SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3568-20

FINANCE OF AMERICA COMMERCIAL LLC,

Plaintiff,

v.

GEM REAL ESTATE SOLUTIONS, LLC and JUTTA SAYLES,

Defendants/Third-Party Plaintiffs-Appellants/ Cross-Respondents,

v.

MAJESTIC TITLE AGENCY, LLC,

Third-Party Defendant-Respondent/Cross-Appellant,

and

WESTCOR LAND TITLE INSURANCE COMPANY, and TOWNSHIP OF IRVINGTON,

Third-Party Defendants-

Respondents.

Argued November 9, 2022 – Decided March 17, 2023

Before Judges Messano, Rose, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6417-20.

Crew Schielke argued the cause for appellants/cross-respondents (Law Offices of Crew Schielke, LLC, attorneys; Crew Schielke, on the briefs).

Thomas G. Rantas argued the cause for respondent/cross appellant (Lewis Brisbois Bisgaard & Smith LLP, attorneys; Thomas G. Rantas, of counsel and on the briefs; Anthony A. Doss, on the briefs).

Barry J. Muller argued the cause for respondent Westcor Land Title Insurance Company (Fox Rothschild LLP, attorneys; Barry J. Muller, of counsel and on the brief).

PER CURIAM

Defendants/third-party plaintiffs GEM Real Estate Solutions, LLC (GEM) and Jutta Sayles appeal orders granting the motions of third-party defendants Majestic Title Agency, LLC (Majestic) and Westcor Land Title Insurance Company (Westcor) to dismiss the third-party complaint pursuant to Rule 4:6-

2(e) for failure to state a claim on which relief could be granted.[1] We affirm the dismissal of the negligence claim against Westcor and the dismissal of the breach-of-contract claim against Majestic but otherwise reverse and remand for further proceedings.

I.

We derive the following facts from defendants' pleadings. On February 7, 2019, 7 Krotic Place, LLC (Krotic) purchased property (the property) in the township of Irvington (Irvington) at a sheriff's sale. Krotic recorded the deed with the Essex County Clerk on February 14, 2019. On February 22, 2019, GEM purchased the property from Krotic and recorded its deed with the Essex County Clerk on March 25, 2019. On the same date, Sayles, who was GEM's sole and managing member, executed on behalf of GEM a mortgage on the property in favor of plaintiff Finance of America Commercial LLC as security for payment of a note in which GEM promised to pay plaintiff $216,900 "together with all charges . . . and interest . . . ."

[1] Majestic submitted a notice of cross-appeal referencing one of the same orders. However, in that order, the motion judge granted Majestic's motion in its entirety and Majestic in its brief argued we should affirm the order. It did not argue we should reverse the order. Accordingly, we need not address Majestic's purported cross-appeal. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived upon appeal").

In connection with its purchase of the property, GEM "utilized the services of Majestic," a New Jersey licensed title insurance agency. Majestic "at all times held itself out to be an agent of Westcor," which is also a licensed title insurance company. Specifically, "GEM had Majestic conduct a title search on the property." According to defendants, Majestic did not conduct an official tax search pursuant to N.J.S.A. 54:5-11 to -18, and the title search Majestic had conducted did not reveal any liens or any delinquent taxes or water or sewer charges that could have been the subject of any lien.

On January 23, 2019, based on Majestic's title search, Westcor issued an American Land Title Association (ALTA) "Commitment for Title Insurance," which identified GEM as the proposed insured for an owner's policy in the amount of $161,000. At or around the closing, an ALTA owner's policy of title insurance for $161,000 was issued to GEM.

Around the same time, Majestic's employee called Irvington's tax office to inquire about any open or unpaid property taxes or water or sewer charges. An Irvington employee advised her that the only open charge was a $360 sewer charge, which was due on March 1, 2019. At the closing, Majestic collected a $360 check from GEM and forwarded it to Irvington's tax office, which negotiated the check.

According to defendants, without their knowledge, a tax sale certificate dated January 7, 2019, in the amount of $448.59 was sold and was subsequently recorded with the Essex County Clerk on April 10, 2019 (the tax lien). Even though GEM had applied for and received permits to perform work on the property, Irvington declared the property to be abandoned pursuant to the Abandoned Properties Rehabilitation Act, N.J.S.A. 55:19-78 to -107. Irvington sent notice of that designation to a prior owner and did not give GEM notice of or an opportunity to challenge it.

On May 30, 2019, Mill Rd. LLC (Mill) purchased an assignment of the tax lien. On June 24, 2019, Mill recorded the assignment with the Essex County Clerk and filed an action to foreclose on the property in an expediated manner pursuant to N.J.S.A. 55:19-58(a) (the foreclosure action). According to defendants, "the expedited nature of the foreclosure action deprived GEM of any meaningful opportunity to pay the redemption amount of the lien." In an attempt to cure the lien, GEM mailed a check to Mill's attorney, but the check was rejected. On November 6, 2019, the trial court entered final judgment in Mill's favor and subsequently denied GEM's motion to vacate the default judgment. In 2022, we reversed and vacated the default judgment entered in Mill's favor and remanded the foreclosure action for further proceedings "[b]ecause the final

judgment was reached in an expediated procedure predicated on a procedurally-flawed determination that the property at issue had been abandoned and because of other anomalies . . . ." Mill Rd. LLC v. Schedule 1 Lot, No. A-3296-19 (App. Div. Jan. 25, 2022). The Court denied Mill's petition for certification. 251 N.J. 362 (2022).

According to defendants, "GEM tendered a claim to Westcor and Majestic for insurance coverage pursuant to the ALTA Owner's Policy of Title Insurance[,]" but "Westcor has refused to provide any defense or indemnification pursuant" to the policy.

Meanwhile, on September 28, 2020, plaintiff filed the complaint in this action, alleging GEM was in default of the note because of a missed payment due on February 22, 2019, and the entry of the foreclosure judgment. Plaintiff sought payment pursuant to the terms of the note.

On November 25, 2020, defendants filed an answer to plaintiff's complaint and a third-party complaint naming Majestic, Westcor, and Irvington[2] as third-party defendants. In the third-party complaint, defendants alleged Majestic and Westcor were negligent in that they had owed and breached a duty of care to

[2] Irvington was later dismissed with prejudice. Accordingly, it did not participate in this appeal.

conduct accurately and thoroughly a title search and to order an official tax search. Defendants also alleged the title insurance owner's policy issued to GEM was a contract between GEM and Westcor, which Westcor and its agent Majestic had breached by failing to conduct properly a title search and to order an official tax search. In addition, defendants sought judgment declaring Westcor had duties to indemnify and defend GEM in the foreclosure action and had breached those duties or, alternatively, reformation of the policy to provide for duties to indemnify and defend.

Westcor and Majestic moved to dismiss the third-party complaint pursuant to Rule 4:6-2(e). Defendants opposed both motions. After hearing argument, the motion judge, in a decision placed on the record and in orders issued the same day, granted the motions and dismissed the third-party complaint with prejudice.

On appeal, defendants argue the motion judge erred in finding defendants could not assert a negligence claim against Majestic pursuant to Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517 (1989), in making factual findings not contained in the pleadings, and in concluding GEM's breach-of-contract claim was precluded by the notice provision of the title insurance policy. We agree and reverse the orders as to the dismissal of the negligence

claim against Majestic and the breach-of-contract claim against Westcor. Because defendants do not argue that the motion judge erred in dismissing the negligence claim against Westcor or the breach-of-contract claim against Majestic, we affirm those aspects of the orders. See N.J. Dep't of Env't Prot., 438 N.J. Super. at 505 n.2.

II.

We review de novo a trial court's order granting a motion to dismiss pursuant to Rule 4:6-2(e). See Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). We assume the allegations in the pleadings are true and afford the pleading party all reasonable inferences. Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017). In this early stage of litigation, we are not concerned with a pleading party's ability to prove its allegations. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Instead, we examine "'the legal sufficiency of the facts alleged on the face of the complaint,' [ibid.], limiting [our] review to 'the pleadings themselves,' Roa v. Roa, 200 N.J. 555, 562 (2010)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019). We "search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement

of claim . . . ." Printing Mart-Morristown, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). "If we are able to do so, 'the complaint should survive this preliminary stage.'" Petro v. Platkin, 472 N.J. Super. 536, 563 (App. Div. 2022) (quoting Wreden v. Township of Lafayette, 436 N.J. Super. 117, 125 (App. Div. 2014)).

The motion judge based his decision to dismiss defendants' negligence claims on Walker Rogge, a case decided not on a motion to dismiss but after completion of a non-jury trial. 116 N.J. at 520. After considering all the evidence presented at trial, the trial court in Walker Rogge held the defendant title insurance company, Chelsea Title & Guaranty Co. (Chelsea), "was liable under its title policy, but not in negligence." Ibid. On appeal, we concluded "Chelsea was liable in both negligence and in contract." Ibid. On the negligence claim, the Supreme Court remanded the case to the trial court for a determination of whether Chelsea had assumed an independent duty. Id. at 541-42.

In rendering its decision, the trial court considered evidence, including testimony, about the plaintiff's president's real-estate experience, the "long-standing business relationship" between Chelsea and the plaintiff's president, the various aspects of the business conducted by Chelsea, the real-estate transaction at issue, and the discussions between Chelsea and the plaintiff's

president regarding what he had ordered and requested from Chelsea. Id. at 521-22. In finding in favor of Chelsea on the negligence claim, the trial court rejected as not credible the plaintiff's president's testimony that he had asked Chelsea to perform a title search. Id. at 522. Based in part on that credibility determination, the trial court concluded the plaintiff had not engaged Chelsea to prepare a title report but only to issue a policy of title insurance and that Chelsea had prepared a title report not for the plaintiff but for its own benefit in deciding whether to issue the title insurance policy. Id. at 536.

Considering the negligence claim, the Court framed the question as "whether the issuance of the title commitment and policy places a duty on a title insurance company to search for and disclose to the insured any reasonably discoverable information that would affect the insured's decision to close the contract to purchase." Id. at 535. Addressing that question, the Court made a distinction between a title insurance company and "a title searcher." Ibid.

> In this state, the rule has been that a title company's liability is limited to the policy and that the company is not liable in tort for negligence in searching records. Underlying that rule is the premise that the duty of the title company, unlike the duty of a title searcher, does not depend on negligence, but on the agreement between the parties.
>
> [Ibid. (emphasis added).]

The Court concluded the relationship between a title insurance company and its insured is generally governed by the title insurance policy, unless the company voluntarily assumes additional duties. Id. at 541.

In the third-party complaint, defendants alleged "GEM utilized the services of Majestic" and "GEM had Majestic conduct a title search on the property." From those allegations, we reasonably infer GEM retained Majestic as a title searcher with an independent duty to GEM, and not just as the issuer of a title insurance policy, like Westcor.

In deciding the dismissal motions, the motion judge had to assume the allegations in the third-party complaint were true and to afford defendants all reasonable inferences. See Sparroween, 452 N.J. Super. at 339. Instead, the motion judge effectively rejected GEM's allegation it had retained Majestic as a title searcher and did so, unlike the trial judge in Walker Rogge, at a preliminary stage of litigation without the benefit of the presentation of testimony and other evidence regarding the nature of the relationship between GEM and Majestic. The motion judge had to decide the motions based on a review limited to the factual allegations set forth in the third-party complaint. See Dimitrakopoulos, 237 N.J. at 107. Instead, the motion judge accepted the representation of Majestic's counsel that Majestic was "in the same shoes" as Chelsea and

apparently jumped to the conclusion that, like Chelsea, any title search prepared by Majestic was prepared for its own benefit and not for the benefit of GEM. Because the motion judge misapplied Walker Rogge, failed to assume as true defendants' factual allegations, and assumed as true facts not pleaded in the third-party complaint, we reverse the dismissal of defendants' negligence claim as to Majestic.

Defendants alleged in the third-party complaint that "GEM tendered a claim to Westcor and Majestic for insurance coverage pursuant to the ALTA Owner's Policy of Title Insurance." (Emphasis added). Instead of reasonably inferring from that allegation GEM had timely submitted a claim in accordance with the terms of the policy, the motion judge apparently accepted Westcor's representation that defendants' notice of claim was untimely and dismissed defendants' breach-of-contract claim with prejudice. The motion judge also relied on allegations made in the complaint in the foreclosure matter and on the factual findings made in the decision supporting the order denying GEM's motion to vacate the default judgment entered in that case, an order we since have reversed. Because the motion judge failed to assume as true defendants' factual allegations, assumed as true facts not pleaded in the third-party complaint, and relied on a decision supporting an order we later reversed, we

reverse the dismissal of defendants' contract-based claims as to Westcor, including the breach-of-contract, declaratory-judgment, and reformation claims.

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

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION