FILED

02/27/2024

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 22-0486

DA 22-0486

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 39

GILBERT R. JOHNSTON and JUDITH A. JOHNSTON, husband and wife; STEPHEN R. GIBBS; SCOTT SHONE; DONALD S. SMITH and BRENDA J. SMITH, husband and wife as trustees of the Donald S. Smith and Brenda J. Smith AB Living Trust; RACHELLE AMBER McCRACKEN; MICHAEL ALLEN McCRACKEN; SEAN JUSTIN SMITH; GERALD B. WOODAHL and SUSAN A. WOODAHL, husband and wife; JEFFREY M. HOLLENBACK; JIM S. FERGUSON; ERIC W. SMART and STEPHANIE NICOLE SMART, husband and wife; NANCY CORDIAL; EDS INVESTMENTS, LLC, an Arizona limited liability company; NEWS DEVELOPMENT, LLC a Montana limited liability company; and JCO PROPERTIES, LLC, a Montana limited liability company,

Plaintiffs and Appellants,

v.

FLYING S TITLE & ESCROW, INC., f/k/a FIRST AMERICAN TITLE COMPANY,

Defendant and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-14-570
Honorable Jason Marks, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

David B. Cotner, Kyle C. Ryan, Brian T. Geer, Cotner Ryan Law, PLLC, Missoula, Montana

For Appellee:

Michael S. Dockery, Jeffrey M. Roth, Jeffrey R. Kuchel, Crowley Fleck PLLP, Missoula, Montana

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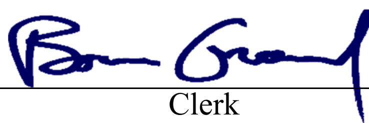
Submitted on Briefs: June 7, 2023

Decided: February 27, 2024

Filed:



Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Appellants Gilbert and Judith Johnston *et al.* (collectively "Appellants") appeal the order of the Fourth Judicial District Court, Missoula County, granting summary judgment to Appellee Flying S Title and Escrow, Inc., (Flying S)[1] in the litigation they commenced regarding the failed Gleneagle subdivision. We affirm and consider the following issue:

> *Did the District Court err by holding that Flying S is not contractually liable to Appellants for title insurance on the disputed properties?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Gleneagle at Grantland subdivision (Gleneagle), as originally platted, consisted of 94 lots[2] on approximately 73 acres in Missoula County, north of Missoula. Missoula County approved Gleneagle in 1985, but in 1989 acquired it by tax deed. In 1997, Ken Knie and Mark Denton, Gleneagle's developers, sued Missoula County to reclaim the subdivision from the County. That litigation resulted in a 1999 settlement agreement (the Settlement Agreement), which allowed the developers to reacquire the subdivision. The developers agreed to reconfigure 67 *lots* in the subdivision into 25 larger *parcels*. For that purpose, Knie was required to install necessary infrastructure and to record an amended plat to reflect the lot consolidation, which would create the new parcels and allow them to

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[1] Flying S previously operated under the name First American Title Company, and was referred to in the District Court's orders as "FATCO." Flying S is an insurance agency, not to be confused with First American Title Insurance Company, the title insurer in this case.

[2] A critical distinction is made in this case between the approved land divisions within the Gleneagle subdivision, denominated as "lots," and the proposed reconfigured land divisions within the same subdivision, which never came to exist, but which are referenced on documents in the record as either "parcels" or "tracts."

be conveyed.[3] Ultimately, the necessary infrastructure was not installed, and the amended plat was never recorded.

¶3 The Appellants, with and as part of a larger group of entities and individuals (collectively "Buyers"), subsequently purchased land within the subdivision. At closing, the Buyers received warranty deeds stating they had purchased *lots*, which warranty deeds were recorded. However, according to affidavits filed by Appellants in litigation with Missoula County, their intention in purchasing the lots was ultimately to obtain or purchase the proposed *parcels*. They alleged that they were made to believe, by Knie, that the lots they would purchase would be re-platted and consolidated into the desired parcels, and that the funds generated by the lot sales were necessary to finance the process of developing infrastructure and re-platting the subdivision. The Buyers thus undertook purchase of the lots.

