IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

TERRA EQUITIES, INC.,	: March Term, 2000
CHARLES MCDONALD, Trustee, and	
MARTIN OBOYLE, SR.	: No 1960
Plaintiffs	
	:
v.	
	:
FIRST AMERICAN TITLE INSURANCE CO.,	
Defendant	: Control Nos. 041237 and 060193

O R D E R

AND NOW, this 9th day of August, 2001, upon consideration of defendant, First American Title Insurance Company's Preliminary Objections to plaintiffs' Amended Complaint and the response of plaintiffs in opposition, and upon consideration of the defendant's Motion for Summary Judgment and the plaintiffs' response in opposition and all matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that the Motion for Summary Judgment is **Denied** and the Preliminary Objections are **Overruled**. The defendant is directed to file an answer to the plaintiffs' Amended Complaint within twenty-two (22) days of the date of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ..... August 9, 2001

Defendant, First American Title Insurance Company ("First American"), has submitted a Motion for Summary Judgment ("Motion") and Preliminary Objections ("Objections") to the Amended Complaint ("Complaint") of plaintiffs, Terra Equities, Inc., Charles McDonald, Trustee and Martin O'Boyle, Sr. For the reasons stated in this Opinion, this court will issue a contemporaneous Order denying the Motion and overruling the Objections.

BACKGROUND

On April 22, 1993, Commerce Realty Group, Inc. ("CRG") entered into a lease agreement ("Original Lease") with Irving Baker ("Baker") under which Commerce agreed to lease real property in Orange County, Florida ("Premises"). Ex. A. The Original Lease covered five individual parcels and interests:

1. A lease interest in a 25,030-square foot parcel ("Parcel I" or "Color Tile Parcel");
2. A non-exclusive perpetual easement to use a common access drive ("Parcel II");
3. A non-exclusive perpetual easement to use a portion of the common driveway ("Parcel III");
4. An exclusive perpetual easement to a retention area ("Parcel IV") for storm water drainage and storage; and
5. An exclusive perpetual easement to use a turn-around area ("Parcel V").

Ex. A at Exs. D1-D5. The Original Lease also granted Commerce an option ("Original Option") to lease an adjoining parcel ("Expansion Area" or "Parcel VI") and to purchase the interests granted under the Original Lease. Id. at ¶¶ 13(c), 38.[1] Plaintiffs assert that the Original Option included the option to purchase Parcel VI, as well as the option to lease and to purchase Parcel IV, as part of the Expansion Area. CRG assigned its interest in the Original Lease to Commerce Limited Partnership #9219 ("Commerce"),[2] and the Original Lease was recorded on March 10, 1994.

[1] The portion of the Original Option granting Commerce the option to lease the Expansion Area is referred to as the "Original Lease Option." The portion of the Original Option granting Commerce the option to purchase the Expansion Area is referred to as the "Original Expansion Option."

[2] Commerce is a Pennsylvania limited partnership with Terra Equities, Inc., the lead plaintiff, as a general partner, and Charles McDonald, Trustee and Martin E. O'Boyle, Sr. as limited partners.

First American Title Insurance Company ("First American") issued a title policy ("Policy") to Commerce on April 15, 1994 to insure Commerce's interests in the Premises and Expansion Area, including at least part of the Original Option.[3] The Policy had an effective date of March 10, 1994. Only Commerce was a named insured in the Policy, which included in the definition of "insured" "those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." P's Ex. C at Conditions and Stipulations ¶ 1(a), Sch. A ¶ 1.

Under the Policy, First American agreed to insure Commerce against loss or damage up to $400,000 incurred by Commerce due to the following:

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.

P's Ex. C at 1.[4] As a default rule, all defects "attaching or created subsequent to Date of Policy" are excluded from coverage. P's Ex. C at Exclusions from Coverage ¶ 3(d). The Policy also includes provisions requiring First American to assume the defense and prosecution of certain actions arising from title disputes. P's Ex. C at Policy Conditions and Stipulations ¶ 4.

[3] First American disputes that anything other than the option to lease Parcel VI was covered by the Policy.

[4] Schedule A lists Commerce's leasehold interest in Parcel I, its easement interests in Parcels II, III, IV and V, and an unspecified "option" interest in Parcel VI.

