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2014 IL App (4th) 130892-U

NO. 4-13-0892

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

September 25, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

WEBER ESTATES INVESTMENTS, LLC,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
and	)	McLean County
THE TRAILS OF SUNSET LAKE, LLC,	)	No. 09L156
JIM O'NEAL, and B.J. ARMSTRONG,	)	
Plaintiffs,	)	
v.	)	
CHICAGO TITLE INSURANCE COMPANY,	)	
Defendant-Appellee,	)	
and	)	Honorable
FARNSWORTH GROUP, INC.,	)	Rebecca Simmons Foley,
Defendant.	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Presiding Justice Appleton and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, concluding the title insurance policy did not allow plaintiff-insured to recover the costs associated with moving the gas main.

¶ 2 In July 2007, plaintiff, Weber Estates Investments, LLC, purchased approximately 63 acres of farmland for the purpose of developing it into a residential subdivision and contemporaneously entered into a contract for title insurance with defendant, Chicago Title Insurance Company. When work began on the planned entrance into the subdivision, in October 2007, plaintiff discovered an easement, held in favor of the Northern Illinois Gas Company, n/k/a Nicor Gas, encumbered a portion of the property and contained a 12-inch, high-pressure

gas main. Plaintiff thereafter submitted a claim to defendant, informing it of the existence of the easement and gas main.

¶ 3 In September 2010, plaintiff, The Trails of Sunset Lake, LLC (the Trails), B.J. Armstrong, and James O'Neal filed a second amended complaint seeking, in part, a declaratory judgment requiring defendant to pay damages under the title insurance policy. In May 2012, the trial court found the policy provided plaintiff with coverage and subsequently set the matter for a trial on damages.

¶ 4 In March 2013, plaintiff filed a motion for summary determination on the proper measure of damages in which it asserted the proper measure of damages was the difference between the value of the land as insured and the value of the land less the costs of moving the gas main. In May 2013, the trial court denied plaintiff's motion, finding the proper measure of damages under the policy was diminution in fair market value, and subsequently awarded plaintiff \$4,200 in damages.

¶ 5 On appeal, plaintiff contends (1) the policy language supports its valuation of the damages incurred by plaintiff; and (2) the trial court erred in denying its motion for leave to amend its complaint. We affirm.

¶ 6 I. BACKGROUND

¶ 7 A. The Development Site

¶ 8 In June 2006, plaintiffs Jim O'Neal and B.J. Armstrong, who are not parties to this appeal, began searching for land on which they could develop an upscale residential subdivision. O'Neal and Armstrong ultimately targeted an 84.29-acre site of farmland located in Normal, Illinois, and entered into negotiations with the owner. As part of their plan to develop the site, O'Neal and Armstrong divided the site into three separate parcels with the intent to develop the

site in three separate phases. Plaintiffs would develop "parcel two" first, "parcel one" second, and "parcel three" last.

¶ 9 B. The Nicor Easement

¶ 10 A publicly recorded easement, recorded on August 17, 1972, encumbered a portion of parcels two and three. The easement was held by Nicor Gas, f/k/a Northern Illinois Gas Company, and contained a 12-inch, high-pressure gas main.

¶ 11 C. Plaintiff's Purchase of the Property

¶ 12 In January 2007, O'Neal and Armstrong organized two entities, plaintiff and the Trails, for the purpose of pursuing their effort to purchase and develop the property. As negotiations continued, O'Neal and Armstrong enlisted Farnsworth Group, Inc. (Farnsworth), to provide a feasibility study, preliminary sketch plans for the development, and a list of preliminary development costs.

¶ 13 Plaintiff first pursued the purchase of parcels one and two (the property), which totaled approximately 63 acres, and agreed to pay \$2,855,700 for the parcels. Plaintiff later discovered the soil on the property was not conducive to its plans for development and, as a result, plaintiff and the owner agreed to reduce the purchase price by \$856,000, the cost of correcting the soil conditions. On July 20, 2007, defendant issued a commitment for title insurance on the property and, on July 31, 2007, plaintiff and the owner executed a second revised contract for sale of the property. Plaintiff did not purchase parcel three in this transaction.

¶ 14 D. The Policy and Its Relevant Provisions

¶ 15 On August 15, 2007, defendant issued a title insurance policy (the policy), insuring plaintiff's title in the property. Schedule A, which was attached to the policy, stated the

policy provided plaintiff with \$2,855,700 in coverage. Schedule A indicated defendant insured the property and included separate legal descriptions for each parcel. (The policy refers to parcel two as "Tract No. 1" and parcel one as "Tract No. 2.") The policy further provides:

"SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, [Defendant], a Missouri Corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

\*\*\*

2. Any defect in or lien or encumbrance on the title[.]"

Schedule B, which was attached to the policy and listed the exceptions from coverage, did not identify the Nicor easement as being excepted from coverage.

