STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 17, 2013)

RAYMOND C. GREEN, INC., and BUILDERS FIRST FINANCIAL, LLC	:	
vs.	:	**C.A. No. WC/10-0096**
UNITED GENERAL TITLE INSURANCE CO., MICHAEL BESTWICK, STEVEN DETOY, ELIZABETH DOLAN, CAROL HEUSTON, and CHARLES STAMM, in their Capacities as MEMBERS of the TOWN COUNCIL of the TOWN of NORTH KINGSTOWN, JEFFREY CAMPOPIANO, PE, WESLEY GRANT III, ENVIRONMENTAL SURVEYING & PLANNING, INC., VINCENT RINALDI, JR., and PLEASANT VALLEY, LLC.	:	

DECISION

STERN, J. Before the Court are three Motions for Summary Judgment in this breach of contract, negligence, breach of warranty and slander of title action. Jurisdiction is pursuant to G.L. 1956 § 8-2-14 and Super. R. Civ. P. 56.

I

Facts and Travel

In 2005, Defendant Town of North Kingstown (Town) approved a residential subdivision plan for "The Falls at Pleasant Valley." Included in the plan was a property located at 327 Delano Drive, North Kingstown, Rhode Island (Lot 19 or Property), which is the subject of this dispute.

Defendant Professional Engineer, Jeffrey Campopiano (Campopiano), prepared the original subdivision plan. See Mem. in Supp. of Partial Summ. J. filed by Defendant United General Title Insurance Co. (UGT Memo.) Ex. 3. Defendant Wesley Grant III (Grant), a Rhode Island licensed land surveyor, "stamped" the plan. Id. Grant is the principal of Defendant Environmental Planning and Surveying, Inc. (EPS) a surveying company located in Wakefield, Rhode Island. (Tr. 2, Oct. 5, 2012).[1] The title abstract for Lot 19 had been prepared by West Bay Title Company (West Bay), which is not a party to this suit. (Aff. of Vincent Rinaldi at 1.) The subdivision was recorded in the Town's Land Evidence Records on September 7, 2005. (UGT Mem.; Ex. 3.)

In 2006, Campopiano prepared an amended subdivision plan which was administratively approved by the Town and was recorded on July 19, 2006. (UGT Mem.; Ex. 4.) Grant "stamped" the amended plan as well. Id. Lot 19 was depicted on both the original and amended subdivision plans. (UGT Mem.; Exs. 3-4.)

The amended subdivision plan depicted a different boundary line than the one contained in the original subdivision plan. Id. This line reflected a downward adjustment in the size of Lot 19 from 41,400 square feet to 29,332 square feet, and represented a loss of 12,068 square feet from the rear boundary line. (UGT Mem.; Ex. 16.)

In May 2007, Thomas Huling (Huling) obtained a building permit for Lot 19 from the Town. Thereafter, Huling installed a foundation on the Property. The Town's building official inspected the foundation in June 2007.

[1] In the Complaint, Environmental Planning and Surveying, Inc. was designated incorrectly as Environmental Surveying and Planning, Inc. See Mem. In Supp. of Defs.' Wesley Grant III and Environ. Planning [and] Surveying, Inc.'s Mot. for Summ. J. on Co-Defendants' Cross-Claims, at 1. For ease of reference, the Court will refer to this party as EPS in the Decision.

On August 2, 2007, Plaintiffs Raymond C. Green, Inc. (RCG), and Builders First Financial, LLC (Builders) (collectively, Plaintiffs) provided Huling with an $810,000 construction loan for Lot 19. At the time, Huling jointly owned Lot 19 with another party, who quit-claimed her interest in the property in favor of Huling at the loan's closing. The loan was a "wraparound" mortgage covering Lot 19 and another undeveloped lot located at 230 Delano Drive (Lot 11).

Defendant Vincent Rinaldi, Esq. (Rinaldi) served as Huling's closing and title attorney for the construction loan. (Aff. of Vincent Rinaldi at 1.) In that capacity, Rinaldi received a title update for Lot 19 from West Bay Title Company. Id. During the course of his representation, Rinaldi drafted and provided Plaintiffs with a title opinion letter. Id. at 2. The Plaintiffs had required said opinion as part of their agreement to finance the construction loan. In addition, Rinaldi provided Plaintiffs with a "Lender's" policy of title insurance issued by UGT.

