, the information presented in the Township of Oxford Building Department report would be probative evidence of the relation back principle. The report shows that basement footings were inspected and approved by the Township as of June 2, 2003. Thus, logic dictates that the basement footings must have been in place at Unit 31 at that time. Hence, the report might indicate that the four construction liens had priority over the mortgage because they may “relate back” to other, earlier, actual physical improvements made at Unit 31 before Fidelity Bank recorded its mortgage. MCL 570.1119(3); *MD Marinich, Inc.*, 193 Mich App 454.<sup>3</sup> But, for purposes of negotiated title insurance coverage at issue in this case, we decline to overlay the relation back principle of the Construction Lien Act on the parties’ insurance contract. As such, because the relation back principle of the Construction Lien Act has no bearing on the dates at issue in this case, all four construction liens are clear that the lien claimants first provided labor or material at Unit 31 *after* December 6, 2005. Therefore insurance coverage relating to the four construction liens is outside the scope of the insuring provisions as well as expressly excluded from coverage in the contract.

Fidelity Bank also asserts in its brief on appeal that the title insurance policy was not issued in accordance with the commitment. Fidelity Bank requests that Chicago Title be required to specifically perform so as to issue a title insurance policy that does not except from coverage “any lien or right to a lien for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown of (sic) the public records.” Fidelity Bank also requests that the Court grant relief on its promissory estoppel claim and enforce “Chicago’s promise to provide coverage . . . to avoid injustice.” But the record belies Fidelity Bank’s claim that the title insurance policy was not issued in accordance with the commitment. Westphal testified that the title insurance policy issued by Chicago Title was “appropriately issued

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<sup>3</sup> This Court in *MD Marinich*, 193 Mich App 458-459, contemplated situations where lenders in the construction finance industry “would not risk subordinating their mortgage interests to lien claimants who are not known at the time a loan is made but are able to relate their liens back to the date of the first actual physical improvement on the project.” The Court stated that:

While we agree . . . that there is a potential risk for lenders contemplating the financing of construction projects, there is an adequate remedy afforded such lenders by the Construction Lien Act, MCL 570.1119(4) which provides for the recording of the mortgage interest before the first actual physical improvement is made. In addition, advances made by mortgage lenders after the first actual physical improvement is made may still enjoy priority over construction liens under MCL 570.1119(4) if the mortgagee has received a sworn statement from the contractor pursuant to MCL 570.1110. [*Id.*]

It would certainly seem unfair in this situation and others like it to simply transfer the lender’s potential risk to the title insurance company, especially where (1) the Construction Lien Act provides adequate remedies to lenders, and, (2) title insurance companies may contract out of the risk, as Chicago Title has done here.

pursuant to the commitment” and that Fidelity Bank never objected to the form of the policy that was issued. Fidelity Bank has not shown error and is not entitled to specific performance or relief on its promissory estoppel claim.

Affirmed. Chicago Title, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio  
/s/ Mark J. Cavanagh  
/s/ E. Thomas Fitzgerald