¶4 Each transaction was facilitated by a form sales agreement, titled "Offer to Purchase," although signed by the developers as Sellers. These documents, ostensibly between the Sellers and Buyers, listed the property to be purchased by its existing lot description, with an "AKA" reference to the proposed reconfigured parcel. For example, lead Plaintiffs Gilbert and Judith Johnston's "Offer to Purchase" document provided for their joint purchase of "Lots 56 & 57 of GlenEagle at Grantland," and thereunder stated

[3] The District Court order approving the 1999 Settlement Agreement determined that no new subdivision or other division of land was created by the Agreement, as the effect was only to restrict development of the previously platted and approved Gleneagle subdivision.

"AKA Parcel 10."[4] The document stated that Sellers would "furnish title insurance." Flying S, as agent of First American Title Insurance, issued a "Lot Commitment" in July 2006 to each buyer, offering title insurance underwritten by First American for the lots described in their agreement. The Johnstons' Lot Commitment described the property to be purchased as "Lots 56 and 57 of Gleneagle at Grantland Addition, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof." In contrast to the "Offer to Purchase" documents, the Lot Commitments offering title insurance to Appellants did not make reference to the proposed parcels.

¶5 Throughout the purchase process, the Appellants—the only Buyers who remain in this litigation—were represented by attorney Gerald Steinbrenner. Steinbrenner requested Flying S to provide Appellants, in addition to the Lot Commitments, "pro forma" documents that would reflect the title insurance that could be issued for the contemplated *parcels*. Though contrary to its business practices, Flying S obliged and configured a document in the form of a commitment, which it entitled "Pro-Forma," and a document configured as a title insurance policy, likewise entitled "Pro-Forma," to each Appellant. The Pro-Forma commitment form reiterated the "Policy Amount" and "Premium Amount" that were listed on each Appellant's actual Lot Commitment, but because the parcels did not exist, the legal descriptions of the property within each Pro Forma commitment form

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[4] For ease of reference, we will cite to the Johnstons' version of the common purchase documents to exemplify the documents utilized by all the Appellants. The provisions of the documents were the same, except for references to individual properties and corresponding purchase prices and premiums.

were not completed. The Johnstons' Pro Forma document, for instance, described the property as "Parcel ____ of Retracement Certificate of Survey No. ____, being Lots 56 and 57, a platted subdivision in Missoula County, Montana, according to the official recorded plat thereof." Each Pro-Forma commitment form provided that, among the "requirements [that] must be met," "[d]ocuments satisfactory to us creating the interest in the land and/or the mortgage to be insured must be signed, delivered and recorded," including "a copy of the recorded retracement survey." Appellants were instructed therein that they also needed to obtain "a commitment to insure setting forth these requirements" from Flying S. The commitment form further specified that "[i]f the Requirements shown in this Commitment have not been met within six months after the Commitment Date, our obligation under this Commitment will end." Similarly, the Pro Forma policy form provided with the Pro Forma commitment form provided the following disclaimer:

> NOTICE: This is a Pro Forma Policy furnished to or on behalf of the party to be insured. It neither reflects the present status of title, *nor is it intended to be a commitment to insure*. The inclusion of endorsements as part of the Pro Forma Policy *in no way evidences the willingness of the Company to provide any affirmative coverage shown therein*.
>
> *There are requirements which must be met before the final Policy can be issued in the same form as this Pro Forma Policy. A commitment to insure setting forth these requirements should be obtained from the Company.*

(Emphasis added.)

¶6 In August through September 2006, the Appellants individually closed on their purchase of the properties. They signed a document issued by Flying S, titled "Closing Escrow Instructions Purchase," stating that they, as Buyers, "agree to purchase the

hereinafter property as described in Schedule A of [the Lot Commitment]" issued to them for the purchase of the lots. Each Appellant was issued a warranty deed that described and granted their purchased properties only in terms of lots. Johnstons' warranty deed described their property as "Lots 56 and 57 of Gleneagle at Grantland Addition." Flying S accepted premiums from Appellants, ranging between $277 and $447 for each transaction, according to the amount stated in the Lot Commitments and reiterated in the Pro Forma commitment form, for a total amount of premiums received from all Appellants of $2,636.