When Huling subsequently defaulted on his payment obligations, Plaintiffs foreclosed on the loan and took ownership of Lots 19 and 11 on August 27, 2008. (UGT Mem.; Ex 7.) The foreclosure purchase price for both properties totaled $355,000, or $177,500 each. Id. This total equaled the amount that previously had been advanced to Huling on the construction loan.

On September 30, 2008, the Town rescinded the building permit because the "application and site plan misrepresented the zoning setbacks of the project." (UGT Mem.; Ex. 8.) On October 6, 2008, Plaintiffs notified UGT about the revocation and zoning violation. (UGT Mem.; Ex. 9.) On June 18, 2009, Plaintiffs informed UGT that it was willing to settle its claim for $125,000 in loss of value, plus expenses. (UGT Mem.; Ex. 10.) On October 20, 2009, UGT acknowledged liability on the policy, but disputed alleged losses. (UGT Mem.; Ex. 11.) Thereafter, Plaintiffs filed the instant action.

In their Complaint, Plaintiffs set forth nine counts against the various parties. Count I alleges negligence against all of the parties. Count II is a breach of warranty claim against Grant and EPS. In Count III, Plaintiffs allege "Breach of Contract and Negligence" against UGT. Count IV is a "Breach of Contract and Negligence" claim against Rinaldi. Count V alleges negligence against the Town. In Count VI, Plaintiffs accuse the Town of slandering title. Count VII is a negligence claim against Campopiano. Count VIII alleges negligence against Pleasant Valley, LLC. In their final claim, Count IX, Plaintiffs allege a breach of warranty of title against Pleasant Valley, LLC.

After filing the instant Complaint, Plaintiffs sold Lot 11 for $145,000 (UGT Mem.; Ex. 13) and Lot 19 for $120,000 (UGT Mem.; Ex. 11.) The Plaintiffs alleged in interrogatories that the dimunition in value of Lot 19 was $200,000. (UGT Mem.; Ex. 15.) UGT's appraiser calculated the dimunition in value due to the 12,068 square footage loss to be $29,000 on the date of the foreclosure sale. (UGT Mem.; Ex. 16.)

Meanwhile, on May 2, 2012, EPS and Grant entered into a release and settlement agreement with Plaintiffs. Thereafter, Defendants Rinaldi and UGT, the Town, and Pleasant Valley, LLC, each filed cross-claims against Co-Defendants EPS, Grant, and Campopiano, seeking contribution and indemnification.

Presently before the Court are the following motions: (1) Rinaldi's Motion for Summary Judgment as to Count IV of the Complaint; (2) UGT's "Motion for Partial Summary Judgment on the Issue of Liability, the Proper Measurement of Damages, and the Right of [UGT] to Subrogation (Counts I and III)"; and (3) "[Co-]Defendants Wesley Grant III and Environmental Planning [and] Surveying, Inc.'s Motion for Summary Judgment on Co-Defendants' Cross-Claims."

II

Standard of Review

Summary judgment is proper when, after reviewing the admissible evidence in the light most favorable to the non-moving party, "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). When considering a motion for summary judgment, "the court may not pass on the weight or credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Westinghouse Broad. Co., Inc. v. Dial Media, Inc., 122 R.I. 571, 579, 410 A.2d 986, 990 (R.I. 1980) (internal citations omitted).

During a summary judgment proceeding, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981). Moreover, if no genuine issue of material fact exists, the trial justice may determine "'whether the moving party is entitled to judgment under the applicable law.'" Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980) (quoting Belanger v. Silva, 114 R.I. 266, 267, 331 A.2d 403, 404 (1975)). "When there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is properly entered." Tangleridge Dev. Corp. v. Joslin, 570 A.2d 1109, 1111 (R.I. 1990); Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating that "summary judgment is proper when there is no ambiguity as a matter of law").

III

Analysis

A

Rinaldi's Motion for Summary Judgment

Rinaldi has filed a Motion for Summary Judgment with respect to Count IV of the Complaint, which Plaintiffs simultaneously characterize as a claim for negligence and breach of contract. However, the factual allegations underpinning the claim invoke only a negligence theory and fail to allege even the existence of a contract, much less its breach thereafter. Consequently, the Court deems Count VI only to be a negligence claim.

In his Motion, Rinaldi asserts that the only theories of recovery that might be available to Plaintiffs are vicarious liability and legal malpractice, but that such theories are unavailing in this case. Thus, he contends that he cannot be found vicariously liable under the doctrine of respondeat superior because his relationship with West Bay was that of employer/independent contractor rather than that of principal/agent. In support of this assertion, he maintains that because he engaged West Bay as an independent contractor to prepare the title report, he did not have a duty to investigate and/or verify West Bay's title examination. Next, Rinaldi maintains that as each and every statement in the title opinion letter to Plaintiffs was correct, there were no material errors in the letter that might subject him to a claim of legal malpractice.