¶ 16 The policy also limited the extent of defendant's liability in the event of a breach.

Paragraph seven of the conditions and stipulations stated:

"This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant 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 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.

¶ 17 E. The Circumstances Giving Rise to Plaintiff's Cause of Action

¶ 18 In October 2007, Stark Excavation began excavation work on the planned entrance into the subdivision and discovered the gas main when it made a Joint Utility Locating Information for Excavators call to locate the underground utility lines. Stark informed Farnsworth, which related the information to plaintiff. To continue with construction of the entrance as planned, the gas main needed to be moved. The discovery of the gas main and its interference with the planned entrance prompted plaintiff to file a claim under the policy.

¶ 19 In November 2007, defendant received notice of plaintiff's claim against the policy. Later that month, defendant acknowledged receipt of plaintiff's claim. In December 2007, plaintiff informed defendant the gas main needed to be moved.

¶ 20 In February 2008, plaintiff transferred its title to parcel two to the Trails by warranty deed. Plaintiff retained its title to parcel one. Plaintiff did not inform defendant it had transferred the property to the Trails.

¶ 21 In June 2008, plaintiffs' attorney informed defendant he was waiting to receive an estimate of the costs of moving the gas main. In September 2008, plaintiffs' attorney provided defendant with an estimate of the cost to relocate the gas main. In October 2008, plaintiffs' attorney advised his clients to authorize the work on moving the gas main.

¶ 22 In April 2009, plaintiff submitted its proof of loss or damage to defendant as required by paragraph five of the conditions and stipulations in the policy. In June 2009, the Trails authorized the work to move the gas main. By the time work was completed, the Trails had incurred \$521,578.76 in direct out-of-pocket costs to move the gas main. The easement remained but the gas main was moved to where it no longer interfered with the planned entrance to the subdivision.

¶ 23 F. Procedural History

¶ 24 In September 2010, plaintiff, O'Neal, Armstrong, and the Trails filed their second amended complaint against defendant, Farnsworth, plaintiffs' former attorney, Frank Miles, and his firm, Hayes, Hammer, Miles, and Cox, LLP. Count I was directed against defendant and sought a declaratory judgment requiring, *inter alia*, defendant to "pay damages accrued by [plaintiff], or alternatively [the Trails], which is an amount currently exceeding \$521,578.86, plus an award of reasonable attorney's fees plus costs of suit under 215 ILCS 5/155."

¶ 25 In September 2011, defendant filed its affirmative defenses to the second amended complaint. In its first and fifth affirmative defenses, defendant asserted the Trails could not recover under the policy. In its second affirmative defense, defendant asserted the transfer of parcel two to the Trails divested plaintiff of coverage under the policy. In its third affirmative defense, defendant asserted paragraph seven of the conditions and stipulations of the policy limited its liability under the policy. In its fourth affirmative defense, defendant asserted plaintiff sustained no loss or damage as a result of the Nicor easement because plaintiff acquired title to parcel two solely for the purpose of conveying it to the Trails. In its sixth affirmative defense, defendant asserted plaintiff suffered no loss or damage as a result of the Nicor easement because

plaintiff "agreed in the Second Revised Contract to accept title subject to any easement that did not violate an existing improvement or the use thereof."

¶ 26 In February 2012, plaintiff filed a motion for summary judgment as to defendant's second, fourth, and sixth affirmative defenses and a memorandum in support thereof. Therein, plaintiff did not contest defendant's first and fifth affirmative defenses, agreeing with defendant's assertion the Trails could not recover under the policy. With respect to defendant's second affirmative defense, plaintiff argued it was still an "insured" as defined by the policy because it retained an interest in the property as defined in Schedule A. Further, plaintiff asserted it sustained damages in an amount equal to the difference between the value of the property as insured and the value of the property subject to the defect in title. Other than noting its disagreement that defendant's third affirmative defense was actually an affirmative defense, plaintiff did not dispute paragraph seven of the conditions and stipulations would limit its recovery under the policy. In response to defendant's fourth affirmative defense, plaintiff incorporated its argument regarding defendant's second affirmative defense, asserting it did sustain a loss as a result of defendant's failure to disclose the Nicor easement. Finally, with respect to defendant's sixth affirmative defense, plaintiff contended it could not accept title to the property subject to an easement of which it had no knowledge.

¶ 27 In March 2012, defendant filed a cross-motion for summary judgment on its affirmative defenses.

¶ 28 In May 2012, the trial court granted summary judgment in favor of plaintiff as to defendant's second, fourth, and sixth affirmative defenses. In doing so, the court accepted plaintiff's argument it (1) was still an "insured" under the policy, and (2) sustained damages as a

result of defendant's failure to disclose the Nicor easement. In other words, the court found the policy provided coverage for plaintiff's claim.

