

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FALCON, INC,)
)
 Plaintiffs,)
)
)
 v.) Civ. No. 95-CV-182-B
)
)
 CHICAGO TITLE INSURANCE)
 COMPANY,)
 Defendant.)

RECOMMENDED DECISION

Plaintiff, Falcon, Inc., seeks a declaratory judgment determining Defendant Chicago Title Insurance Company's duty to defend it under a title insurance policy issued in February, 1986. Falcon is a Maine corporation with its principal place of business in Bangor. Ernest A. Caliendo, Jr., a resident of Bangor, is the President of Falcon. Defendant, Chicago Title Insurance Company, is a Missouri corporation with business operations in Maine. Jurisdiction is based on diversity of citizenship. Both parties move for partial summary judgment. For the reasons set forth below I recommend the Court deny Plaintiff's Motion for Partial Summary Judgment, and grant Defendant's Motion for Partial Summary Judgment.

I. Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect

the outcome of the suit under applicable law." *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)).

The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

II. Background

In this case, there are no material factual disputes. In February, 1986, Chicago Title issued title insurance to Falcon covering land at Spencer Lake, Township 3, Range 5, Somerset County, Maine ["SPENCER LAKE PROPERTY"]. Coverage under the policy commenced on February 14, 1986. The policy insured against:

loss or damages . . . sustained or incurred . . . by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land; or
4. Unmarketability of such title.

The policy, however, excluded: "[d]efects, liens, encumbrances, adverse claims, or other matters . . . created, suffered, assumed or agreed to by the insured claimant . . . [or] resulting in no loss or damage to the insured claimant"

In October, 1994, Falcon and Alan J. Nowicki executed a purchase and sale agreement, as well as an option contract, for the Spencer Lake property.¹ On or about February 7, 1995, Nowicki

¹ The property was divided into two parcels, one of which was the subject of the purchase contract, and the other of the option. Together, the parcels comprise the exact property identified in the February, 1986 title insurance contract.

filed suit against Falcon, Caliendo, and United Bank in Superior Court, Somerset County. *Nowicki v. Falcon, Inc.*, Docket No. CV-95-15. Nowicki asserted both tort and contract claims.

Falcon sought both legal defense and indemnification from Chicago Title covering Nowicki's underlying state court action.² Chicago Title, however, refused Falcon's demand. Falcon then proposed that Chicago Title issue a title insurance binder to Nowicki. Chicago Title denied this request as well. Falcon now seeks to have this Court determine the scope of its title insurance policy.

III. Duty to Defend

At issue in this Motion for Partial Summary Judgment is the scope of Falcon's duty to defend under the title insurance policy. Whether an insurer has a duty to defend is a question of law. *Endre v. Niagra Fire Insurance*, 1996 WL 224099, *2 (Me.); *Commercial Union Insurance v. Royal Insurance*, 658 A. 2d 1081, 1082 (Me. 1995). Maine courts employ the "comparison test" to determine the scope of an insurer's duty to defend. *Commercial Union*, 658 A.2d at 1082. That is, courts compare the insurance policy with the allegations in the underlying complaint. *NE Properties v. Chicago Title*, 660 A.2d 926, 927 (Me. 1995); *City of Old Town v. American Employers Insurance*, 858 F. Supp. 264, 267 (D. Me. 1994). An insurer has a duty to defend if any potential exists that the facts ultimately proven may come within the scope of the policy in question. *Commercial Union*, 658 A.2d at 1082.

² Falcon claims it notified Chicago Title in a timely manner, by a letter on February 21, 1995, as to Nowicki's suit.

Plaintiff asserts that Counts I, II and IV of Nowicki's complaint establish a potential for coverage and thus trigger Chicago Title's duty to defend.³ If any one of these claims would be "potentially covered," then Falcon is entitled to a defense on all five counts. *L. Ray Packing Co. v. Commercial Union Insurance*, 469 A.2d 832, 833-34 (Me. 1983).

Counts I and II of Nowicki's complaint sound in contract; count IV in tort. In each of these counts, Nowicki asserts that Falcon failed to provide deeded access to the property from State Route 201, and misrepresented the nature of certain encumbrances. Falcon argues that Nowicki's claims are thus covered, or at least potentially covered, under the provision of its title insurance covering losses, damages and expenses resulting from "[a]ny defect in, or lien or encumbrance on such title."

Comparing the claims in counts I, II and IV of the Nowicki complaint to the policy the Court finds that Chicago Title does not have a duty to defend. The essence of Nowicki's claim is that certain oral representations were made, *prior to the execution of the purchase and option contracts*, regarding accessibility to the property from Route 201, and the nature of the encumbrances. However, the insurance covers only that property identified in the policy. Representations that the property is somehow different from that description are simply not covered.

As the Defendant points out, the access by land at issue in Nowicki's complaint likely relates to the expiration of a prior license granted by the predecessor in interest to the land. That license was granted for a period of five years commencing in 1985. Chicago Title did not issue their policy until 1986. If the license did in fact expire in 1990, it did so after the date of Chicago

³ Nowicki filed a five count complaint seeking damages for breach of contract (Count I); intentional misrepresentation (Count III), negligent misrepresentation (Count IV) and contract interference (Count V). Nowicki seeks injunctive relief in Count II.

Title's policy and thus it was not covered by the policy. Whether that license did or did not lapse is not a consequence for which Chicago Title would be responsible, as the policy clearly excludes defects arising after the effective date of the policy.

The same is true of Nowicki's allegations regarding the easements, which Nowicki asserts were created *after* Plaintiff acquired the property, and therefore the title insurance. If Nowicki proves his claim, that particular defect would not be covered.

Conclusion

For the foregoing reasons, I hereby recommend the Court DENY Plaintiff's Motion for Partial Summary Judgment, and GRANT Defendant's Motion for Partial Summary Judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on September 16, 1996.