The Plaintiffs counter that Rinaldi is legally responsible for any negligence committed by West Bay because it was Rinaldi, not Plaintiffs, who contracted with West Bay. The Plaintiffs also dispute Rinaldi's claim that the opinion letter contained no material errors.

With respect to vicarious liability under the doctrine of respondeat superior, our Supreme Court has declared:

> "Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another." DelSanto v. Hyundai Motor Finance Co., 882 A.2d 561, 565 n.11 (R.I. 2005).

It is important to remember "that the legal construct of vicarious liability does not transmogrify a non-tortfeasor into a tortfeasor." Id. Accordingly, "the principles of vicarious liability apply where only the agent has committed a wrongful act. The principal is without fault. The liability of the principal arises simply by the operation of law and is only derivative of the wrongful act of the agent." Id.

To prove the existence of an agency relationship, the following evidence must be demonstrated: "(1) a manifestation by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) an agreement between the parties that the principal will be in control of the undertaking." Powers v. Coccia, 861 A.2d 466, 470 (R.I. 2004). Thus, "[t]he essence of an agency relationship is the principal's right to control the work of the agent, whose actions must primarily benefit the principal." Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995).

A person who employs an independent contractor generally will not be liable for the negligence of that contractor. Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1117 (R.I. 2004); see also Ballet Fabrics, Inc. v. Four Dee Realty Co., Inc., 112 R.I. 612, 617, 314 A.2d 1, 4 (1974) ("[O]ne who engages an independent contractor to perform work is not liable for the negligent acts of the contractor or his employees in performing th[at] work . . . ."). An independent contractor is defined as one who contracts to do a piece of work according to his or her own methods, and without being subject to the control of his or her employer except as to the result of

that work. See Lake v. Bennett, 41 R.I. 154, 156, 103 A. 145 (R.I. 1918). Thus, "independent contractors are independently employed persons who offer 'services to the public to accept orders and execute commissions for all who may employ such person in a certain line of duty, using his or her own means for the purpose of being accountable only for the final performance.'" Powers, 861 A.2d at 471 (quoting 41 Am. Jur. 2d Independent Contractors § 1 at 397 (1995)).

At first glance, it appears that West Bay fits the classic definition of an independent contractor; namely, one who contracts to perform a piece of work according to his or her own methods, and without being subject to the control of his or her employer except as to the result of that work. See Lake, 41 R.I. at 156, 103 A. 145. However, according to Plaintiffs, Rinaldi acknowledged that he hired West Bay without Plaintiffs' knowledge; that West Bay worked for him, and not Plaintiffs; that the work was performed in order to provide him with support for his opinion letter; and that Plaintiffs were unaware of West Bay's input at the time the letter was received. Accordingly, Plaintiffs posit that there is a genuine issue of material fact as to whether West Bay was an agent of Rinaldi rather than an independent contractor because Rinaldi ordered the work, knew what needed to be done, received the work product and judged its sufficiency, and then incorporated the results into his letter and held the opinion out as his opinion based on his review of pertinent documents and facts. The Plaintiffs also contend that Rinaldi never represented that he would engage third parties to perform work for which he would not be responsible and that, unlike many other independent contractor situations, such as in construction, Plaintiffs had no reason to know or suspect that the work had been outsourced to a third party.

Given that the determination of employer/independent contractor status is fact intensive, and considering Plaintiffs' allegations, there are genuine issues of material fact that preclude summary judgment in the instant matter. However, even assuming that Rinaldi established that West Bay was an independent contractor, the analysis would not end at this point because, under certain circumstances, a party may be liable for the negligence of his or her independent contractor. See Ballet Fabrics, Inc., 112 R.I. at 612, 314 A.2d at 1 (1974). Under these circumstances or exceptions, an employer may be held liable:

> "(1) on the ground of his being subject to a nondelegable duty; or (2) in respect to work that by its very nature is likely to cause harm unless proper precautions are taken; or (3) with respect to work which is unquestionably inherently dangerous; or (4) where the owner of a structure without formally accepting the contractor's work assumes practical control by appropriating it to the use for which it is built." Id. 112 R.I. at 622, 314 A.2d at 7.

