No. 2—10—0182
Order filed February 15, 2011



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| PAMELA J. FUREY, | ) | Appeal from the Circuit Court |
| | ) | of Lake County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 09—L—13 |
| | ) | |
| CHICAGO TITLE INSURANCE COMPANY, | ) | |
| | ) | |
| Defendant-Appellee | ) | |
| | ) | Honorable |
| (Barrington Engineering Consultants, Ltd., | ) | Christopher C. Starck, |
| Defendant). | ) | Judge, Presiding. |

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JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

*Held*: The trial court properly granted defendant summary judgment on plaintiff's complaint for breach of contract, as plaintiff's damages resulted from a flood, not from defendant's alleged failure to disclose a drainage easement on plaintiff's property.

**ORDER**

Plaintiff, Pamela J. Furey, appeals the trial court's order granting summary judgment to defendant, Chicago Title Insurance Company. She contends that defendant's title insurance policy unambiguously covered damage caused by an undisclosed drainage easement across her property. We affirm.

In 2005, plaintiff purchased a home at 728 Cutter Lane in Barrington for $660,000. In connection with the purchase, she obtained a title insurance policy from defendant. On August 24, 2007, and June 11, 2008, the property experienced severe flooding. After the second flood, plaintiff hired James B. Clarage & Associates to inspect the property and identify the cause of the flooding. Clarage concluded that the flooding was the result of hydrostatic pressure from a "major drainage ditch" on the north side of the property.

Plaintiff sued defendant, alleging that defendant's title policy did not disclose the existence of a drainage easement on the property. The complaint also alleged that Barrington Engineering Consultants, Ltd., provided plaintiff with a survey of the property that did not disclose the drainage easement. Barrington Engineering Consultants, Ltd., is not a party to this appeal.

Defendant moved for summary judgment. It cited a subdivision declaration filed by the subdivision developer in 1977, which provided:

> "All lots having tile or drainage ditches or swales are subject to the rights of the adjacent owners and the public to have maintained the uninterrupted flow of water through said tile or drainage ditches or swales."

Defendant argued that any drainage easement was created by the declaration, which its title policy specifically excepted from coverage. Defendant also contended that, in any event, plaintiff's damages were caused by flooding from the drainage ditch—physical feature that should have been obvious when she purchased the property—not by any defect in the title. The trial court granted defendant's motion and made the requisite finding to make it immediately appealable. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Plaintiff timely appealed.

Preliminarily, we note that defendant filed a motion, which we ordered taken with the case, to strike plaintiff's reply brief. Defendant contends that the reply brief includes arguments that were not raised in plaintiff's initial brief. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (arguments not raised in appellant's original brief are forfeited and shall not be raised in reply brief). We have reviewed the brief and plaintiff's response to the motion and generally agree that the arguments are either logical extensions of arguments raised in the initial brief or proper responses to contentions in defendant's brief. We therefore deny the motion to strike.

Plaintiff contends that summary judgment for defendant was erroneous because the subdivision declaration created a drainage easement across plaintiff's property and defendant did not disclose it. Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2—1005(c) (West 2008). "Summary judgment is to be granted only where the evidence, when construed most strongly against the moving party, establishes clearly and without doubt the movant's right to relief." *Signal Capital Corp. v. Lake Shore National Bank*, 273 Ill. App. 3d 761, 767 (1995). We review *de novo* the granting of summary judgment. First Bank v. Unique Marble & Granite Corp., No. 2—09—1287, slip op. at 6 (Ill. App. Nov. 17, 2010).

Plaintiff contends that defendant breached its contract with plaintiff by failing to discover and disclose a drainage easement across her property. Insurance policies are interpreted in the same way as other contracts. *Allianz Insurance Co. v. Guidant Corp.*, 387 Ill. App. 3d 1008, 1026-27 (2008). "The cardinal rule of contract construction is to ascertain and give effect to the intent of the parties." *Id.*, 387 Ill. App. 3d at 1027. The best indication of the parties' intent is the language of the contract

itself. *Farmers Automobile Insurance Ass'n v. Wroblewski*, 382 Ill. App. 3d 688, 696 (2008). The policy must be read as a whole, giving meaning to all its terms. Clarendon America Insurance Co. v. 69 West Washington Management LLC, 374 Ill. App.3 d 580 (2007). "If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning." Central Illinois Light Co. v. Home Insurance Co., 213 Ill. 2d 141, 153 (2004). "The fact that the parties disagree about the interpretation of a particular provision does not render the provision ambiguous." *Allianz*, 387 Ill. App. 3d at 1027. A provision that is found to be ambiguous and that limits the insurer's liability will be construed in favor of the insured. Jones v. Country Mutual Insurance Co., 371 Ill. App. 3d 1096, 1099 (2007).

A title insurance policy is somewhat atypical in that the title insurer essentially guarantees the accuracy of its title search. "The purpose of title insurance is to protect a purchaser of real estate against title surprises." *Radovanov v. Land Title Co. of America, Inc.*, 189 Ill. App. 3d 433, 437 (1989). A prospective purchaser of real estate relies on the title insurer's search when he or she decides whether to purchase the property. Thus, he or she expects the insurer to (1) research the applicable law, as well as the records, before issuing the commitment and (2) to provide warnings about areas in which there might be surprises. *Id.* at438. Moreover, when a person finalizes a real estate transaction and purchases title insurance, he or she expects to obtain a professional title search, a legal opinion on the condition of title, and a guarantee. *Id.*

Plaintiff points out that the plat of survey for the subdivision shows an area identified as a "drainage easement" across the north end of her property, running from Cutter Lane in front of her home to the Fox River behind. Citing *Dinges v. Lawyers Title Insurance Corp.*, 106 Ill. App. 3d 188

(1982), she argues that the failure to disclose an easement affecting property can breach a title insurance policy.

While at first glance plaintiff appears to be correct, there are several difficulties with this argument. Initially, it is not clear that the existence of a dashed line on the plat of survey created a valid easement. Plaintiff concedes that the alleged easement was not properly dedicated to the municipality, but argues that a common-law dedication arose. See Reiman v. Kale, 83 Ill. App. 3d 773, 776 (1980). Regardless, as defendant successfully argued in the trial court, the language of the declaration referring to lots having drainage ditches or swales being subject to the rights of adjacent owners and the public appears to refer to the drainage easement. However, the policy expressly excludes the declaration from coverage. Moreover, even if we resolve these issues in plaintiff's favor, the more fundamental problem with her argument is that the damages she seeks simply did not result from any breach of the title insurance policy.

"The elements of a cause of action for breach of contract include: (1) an offer and acceptance, (2) consideration, (3) definite and certain contractual terms, (4) the plaintiff's performance of his contractual obligations, (5) the defendant's breach of the contract, and (6) damages resulting from the breach." *Green v. Trinity International University*, 344 Ill. App. 3d 1079, 1085 (2003). As noted, the purpose of a title insurance policy is to protect a purchaser of real estate against title surprises. *Radovanov*, 189 Ill. App. 3d at 437. Plaintiff does not allege that she was damaged by any defect in the title, but because her home flooded.

As defendant points out, an easement is an intangible interest in property, which by its nature cannot cause a flood. Rather, it is apparent that plaintiff's home flooded due to water pressure from the drainage ditch. Plaintiff's own expert, Clarage, opined that "if the drainage ditch was not along

your sideyard, approximately a distance of 20 feet right next to your house, you would not have this sub-surface surcharge of water which is impacting on your house." As defendant notes, plaintiff's complaint adopted this conclusion almost verbatim, but substituted "easement" for "ditch." Plaintiff's syntactical sleight-of-hand notwithstanding, it is clear that plaintiff's home flooded because of water discharged from the ditch, not from an easement. Put another way, had defendant disclosed the existence of the easement, plaintiff's home still would have flooded.

All of plaintiff's claimed damages relate to the flooding of the property. She has not attempted to quantify the diminution in property value, if any, resulting from the undisclosed easement. In Dinges, on which plaintiff relies, the appellate court affirmed a damages award of about $34,000, which was the diminution in the property's value resulting from the existence of an easement that defendant inadvertently did not disclose. Here, plaintiff does not claim that the property is less valuable as a result of the undisclosed easement or, at least, she does not attempt to quantify the damages.

Plaintiff speculates that had she known about the easement, she might have decided not to purchase the property. At other points in her brief, plaintiff denies making such a claim. In any event, such a claim, which essentially contends that defendant had a duty to provide accurate information about the state of the property's title, is barred by *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 341 (2006) (defendant title company could not be liable for negligent misrepresentation because it was not in the business of providing information).

The judgment of the circuit court of Lake County is affirmed.

Affirmed.