IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

NETTE PROPERTIES, LLC.	:	**October Term, 2007**
	:	
Plaintiff	:	**No. 02928**
	:	
v.	:	
	:	
	:	
FIRST AMERICAN TITLE INSURANCE COMPANY ET AL.	:	
	:	
Defendants	:	**Commerce Program**
	:	
and	:	
	:	
CLAIRE NELSON	:	
	:	
Defendant and Third Party Plaintiff	:	
	:	
v.	:	**Control No.**
	:	
PEPPER HAMILTON, LLP ET AL.	:	**09111978**
	:	
Third Party *Defendants*	:	

OPINION

The issue presented by the motion in limine is whether language in a title insurance policy is ambiguous regarding the extent of liability of the insurer. For the reasons below, the language in the title insurance policy is not ambiguous and Plaintiff may recover from the insurer no more than $100,000, if at all.

Background

Plaintiff, Nette Properties, LLC ("Nette,") paid Defendant Claire Nelson ("Nelson,") $1.8 million for the land and air rights to real property located at 1822

Spring Garden Street, Philadelphia, Pennsylvania (the "Property.")[1] After completion of the sale, Nette insured the Property for $1.8 million through Defendant First American Title Insurance Company ("First American.")[2]

On 27 December 2005, Nette signed an agreement of sale selling the Property to a real estate developer. The developer agreed to pay $3.9 million for the land and air rights to the Property, and planned to build thereon a forty-storey building.[3]

On 28 August 2006, Nette discovered that Nelson had never owned the air rights to the property, and had not conveyed them to Nette. Consequently, the sale of air rights from Nette to the developer was worthless. Upon this revelation, the planned erection of the forty-storey building was scrapped, the contract between Nette and the developer was terminated, and Nette was left owning only the land rights to the Property.

Nette filed the instant law suit against a number of defendants, including First American as title insurer to the Property. Count IV of Nette's complaint asserts against First American the claim of breach of the insurance contract, and seeks damages of $1.8 million equivalent to the full amount of the policy. First American filed a motion in limine to limit Nette's recovery to no more than $100,000.

Discussion

"A motion in limine is a device for obtaining rulings on the admissibility of

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[1] Agreement of Sale, Exhibit K to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Defendant Claire Nelson.
[2] Insurance Policy No. 104226394, Exhibit M to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Defendant Claire Nelson.
[3] Agreement of Sale of Mixed Residential and Commercial Real Estate; Zoning Use Permit No. 710515. Exhibits N and R to the response of Plaintiff Nette in opposition to the motion for partial summary judgment of Defendant Claire Nelson.

evidence prior to trial."[4] "The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language."[5] "[A] fundamental rule of construction and interpretation of a contract [requires that] words and phrases be given their plain and ordinary meaning when possible."[6]

In the motion in limine, First American argues that the language in the policy clearly and unambiguously limits Nette's recovery to no more than $100,000. Opposing the motion, Nette argues that the language in the title policy is ambiguous and may be interpreted as allowing recovery of $1.8 million. The pertinent language in the title insurance policy supplies a formula for calculation of insurer's liability in the event of failure of title. The formula states:

7. **Determination, Extent of Liability and Coinsurance**

This policy is a contract of indemnity against the actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) **The liability of the Company under this policy shall not**

[4] Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., 933 A.2d 664, 667 (Pa. Super 2007).
[5] Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).
[6] Toombs NJ, Inc. v. Aetna Casualty & Surety Co., 591 A.2d 304 (Pa. Super. 1991).

exceed the least of:

(i) The **Amount of Insurance** stated in Schedule A; or,

(ii) 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.

First American and Nette agree that the expression "**Amount of Insurance stated in Schedule A**" is clear and unambiguous, and reflects the amount of **$1.8 million**. First American and Nette also agree that the expression "**value of the insured estate or interest subject to the defect**" is clear and unambiguous and reflects the amount of **$1.7 million**. However, First American and Nette disagree as to the expression "**value of the insured estate or interest as insured**," contained in the first half of Section 7(a)(ii). According to First American, this expression is clear and unambiguous, and is fixed by the purchase price of $1.8 million paid by Nette for the land and air rights to the Property. Under First American's interpretation, application of the formula above yields the following:

Value of the insured estate or interest as insured	$1,800,000
Minus the value of the insured estate or interest subject to the defect	$1,700,000
Difference	**$100,000**

Since the difference of $100,000 is less than $1,800,000 (the Amount of Insurance stated in Schedule A,) it follows that the insurer's maximum liability should not exceed $100,000.

Opposing the motion, Nette argues that the term "**value of the insured estate or interest as insured**" is ambiguous and could be interpreted as an amount equal to Nette's lost bargain, which has been fixed by its expert witness at $3.95 million. Under Nette's interpretation, application of the formula yields the

following:

Value of the insured estate or interest as insured	$3,950,000
Minus the value of the insured estate or interest subject to the defect	$1,700,000
Difference	**$2,250,000**

Since the difference of $2,250,000 is greater than $1,800,000 (the Amount of Insurance stated in Schedule A,) it follows that $1,800,000 is the insurer's extent of liability for failure of title.

Neither party identified Pennsylvania case law interpreting the expression "**value of the insured estate or interest as insured**." However, First American cited a case from Ohio, Zeiger v. Shons, 2001 Ohio App. LEXIS 1991, which held that the expression "**value of the insured estate or interest as insured**" was not ambiguous, and determined that such a value was equal to the purchase price paid for the property.

In Zeiger, Buyers paid $320,000 for a residential property, and insured title to their purchase for the same amount. Subsequently, Buyers discovered that an adjoining owner had encroached upon their property. Buyers filed a claim with the Insurer and claimed that the encroachment had diminished the value of their purchase. Buyers hired an appraiser who certified that the value of the property, with the encroachment, was $335,000. This figure was higher than the purchase price paid as insured. Based on this estimate, Insurer denied Buyers' claim, and Buyers filed suit against the Insurer. Subsequently, the Insurer moved for summary judgment on grounds that Buyers had not suffered any damages because the value of their property, despite the encroachment, was higher than the purchase price paid as insured. The trial Court granted summary judgment for the Insurer, and Buyer appealed. The Ohio Court of Appeals stated:

> While the parties dispute whether the admitted encroachment resulted in loss or damage to [Buyers,] the policy clearly defines the measure of damages to be used in calculating loss. Specifically, paragraph seven of the Conditions and Stipulations of the policy provides:
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> * * *
>
> (a) The liability of the Company under this policy shall not exceed the least of:
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> * * *
>
> (ii) 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, encumbrance insured against in this policy.
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> These sections of the policy are clear and unambiguous.... Here, the property, as insured, was valued at $320,000. The [Buyers'] appraiser appraised the property at $335,000. Therefore, based on the express language of the policy which determines how to calculate loss, the property's market value exceeds the value of the property as insured and the [Buyers] have not suffered an actual monetary loss as defined under the policy. Accordingly, the [Buyers'] claim ... fails as a matter of law.[7]

This Court agrees with the policy interpretation provided by the Ohio Appellate Court. Under the clear and unambiguous language in that policy, the "value of the insured estate or interest as insured" was fixed by the purchase price paid for the Property. In this case, the language in the title policy tracks word-by-word the same operative language. In this case, Nette paid $1.8 million for the land and air rights to the Property, and insured title to such rights for the same amount. The expression "**value of the insured estate or interest as insured**" is clear and unambiguous, and is equivalent to the purchase price of $1.8 million paid by Nette for the land and air rights to the Property.

This conclusion is supported by long-standing Pennsylvania case law on how

[7] Zeiger v. Shons, 2001 Ohio App. LEXIS 1991 at 10.

to calculate damages upon failure of title. In Clark v. Steele, 99 A.1001 (Pa. 1917), the Pennsylvania Supreme Court was asked to rule whether the lower court had properly limited damages recoverable by a disappointed buyer of real estate. The Supreme Court stated: "The relative value of the part to the whole is to be estimated with regard to the price fixed by the parties for the whole."[8] In this case, the price fixed by Nette to buy the land and air rights to the Property was $1.8 million, and Nette insured the land and air rights for the same amount. Under the clear and unambiguous language in the title policy, damages are fixed by the purchase price as insured, minus the value of the insured estate or interest subject to the defect ($1.7 million). Nette may recover from First American no more than $100,000.

BY THE COURT,

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ARNOLD L. NEW, J.

[8] Clark v. Steele, 99 A. 1001, 1003 (Pa. 1917), Fuller v. Mulhollan, 450 Pa. Super. 257 (Pa. Super. 1909).