In the present case, the only exception that could apply would be if the Court were to find that Rinaldi had been subject to a nondelegable duty; namely, the duty to examine and clear title. In Lawyers Title Insurance Corp. v. Groff, 808 A.2d 44 (N.H. 2002), the New Hampshire Supreme Court refused to classify the duty to examine title as nondelegable, stating that to do so would result in "open[ing] up an unrealistic and undue liability channel not only with respect to the relationship of attorneys to [title abstractors] but, by analogous extension, also to many other relationships in which attorneys retain specialists and experts in the discharge of their professional obligations to clients." Id. at 50. The court then noted, however, that "an attorney does not 'escape liability' by hiring an independent contractor to examine title[,] [because] [t]he attorney remains subject to liability for negligently hiring, supervising or retaining the abstractor, negligently reviewing the abstractor's report, or negligently rendering an opinion based upon the

abstractor's report." Id.

However, Plaintiffs have not alleged nor provided any evidence that Rinaldi was negligent in hiring, supervising or retaining West Bay, that he negligently reviewed West Bay's report, or negligently rendered an opinion based upon said report. The problem in this case is that the report itself was inaccurate, not that Rinaldi negligently misconstrued the report. Consequently, assuming that Rinaldi could show that West Bay was an independent contractor, then he could not be held negligent under a theory of vicarious liability for West Bay's acts for purposes of Count IV.

The Plaintiffs also contend that Rinaldi owed and breached a duty to Plaintiffs, as non-clients, such that he is liable to them for attorney malpractice. In Credit Union Central Falls v. Groff, 966 A.2d 1262 (R.I. 2009), our Supreme Court observed that:

> "Generally, an attorney owes no duty to an adverse party. Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 907 (R.I.2002). The attorney-client relationship is contractual in nature and "the gravamen of an action for attorney malpractice is 'the negligent breach of [a] contractual duty' * * *." Church v. McBurney, 513 A.2d 22, 24 (R.I.1986) (quoting Flaherty, 492 A.2d at 627). Fraud is a well-settled exception to the privity requirement that historically bars nonclient recovery for attorney malpractice. See Nisenzon v. Sadowski, 689 A.2d 1037, 1046 n. 12 (R.I.1997) (attorney may be liable to nonclients "when his conduct is fraudulent or malicious") (quoting Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex.Ct.App.1985)); see also Savings Bank v. Ward, 100 U.S. 195, 195, 203-04, 25 L.Ed. 621 (1879)." Id. at 1270-71.

"[F]or a non-client to establish a duty owed by the attorney to the non-client, the latter must allege and prove that the actual intent of the client to benefit the non-client was a direct purpose of the transaction or relationship." Groff, 966 A.2d at 1271. Accordingly, "the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party." Id. This exception is:

> "narrow [in] scope [and] [p]roperly applied, . . . will not expose the attorney to endless litigation brought by those who might conceivably derive some indirect benefit from the contractual performance of the attorney and his client. Moreover, this exception should have limited application in adversarial proceedings because our Code of Professional Responsibility requires that a lawyer represent his client zealously within the bounds of the law . . . and that the lawyer ordinarily not represent or act for conflicting interests in a transaction." Id.

The court observed "that an attorney who produced a title certification for his client's lender owed the lender a duty as a third-party beneficiary [because] . . . the lender specifically required the title certification before it would lend the money and that the purpose of the attorney's certification, therefore, was to 'inspire confidence' on the part of the lender." Id. (citing Kirby v. Chester, 331 S.E.2d 915, 919-20 (Ga. App. 1985).

Quoting the Kirby Court, our Supreme Court stated:

> "Title certification was expressly directed to [the lender]. It was a declaration intended and tending to inspire confidence. It was given so that [the lender] could trust that [the borrower's] representation that he owned the . . . property was legally correct. By its nature, it sought to invoke reliance on the professional expert opinion rendered and thus to serve as a catalyst for the loan to be made. The client [borrower] did not himself need the assurance; [the lender] did. [The borrower] needed it only so that [the lender] would act to provide [the borrower] with the money he wanted." Id. at 1272.

Although fraud has not been alleged by Plaintiffs in their Complaint, there are allegations that Rinaldi was not a disinterested party because he had a personal involvement in the property as a member of Pleasant Valley Development, LLC, the entity which conveyed the property to Huling in 2005. See Aff. of Ralph E. Stokes, Esq. at 3, 5.

