

No. 1-10-0285

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOLOMON YESILEVICH and IRVING WEINBERGER,)	Appeal from the
Sole Beneficiaries under CTT Land Trust #1112508 dated)	Circuit Court of
10/27/03,)	Cook County
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 08 CH 21460
)	
REPUBLIC TITLE COMPANY,)	The Honorable
)	Alan Goldberg,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
Justices Pucinski and Salone concurred in the judgment.

ORDER

HELD: The trial court did not err in dismissing pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)) plaintiffs' second amended complaint. Plaintiffs' breach of contract count failed to state a cause of action for which relief may be granted because a title insurance policy does not provide coverage for property deterioration. Plaintiffs' declaratory judgment count also failed to state a cause of action for which relief may be granted because the rights and duties that plaintiffs sought a declaration of were already being litigated.

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This appeal arises from a purchase of real property that had a cloud on its title that was not disclosed in a title insurance policy. Solomon Yesilevich and Irving Weinberger (“plaintiffs”) appeal the trial court’s dismissal of their breach of contract and declaratory judgment counts from the second amended complaint. Plaintiffs claim that the trial court erred in dismissing the breach of contract count because Republic Title Company (“defendant”) failed to provide coverage for property damages that occurred while defendant litigated the cloud on the property’s title. Plaintiffs also claim that the trial court erred in dismissing the declaratory judgment count because an actual controversy exists regarding defendant’s duties and obligations under the title insurance policy. For the reasons that follow, we affirm.

BACKGROUND

Plaintiffs are beneficiaries under a Chicago Title Land Trust Agreement dated October 27, 2003 a/k/a Trust #1112508. On approximately October 29, 2003, plaintiffs, through the trust, purchased a two unit apartment building located at 855 N. Francisco, Chicago, Illinois (“property”) for \$145,000. Defendant is an Illinois title insurance company, and issued to plaintiffs an owner’s policy of title insurance (“policy”) dated October 29, 2003, covering the property. According to Schedule A of the policy, the amount of insurance was \$145,000. Prior to plaintiffs’ purchase of the property, the property’s occupant recorded a *lis pendens* notice against the property on October 9, 2003.¹ Plaintiffs filed a claim with defendant regarding the recorded *lis pendens* notice. Defendant intervened in the suit filed by the occupant, and defendant initiated an eviction proceeding against the occupant on May 17, 2005. Occupant paid use and occupancy to continue living in the property in the amount of \$1,000 per month for

¹ The occupant filed a claim alleging that he was defrauded into selling his home to Bohdan Demkov and Nadja Koval on April 10, 2003 for \$35,000.

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approximately eight months beginning in August 2005. When the occupant became hospitalized in March 2006, he moved from the property. After the occupant died, defendant filed a probate action against his estate. As a settlement on September 17, 2007, defendant paid \$50,000 on plaintiffs' behalf to the occupant's estate in exchange for a release of the *lis pendens* notice and an executed stipulation to dismiss the trust from the litigation.

The litigation concerning the occupant's claim to the property's title began in October 2003, and plaintiffs did not have access to the property while litigation was pending and until approximately July 2006. Plaintiffs claim that the property deteriorated and fell into disrepair during the time that they had no access to the property. Plaintiffs filed a claim with defendant regarding the property damage that occurred during the litigation period. Defendant did not pay the alleged property damages.

Plaintiffs filed a two count complaint setting forth a count for declaratory judgement and a count for breach of contract. Plaintiffs alleged that during the 2½ years that litigation was pending, they were not allowed access to the property and the property went into great disrepair and deteriorated. Plaintiffs claimed that there "were water leaks from the roof into the apartments, with resulting water damage to the walls, floors and ceilings in the building. The appliances had been removed, including the kitchen sink, cabinets and lighting. The damage to the property has been estimated at \$82,500 in December 2006."

Defendant filed a section 2-615 motion to dismiss, to which plaintiffs filed a response. On January 23, 2009, the trial court dismissed with prejudice the declaratory judgment count and dismissed without prejudice the breach of contract count. The trial court also directed defendant

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to produce a copy of the policy within 10 days and granted plaintiffs 28 days thereafter to file an amended complaint.

Plaintiffs filed an amended complaint on February 17, 2009 raising a count for declaratory judgment and a count for breach of contract, which were the same counts raised in the initial complaint. Defendant filed a motion to strike and dismiss the amended complaint pursuant to section 2-615 on May 27, 2009, and plaintiffs filed a response. On September 3, 2009, the trial court issued a memorandum opinion and order granting defendant's section 2-615 motion to dismiss plaintiffs' amended complaint. Plaintiffs filed a second amended complaint on November 25, 2009, pleading a count for declaratory relief and a count for breach of contract. Defendant filed a section 2-615 motion to dismiss the second amended complaint, to which plaintiffs filed a response. On January 20, 2010, the trial court granted defendant's section 2-615 motion to dismiss the second amended complaint with prejudice. A timely appeal followed.

STANDARD OF REVIEW

A section 2-615 motion to dismiss “admits all well-pleaded facts and attacks the legal sufficiency of the complaint.” *Randle v. Americash Loans, LLC*, 403 Ill. App. 3d 529, 533 (2010). When ruling on a section 2-615 motion to dismiss, the relevant question “ ‘is whether the allegations in the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted.’ ” *Id.* at 533, quoting *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 790 (2001). Specific facts must support legal conclusions and factual conclusions to withstand a motion to dismiss. *Randle*, 403 Ill. App. 3d at 533. If no set of facts could be proved under the pleadings entitling plaintiff to relief, then a section 2-615 motion to dismiss should be granted. *Sherman v. Township High*

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School District 214, 404 Ill. App. 3d 1101, 1107 (2010). This court reviews a trial court's granting of a section 2-615 motion to dismiss *de novo*. *Randle*, 403 Ill. App. 3d at 533.

ANALYSIS

Plaintiffs contend on appeal that the trial court erred in dismissing the breach of contract count from the second amended complaint on the basis that the policy does not cover the claimed property damages. Plaintiffs maintain that when defendant decided to litigate the cloud asserted against the property's title, the policy required defendant to litigate the matter diligently, which would have included securing the property and obtaining the necessary court orders to require the property to be maintained and well kept throughout the pending litigation. Plaintiffs claim that the trial court and defendant failed to identify exclusions, exceptions or other provisions in the policy that would be a basis to deny plaintiffs' claim for coverage under the policy. Plaintiffs maintain that the property damage arose out of the status of title since defendant failed to identify the *lis pendens* notice recorded against the property's title prior to plaintiffs' purchase of the property. Since defendant failed to adjudicate the cloud quickly against the property's title and plaintiffs were not allowed access to the property, plaintiffs claim that defendant should pay for the actual monetary loss they suffered from defendant's failure to detect the cloud on the property's title.

Title insurance protects a purchaser of real estate from the possibilities of loss through defects that may cloud the real estate's title. *First National Bank of Northbrook v. Stewart Title Guaranty Co.*, 279 Ill. App. 3d 188, 192 (1996). Title insurance provides coverage against defects or a cloud in a property's title, but does not provide coverage for the land itself. *Id.* Title insurance is not affected by appreciation or depreciation of the property's value. *McLaughlin v.*

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Attorneys' Title Guaranty Fund, Inc., 61 Ill. App. 3d 911, 916 (1978). The issuer of a title insurance policy is insuring the property's title against defects that may damage the purchaser's interest in the property. *Id.* An individual purchasing a title insurance policy expects to receive a "professional title search legal opinion as to the condition of title and a guarantee." *Radovanov v. Land Title Co. of America, Inc.*, 189 Ill. App. 3d 433, 438 (1989). An insurance contract "should receive a practical, reasonable, and fair construction consonant with the apparent object and intent of the parties, viewed in light of their purpose." *First National Bank of Northbrook*, 279 Ill. App. 3d at 193. If a title insurance policy contains an ambiguity, the policy should be liberally construed in favor of the insured. *Id.*; *McLaughlin*, 61 Ill. App. 3d at 914-15.

The parties agree that plaintiffs purchased an "Owner's Policy of Title Insurance." The breach of contract count in the second amended complaint states that defendant "insures Plaintiffs against loss or damages by reason of a defect in or lien or encumbrance on the title, unmarketability of the title or a lack of right of access to the land." Plaintiffs also pled that defendant "breached its duties under the Policy by failing and refusing to diligently protect Plaintiffs' interest and right to access the property and by failing and refusing to cover Plaintiffs for all of their losses under the Policy." As damages, plaintiffs pled that "as a direct and proximate result of Defendant's breach, Plaintiffs have been harmed in an amount in excess of \$80,000.00 to be proved up at trial or hearing in this matter."