¶7 Affidavits submitted by Appellants during the ensuing litigation against Missoula County demonstrated that, at the time of closing, Appellants were then aware they were purchasing lots, but that they believed their interest would transition to ownership of parcels upon completion of the subdivision revision process, a project the developers would fund with the proceeds of their purchases of lots. Steinbrenner sent two letters to each Appellant, one before and one after closing, which discussed the proposed process of transitioning from lots to tracts, and using almost identical language in both letters: "The title company has indicated that *we can obtain* title insurance which will identify the number of the *future tract, as opposed to the presently identified lots* and easements." (Emphasis added.) No tract or parcel numbers were identified in the Pro Forma commitment forms, or ever identified, because the necessary infrastructure was not completed and no amended plat creating the desired parcels was ever recorded.

¶8 In 2013, developer Knie filed for Chapter 7 Bankruptcy. In December 2013, many Buyers, including Appellants, sued Missoula County, alleging, *inter alia*, that Missoula County's failure to ensure the subdivision's infrastructure was constructed as required had rendered their properties worthless, rendering the County liable for losses stemming from their purchases of the lots.[5] In that litigation, the district court granted summary judgment in favor of the Buyers, reasoning that the County's failure to secure an infrastructure development guarantee from Knie constituted a violation of the Montana Subdivision and Platting Act. In August 2017, the Buyers and the County settled. In exchange for a payment of $2,265,000, the Buyers, including Appellants, transferred their ownership interest in the lots to the County, via individual warranty deeds for each of the lots.[6]

¶9 In May 2014, while the Missoula County litigation was pending, the Buyers, including Appellants, filed this case against First American and Flying S.[7] They sought damages stemming from First American's and Flying S's failure to issue title insurance policies for the parcels. Initially, the case was stayed pending resolution of the Missoula

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[5] *See Johnston v. Missoula County*, Cause No. DV 2013-1421.

[6] Under Paragraph 2 of the "Agreement" settling that litigation, as well as Paragraph 7 of the accompanying General Release, titled "Transfer of Lots," the Appellants agreed to transfer "the lots in each Plaintiff's name in Gleneagle at Grantland free and clear of any liens or encumbrances, subject to a proration of taxes and any assessments as of the date of the deeds of transfer," to Missoula County.

[7] After filing the Missoula County lawsuit, litigation counsel for Buyers sent a letter to First American seeking on the Buyers' behalf "benefits under the terms of each of the separate title insurance policy," including "attorney's fees, costs and expenses" related to the Missoula County litigation. First American responded by acknowledging receipt of the claim letter and asked for individualized claim information so it could conduct an investigation. Over the course of several months, First American repeatedly requested the claim information, but never received a response.

County litigation, and after that litigation was settled, all the Buyers filed a Third Amended Complaint that alleged eight causes of action, including, *inter alia*, negligent misrepresentation, unjust enrichment, and constructive fraud, while the Appellants, as a subgroup of the Buyers, asserted four additional claims, including breach of contract (Count VI). Under Count VI, Appellants claimed that the Pro Forma commitment form was a contract for title insurance of the parcels that First American and Flying S breached by failing to issue a policy, resulting in damages.

¶10 In July 2020, the District Court granted summary judgment to First American and Flying S on all of Appellants' claims, except for Count VI. The summary judgment order noted, on the basis of their affidavits, that Appellants were aware at closing they were purchasing lots rather than parcels, reasoning, "it is indisputable that Plaintiffs knew at closing that the amended plat had not been finalized and that re-platting lots and infrastructure development would occur post-sale using proceeds from the sales." After this summary judgment order, only the Appellants, who were the only Plaintiffs-Buyers to have alleged Count VI, remained in the litigation.

¶11 In September 2020, First American settled, paying Appellants the sum of $225,000, including, as designated, "for damages allegedly arising out of their contract claim as set forth in Count VI . . . ." First American was then dismissed from the case. Having substantially narrowed the case, the District Court heard oral argument solely on the issue of whether Flying S had breached a contract with Appellants. In its July 2022 Order, the District Court granted summary judgment to Flying S. Relying on language in the Pro