Furthermore, it appears that Plaintiffs are third-party beneficiaries to the contract between Huling and Rinaldi. The opinion letter was generated for Plaintiffs' benefit. In that letter, he stated:

> "7. Both parcels are located in the Town of North Kingstown zoned for residential use, both comply with all current laws, regulations or ordinances for the construction of a single family residence. Both parcels are zoned RRC and are presently vacant parcels upon which a single family home is to be constructed.
>
> 8. All permits and approvals for the development, construction and operation of the Premises have been obtained, except for building permits which will be obtained in the ordinary course of business, and for which there is no impediment to issuance, the Premises is located on a public way, and the Premises, when developed shall comply with all subdivision and wetland laws, ordinances, rules and land use, zoning regulations, covenants and restrictions required by statute, order, ordinance or regulation of the Town of North Kingstown . . . " Opinion Letter, dated August 2, 2007, at 2.

While the statements in the letter may technically be correct, the building permit issued by the Town was based upon a boundary line that was incorrect. Thus, at this point, it is premature to grant Rinaldi's Motion for Summary Judgment on Count IV because there are genuine issues of material facts as to whether West Bay was an independent contractor, and as to whether Rinaldi owed a duty to Plaintiffs as non-parties to the Huling-Rinaldi contract. Consequently, Rinaldi's Motion for Summary Judgment is denied

B

UGT's Motion for Summary Judgment

UGT acknowledges that it is obligated to pay damages under the policy, but asserts it is not liable in tort for the negligence of third parties. The Plaintiffs initially conceded that UGT is not liable for negligence, but contended that there was a genuine issue of material fact as to the date of the placement of the foundation and asserted that UGT was liable for damages resulting from the post-policy placement of the foundation.[2] However, during oral argument Plaintiffs

[2] The title insurance policy excludes damages resulting from:

essentially dropped this claim. Consequently, the issue before the Court is the amount of damages that UGT is liable to pay Plaintiffs under the policy.

UGT maintains that its expert provided a proper comparable sales analysis to estimate damages in the amount of $29,000, as opposed to the naked, conclusory assertion of a $60,000 loss provided by Plaintiffs' expert. The Plaintiffs counter that it has provided sufficient evidence of a genuine issue of material fact as to the amount of damages payable by UGT.

The Court observes that "[t]he purpose of the summary-judgment procedure is to identify disputed issues of fact necessitating trial, not to resolve such issues." Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996); see also Saltzman v. Atlantic Realty Co., 434 A.2d 1343, 1345 (R.I. 1981) ("The purpose of summary judgment is issue finding, not issue determination.") However, "naked and conclusory assertions in an affidavit are inadequate to establish the existence of a genuine issue of material fact . . . ." Weaver v. American Power Conversion Corp., 863 A.2d 193 (R.I. 2004).

Generally, when the issue of property valuation comes before the Court, it is in the context of condemnation proceedings. There, our Supreme Court has held "that evidence of comparable sales is the preferred indicator of fair market value." Sweet v. Town of West Warwick, 844 A.2d 94, 98 (R.I. 2004). Such an approach requires an analysis of:

> "Any . . . governmental regulation restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land; (ii) the character, dimensions, or location of any improvement now or hereafter erected on the land or any parcel of which the land is or was a part . . . except that a notice of enforcement thereof or a notice of a defect . . . resulting from a violation or alleged violation affecting the land has been recorded in the public records at the date of the policy." See UGT Mem.; Ex. 6, Exclusion 1(a).

> "prices paid in the open market at or about the time of the taking for substantially similar and comparable properties, when available and when proper adjustments can be made for minor differences between the properties. Significant factors that affect comparability include location and character of the property, proximity in time of the comparable sale, and the use to which the property is put. Generally, when evidence of comparable sales is available, other methods of deducing fair market value should not be employed. . . Evidence of comparable sales is preferred because such figures provide the best evidence of fair market value. When evidence of comparable sales is not available or is inappropriate, however, other methods of valuation may be employed." Id. (internal quotations and citations omitted) (emphasis added).

Thus, "the finder of fact may deviate from the comparable sales method of valuation when the evidence of comparable sales is 'no longer probative.'" Id. (quoting Corrado v. Providence Redevelopment Agency, 117 R.I. 647, 657, 370 A.2d 226, 231 (1977)).

During oral argument, UGT suggested that the proper method of valuing Plaintiffs' loss is through a comparable sales analysis. It further contended that Plaintiffs failed to provide such an analysis; consequently, its expert opinion on the issue should be accepted as a matter of law.

