

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED BANK,)	
)	
Plaintiff)	
)	
v.)	Civil No. 97-262-B
)	
CHICAGO TITLE INSURANCE CO.,)	
)	
Defendant)	

MEMORANDUM OF DECISION¹

The plaintiff, United Bank [hereinafter “United”], brings this action against the defendant, Chicago Title Insurance Co. [hereinafter “Chicago Title”], seeking: 1) a declaratory judgment construing the provisions of the title insurance Chicago Title provided to United; 2) reimbursement for the cost United incurred because of Chicago Title’s refusal to defend United in an underlying action; 3) payment for loss suffered because of the unmarketability of title and lack of access to the property insured. Presently before the Court for consideration is Chicago Title’s Motion for Summary Judgment, United’s Response and Chicago Title’s Reply. For the reasons below Chicago Title’s motion is GRANTED.

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 a judgment as a

¹ Pursuant to 28 U.S.C. 636(c) (1993), the parties have consented to proceed before the United States Magistrate Judge.

United has requested oral argument on its motion. Because I am satisfied that the written submissions of the parties are sufficient to permit the court to resolve the issues raised therein, the request for oral argument is denied.

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 nonmoving. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

II. Background

In 1992, United took a mortgage on a large tract of property [hereinafter "Spencer Lake Property"] to secure a loan to Northern Products, Inc., a log home manufacturer.² The Spencer Lake Property contains approximately 900 acres land and a two mile stretch of waterfront along Spencer Lake. Chicago Title contracted with United, on May 1, 1992, to provide lender's title insurance to United on the Spencer Lake property. The policy insured against loss or damage sustained or incurred by "lack of access to or from the land." Both parties agree that the policy did not insure that "deeded access" existed to the property. Until 1990, the property could be accessed by land through a license obtained by Northern Properties from a paper company. That

² Although the loan was made to Northern Products, Falcon, Inc. owned the Spencer Lake property and guaranteed the loan. Ernie Caliendo owned both corporations and negotiated with the bank for the loan.

license expired in 1990, two years before United obtained title insurance from Chicago Title.

In 1993, Northern Products was unable to make payments on the loan. United notified Northern that it intended to foreclose on the property if Northern was unable to successfully auction the property in October 1994. Northern auctioned the property for 925,000 dollars to Alan Nowicki. Nowicki was under the impression that the property had “deeded access” that could accompany traffic to the lodge and trucks for removing timber from the property. Upon learning that no such access existed, Nowicki brought suit against Falcon and United.

After Nowicki initiated suit United foreclosed on the property and liquidated its security interest in the property at a public auction in December 1995. United sold the property for 890,000 dollars. United asserts that Chicago Title, having insured that a right of access existed to the property, must perform its duty to defend and indemnify United against Nowicki’s claims.

III. Discussion

A. Duty to Defend and Duty to Indemnify

United claims that Chicago Title had a duty to defend United against Nowicki's claims. To determine what the title insurance policy was intended to cover the Court must first decide whether the terms agreed to between the parties are ambiguous. United maintains that the Court should interpret the language in the insurance policy broadly, construing the terms against the insurer. *Patron's Mutual Insurance Co. v. Rideout*, 411 A.2d 673 (Me. 1980). However, the rule of construing terms broadly and against an insurer applies only when the insurance policy contains ambiguous terms. *Allstate Ins. Co. v. Elwell*, 513 A.2d 269 (Me. 1986). In the absence of ambiguous language in the insurance policy the interpretation of the contract becomes a matter of law. *Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1282 (Me. 1993). If the insured disagree on

the meaning of the contract, an ambiguity is not automatically established. "Mere hope of coverage by the insured to understand the policy does not render the contract ambiguous."

Patrons Oxford Mut. Ins. v. Marois, 573 A.2d 16, 19 (Me. 1990).

The Court is satisfied that the insurance policy Chicago Title sold to United contains unambiguous terms. The policy specifically insures "access to and from the land". The policy does not specify what type of access and United's hope that the term "access" refers to access by land does not raise the term "access" to ambiguity.

Having determined that the policy's terms are unambiguous, the Court now turns to addressing the policy's scope of coverage and Chicago Title's duty to defend. In Maine, courts employ the "comparison test" to determine the scope of the policy and the insurer's duty to defend. *Commercial Union Insurance v. Royal Insurance*, 658 A.2d 1081, 1082 (Me. 1995). The test requires a court to compare the insurance policy to the allegations in the Complaint. *NE Properties v. Chicago Title*, 660 A.2d 926, 927 (Me. 1995). 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.

Comparing the insurance policy to the allegations in the Complaint the Court is satisfied that no potential exists that Chicago Title will have a duty to defend United.³ United's argument basically follows the following causal route. First, United argues that when Chicago Title issued the title insurance, Chicago Title's agent left the impression that a right of access existed by land.

³ United has also alleged unmarketability of title. A title may be unmarketable for a number of reasons. The only reason the Court can discern to support United's claim is a lack of access. Therefore the issue of access to the property is dispositive on United's unmarketability of title claim.

Second, relying on that representation United read the “right of access” in the insurance policy to cover the right of access by land. Third, relying on the insurance policy insuring a "right of access", bidders on the property, including Nowicki, were told that a "clean title" existed.

Even if United proved the above set of facts, a duty to defend does not arise in Chicago Title because the policy, by its clear terms, insures a right of access, not a right of access by land. Chicago Title maintains that a right of access exists via the lake. In Maine, access to property via water constitutes sufficient access. *See Amodeo v. Francis*, 681 A.2d 462, 466 (Me. 1996) (absent evidence that access via water that bounds the land is unavailable, an easement by necessity cannot exist); *O’Connell v. Larkin*, 532 A.2d 1039, 1042 (Me. 1987) (when alternative means of access exist, even if expensive, an easement by necessity will not be found.) Accordingly, the Court finds that Chicago Title does not have a duty to defend United; nor did Chicago Title have a duty to indemnify United for any costs United suffered.

IV. Conclusion

For the reasons stated above the court GRANTS the Defendant's Motion for Summary Judgment on all counts.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on July 10, 1998