Forma commitment form stating, "We agree to issue a policy to you according to the terms of this Commitment," and "[w]hen we show the policy amount and your name as the proposed insured . . . this Commitment becomes effective," but not citing the disclaimer language specifically stating the pro forma documents did not constitute a commitment to insure, the District Court held the Pro Forma forms had "evolved from preliminary reports, or offers, to binding contracts," because Appellants had paid premiums to Flying S. However, the District Court further reasoned that Flying S's contractual obligation expired when Appellants "failed to provide [Flying S] with a recorded retracement survey within six months of the Commitment Date, July 21, 2006," and thus failed to satisfy the requirements of the contract. Rejecting Appellants' argument that their breach would simply have given Flying S the right to rescind the contract, which Flying S waived by inaction, the District Court held that the plain language of the Pro Forma commitment form "provides for *automatic* termination of First American's/[Flying S]'s obligations to [Appellants] in such a scenario," and no affirmative action by Flying S was required. (Emphasis in original.) It further reasoned that Appellants received a benefit from payment of their premium "by getting a six-month window to provide" Flying S with the necessary documents to proceed with insuring the parcels.

¶12 From the judgment in favor of Flying S, Appellants appeal.

STANDARDS OF REVIEW

¶13 "Using the same criteria as the district court, '[t]his Court reviews a district court's entry of summary judgment and the interpretation of an insurance contract de novo.'"

Christian v. United Fire & Cas. Co., 2023 MT 100, ¶ 10, 412 Mont. 340, 530 P.3d 456 (quoting *Nat'l Indem. Co. v. State*, 2021 MT 300, ¶ 21, 406 Mont. 288, 499 P.3d 516). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). "We must determine whether the court correctly found no genuine issue of material facts existed and whether it applied the law correctly." *Hardy v. Vision Serv. Plan*, 2005 MT 232, ¶ 10, 328 Mont. 385, 120 P.3d 402

¶14 "[G]eneral rules of contract law apply to insurance policies." *Steadele v. Colony Ins. Co*., 2011 MT 208, ¶ 18, 361 Mont. 459, 260 P.3d 145. "The existence of a legal duty is a question of law also subject to de novo review." *Phipps v. Old Republic Nat'l Title Ins. Co*., 2021 MT 152, ¶ 10, 404 Mont. 336, 489 P.3d 507. "Whether or not a contract exists is a combined issue of fact and law." *Johnston v. Palmer*, 2007 MT 99, ¶ 38, 337 Mont. 101, 158 P.3d 998. "We will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *Mont. Democratic Party v. State*, 2020 MT 244, ¶ 6, 401 Mont. 390, 472 P.3d 1195.

DISCUSSION

¶15 *Did the District Court err by concluding that Flying S is not contractually liable to Appellants for title insurance on the disputed properties?*

¶16 Appellants argue that, although the District Court properly determined the Pro Forma commitment forms were enforceable contracts to insure their title to the parcels, it nonetheless erred by failing to hold that the requirements for creating such insurable

properties were conditions precedent to *performance* of the contract, which therefore limited Flying S's remedies, upon the failure of those conditions, to either recission or specific performance of the contract. Because Flying S failed to pursue either remedy, Appellants contend Flying S waived its remedies and must honor the contract.

¶17 In answer, Flying S argues the District Court appropriately concluded Flying S was not liable for provision of title insurance of the parcels, but that it did so for the wrong reasons. According to Flying S, it was not liable to Appellants under the Pro Forma documents because they did not constitute a contract for insurance on the parcels. Rather, the Pro Forma documents were merely an *offer* to issue a title insurance policy for the parcels, subject to the terms therein. As such, the requirements for creating the parcels as an insurable interest functioned as a condition precedent to *formation*, and when the conditions were not completed or met, a contract was never formed. Flying S also argues that a title insurance contract could not exist under the Pro Forma documents because the parcels, and the title thereto, never existed. Lastly, Flying S contends that, even if a contract was formed, the contract was between Appellants and First American because Flying S acted exclusively as an agent for First American, a disclosed principal, and is therefore exempted from liability under agency principles.

¶18 Generally, as the parties note, a title insurance commitment, or "preliminary report," as stated in § 33-25-105(7), MCA, is "merely 'an offer to issue a title insurance policy' . . . subject to the terms stated in the commitment," and does not constitute an insurance policy itself. *Phipps*, ¶ 14 (quoting § 33-25-105(7), MCA). While the parties focus their

arguments on whether the Pro Forma documents constituted a formed contract for insurance of the parcels or merely an offer to issue insurance for the parcels upon the satisfaction of conditions, largely overlooked by the parties' arguments is the record history of their interactions, which include the completion of a title-insured transaction, supported by consideration, involving the *lots*.