Bearing in mind that the Court's function at this juncture is to determine whether there exist genuine issues of material fact, the Court observes that Plaintiffs provided the Court with an affidavit from expert Real Estate Appraiser, Peter D'Allesandro. Attached to that affidavit was an exhibit purporting to estimate the value of both parcels as of August 2007 and October 2010, as well as purporting to estimate the difference in value for Lot 19 as a result of the reduction in square footage. According to Mr. D'Allesandro's calculations, the difference in the value was $60,000. This amount differs from UGT's estimate of $29,000.

Although UGT asserts that its valuation comparable sales approach may be the preferred method of valuing property in a property takings context, the Court recognizes that this is not the only valuation method available. Furthermore, although UGT takes issue with the valuation

provided by Plaintiffs' expert, the Court is satisfied that said valuation raises a genuine issue of material fact concerning the value of Plaintiffs' loss under the contract. Consequently, UGT's Motion for Partial Summary Judgment as it relates to damages is denied.

C

Grant's and EPS's Motion for Summary Judgment against Cross Claimants

In their Cross-Claims, Rinaldi and UGT seek contribution and indemnification from Grant, EPS and Campopiano, pursuant to chapter 6 of title 10, entitled "Contribution Among Tortfeasors Act (the Tortfeasors Act)," as well as common law contribution and indemnification and equitable contribution and indemnification. Defendants Grant and EPS (Movants) have filed a Motion for Summary Judgment against Cross-Claimants Rinaldi, UGT, the Town, and Pleasant Valley asserting that they are not liable for contribution or indemnity. Specifically, they assert that their release and settlement agreement with Plaintiffs precludes recovery under the Tortfeasors Act. They further maintain that Co-Defendants had actual and constructive knowledge of the corrected boundary line since July 2006, when it was filed in the Town's Land Evidence Records and that, as such, Co-Defendants are not entitled to equitable contribution and/or indemnification.

In response, Rinaldi asserts that Movants' status as joint tortfeasors is a material fact in dispute, thus precluding summary judgment on the statutory claim. UGT maintains that the Tortfeasors Act does not impair its right of indemnity under existing law (see G.L. 1956 § 10-6-9 ("This chapter does not impair any right of indemnity under existing law")), and that it has a

right to equitable contribution and subrogation. Neither the Town nor Pleasant Valley filed objections to this motion.[3] The Court first will address the claims under the Tortfeasors Act.

Recently, our Supreme Court succinctly declared:

> "When the language of the statute is clear and unambiguous, it is our responsibility to give the words of the enactment their plain and ordinary meaning. Moreover, when we examine an unambiguous statute, there is no room for statutory construction and we must apply the statute as written.
> The plain meaning approach, however, is not the equivalent of myopic literalism, and it is entirely proper for us to look to the sense and meaning fairly deducible from the context. Therefore we must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections. It is generally presumed that the General Assembly intended every word of a statute to have a useful purpose and to have some force and effect, and this Court's ultimate goal is to give effect to the purpose of the act as intended by the Legislature. Finally, under no circumstances will this Court construe a statute to reach an absurd result." Peloquin v. Haven Health Center of Greenville, LLC, 61 A.3d 419, 425 (R.I. 2013) (internal citations and quotations omitted).

The term "joint tortfeasors" is defined as "two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them . . . ." Sec. 10-6-2. The right of contribution among joint tortfeasors exists under the Tortfeasors Act, "provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares." Sec. 10-6-2.

[3] The Court grants the Motion for Summary Judgment against the Town and Pleasant Valley because they have waived any opposition that they may have had to the motion for failure to file an objection. See Dallman v. Isaacs, 911 A.2d 700, 704 (R.I. 2006) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (quoting Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir. 1995)).

If an injured party releases one tortfeasor on liability, such release "reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." Sec. 10-6-7. However:

> "A release by the injured person of one joint tortfeasor does not relieve him or her from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors." Sec. 10-6-8.[4]

In the present case, Rinaldi asserts that before Movants may be released from liability under this provision, they must be joint tortfeasors in the first instance. He maintains that there exist genuine issues of material fact as to whether Movants are joint tortfeasors because, although Movants do not admit that they are joint tortfeasors in the release and settlement agreement, they claim that they are entitled to immunity under the Tortfeasor Act. Rinaldi also maintains that there are genuine issues of material fact involving causation and that, until the causation issue is resolved, it is not possible to determine whether the Movants may be jointly and severally liable. The Movants contend that whether or not they are joint tortfeasors is not a valid basis for denying summary judgment and that assuming that they are joint tortfeasors, then the claim would be prohibited under the Tortfeasor Act.

The settlement agreement at issue in this case provides, in pertinent part: "[Plaintiffs] further agree that to the extent damages are recoverable in the Lawsuit by [Plaintiffs] against the tortfeasors other than [Grant and EPS] that recovery shall be reduced to the extent of [Grant's and EPS'] pro rata share." The Court finds that the language of the settlement agreement

[4] It is undisputed that neither of the non-moving parties have secured a money judgment against Movants as required by § 10-6-8.

comports with the requirements set forth in § 10-6-8. Accordingly, to the extent that a jury should determine that Grant and EPS are liable to Plaintiffs, Co-Defendants would be entitled to a set-off with respect to their pro rata share of any judgment. Furthermore, should Movants prove not to be joint tortfeasors, then the Tortfeasors Act would not apply and Co-Defendants could not prevail on their claim for contribution under the statute. Consequently, the Motion for Summary Judgment is granted as to the Cross-Claims for statutory contribution filed by Rinaldi and UGT.

Before addressing Co-Defendants' other claims for indemnification and contribution, the Court next will address UGT's claim for subrogation. It claims that it is entitled to contribution and/or indemnity from any Defendant who is culpable based upon its common law and contractual/conventional rights of subrogation.

Our Supreme Court has declared that "[c]onventional or contractual subrogation allows the title insurer to 'stand in the shoes' of the insured creditor when it pays an obligation in satisfaction of the express terms of their policy." Credit Union Central Falls, 966 A.2d at 1275. Thus, "[i]n its broadest sense, subrogation is the substitution of one person for another, so that he may succeed to the rights of the creditor in relation to the debt or claim and its rights, remedies and securities. The doctrine is derived from the civil law from which it has been adopted by the courts of equity." Hawkins v. Gadoury, 713 A.2d 799, 804 (R.I. 1998). A claim for "[s]ubrogation requires, (1) the existence of a debt or obligation for which a party other than the subrogee is primarily liable, which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests." Credit Union Central Falls, 966 A.2d at 1275. Thus, when an insurance company is neither a volunteer nor an intermeddler and has a contractual obligation to protect its insured, once it discharges its debt, it

becomes "entitled to all rights and remedies which the Insured claimant would have had against any person or property in respect to the claim had this policy not been issued." Id.

It is undisputed that UGT provided a policy for title insurance. UGT contends that because it is neither a volunteer nor an intermeddler, it is entitled to subrogation in the instant matter. However, it also is undisputed that UGT has not paid on the title insurance policy; thus, it appears that any claim that it may have had for subrogation never ripened. Meanwhile, however, Plaintiffs entered into a release and settlement agreement in which Plaintiffs released and forever discharged Movants:

> "of and from all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damage, injury and any and all claims and liabilities whatsoever of every name and nature, both in law and in equity that involve or relate to the subdivision and property that is the subject of the Lawsuit referenced below. Releasors specifically release Releasees from any claims and all liabilities which Releasors ever had, now have, or may hereafter have on account of damage alleged to have been sustained which are, or could have been asserted by Releasors against Releasees in the civil action pending in Superior Court . . . ." (Release and Settlement Agreement at 1).

In accordance with this agreement, Plaintiffs no longer have any causes of action against Movants. Consequently, assuming that UGT pays on the policy, it would not be entitled to subrogation because, standing in Plaintiffs' shoes, they would not have any more rights than those that Plaintiffs possess. See, e.g., Hawkins, 713 A.2d at 804 ("Defenses which would not have been available against the creditor or obligee cannot, as a rule, be interposed against the subrogee, including the defense of limitations.") Accordingly, the Court concludes that UGT is not entitled to subrogation.

The Co-Defendants assert that they are entitled to legal and equitable indemnification. Rinaldi asserts that there is an issue of material fact as to whether Movants provided proper

notice of the boundary line change when they only recorded the change as against the subdivision, rather than as against each individual lot within the subdivision. Rinaldi also contends that there is an issue of material fact as to whether the subdivision recording, which consisted only of dotted lines with no explanations, was sufficient constructive notice of the boundary change.

Although "[a]t common law, a right to indemnity is generally contractual in nature . . . indemnity may also be based on equitable principles." Wilson v. Krasnoff, 560 A.2d 335, 341 (R.I. 1989). "[A]n equitable right to indemnity exists when one has been held liable solely because of the wrongful act of another." Id. The reason for this is that "[t]he concept of indemnity is based upon the theory that one who has been exposed to liability solely as the result of a wrongful act of another should be able to recover from that party." Muldowney v. Weatherking Products, Inc., 509 A.2d 441, 443 (R.I. 1986). Furthermore "[e]veryone is deemed responsible for the consequences of his or her own acts[;] [t]his responsibility extends not only to the person directly injured but also to the one indirectly harmed by being held liable by operation of law." Id.

To prevail on an action for indemnity, a claimant must prove three elements:

> "first, the party seeking indemnity must be liable to a third party, second, the prospective indemnitor must also be liable to the third party, and third, as between the prospective indemnitor and indemnitee, equity requires the obligation be discharged by the potential indemnitor. One situation satisfying this third element is when a potential indemnitor is at fault and the prospective indemnitee is blameless." Id. (internal citation omitted).

Essentially, UGT and Rinaldi in this case each maintain that they are blameless. UGT contends that it is blameless in this case because it is not liable in tort; rather, it simply is an insurer of the title. Rinaldi maintains that there exist genuine issues of material fact concerning

the proximate cause of Plaintiffs' injuries that prevent the granting of summary judgment. Essentially, Rinaldi is maintaining that "but for" Movants' negligence in recording an improper boundary line, coupled with their failure to properly remediate the mistake by recording solid-line change as to each specific lot in the subdivision, Rinaldi would not have committed any alleged negligence.

After reviewing the evidence, the Court is satisfied that there exists a genuine issue of material fact as to whether Movants provided proper notice of the boundary line change in July 2006. The record reveals that the newly recorded subdivision plan delineated both the new boundary line and the Town line with dashed markings. The record also reveals that the new boundary line was not recorded against the individual properties in the subdivision. While our Supreme Court has declared that notice of a restrictive covenant in the recording of a subdivision constitutes constructive notice to the individual properties within said subdivision (see Martellini v. Little Angels Day Care, Inc., 847 A.2d 838, 842 (R.I. 2004)), there exists a genuine issue of material fact as to whether the dashed lines, with no explanations, was sufficient constructive notice of the boundary change. Consequently, Movants' Motion for Summary Judgment on the Cross Claims for common law indemnification is denied.

With respect to the Cross-Claims for equitable contribution, it is well settled that "[t]he doctrine of equitable contribution is applied to prevent one of two or more guarantors from being obliged to pay more than his or her fair share of a common burden, or to prevent one guarantor from being unjustly enriched at the expense of another." Thomas v. Jacobs, 751 A.2d 732, 734 (R.I. 2000) (citing Mellor v. O'Connor, 712 A.2d 375, 380 (R.I. 1998). Thus, according to this doctrine:

> "when one of two guarantors pays the entire outstanding debt, he or she is entitled to contribution in the amount of half the payment.

> Or, if the same guarantor paid three-quarters of the outstanding debt, the guarantor could seek contribution for the amount over and above his or her share, namely one-quarter, of the debt. If this guarantor, instead, satisfies one-quarter of an unpaid liability, the guarantor would not have an action for contribution because he or she has not paid more than his or her fair share of the common burden." Thomas v. Jacobs, 751 A.2d at 734.

In the instant matter, there is no evidence that Movants are contractually obligated to make any payments in relation to this dispute; therefore, there is no conceivable situation where they could be considered joint obligors with either UGT or Rinaldi. Consequently, Movants' Motion for Summary Judgment on the issue of equitable contribution is granted.

IV

Conclusion

In light of the foregoing: (1) Rinaldi's Motion for Summary Judgment on the issue of negligence is denied; (2) Rinaldi's Motion for Summary Judgment on the contractual claim is denied; (3) UGT's Motion for Partial Summary Judgment is denied; (4) Grant's and EPS's Motion for Summary Judgment is granted as to the statutory claims and the equitable contribution claims; and (5) Grant's and EPS's Motion for Summary Judgment on the issue of equitable indemnification is denied.

Counsel shall submit an appropriate order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Raymond C. Green, Inc. and Builders First Financial, LLC v. United General Title Insurance Co., et al.
CASE NO:	WC/10-0096
COURT:	Washington County Superior Court
DATE DECISION FILED:	June 17, 2013
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
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For Defendant:	Stephen B. Kenyon, Esq. Kyle M. Zambarano, Esq. John D. Meara, Esq.