SATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
JOHN DORRITIE and DANIELLE DORRITIE

Plaintiff,

DECISION and ORDER
INDEX NO. 08-202
RJI NO. 19-08-3457

-against-

NICOLINO BUOSCIO, MARIA BUOSCIO, LAWYER'S TITLE INSURANCE CORPORATION, SANTO ASSOCIATES LAND SURVEYING AND ENGINEERING, P.C., LAKE AND MOUNTAIN REALTY, LLC and CENTURY 21 HEARTLAND REALTY,

Defendants.

Supreme Court Greene County All Purpose Term, May 1, 2009

APPEARANCES:

Philips & Millman, LLP
Attorneys for Plaintiffs
Frank J. Phillips, Esq. of Counsel
50 Route 9W
Stony Point, New York 10980

Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP
Attorneys for Defendants Buoscio
Jason L. Shaw, Esq. of Counsel
436 Union Street
Hudson, New York 12828

Hiscock & Barclay
Attorneys for Century 21 Heartland Realty
David B. Cabaniss, Esq. of Counsel
50 Beaver Street
Albany, New York 12207

Deily & Schaefer
Attorneys for Santo Associates Land Surveying & Engineering, P.C.
Robert J. Deily, Esq. of Counsel
One Bridge Street
Catskill, New York 12414

John Connor, Esq.
Attorney For Defendant Lawyer's Title Insurance Corporation
76 Green Street
Hudson, New York 12534

James Kleinbaum, Esq.
Attorney for Defendant Lake & Mountain Realty
18 Park Row
Chatham, New York 12037

TERESI, J.:

The defendant, Lawyers Title Insurance Corporation moves for summary judgment pursuant to CPLR 3212. The defendant seeks the dismissal of the complaint and maintains it never insured a survey prepared by Santo Associates Land Surveying. The defendant also claims it was not negligent in failing to discover an action entitled Pilossoph v Hedges and Buoscio against the prior owner.

The Buoscio defendants owned vacant lakefront land on Sleepy Hollow Lake in Athens, New York. In 1999, their adjoining owners, Pilossoph commenced a lawsuit against the defendants, and another owner alleging a dock and retaining wall encroached on their property at the waterfront. (Pilossoph v. Hedges, Supreme Court, Greene County). The Homeowner Association was named a defendant and charged with violating the guidelines of the Environmental Control Committee for permitting the construction. A settlement was attained by the parties and placed on the record in Supreme Court on January 24, 2005. The agreement resulted in no diminishment of shoreline owned by the Buoscios. The agreement required the

plaintiffs in that action to restore the area to the same condition before the construction in 1998. In the summer of 2006, the defendants allege they decided to place the land for sale. The plaintiffs made an offer to purchase the property for $92,500.00 and a contract for sale was signed on November 1, 2006. The closing took place on December 14, 2006.

The plaintiffs commenced this action for recession, breach of contract, fraud, injunctive relief and negligent misrepresentation. The plaintiffs maintain the defendants fraudently misrepresented that the property had lakefront right and failed to disclose the pending litigation. The plaintiffs contend the stipulation eliminated the property lakefront rights. Plaintiffs claim the other defendants knew or should have known about the litigation and the purported elimination of their lakefront rights. Plaintiffs seek to rescind the sale, have the purchase price of $92,500.00 restored to them and the payment of $15,000.00 for attorney fees, costs and disbursements. The plaintiffs claims the title company failed to search the court records to determine if there was a civil action pending against the property. The plaintiffs also claim the defendant is liable for failing to notify them of the court ordered settlement in the Pilossoph action.

The title company claims there was no Notice of Pendency on file with the Greene County Clerk and the claims of the plaintiffs are not covered by the title insurance policy. Defendant's Answer alleges two affirmative defenses in this action. The first affirmative defense alleges no Notice of Pendency was filed in the Pilossoph action and as a result it would not be disclosed in a title search. The second affirmative defense alleges the title policy issued to the plaintiffs specifically stated that Lawyers Title did not guarantee water frontage.

The defendant claims the Pilossoph action sought damages for trespass. The defendant maintains this claim would not be covered by a title insurance policy as it did not affect

ownership of the property. The defendant contends a Notice of Pendency was never filed in the Greene County Clerk's Office for the Pilossoph action and there was no record of the existence of this action. The defendant alleges it searched the Lis Pendens Index in Greene County and found no recorded Notice of Pendency. The defendant contends title companies are not required to search all court records to ascertain if any pending action included grantors to the property being conveyed. The defendant maintains in the absence of a duly filed Notice of Pendency, a lawsuit is not a valid encumbrance against real property and the title company is not responsible for a claim based on litigation for which a Lis Pendens is not filed.

