2015 IL App (1st) 123301-U
No. 1-12-3301
Order Filed April 10, 2015

SIXTH DIVISION

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 DISTRICT

CHICAGO TITLE INSURANCE COMPANY, a Nebraska corporation, as successor by merger to Ticor Title Insurance Company, Plaintiff and Counterdefendant-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 11 CH 15554
ALI PROPERTIES, I, LLC, AMERICAN LITHO, INC., MICHAEL FONTANA, CHRISTOPHER JOYAX, MARK DZUIBAN and JAMES DIVITO, Defendants and Counterplaintiffs-Appellants and Third-Party Plaintiffs,	)	Honorable Kathleen G. Kennedy, Judge Presiding.
(Standard Bank and Trust Company, an Illinois corporation, Third-Party Defendant.)	)	

JUSTICE HALL delivered the judgment of the court.

Justices Lampkin concurred in the judgment.

Presiding Justice Hoffman concurred in part and dissented in part.

O R D E R

¶ 1 *Held*: The circuit court's grant of judgment on the pleadings to the plaintiff was affirmed. No disputed questions of fact existed and, as a matter of law, the mechanics' lien claims paid by the plaintiff were exceptions as defined in the Title Indemnification Agreement and the Personal Undertaking.

¶ 2 Defendant Ali Properties, I, LLC (ALI), and defendants, American Litho, Inc., Michael Fontana, Christopher Joyax, Mark Dzuiban and James Divito (collectively the defendants) appeal from an order of the circuit court of Cook County granting the motion of plaintiff Chicago Title Insurance Company (CTI) for judgment on the pleadings. The sole issue on appeal is whether the circuit court erred in granting judgment on the pleadings to CTI. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3 The following facts are taken from the pleadings contained in the record on appeal. ALI developed a parcel of property commonly known as 16111 LaGrange Road, Orland Park, Illinois (the property). In September 2005, ALI agreed to sell the property, improvements and leases to Standard Bank and Trust Company, as trustee for Tamayo Summit Square LLC and Tamayo Financial Services, Inc. (collectively Tamayo), for \$8.6 million. The closing on the property took place on November 18, 2005.

¶ 4 Title Insurance

¶ 5 In its commitment for title insurance for the property, Ticor Title Insurance Company (Ticor) raised exceptions affecting the title to the property. To induce Ticor to issue the title insurance policies without mentioning the exceptions it had raised or insuring against any

losses resulting from them, at the closing, ALI and Tamayo executed Ticor's "ALTA Loan and Extended Coverage Policy Statement" (the ALTA statement), certifying, in pertinent part, that to the best of their knowledge and belief,

> "(1) No contracts for the furnishing of any labor or material to the land or the improvements thereon, and no security agreements or leases with respect to any goods or chattels that have been or are to become attached to the land or any improvements thereon as fixtures, have been given or are outstanding that have not been fully performed and satisfied;
>
> * * *
>
> (4) That the only tenants of the subject property are the sellers or purchasers. (If other than sellers or purchasers, give names and interest held)[:] Leasehold interest of ***JEKED, Inc. d/b/a Ciabatta Sandwich Café; ***."

¶ 6 In addition, Ticor and ALI entered into a "Title Indemnification Agreement" (the TIA), and the defendants were required to execute a "Personal Undertaking."

¶ 7 The TIA

¶ 8 The TIA provided in pertinent part as follows:

> "WHEREAS, [Ticor] has raised as title exceptions on the Title Insurance Policy certain defects or other matters, hereinafter referred to as the "Exceptions", more particularly described as follows:
>
> Any lien or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
>
> AND WHEREAS, [Ticor] has been asked to issue the Title Insurance Policy either without mention of the Exceptions or insuring against loss or damage by reason thereof;

* * *

NOW THEREFORE, in consideration of the issuance of the Title Insurance Policy and the payment of $1.00 to the undersigned by [Ticor], the sufficiency and receipt of which is hereby acknowledged, the undersigned, jointly and severally, for themselves, heirs, personal representatives and assigns do hereby covenant and agree with [Ticor]:

(1) to forever fully protect, defend, and save [Ticor] harmless from and against all the Exceptions, in and from any and all loss, costs, damages, attorneys' fees and expenses of every kind and nature which it may suffer, expend or incur, or by reason, or in consequence of the Title Insurance Policy on account or in consequence, or growing out of the Exceptions, or on account of the assertion or enforcement or attempted assertion or enforcement thereof or of any rights existing or hereinafter arising, or which may at any time be claimed to exist under, or by reason, or in consequence, or ground out of the Exceptions or any of them;

* * *

(3) to pay, discharge, satisfy or remove all of the Exceptions and, when the Exceptions appear as a matter of public record, to clear the record by the recording or filing of releases, assignments, deeds or other appropriate instruments, or by the procurement of a final court order or judgment entered by a court of competent jurisdiction quieting the title of the insured, or declaring the Exceptions to be null and void and of no force and effect, on or before November 21, 2006; and

(4) that each and every provision herein shall extend and be in force concerning Future Polices or Commitments."

* * *

> [ALI] hereby deposits with [Ticor] under [the TIA], the amount of [$957,819.50] to constitute a fund under absolute control of [Ticor] to indemnify [Ticor] as herein provided, for the purposes set forth, and to secure the performance of the obligations of [ALI] contained herein.
>
> [Ticor] shall have the right at any time hereafter, when it shall deem it necessary, expedient, desirable, or to its interest to do so, in its sole discretion, to use or apply the fund, or any portion thereof, in such manner and in such amounts as [Ticor] may deem necessary and advisable, to the payment, discharge or satisfaction of, or the removal from the title to the land, or any part or parts thereof or interests therein, any of the Exceptions, including the right to procure for the purpose of clearing the public record releases, assignments, deeds or other appropriate instruments, or by procuring final court orders or judgments quieting the title of the insured or declaring the Exceptions to be null and void and of no force and effect, or for the purpose of acquiring by conveyance, assignment or otherwise any Exceptions, or for the purpose of reimbursing anyone who may have been paid, discharged, satisfied or removed any Exceptions or cleared the public record of such Exceptions."

¶ 9 The Personal Undertaking

¶ 10 The Personal Undertaking contained the same indemnification provisions as the TIA (paragraphs 1, 3 and 4 of the TIA). In addition, Ticor and the defendants agreed:

> "that this agreement at the option of [Ticor], shall be converted to a standard form title indemnity agreement within 15 business days of written demand for deposit in an amount not to exceed 150% of the total of any liens, rights, claims, encumbrances, or defects in title, that may become subject to this agreement . Failure to deposit said

funds shall constitute a full default under this agreement and all means to enforce this agreement shall become optional and at the disposal of [Ticor]."

¶ 11 In the Personal Undertaking, the "Exceptions" were described as: "Any Lien or right to lien for services, labor or materials furnished for the construction of improvements on the land." [1]

¶ 12 On December 1, 2005, Ticor issued an owner's title insurance policy to Tamayo and a lender's policy to Standard Bank and Trust Company.[2] On December 2, 2005, ALI deposited with Ticor the sum of $957,819.50 to secure its obligations under the TIA. After withdrawals and interest earnings, the balance in the TIA fund as of January 1, 2010, was $176,155.41.

¶ 13 In 2006, Ram Mechanical Services, Inc. filed a lawsuit to foreclose its mechanics' lien claim against the property. Fortney & Wegandt, Inc. filed a counterclaim to foreclose its mechanics' lien claim against the property. Five more mechanics' liens were filed against the property. Subsequently, CTI, as successor to Ticor, paid $244,000 to settle the claims and filed this lawsuit for declaratory judgment. For clarity sake, we will now refer to CTI rather than Ticor.

¶ 14 Circuit Court Proceedings

¶ 15 Count I of CTI's first amended complaint was against ALI. CTI alleged that the mechanics' lien claims constituted "Exceptions" as described in the TIA. CTI further alleged that ALI maintained that CTI was not entitled to reimbursement from the TIA fund for the mechanics' lien claims it paid. Therefore an actual controversy existed between CTI and ALI

[1] The following language was crossed out on the description of the Exceptions in the Personal Undertaking: "and arising from contracts entered into or on behalf of the undersigned or any parties claiming by through or under them." There were no dates or initials by the crossed-out language.