In reviewing a section 2-615 motion to dismiss, the complaint must be analyzed to determine whether the allegations viewed in a light most favorable to the plaintiff state a cause of action for which relief may be granted. Applying this standard in the instant case, the trial court did not err in dismissing plaintiffs' breach of contract count. The policy was to insure "against

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the loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

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

In plaintiffs' briefs on appeal, they acknowledge that defendant litigated the *lis pendens* notice recorded against the property's title and in doing so, defendant provided the required coverage against defects or clouds in the property's title. Plaintiffs also acknowledge that title insurance's purpose is to protect a purchaser of real estate against title surprises. Here, a cloud recorded against the property's title was a surprise to plaintiffs because defendant did not disclose to them the *lis pendens* notice recorded against the property's title before they purchased the property. According to the policy's condition number four entitled “DEFENSE AND PROSECUTION OF ACTIONS: DUTY OF INSURED CLAIMANT TO COOPERATE”, defendant:

“at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or

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interest as insured, but only as to those causes of action alleging a defect, lien or encumbrances or other matter insured against by this policy.”

No dispute exists that defendant participated in litigation to defend against the cloud recorded on the title to plaintiffs’ property. Plaintiffs’ breach of contract count alleges that defendant failed and refused “to diligently protect Plaintiffs’ interest and right to access the property and by failing and refusing to cover Plaintiffs for all of their losses under the Policy.” Here, defendant litigated the matter and paid \$50,000 as settlement of the litigation removing the cloud asserted against the property’s title. Thus, defendant provided the coverage required under the policy by paying to settle the claim and by defending on plaintiffs’ behalf the cloud asserted against the property’s title. Plaintiffs’ breach of contract count pled that defendant breached its duties of diligently protecting their interests in the property and the right to access the property. Plaintiffs claim that the costs associated with the disrepair and deterioration of the property are losses that defendant should have covered under the policy since plaintiffs did not have access to the property. Title insurance, however, is to protect against loss resulting from defects that may cloud title or defects that damage the purchaser’s interest in the property. *First National Bank of Northbrook*, 279 Ill. App. 3d at 192; *McLaughlin*, 61 Ill. App. 3d at 915-16. Plaintiffs pled in their complaint that the property damage constituted a loss that defendant should have covered under the policy, and defendant’s failure to do so resulted in a breach of the policy. Title insurance, however, does not insure the property itself. *McLaughlin*, 61 Ill. App. 3d at 916. A title insurance policy is unaffected by a change in the property’s value, such as depreciation or appreciation. *Id.* Plaintiffs notified defendant about a claim arising out of the property’s title’s status, which defendant then defended against the claim. Plaintiffs contend, however, that

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defendant failed to litigate the cloud in the title in a reasonably diligent manner and during the time that litigation was pending, the property became deteriorated. The property damage that plaintiffs are seeking coverage for under the policy, however, are not losses insured against in a title insurance policy. A lien recorded against a property's title that must be paid to remove the cloud on the property's title is a loss or damage arising out of the title's status. Damages to property are not insurable losses under a title insurance policy. Although plaintiffs contend that they are entitled to coverage because the trial court and defendant failed to identify a provision in the policy excluding coverage, identification of an exclusion is not necessary because the policy's purpose is to protect against defects in a property's title and not against defects in the property itself. Accordingly, the breach of contract count as pled in the second amended complaint fails to state a cause of action for which relief may be granted.

Plaintiffs also claim on appeal that the trial court erred in dismissing the declaratory judgment count. Plaintiffs contend that an actual controversy exists concerning defendant's duties, rights and obligations under the policy to provide plaintiffs' requested coverage. Plaintiffs maintain that they filed a coverage claim relating to the property damage, which defendant denied. Plaintiffs claim that if a court determines the parties' rights and responsibilities by entering a declaratory judgment, then the controversy would end.

The trial court did not err in dismissing plaintiffs' declaratory judgment count because the pleading fails to present a cause of action for which relief may be granted. The purpose underlying the declaratory judgment procedure is to "settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 174 (1995). A

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declaratory judgment provides “security and relief against uncertainty so as to avoid potential litigation.” *Id.* Here, litigation regarding the alleged breach of contract count already occurred. The count for declaratory judgment was filed simultaneously with the breach of contract count. At the time plaintiffs filed the two count complaint including a count for declaratory judgment and a count for breach of contract, plaintiffs had already filed a claim for coverage under the policy, which defendant denied. The declaration that plaintiffs seek resembles plaintiffs’ breach of contract claim, in which they allege that defendant breached the policy by not providing the coverage insured for under the policy. Litigation regarding the declaration of rights sought by the declaratory judgment had already commenced when plaintiffs filed the declaratory judgment count. No potential litigation would be avoided. Thus, the trial court did not err in dismissing the declaratory judgment count pursuant to section 2-615.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.