Santo Associates Land Surveying and Engineering , P.C. (Santo) prepared a survey in 1991 of Athens Court and certified it to the plaintiffs. The plaintiffs maintain the Santo survey was incorporated into and insured in the title policy prepared for the plaintiffs. The defendant contends it insured the legal description contained in the deed from Buoscio to Dorritie which refereed to a prior 1972 survey recorded in the Greene County Clerk's Office. The defendant alleges it did not use the description from the Santo survey as the legal description was substantially different. The defendant claims the older survey it utilized contained no representations of lake frontage. The defendant maintains that the standard practice in the title industry is that a survey is guaranteed only when the survey is certified by the surveyor to the title company. The Santo survey was guaranteed only to the plaintiffs.

The defendant maintains the title policy contained exceptions to coverage. The defendant claims the title policy specifically declared the plaintiffs did not have lake rights and specifically stated that lake front property stopped "one-foot above the water level of the lake". The defendant claims the policy excluded lake front rights. The defendant also claims the title report disclaimed

insuring the boundaries of the property as a guaranteed survey was not provided to the defendant.

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v Prospect Hospital, 68 NY 2d 320 [1986]; Gilbert Frank Corp. v Federal Insurance Co., 70 NY 2d 966 [1988]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY 2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. (Sillman v Twentieth Century-Fox Film Corp., 3 NY 2d 395 [1957], and all evidence must be viewed in the light most favorable to the opponent to the motion. (Crosland v. New York City Transit Auth., 68 NY 2d 165 [1986]).

A policy of title insurance insures "against loss by reason of defective titles and encumbrances and insures the correctness of searches for all instruments, liens or charges affecting the title to such property." (see, Insurance Law § 1113(a)(18); L. Smirlock Realty Corp. v. Title Guar. Co., 52 NY 2d 179 [1981]). The liability of the title insurer to its insured is governed and limited by the terms and conditions contained in the policy. (Ankari v. Fidelity Nat. Title Ins. Co., 19 Misc. 3d 1143(a) [2008]). "The title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from coverage." (Citibank, N. A. v. Commonwealth Land Title Insurance Company, 228 AD 2d 653 [2nd Dept. 1996]).

A notice of pendency is authorized to be filed in an action seeking a judgment that would affect title to, or possession, use or enjoyment of real property. (see, CPLR § 6501; Nastasi v. Nastasi, 26 AD 3d 32 [2nd Dept. 2005]). It puts all potential buyers on notice that the ownership

of the real property is subject to a pending lawsuit and insures that a court retains its ability to effect justice by preserving its power over the property regardless of whether a purchaser had any notice of the pending suit. (5303 Realty Corp. v. O & Y Equity Corp., 64 NY 2d 313 [1984]). Notice of a lis pendens cannot be filed where the party who has filed it claims no right, title or interest in or to real estate against which it is filed and where the action alleges some encroachment or wrong perpetrated by defendant on plaintiff's land. (Braunston v. Anchorage Woods, Inc., 10 NY 2d 302 [1961]). An action for trespass will not support a notice of pendency since it does not affect the title to, or the possession, use or enjoyment of, the real property against which the notice is filed. (5303 Realty Corp. v. O & Y Equity Corp., supra 321).

The defendant title company's motion for summary judgment is granted. The prior action, Pilossoph v. Hedges, sought damages for trespass to land. The plaintiff in that action never filed a Notice of Pendency. When the plaintiffs entered into a contract to purchase the subject property, they engaged the defendant to conduct a title search of the premises. The title report did not list the Pilossoph action as it was not listed in the Lis Pendens Index with the Greene County Clerk. The Pilossoph trespass action does not affect title to, or possession, use or enjoyment or real property as required by the provisional remedy of notice of pendency. (see, CPLR § 6501). As a result, the defendant was not required to search all of the records of the Greene Count Clerk to ascertain any trespass actions possibly affecting the sellers or prior owners of the property. In addition, the title policy clearly excluded any representations that the property had lake frontage and clearly stated that lake front property stopped "one-foot above the water level of the lake". Schedule B of the policy clearly stated that "riparian rights, if any, in favor of the premises herein are not insured." Policy exclusions are not to be "extended by interpretation or implication, but are

to be accorded a strict and narrow construction." (Incorporated Village of Cedarhurst v. Hanover Ins. Co., 89 NY 2d 293 [1996]). Moreover, the defendant never relied upon or insured the Santo survey as it was incorrect and was only certified to the purchasers and not to the title company.

Defendant having established prima facie entitlement to summary judgment, the burden shifted to the plaintiffs to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial. (Giuffrida v. Citibank Corp., 100 NY 2d 72 [2003]). Plaintiffs' submissions were insufficient to defeat summary judgment as they did not establish the existence of material issues of fact. (Franchini v. Palmieri, 1 NY 3d 536 [2003]; Zuckerman v. City of New York, supra 562).

All papers, including this Decision and Order are being returned to the attorneys for the Lawyer's's Title Insurance Corporation. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 30, 2009

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated March 27, 2009;.
2. Affidavit of Vincent Monte dated March 26, 2009 with attached exhibits A-F;.
3. Affidavit of John Dorritie dated April 24, 2009 with attached exhibits 1 & 2;
4. Affidavit of John Connor, Esq. dated April 30, 2009 with attached exhibits A &B.