[2] According to CTI, Standard Bank and Trust Company, as trustee for Tamayo, and Standard Bank and Trust Company, as Tamayo's lender, were separate entities.

and that CTI had no adequate remedy at law. CTI sought a declaration that the mechanics' lien claims were "Exceptions" under the TIA and that it was entitled to reimbursement from the TIA fund, to the extent the funds are available.

¶ 16 In count II, CTI sought to enforce the PERSONAL UNDERTAKING against the defendants. CTI alleged that it served demands on the corporate and the individual defendants for payment of $455,836.65 (150% of the total liens that were "Exceptions" under the Personal Undertaking), but no funds were deposited in response to the demand. CTI sought judgment from the defendants in the amount of $244,000 and reimbursement for attorney fees, costs and expenses incurred in connection with satisfying the mechanics' lien claims. ALI filed an answer, affirmative defenses, a counterclaim against CTI and a third-party claim against the lender.

¶ 17 On April 12, 2012, CTI filed its motion for judgment on the pleadings. CTI maintained that under the terms of both the TIA and the Personal Undertaking, CTI was entitled to reimbursement from the TIA fund for the mechanics' lien claims it paid and that as signatories to the Personal Undertaking, defendants were responsible for the balance of the payments due on the claims. In its response, ALI asserted that the mechanics' lien claims arose from contracts between one of the property's tenants, Jeked, Inc., doing business as Ciabatta Sandwich Café (Ciabatta) and its contractors, and under the terms of the lease with ALI, Ciabatta was responsible for payments owed to its contractors. Since Ciabatta's lease was disclosed at the time of the closing on the property, ALI maintained that the liens which CTI paid were not "Exceptions" under the TIA and that CTI breached the terms of the TIA by paying the lien claims. ALI further maintained that questions of fact existed which precluded the grant of judgment on the pleadings to CTI.

¶ 18 Following arguments, the circuit court granted CTI's motion for judgment on the pleadings. In its judgment order, as to count I, the court found that mechanics' lien claims set forth in the first amended complaint were "Exceptions" as defined in the TIA and that CTI was entitled to reimbursement from the remaining funds. On count II, the court entered judgment in favor of CTI and against the defendants in the amount of $67,305.26, the difference between the $244,000 paid by CTI for release of the lien claims and the balance of $176,6 94.74 in the title indemnity fund. The court awarded attorney fees and costs in the amount of $26,780.25 to CTI and dismissed ALI's counterclaim with prejudice. This timely appeal followed.

¶ 19 ANALYSIS

¶ 20 I. Standard of Review

¶ 21 The court reviews a grant of judgment on the pleadings *de novo*. *Pekin Insurance Co. v.*

¶ 22 *Wilson*, 237 Ill. 2d 446, 455 (2010). A motion for judgment on the pleadings is limited to the pleadings. *Wilson*, 237 Ill. 2d at 455. "Judgment on the pleadings is properly granted if the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Wilson*, 237 Ill. 2d at 455. In resolving the motion, the court considers as admitted all well-pleaded facts contained in the pleadings of the nonmoving party and the fair inferences drawn from them. *Wilson*, 237 Ill. 2d at 455. The construction of the terms of a contract presents a question of law which we review *de novo*. *Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 373 Ill. App. 3d 384, 389 (2007) (construing contract language is a matter of law).

¶ 23 II. Discussion

¶ 24 ALI contends that the circuit court erred when it granted judgment on the pleadings to CTI because the mechanics' lien claims paid by CTI were not "Exceptions" under the TIA and the Personal Undertaking. ALI asserts that the "Exceptions" did not include indemnification for future liens that were disclosed to Ticor prior to the closing and, therefore, the parties did not intend for ALI to indemnify CTI against future lien claims.

¶ 25 "An indemnity agreement is a contract and is subject to contract interpretation rules." *Buenz v. Frontline Transportation Co*., 227 Ill. 2d 302, 308 (2008). When construing contract provisions a court's primary objective is to give effect to the parties' intent at the time the contract was made. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). Such intentions are to be ascertained from the contract language. *Owens*, 316 Ill. App. 3d at 344. "Where the contract language is unambiguous, it should be given its plain and ordinary meaning." *Buenz*, 227 Ill. 2d at 308. Neither party argues that the TIA or the Personal Undertaking was ambiguous. *Hillenbrand v. Meyer Medical Group, S.C.*, 288 Ill. App. 3d 871, 876 (1997) (the fact that the parties disagree as to its meaning does not render a contract ambiguous).

¶ 26 It is undisputed that the mechanics' lien claims paid by CTI arose from contracts entered into by Ciabatta and its contractors prior to the closing on the property. As described in the TIA and the Personal Undertaking, the "Exceptions" included both "liens" and the "right to lien." Under the ordinary and plain language of the TIA and the Personal Undertaking, the parties intended that ALI indemnify CTI for mechanics' lien claims it paid where the right to lien existed, but the lien had not yet been filed as of the date of the title insurance policy.

¶ 27 ALI argues that because the Ciabatta lease was disclosed in the ALTA statement, CTI was on notice that ALI was not liable for the liens filed against the property for work

contracted for by Ciabatta. In the ALTA statement, ALI disclosed the fact that Ciabatta was an occupant on the property based on its leasehold interest. However, in the ALTA statement, ALI and Tamayo certified that there were no outstanding contracts for labor or materials. The certification in the ALTA statement did not make exceptions for contracts entered into by leaseholders.

¶ 28 ALI maintains that the circuit court erred by not considering the provisions of the title insurance policy. ALI argues that CTI was not obligated to pay the mechanics' lien claims because the liens were exceptions under the title insurance policy. ALI asserts that the provisions of the TIA and the Personal Undertaking and the title insurance policy must be considered and construed together because the TIA and the Personal Undertaking each contained a reference to the title insurance policy. ALI points out that the policy excluded from coverage, "3. Defects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed or agreed to by the insured claimant [.]" The title policy further provided, "This policy does not insure against loss or damage by reason of the following: *** 6. Rights of tenants, as tenants only, under existing unrecorded leases and of all parties claiming by, through or under them."

¶ 29 As a general principle of contract law, "in the absence of evidence of a contrary intention, where two or more instruments are executed by the same contracting parties in the course of the same transaction, the instruments will be considered and construed with reference to one another because they are, in the eyes of the law, one contract." *Tepfer v. Deerfield Savings & Loan Ass'n*, 118 Ill. App. 3d 77, 80 (1983); see *Feldman v. Cipolla*, 7 Ill. App. 2d 448 (1955) (the reviewing court held that, as contemporary and related documents, the warranty deed and the affidavit of title should be read and construed as a single instrument). In the present

case, ALI and the defendants did not execute the title insurance policy and were not insureds under the policy. See *Avanti Medical Group, LLC v. BMO Harris Bank, N.A.*, 2014 IL App (2d) 140401, ¶ 24 (the applicability of the rule was doubtful where the party did not execute the document on which they based their suit). Moreover, the principle that such agreements should be considered together and construed with reference to one another, does not mean that provisions relating to one subject automatically apply to every subject. *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 24.

¶ 30 Neither the TIA nor the Personal Undertaking specifically incorporated the exception or exclusion provisions of the policy. The plain language of those documents provided that in exchange for CTI's issuance of the title insurance policies without the "Exceptions" or insuring over them, ALI would indemnify CTI for claims made based on those "Exceptions," *i.e.* any lien or the right to lien. ALI's reliance on *Halperin v. Darling Co.*, 80 Ill. App. 2d 353 (1967) is misplaced. *Halperin* involved only one document, a lease which contained an indemnification clause. See *Halperin*, 80 Ill. App. 2d at 355-56.

¶ 31 There is nothing in the record before us that indicates the court did not consider the title insurance policy. Moreover, we have determined that the court was not required to consider the title insurance policy when construing the TIA and the Personal Undertaking. We conclude that under the plain and ordinary language of the TIA and the Personal Undertaking, the mechanics' lien claims paid by CTI were "Exceptions " as described in those documents.

¶ 32 We also reject ALI's argument that CTI breached the terms of the title insurance policy by paying those claims. ALI relies on *Clements v. Mississippi Valley Insurance Co.*, 612 So.2d 1172 (1992). As a general rule, Illinois courts are not required to follow decisions

rendered in the courts of other states, although those decisions may be persuasive where Illinois authority is lacking. *Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 812 (2010).

¶ 33 In any event, *Clements* does not support ALI's argument. In that case, the plaintiffs-purchasers sued the defendant-title company seeking indemnification for liens placed on the property after the sellers failed to pay money due subcontractors and suppliers. Summary judgment for the title company was affirmed by the Alabama supreme court based on the title insurance policy provision that specifically excluded coverage of "any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records." *Clements*, 612 So.2d at 1173.

¶ 34 Those same exclusions constituted the "Exceptions," as described in the TIA. However, the parties in *Clements* did not enter into an agreement for the issuance of a title insurance policy without those exclusions, as ALI and the defendants did in the present case. Here, the TIA provided that to induce CTI to issue the title insurance policy without those "Exceptions," ALI agreed to indemnify CTI for claims based on the "Exceptions." In the Personal Undertaking, the defendants agreed to provide additional funds to insure that the claims would be paid.

¶ 35 ALI's reliance on *Rhone* is also misplaced. In *Rhone*, this court recognized the prospective nature of title insurance and that its function was to protect purchasers and mortgagees from defects or encumbrances existing on the date of the insurance. Since unassessed property taxes did not become liens or encumbrances on the property until the taxes were levied, the title company was not liable for their payment. *Rhone*, 401 Ill. App. 3d at 814. This court pointed out that, knowing the property was under assessed, the

purchasers could have protected themselves by including in the proration agreement the sellers' liability for any additional taxes once the land was reassessed as improved property. *Rhone*, 401 Ill. App. 3d at 815. Unlike the purchasers in *Rhone*, CTI protected itself by obtaining indemnification from ALI in the event it became liable under the "Exceptions" it raised.

¶ 36 Next, ALI maintains that if the parties had intended to include mechanics' lien claims recorded after the date of the title insurance policy such intent had to be expressly stated in the TIA. ALI argues that the TIA did not expressly state the parties' intent or, in the alternative, there is a question of fact as to the parties' intent. ALI further maintains that the TIA does not indemnify CTI against its own negligence in paying claims that were excluded and were exceptions under the title insurance policy. We disagree.

¶ 37 Under the TIA, ALI agreed that in exchange for the issuance of a title insurance policy without raising the "Exceptions," which included any lien claim and the right to file such a lien, ALI would indemnify CTI for its payment of any claims arising out of those exceptions. It is clear from the language of the TIA, ALI intended to indemnify CTI with respect to claims arising out of the "Exceptions" which included the "right to lien." ALI does not assert that the claims paid by CTI resulted from contracts entered into after the date of the title insurance policy, only that the liens were filed after that date. The TIA did not indemnify CTI against its own negligence in not discovering these claims. CTI raised the possibility of these claims as the "Exceptions." It was ALI that requested CTI to issue the title insurance policy without raising the "Exceptions" in exchange for indemnifying CTI.

¶ 38 Next, ALI maintains that material questions of fact existed which precluded the award of judgment on the pleadings. In its opening brief, ALI asserted that "[b]oth [CTI] and Standard

Bank & Trust's knowledge of Ciabetta's leasehold possession is legally sufficient notice of all of Ciabatta's rights, including its right to lien the property." Since under the lease, Ciabatta had the right to contract for work on the property, the purchaser had knowledge that liens could be asserted in the future. ALI argues that at the very least, there is a question of fact as to whether CTI had notice of the potential lien claims.

¶ 39 Contrary to ALI's argument, the lease did not give Ciabatta the right to lien the property. ALI asserted in its first amended affirmative defenses as follows:

> "6. Under the lease, [Ciabatta] was obligated to perform the build-out work appropriate for its use of the space and to pay for the work and *keep the Property lien free*." (Emphasis added.)

Therefore, the terms of the lease would not have put CTI on notice that liens could be asserted in the future.

¶ 40 ALI also argues that a material question of fact exists as to whether there was a lack of consideration. ALI alleged that CTI did not pay ALI and the defendants $1 as required under the TIA. In response, CTI denied the allegation. ALI's argument ignores the language contained in the TIA in which "the payment of $1.00 to [ALI] by [CTI], the sufficiency and receipt of which is hereby acknowledged." As ALI's assertion that CTI failed to pay the $1 is completely refuted by the record, no material question of fact exists as to whether there was sufficient consideration. See *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 431-32 (2004) (reiterating that any document attached to a complaint is part of the pleading, and where the complaint is founded on the document, the rule that the facts in the exhibit control over the allegations of the complaint applies).

¶ 41 In his partial concurrence and partial dissent, Justice Hoffman maintains that judgment on the pleadings was improper as to count II of the first amended complaint. He asserts that a question of fact exists based on the parties' disagreement over whether the language "*and arising from contracts entered into or on behalf of the undersigned or any parties claiming by through or under them"* was deleted from description of the "Exceptions" contained in the Personal Undertaking.

¶ 42 In their opening brief, ALI and the defendants did not argue that there was a question of fact as to the deletion of the language from the description of "Exceptions" contained in the Personal Undertaking. They simply pointed out that CTI omitted the lined-through portion of the Exceptions in the Personal Undertaking and that the trial court failed to read the entire provision. It was not until their reply brief that they argued that a question of fact existed as to the circumstances of the deletion.

¶ 43 Arguments raised for the first time in a reply brief are waived. *Illinois Health Maintenance Organization Guaranty Ass'n v. Department of Insurance*, 372 Ill. App. 3d 24, 45 (2007). The appellant may respond to arguments raised in the appellee's brief in the reply brief even if those arguments were not raised in the opening brief. See Rule 341(h)(7) (j) (eff. Feb. 6, 2013) ("[t]he rely brief, if any, shall be confined strictly to replying to arguments raised in the brief of the appellee and need contain only argument"); *Jones v. Country Mutual Insurance Co.*, 371 Ill. App. 3d 1096, 1102 (2007) .

¶ 44 In its appellee's brief, CTI responded that ALI and the defendants themselves misquoted the Personal Undertaking by including the language which had been deleted. CTI further pointed out that ALI and the defendants attached a copy the Personal Undertaking reflecting the deletion to their section 2-619 motion to dismiss (735 ILCS 5/2-619) (West 2010)). ALI

and the defendants' argument in the reply brief did not address CTI's argument directed at their use of the Personal Undertaking which clearly showed that the language they relied on had been deleted. Instead, and for the first time, ALI and the defendants claim that the plaintiff never stated that they agreed to the modification to the agreement.

¶ 45 A review of the record in this case reveals that ALI and the defendants never argued in the trial court that a modification to the Personal Undertaking was made after the Personal Undertaking was executed by the defendants. In a corrected verified statement of facts in support of ALI's and the defendants' section 2-619 motion to dismiss, attorney Kevin R. Krantz averred that the Personal Undertaking signed by the defendants contained "the printed text 'Any lien or right to lien for services, labor or materials furnished for the construction of improvements on the land and arising from contracts entered into or on behalf of the undersigned or any parties claiming by through or under them.' (See attached Exh. 11)." Exhibit 11 is a copy of the Personal Undertaking. The Exceptions language is "printed" in full but the "and arising from contracts entered into ***" language has been crossed through.

¶ 46 Issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal. *Cambridge Engineering Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). A key purpose of the waiver rule is to allow the trial court to resolve alleged errors and to correct mistakes. *Cambridge Engineering Inc.*, 378 Ill. App. 3d at 453. In this case, ALI and the defendants failed to raise any issue or inform the circuit court regarding modification on the face of the Personal Undertaking in opposing CTI's motion for judgment on the pleadings. To consider ALI's and the defendants' argument at this late date, would be highly prejudicial to CTI. See *Cambridge Engineering Inc.*, 378 Ill. App. 3d at 453 (waiver doctrine prevents unfair prejudice to the opposing party).

¶ 47 Next, ALI argues that judgment on the pleadings for CTI was barred by the doctrine of judicial estoppel. In a letter dated March 13, 2007, Ticor denied Tamayo's request for reimbursement for the $10,000 it paid to settle a mechanics' lien claim against the property. Ticor cited the title policy exclusions and the special exception. In September 2007, prior to the merger between Ticor and CTI, Tamayo filed a third-party action against Ticor in the mechanics' lien litigation between Ram Mechanics, Tamayo and ALI. ALI maintains that in a motion for summary judgment, Ticor asserted that the claim was not covered under the title insurance policy and that it was not the intent of the parties to indemnify Tamayo indefinitely. However, after the merger, CTI paid the liens which Ticor had asserted were not covered under the title insurance policy.

¶ 48 "Under the doctrine of judicial estoppel, a party who takes a particular position in a legal proceeding is estopped from taking a contrary position in a subsequent legal proceeding." *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 948 (2010). Five elements are necessary in order for judicial estoppel to apply: "(1) the party must have taken two positions; (2) the positions must be factually inconsistent; (3) the positions were taken in separate judicial or quasi-judicial proceedings; (4) the person intended the trier of fact to accept the truth of the facts alleged; and (5) the party succeeded in the first proceeding and received some benefit therefrom." *Maniez*, 404 Ill. App. 3d at 948-49. "Judicial estoppel applies to statements of fact and not to legal opinions or conclusions." *Maniez*, 404 Ill. App. 3d at 949.

¶ 49 ALI's argument fails because CTI did not take a different factual position in the present case. Ticor's denial of Tamayo's claim for reimbursement was based on the terms of the title insurance policy and therefore constituted a legal conclusion. See *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n*, 387 Ill. App. 3d 85, 98 (2008) ("The

construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court"). Moreover, as ALI acknowledges, CTI (then Ticor) asserted its position that the title insurance policy did not cover the liens in a motion for summary judgment. See *Cincinnati Insurance Co.*, 387 Ill. App. 3d at 98 (recognizing that construction of an insurance policy is an appropriate subject for disposition by summary judgment and will be granted if the moving party demonstrates that no issue of material fact exists and the moving party is entitled to judgment as a matter of law). We further observe that CTI did not benefit from the position it took in the prior case, as it paid the lien claims rather than assert that the policy did not cover them. We conclude that judgment on the pleadings was not barred by judicial estoppel.

¶ 50 Finally, ALI argues that the circuit court erred in dismissing its counterclaim against CTI for violation of its fiduciary duty owed to ALI and the defendants. ALI's argument is based on its assertion that CTI's payment of the lien claims was wrongful. We have determined that the mechanics' lien claims constituted exceptions under the TIA and the Personal Undertaking. As CTI's payment of those claims was proper, CTI did not violate its fiduciary duty to ALI and the defendants. Therefore the dismissal of the counterclaim was proper.

¶ 51 For all of the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 52 Affirmed.

¶ 53 PRESIDING JUSTICE HOFFMAN concurring in part and dissenting in part:

¶ 54 I agree with the majority's conclusion as to judgment entered on count I of the first amended complaint. As to count II, however, I would reverse as I believe a question of material fact exists.

¶ 55 Count II of the first amended complaint was based on the Personal Undertaking Agreement. Under that agreement, an "exception" is defined as "any lien or right to lien for services, labor or materials furnished for the construction of improvements on the land *and arising from contracts entered into or on behalf of the undersigned or any parties claiming by and through them.*" (Emphasis added.) Here, the defendants dispute that the liens arose from contracts that they entered into or that were entered into on their behalf, as it is undisputed that the liens arose from contracts that Ciabatta entered into for work on its leased space. CTI contends that the emphasized language which the defendants rely upon was deleted from the agreement, pointing to the copy of the document which contains a handwritten line through the language. Thus, the parties dispute whether the handwritten striking of the language was intended to delete the language or was done some time after the contract was signed. As that language is relevant to determining whether the mechanic's lien claims fall under the "exception" definition in the Personal Undertaking Agreement, a judgment on the pleadings as to count II was improper.

¶ 56 Therefore, I would affirm the judgment on the pleadings as to count I, reverse as to count II and remand for further proceedings.