The Policy also sets forth an option endorsement ("Option Endorsement") as follows:

> With respect to the option to purchase described in Schedule B, the option to purchase is hereby incorporated into Schedule A of the policy as an interest insured thereby vested in the insured and [First American] insures against loss or damage sustained or incurred by the insured by reason of:
>
> > a) The unenforceability of the right to exercise the option to purchase except to the extent that such unenforceability or claim thereof is based on the failure of the insured to have fulfilled the terms and conditions of the option.
> >
> > b) The priority over the option to purchase of any conveyance made of the fee simple estate in the land or of any liens or encumbrances created therein after the date of policy, excepting those liens or encumbrances created or consented to by the insured or created by statute in favor of or for the benefit of governmental bodies or public utilities including without limitation real estate taxes, special assessments, demolition liens, drainage liens and water liens.

P's Ex. C at Option Endorsement.

On August 3, 1994, Commerce and Baker agreed to a first amendment to the Original Lease ("First Amendment"). In Commerce's view, the First Amendment merely "confirmed" that the Expansion Area included Parcel IV, while First American contends that the First Amendment enlarged the Expansion Area to include Parcel IV.[5] P's Ex. D at ¶ 1. In either case, no changes were made to the Policy, leaving Commerce insured only for those interests that it held under the Original Lease.

On January 27, 1995, Baker and Commerce entered into a second amendment to the Original Lease ("Second Amendment"), which was recorded on April 6, 1995. The Second Amendment included an option under which Commerce could demand that Baker convey the Premises and the Expansion Area

[5] The First Amendment also made Commerce's easement interest in Parcel V non-exclusive and was recorded on August 15, 1994.

to Commerce or its designee within sixty days for $350,000 ("Option"). On the same date, Baker and Commerce also agreed to an amended and restated lease ("Restated Lease"). Under the Restated Lease, which incorporated many of the terms of the First and Second Amendments, Baker leased Commerce the Expansion Area, defined to include Parcel IV. In neither of these documents did Baker retain a right to grant easements in the Premises or Expansion Area to others, and, in the event that Commerce exercised the Option, Baker was required to convey good and marketable title, free and clear of all encumbrances.

Commerce assigned its interests under the Restated Lease to Commerce Limited Partnership #9219-II ("Commerce II")[6] under an assignment dated May 2, 1996 ("Assignment"). Commerce II paid a sum of $10.00 as consideration for the Assignment, which was recorded on May 21, 1999. According to the plaintiffs, Commerce made the Assignment in conjunction with oral representations and warranties that, when the Option was exercised, the title to the Premises and the Expansion Area would be free and clear of all encumbrances. First American contends that the Assignment did not include any representations or warranties. Neither a new insurance policy nor an additional endorsement to the Policy was issued.

Around the time the Assignment was executed, Baker granted Brightway Builders, Inc. ("Brightway") a storm water drainage easement ("Brightway Easement") that ran across a portion of the Premises and/or the Expansion Area.[7] This was done in conjunction with the sale of certain property near

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[6] Commerce II is a Delaware limited partnership that was formed on April 26, 1996. Commerce II's general partner is Commerce GP, Inc., with Charles McDonald, Trustee, and Martin E. O'Boyle, Sr. as limited partners.

[7] The document evidencing the Brightway Easement is referred to as the "Brightway Easement Agreement." In their response, the plaintiffs assert that the Brightway Easement traverses Parcels IV, V and VI.

the Expansion Area and was concluded without notice to or the consent of either Commerce or Commerce II. Under the Brightway Easement Agreement, Brightway allegedly had the right to enter the Expansion Area and to make use of a Commerce-built retention pond for storm water runoff and drainage. In addition, Baker and any future assignees of Baker were responsible for the maintenance of the retention pond for Brightway's benefit.

The parties disagree as to when the Brightway Easement constituted an encumbrance on the Expansion Area, thus potentially implicating the Policy. The Brightway Easement Agreement itself is dated May 12, 1996, a date supported by First American, and was recorded on May 17, 1996. Plaintiffs, however, point to an amended and restated contract for purchase and sale between Baker and Brightway ("Brightway Contract"), which is dated April 26, 1996 and guarantees the delivery of the Brightway Easement Agreement at the closing of the Brightway Contract on May 8, 1996. On this basis, the plaintiffs argue that the Brightway Contract imposed an encumbrance on the Expansion Area as of April 26, 1996, even if the Brightway Easement Agreement was not executed until later.

On June 26, 1997, Commerce II gave Baker notice of its intent to purchase the Expansion Area and set July 15, 1997 as the closing date for the sale. However, due to the encumbrance placed on the Expansion Area by the Brightway Easement, the closing did not take place. Commerce II filed suit ("Baker Suit") in Florida's Circuit Court for the Ninth Judicial Circuit for Orange County against Baker and Brightway on February 23, 1998 for damages and specific performance under the Original Lease, the First Amendment, the Second Amendment and the Restated Lease. In the Baker Suit, Commerce II requested a declaratory judgment with respect to the invalidity of the Brightway Easement and further sought to quiet title to the Expansion Area. Commerce II also asked for damages for breach of contract and for trespass.

Commerce II sent notice to First American of its claim relating to the Brightway Easement over the Expansion Area on December 1, 1997.[8] On March 9, 1998, Commerce II provided First American with the basis of its claim, asserting that it had sustained damages as a result of the unenforceability of the Option and the priority of the Brightway Easement over the Option. Commerce II also provided First American with a copy of Commerce II's complaint in the Baker Suit and asked that First American pay costs and legal fees associated with the counts of the complaint seeking to determine the validity of the Brightway Easement.

First American responded on March 18, 1998, refusing to cover the costs of the litigation. First American based its denial on the fact that it was not aware of any claim that the Brightway Easement had priority over the Option, although it appears that this is precisely the position taken by Brightway in the Baker Suit. Over the next year and a half, Commerce and First American exchanged correspondence as to responsibility for the Baker Suit without any success at resolving the dispute. To date, Commerce claims it has incurred in excess of $90,000 in fees and expenses in attempting to clear title to the Expansion Area.

On April 5, 2001, the plaintiffs filed this Complaint, which asserts claims for breach of contract and bad faith. In response, First American has filed both the Objections and the Motion in each of which it asserts that the plaintiffs' claims are legally insufficient.[9]

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[8] First American contends that the claims initially filed by the plaintiffs refer only to Parcel IV, and not Parcels V and VI.

[9]The parties have agreed that the court may consider the two pleadings together for present purposes.

DISCUSSION

While the facts are complicated, the legal matters in dispute can be distilled to three issues:

1. The interests insured under the Policy and when Policy coverage was terminated;

2. The specific warranties given when Commerce transferred its property interests to Commerce II under the Assignment; and

3. The timing of the Assignment with regard to the creation of the Brightway Easement.

Because there are disputed issues of material fact as to these issues, the Objections are overruled and the Motion is denied.

I. Although the Policy Does Not Cover an Option to Purchase Parcel IV, it Covers an Option to Purchase Parcel VI and Post-Policy Encumbrances on That Option, Possibly Including the Brightway Easement.

While the Policy is not clear, it appears to cover an option to purchase Parcel VI alone and insures only an easement interest in Parcel IV. In addition, the Policy covers post-Policy encumbrances on the option to purchase Parcel VI. Because there are disputed issues of material fact as to which Parcels have been encumbered by the Brightway Easement, the court cannot grant summary judgment.

A. The Brightway Easement May Cross Parcels IV, V and VI.

As an initial matter, it is necessary to address which Parcels are encumbered by the Brightway Easement. Plaintiffs currently assert the Brightway Easement is "a storm water drainage easement across Parcels IV, V and IV," Plaintiffs' Response at 8, although a previous plaintiffs' submission made no claim that the Brightway Easement infringed on their interests in Parcels V and IV. Complaint Ex. F. Given the confusion over the interests encumbered, this court should not grant summary judgment. The court will, however, assume that the Brightway Easement traverses Parcels IV, V and VI and examine the Policy and

the issues of law accordingly.[10]

B. The Policy Covers an Option to Purchase Parcel VI.

The Policy states that it insures Commerce against loss resulting from "[t]itle to the estate or interest described in Schedule A being vested other than as stated therein," as well as "[a]ny defect in or lien or encumbrance on the title." Ex. C at 1. Schedule A, in turn, states that "[t]he estate or interest in the land described or referred to" in the Policy is a leasehold as to Parcel I, an easement as to Parcel II, III, IV, V, and an option interest as to Parcel VI. There is no explicit definition of the option interest in Parcel VI covered, leaving it unclear whether the Policy covers an option to lease Parcel VI or an option to purchase parcel VI.

This confusion is ameliorated to a degree by the Option Endorsement. The Option Endorsement refers to "the option to purchase described in Schedule B," and states that this option "is hereby incorporated into Schedule A of the policy as an interest insured. . . ." At the least, this implies that the Parcel VI option covered by the Policy is an option to purchase and not merely an option to lease.

This conclusion is bolstered by the language in the Original Lease.[11] Paragraph 38 of the Original Lease, which sets forth the Original Purchase Option, states that Commerce "shall have the option ('Option') to purchase the Leased Premises (as the same may have expanded pursuant to the provisions

[10] Neither party asserts that the Policy covered any interest in Parcel V other than an easement interest. As a result, there is no need to address the Policy coverage of Parcel V.

[11] The court has inferred that First American reviewed the Original Lease before issuing the Policy.

of subparagraph [13](c), hereof) in the following manner." Ex. A at ¶ 38 (emphasis added).[12] Paragraph 13(c), in turn, describes the Original Expansion Option, including the option to expand the leased land to include Parcel VI. Thus, the Original Lease includes the option to purchase Parcel VI and establishes that this option maybe an insurable interest.

The court concedes it to be peculiar that the option to purchase would include Parcel VI but none of the original leased land. Because the Policy fails to mention any option interest in Parcel I, however, there can be no other reasonable interpretation other than that the option to purchase covered by the Policy is an option to purchase Parcel VI.[13]

In its Motion, First American dismisses the Policy's reference to an option to purchase as a "misnomer," arguing that the Original Lease did not grant Commerce an option to purchase Parcel VI. Motion at n.6. In doing so, First American ignores the definition of "Leased Premises" set forth in Paragraph 38 of the Original Lease. Given the evidence currently before it, the court must disagree with First American and conclude that the option covered by the Policy is an option to purchase Parcel VI.

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[12] The actual reference in Paragraph 38 is to Paragraph 11(c), but it appears that this reference is in error. Paragraph 11(c) addresses the allocation of awards in the event that the Premises are taken through eminent domain and does not address expansion at all. Paragraph 13, in contrast, sets forth the Original Purchase Option. The Court has therefore inferred that the intended reference is to Paragraph 13(c).

[13] To the extent that this provision is ambiguous, the parties doubtlessly will introduce evidence to resolve any ambiguities at trial. See Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000) ("[i]f the relevant policy language is susceptible to more than one reasonable interpretation, . . . the insurance policy is considered ambiguous"); Fayette County Hous. Auth. v. Housing and Redev. Ins. Exch., 771 A.2d 11, 13 (Pa. Super. Ct. 2001) (provisions in an insurance policy are ambiguous "if they are subject to more than one reasonable interpretation when applied to a given set of facts"); Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 885 (Pa. Super. Ct. 2000) (an insurance provision is ambiguous "if reasonably intelligent people could differ as to its meaning").

C. Regardless of What the Original Lease Says, the Policy Does Not Cover an Option to Do Anything Other than to Purchase Parcel VI.

The plaintiffs argue that the Original Lease grants Commerce, as part of the Original Purchase Option, an option to purchase Parcel IV and that the Policy covers the entire Original Purchase Option. The court cannot agree with this assessment.

Plaintiffs' argument raises the threshold question whether the Original Option included Parcel IV in the Expansion Area, thus granting Commerce the option to purchase Parcel IV in addition to Parcel VI. The Original Lease describes the property covered by the "Expansion Option" as "the tract or parcel of land situate in Orange County, State of Florida, and designated as 'Expansion Area' on the Plan" attached to the Original Lease. Ex. A at ¶ 13(c)(i). Unfortunately, the Plan is less than clear: it appears to indicate that the Expansion Area covers Parcels III and VI and a portion (though not all) of Parcel IV.[14] Moreover, the parties dispute whether the First Amendment merely clarified that Parcel IV was part of the Expansion Area, as the plaintiffs argue, or enlarged the Expansion Area to include Parcel IV, as First American contends.

This discussion of the Original Lease may be beside the point, however, since there is no Policy language explicitly incorporating the terms of the Original Lease. Irrespective of how the Original Lease is interpreted, there is no indication that the Policy covered any option interest in Parcel IV. Schedule A of the Policy refers only to an easement interest in Parcel IV, and the only option interest insured is the option to purchase Parcel VI. While Commerce was permitted to extend the Original Option to include an option to purchase Parcel IV in the First Amendment, the plaintiffs have not pointed to anything that

[14] The remaining portion of Parcel IV is designated as "Retention Area."

would indicate a parallel extension of the Policy's coverage. On this basis, the court must conclude that the Policy covers only Commerce's easement interest in Parcel IV, and that the option insured under the Policy is nothing more than an option to purchase Parcel VI.

D. The Policy May Cover Post-Policy Encumbrances on the Option to Purchase Parcel VI.

First American also argues that the Policy does not cover encumbrances arising after the date that it issued the Policy. The court is not persuaded to accept this argument to the broad extent that First American presses it.

First, the Policy insures against encumbrances on Commerce's option to purchase Parcel VI that arise after the effective date of the Policy. While the Policy generally insures against only those encumbrances existing at the time the policy is issued,[15] it insures against "[t]he priority over the option to purchase of any conveyance made of the fee simple estate in the land or of any liens or encumbrances created therein after the date of policy," with certain limited exceptions. Ex. C at Exclusions from Coverage ¶ 3(d), Sch. B (emphasis added). Thus, the fact that the Brightway Easement was created after April 15, 1994, the date on which the Policy was issued, does not automatically preclude coverage under the Policy for encumbrances on the option to purchase Parcel VI.

Additionally, the terms of the Policy specifically provide that it is to continue in force "so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest." Ex. C at Conditions and Stipulations ¶ 2. As a result, if Commerce

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[15] To support the position that title policies cover only those encumbrances in existence at the time the policy is issued, First American has cited Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561, 563 (1907).

is subject to liability for breach of warranties given in conjunction with the Assignment, the Policy remains in effect, and Policy coverage may be implicated for encumbrances on the option to purchase Parcel VI.

II. The Assignment Includes an Implied Warranty That Commerce has the Option to Purchase Good Title to Parcel VI.

Having determined the general scope of the Policy, the court must now consider the Assignment between Commerce and Commerce II and the question whether that Assignment included warranties that implicated the Policy. Because Florida law implies a warranty of good title in an assignment of an interest in real property, the Assignment includes an implied warranty that the option to purchase Parcel VI would grant Commerce II good title to Parcel VI.

The court must first note that the Assignment does not include any written warranties. According to the plaintiffs, however, Commerce represented to Commerce II that it held its interests under the Restated Lease "free and clear of all title liens, defects and encumbrances," and that the interests covered by the Option, when exercised, would be similarly "free and clear of all title liens, defects and encumbrances." Affidavit of Martin E. O'Boyle, Sr. at ¶¶ 16-17. Commerce also argues that the Assignment included an implied warranty of title, in accordance with Florida law.

In asserting that Commerce gave Commerce II an implied warranty of title in the Assignment, the plaintiffs rely primarily on two Florida cases. In General Electric Credit Corp. v. Air Flow Industries, Inc., 432 So. 2d 607 (Fla. Dist. Ct. App. 1983), the defendant had assigned the plaintiff a mortgage that was ineffective because its legal description of the property was inaccurate. In finding for the plaintiff, the court noted that the warranty in the assignment that the mortgage was legally enforceable "simply mirror[ed] the otherwise existing rule that the assignment of a mortgage carries with it an implied warranty that it is what

it purports to be: an existing valid, legal obligation enforceable against the property, ostensibly secured." 432 So. 2d at 608-09 (citations and footnote omitted).

Similarly, in Walton Land & Timber Co. v. Long, 135 So. 2d 843 (Fla. 1939), the Florida Supreme Court examined the assignment of a license to cut timber where the land on which the timber was located had been condemned by the government for eminent domain purposes. The Court noted that "in every contract for the sale of realty there is an implied undertaking to make a good title" and held that there was "an implied undertaking on the part of the defendant to make good title to the standing timber contracted to be sold." 135 So. 2d at 848. See also 77 Am. Jur. 2d Vendor & Purchaser ¶ 123 ("in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking on the part of the vendor to make and convey a good or marketable title to the purchaser").

According to First American, these cases "merely stand for the proposition that an assignment of realty, or an interest in realty, carries an implied warranty that the assignor has the legal right to assign the interest assigned" and cannot be applied to the instant matter. Defendant's Reply at 8. However, this interpretation finds no support in either case. Indeed, in both General Electric and Walton, the flaws were in the assignor's title to the property, not merely in the assignor's right to assign title to the property.

In the absence of language disclaiming the implied warranty of title, the court must conclude that, in assigning its interests under the Restated Lease to Commerce II, Commerce impliedly warranted that it had good title to such interests, including its option to purchase Parcel VI. This warranty was breached if Commerce did not have a right to purchase good title to Parcel VI.[16]

[16] Because the Assignment included an implied warranty of good title, the court need not examine the legal effect of Mr. O'Boyle's alleged oral warranty.

III. The Brightway Easement Constituted an Encumbrance as of the Date of the Brightway Contract.

The final question presented by the Motion is whether the Brightway Easement encumbrance was lodged prior to the transfer of interests from Commerce to Commerce II, thereby implicating the Policy. The court concludes that it was.

While the parties have not been able to agree on the legal effect of certain events, they are in agreement as to the dates on which those events took place. Brightway and Baker entered into the Brightway Contract, which promised the establishment of the Brightway Easement, on April 26, 1996. The Assignment was executed on May 2, 1996, and on May 12, 1996, Brightway and Baker entered into the Brightway Easement Agreement.

The plaintiffs rely on the doctrine of equitable conversion urging that the encumbrance was created on the date the Brightway Contract was executed. This doctrine was relied on in B.W.B. Corp. v. Muscare, 349 So. 2d 183 (Fla. Dist. Ct. App. 1977). There, the sellers-defendants granted the lessee of the relevant property an option to purchase the property, and the parties later entered into an unrecorded agreement of sale. Although the sale was never consummated, no release was signed. The defendants then conveyed the property to the plaintiff by warranty deed.

The B.W.B. Corp. court first noted that, under the doctrine of equitable conversion, an outstanding contract for sale of real property establishes "the vendee as the beneficial owner of the property, with the vendor retaining only naked title," even where the vendee has not paid the purchase price. 349 So. 2d at 184-85 (citation omitted). Because the outstanding agreement of sale created a cloud on the defendants' title to the property, the defendants breached the warranty deed, and the plaintiffs were entitled to costs

required to quiet title.

First American attempts to distinguish B.W.B. Corp. in several ways. First, the sellers in B.W.B. Corp. executed affidavits stating that the property was "free and clear of all liens, taxes, encumbrances and claims. . . ." 349 So. 2d at 184. Second, the property was conveyed by warranty deed, and third, the defendants themselves were responsible for the defect in the title.

First American's first two arguments are unpersuasive because, as discussed supra, the Assignment included an implied warranty of good title. In addition, there is no indication in B.W.B. Corp. or anywhere else that Florida law distinguishes between defects created by the seller and those created by third parties. Thus, the doctrine of equitable conversion leads to the conclusion that the Brightway Easement constituted an encumbrance as of April 26, 1996, prior to the date on which Commerce assigned its interest under the Restated Lease to Commerce II. Hence, the Policy was implicated.

CONCLUSION

The court has reached the following conclusions based on the record as constituted in conjunction with the Motion:

- Although the Policy is not clear, it appears that the only option covered is an option to purchase Parcel VI;
- The Policy covers those post-Policy encumbrances that interfere with the option to purchase Parcel VI;

- The Assignment included an implied warranty that Commerce had good title to the property covered by the Option;
- The Brightway Contract constituted an encumbrance as of April 26, 1996; and
- There are disputed issues of material fact as to which Parcels are encumbered by the Brightway Easement.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.