¶19 As between *Appellants and the sellers*, or developers, Appellants entered an "Offer to Purchase" document that indeed referenced both the properties to be purchased, with the approved lot legal descriptions, and an "AKA" description referencing the parcels. This document also stated that sellers would provide title insurance. However, the Lot Commitments issued to Appellants for those transactions by Flying S contained nothing about the proposed parcels, but rather identified only the lots of record, and committed to insure only those lots. The closing documents signed by Appellants referred only to the lots, and the warranty deeds issued to each Appellant likewise referenced only the lots. Appellants each paid the premiums quoted in the Lot Commitments issued by Flying S to satisfy the conditions of the offer. The nondocumentary evidence is consistent, with the District Court noting that it was "indisputable" that Appellants knew at the time of closing that they were then purchasing only the lots, but had been led to believe by Knie that, upon action completed by third parties, the lots would later be reconfigured into parcels. Counsel confirmed this in two letters to Appellants, one before and one after the closing, both indicating that "we can obtain title insurance" for the "future tract." In reasoning that the Pro Forma documents were supported by the consideration of the paid premiums, the

District Court overlooked that those premiums had been paid for something else—a "live" transaction for which Flying S, as it had offered, provided insurance for Appellants' title to the lots. The four elements of a contract were satisfied for this purpose: contracting capacity, consent, a lawful object, and sufficient consideration. Section 28-2-102, MCA. Thus, a contract between Appellants and Flying S was indeed formed—but for the purpose of insuring the *lots*, for which Flying S has never denied coverage. Appellants later transferred, as the record title owners of the lots, their interests to the County in exchange for a settlement payment. Had they not been the record owner of the lots, they could not have done so.

¶20 It is Appellants' claim that they purchased the lots with the understanding that future actions to be completed by third parties would culminate in the creation of the parcels to which their ownership interest would transfer. They sought and received documents from Flying S to illustrate the title insurance that could be obtained for that future interest, titled "Pro Forma." In concluding that these documents constituted a contract, the District Court quoted therefrom that, "[w]e agree to issue a policy to you according to the terms of the Commitment," but this was standardized language that would come into effect only as part of a completed contract, as the "Pro Forma" title reflected. The documents were appropriately titled Pro Forma because, according to their terms, Flying S had not yet agreed to insure the parcels. While Appellants regard the Pro Forma documents as a commitment to insure the parcels, it is clear the requirements for the issuance of such insurance were not finally identified by the documents. Indeed, in addition to disclaiming

that they were not "intended to be a commitment to insure," and that they "in no way evidence[] the willingness of the Company to provide any affirmative coverage shown herein," the Pro Forma documents expressly instructed Appellants that "there are requirements that must be met before" insurance could issue, and that Appellants still needed to obtain "*a commitment to insure setting forth these requirements*" from Flying S. (Emphasis added.) This was never done.

¶21 Appellants argue that Flying S should have rescinded the Pro Forma documents, but there was not yet a contract to rescind. Flying S could not yet have agreed to insure the parcels because the requirements or conditions for obtaining such insurance had not been finally determined or stated. Ultimately—even assuming all conditions for contracting had been established—the object of the proposed contract became impossible and failed, because the necessary actions by the third parties were not completed and the parcels never came into existence. *See* § 28-2-601, MCA ("The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do."). "Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void." Section 28-2-603, MCA.

¶22 Flying S was not unjustly enriched by Appellants' premium payments because it provided, as it agreed, title insurance for the transaction completed by Appellants to purchase the lots. Unlike the Pro Forma commitment forms, the Lot Commitments, as explained above, encompassed lawful objects because they committed to insure the title to

properties that actually existed and were therefore insurable, and Appellants knowingly consented to this coverage by paying the quoted premiums and closing the transactions.

¶23 Here, however, Appellants are pursuing a claim of title insurance to the parcels, which is the only claim before the Court. Although we employ different reasoning than the District Court, we agree that Appellants' claim fails.

¶24 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR