STATE OF MICHIGAN

COURT OF APPEALS

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff/Counter-Defendant-Appellee,

v

TICOR TITLE INSURANCE COMPANY,

Defendant-Appellant

and

JPS TITLE AGENCY, L.L.C., and JON SINUTKO,

Defendants,

and

ROSEWOOD TERRANCE CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff.

UNPUBLISHED
June 21, 2012

No. 295735
Macomb Circuit Court
LC No. 2008-003420-CZ

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant Ticor Title Insurance Company appeals as of right from an order granting summary disposition to plaintiff. We affirm in part, reverse in part, and remand for further proceedings.

On January 9, 2006, New Century Mortgage Corporation gave Twana Pinskey a loan secured by a mortgage on a condominium unit in the Rosewood Terrace condominium development in Richmond. Defendant Jon Sinutko, working for defendant JPS Title Agency, L.L.C., conducted the closing, and Ticor issued a title insurance policy in the amount of $114,750 to insure the mortgage, which was assigned to plaintiff as trustee. Ticor issued a first lien letter to New Century indicating that its mortgage was senior to all other liens.

After Pinskey failed to pay condominium dues, the condominium association, on January 22, 2007, recorded a lien against the property in the amount of $625.75. In the meantime, plaintiff began foreclosure proceedings and discovered that its mortgage had never been recorded. It therefore filed a title claim with Ticor on April 3, 2007. On April 5, 2007, a title examiner from JPS Title signed an affidavit indicating that the mortgage had been issued but had been lost.[1] On May 11, 2007, Ticor sent plaintiff a letter indicating that "it appears that the mortgage to New Century Mortgage Corporation has not been recorded. Our agent has been contacted regarding this claim and is in the process of having the mortgage recorded with an Affidavit of Lost Document." A second affidavit was recorded on May 14, 2007; this affidavit again indicated that the mortgage had "not been recorded."[2]

On July 6, 2007, the condominium association foreclosed on its lien and purchased the unit at a sheriff's sale for $3,721.95, subject to a six-month redemption period. Thereafter, on October 5, 2007, plaintiff foreclosed and purchased the property at a sheriff's sale for $128,433.48, subject to a six-month redemption period. At the expiration of the condominium association's redemption period on January 7, 2008, it sent a letter to plaintiff indicating that it now owned the property, and plaintiff thus filed a claim with Ticor.

Ticor denied the claim, arguing that plaintiff had prejudiced Ticor because it did not tender the claim before the expiration of the condominium association's redemption period. Ticor argued that if it had been notified in a timely manner, it could have cured the title defect for $3,721.95.

Plaintiff later filed the present lawsuit. The condominium association intervened, and the trial court granted its motion for summary disposition and awarded it title to the property. Meanwhile, plaintiff and Ticor filed motions for summary disposition under MCR 2.116(C)(8) and (10). In resolving the motions, the trial court cited the following section—section 3—from the title insurance policy:

> The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

[1] This affidavit was not recorded until October 15, 2007.

[2] Meanwhile, as stated, the condominium association had recorded its lien on January 22, 2007.

The trial court also noted that the policy specifically defined "knowledge" or "known" as "actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land." The trial court found that Ticor had failed to provide any documentary evidence demonstrating that plaintiff had actual knowledge of the condominium association's lien before January 14, 2008, when it received a letter from the association. The court also found that plaintiff acted properly, and complied with section 3 of the policy, by notifying Ticor on April 3, 2007, that the mortgage had not been recorded. The trial court ruled that plaintiff was entitled to summary disposition under MCR 2.116(C)(10) with regard to its breach of contract claim.[3]

We review de novo a trial court's ruling regarding a motion for summary disposition. *Altairi v Alhaj*, 235 Mich App 626, 628; 599 NW2d 537 (1999).

> A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. The trial court must consider the pleadings, affidavits, admissions, and other documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record could be developed leaving an issue on which reasonable minds might differ. The nonmoving party must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists and cannot simply rest on mere conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact. [*Id*. at 628-629 (citations omitted).]

In addition, we review contract-interpretation issues de novo. *Morely v Automobile Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998).

Ticor argues on appeal that it did present evidence that plaintiff had knowledge of the condominium association's lien before the expiration of the pertinent redemption period. Ticor cites the language of a January 31, 2008, letter from plaintiff's attorney to Ticor. The letter states, in part:

> During foreclosure proceedings on the property, we discovered that the Condo Association recorded a Lien for Nonpayment of Assessments on January 22, 2007 prior to our mortgage being recorded. Our mortgage was actually never recorded and on May 14, 2007 an Affidavit of Lost Document was recorded. On October 5, 2007 a Sheriff's Deed was provided to my client. On January 14, 2008 we were notified by the Condo Association's attorney that the Association foreclosed on its lien on July 6, 2007 and that the redemption period expired on January 7, 2008.

[3] Other claims were raised but are not at issue in this appeal.

Ticor contends that because plaintiff admitted to discovering the lien "[d]uring foreclosure proceedings," and because plaintiff received its sheriff's deed on October 5, 2007, plaintiff must have known about the lien at least by October 5, 2007, which was before the expiration of the condominium association's redemption period.

The trial court addressed this issue in rejecting Ticor's motion for reconsideration. The trial court stated:

> Upon thorough review of the record including this letter, the [c]ourt finds it is insufficient to create a genuine issue of material fact regarding plaintiff's actual knowledge. Although the letter provides plaintiff discovered the lien "during foreclosure proceedings", it proceeds to clarify how it was discovered and specifically indicates plaintiff was notified on January 14, 2008. The letter provides no other indication that plaintiff learned of the lien in any other way or at any other time.
>
> Further, the phrase "during foreclosure proceedings" relied upon by defendant is at best ambiguous. At the time the letter was issued plaintiff's foreclosure proceedings were still ongoing. Plaintiff foreclosed on the property on October 5, 2007 and the redemption period did not expire until April 5, 2008. . . . Accordingly, the phrase "during foreclosure proceedings" fails to create any time line regarding plaintiff's actual knowledge. . . . Absent any additional evidence on this point, the letter does not create a genuine issue of material fact that plaintiff had actual knowledge of the Rosewood lien prior to January 14, 2008.

We agree with the trial court's analysis. The January 31, 2008, letter does not create a genuine issue of material fact regarding actual knowledge, as required by the title insurance policy. While plaintiff admitted to having discovered the lien "[d]uring foreclosure proceedings," the foreclosure proceedings were still ongoing after the expiration of the condominium association's redemption period. It is mere conjecture for Ticor to claim that plaintiff knew of the lien before that expiration. Conjecture is insufficient to defeat a motion for summary disposition. *Altairi*, 235 Mich App at 629.

Ticor also argues that it adequately set forth a genuine issue of material fact by way of the April 3, 2007, letter from plaintiff's servicer. In this letter, plaintiff's servicer stated, in part:

> The purpose of this letter is to advise your company of a possible claim against the above referenced commitment.
>
> This account is currently in foreclosure and based on the pre foreclosure title examination, we have discovered our mortgage is unrecorded.

Ticor claims that "[a]s Rosewood's lien was already of record, the inescapable conclusion is U.S. Bank knew of the lien as early as April 3, 2007.

The trial court addressed this argument in his original opinion and order, stating that "[c]onstructive knowledge based on a title search is insufficient to demonstrate knowledge for

purposes of the policy." We again agree with the trial court's analysis. As noted, the policy specifically indicates that "knowledge" means "actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land." The mere fact of a title examination's having been conducted is insufficient to allow Ticor to survive summary disposition.

After resolving the motions for summary disposition, the trial court ordered plaintiff to submit a proposed judgment, and Ticor objected when plaintiff submitted a judgment for the full extent of the policy limits. A hearing took place with regard to the objection, and the trial court allowed the parties to submit supplemental briefs concerning the amount of damages.

The policy provides, in section 7:

> (a) the liability of the Company under this policy shall not exceed the least of:
>
> (i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;
>
> (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
>
> (iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

The trial court, in resolving the damages issue, indicated that "the parties agree the amount of insurance is $114,750.00." The court noted that the parties were solely contesting the interpretation of section (7)(a)(iii). The court stated:

> While defendant maintains that the measure of damages should be the fair market value of the property on the date of the judgment, September 17, 2009, the contract does not provide as such and requires payment for the actual loss suffered due to the defect.
>
> Here, the property, as insured, was valued at $114,750.00. . . . The defect, i.e. Rosewood's lien, which extinguished plaintiff's security interest in the property, reduced plaintiff's interest in the property to $0.00. Accordingly, based on the express language of the policy which determines how to calculate loss, the difference between the value of the insured interest as insured ($114,750.00) and the value of the insured interest subject to the defect ($0.00) is $114,750.00. Therefore, the liability of defendant under the policy is $114,750.00.

The key phrase in section (7)(a)(iii) of the policy is "as insured." The pertinent value is "the value of the insured estate . . . as insured." The parties agree that no Michigan case law addresses the interpretation of this phrase.[4] Plaintiff insists that the value of the insured estate as insured is the amount of the insurance—$114,750. However, section (7)(a)(iii) refers to "the value of the insured estate" and not to "the amount of insurance," a phrase employed elsewhere in section (7)(a). The additional words "as insured" simply refer to the estate as it exists in the state to be insured, i.e., without the defect, lien, or encumbrance at issue. We note that this same phrase—"as insured"—is employed in section 3 of the policy as set forth above, and it appears to refer, again, to the estate as it exists in the state to be insured.

Ticor insures against defects, liens, and encumbrances; it does not insure against changes in valuation due to market fluctuations. We find that the trial court erred in simply awarding the amount of insurance to plaintiff. This case must be remanded for a hearing and further arguments regarding damages.[5] Because we are vacating the award of damages, we also vacate the case-evaluation sanctions; the trial court shall reevaluate them on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[4] Some out-of-state case law supports, in a general way, our ruling today. See, e.g., *In re Gordon*, 317 PA 161, 165-166; 176 A 494 (1935), and *Demopoulos v Title Ins Co*, 61 NM 254, 255; 298 P2d 938 (1956) (discussing valuation of property when the market amount differs from the mortgage amount).

[5] We leave it up to the trial court to determine, after further briefing and argument by the parties, the proper measure of valuation.