¶ 29 In June 2012, plaintiff filed a motion to sever the claims to be tried against defendant. In August 2012, the court granted plaintiff's motion to sever and set the trial on damages for March 2013.

¶ 30 In March 2013, plaintiff moved for summary determination of the proper measure of damages under the terms of the policy. Therein, plaintiff contended the insured property "was devalued by the cost of moving the [Nicor] gas main, which greatly impacted the planned development." Plaintiff relied on the opinion of its appraiser, Brian Finch, who opined plaintiff suffered damages of approximately \$574,000, which was what an informed developer would have adjusted its purchase price had the Nicor easement and gas main been disclosed. Finch reached his conclusion by adding the additional costs incurred by the Trails to move the gas main and a 10% contingency for the developer's time spent in oversight, project management, and unanticipated "soft" costs related to moving the gas main. Finch's report does not indicate either the size or location of the easement. In his deposition, when asked whether he knew the approximate size of the easement, Finch could not provide an answer.

¶ 31 In May 2013, defendant filed a response to plaintiff's motion for summary determination and a "cross-motion" *in limine*. Therein, defendant contended, for the first time, plaintiff could not recover the costs of moving the gas main because the easement remained on the property. In support of its contention, defendant relied on the cases plaintiff cited in its motion for summary determination. Defendant's motion *in limine* sought to bar the testimony of plaintiff's appraiser, Brian Finch. Defendant contended Finch did not offer an opinion of

diminution in value, which was the proper measure of damages, but, rather, determined the additional development costs incurred as a result of the presence of the Nicor easement.

¶ 32 Plaintiff filed a reply to defendant's response. Plaintiff argued defendant should be estopped from arguing plaintiff could not recover the cost of moving the gas main because the easement remained on the property. Plaintiff's estoppel theory was predicated on defendant's silence regarding the need to remove the easement despite its knowledge plaintiffs were planning to move the gas main.

¶ 33 Following a May 2013 hearing, the trial court entered the following order:

"IT IS HEREBY ORDERED AS FOLLOWS:

A. On the Motion for Summary Determination, the Court finds, determines, and declares that (a) [plaintiff] cannot recover, as a matter of law, as part of its damages in this case, the costs and expenses incurred by the Trails to relocate the [Nicor] gas main within the [Nicor] Easement; and (b) that the proper measure of [plaintiff's] damages is the difference between the fair market value of the property if no impairment existed and the fair market value of the property with the impairment, which is diminution in value.

B. The Court grants [defendant's] Cross-Motion in Limine and does hereby exclude and bar Brian Finch from testifying at trial regarding the loss or damage sustained by [plaintiff] \*\*\*. The Court finds that Brian Finch does not offer an opinion regarding the proper measure of [plaintiff's] damages."

¶ 34 In June 2013, plaintiff filed motions (1) to reconsider the trial court's rulings on its motion for summary determination and defendant's motion *in limine*, and (2) for leave to amend its second amended complaint. Therein, plaintiff sought leave "to file its proposed [c]ount IV to the [s]econd [a]mended [c]omplaint to allege that [defendant] should be estopped from arguing that [plaintiff] cannot claim damages because the easement has not been removed from the property."

¶ 35 Later that month, the trial court held a hearing on plaintiff's motions to reconsider and for leave to amend. The court denied plaintiff's motion to reconsider, finding its previous ruling was appropriate. With respect to plaintiff's motion for leave to amend, the court set forth the factors contained in *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273, 586 N.E.2d 1211, 1215-16 (1992). In analyzing those factors, the court found plaintiff did not seek to cure defective pleadings but, rather, sought to add a new theory to the case. Further, the court found the amendment would prejudice the parties, as it had already decided the motion for summary determination and set the matter for trial. The court stated it understood plaintiff's argument that they first received notice of defendant's intent to make this argument in May 2013, when defendant responded to plaintiff's motion for summary determination. However, the court found defendant had placed the policy language at issue from the beginning and was "not necessarily required to lay out [its] entire hand in terms of how [it] intend[ed] to defend \*\*\* the contract language that is in dispute."

¶ 36 In August 2013, the cause proceeded to a stipulated bench trial. The trial court found plaintiff was entitled to recover the sum of \$4,200 from defendant. The court based this award on the testimony of defendant's expert, James Klopfenstein, who estimated the retrospective value difference due to the Nicor easement was \$4,200. In other words,

Klopfenstein opined the difference between the value of the property as insured and the value of the property subject to the Nicor easement was \$4,200.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, plaintiff contends (1) the policy's language provides plaintiff "with a measure of damages equal to, or close to, the costs associated with moving a high[-]pressured gas main contained within an undisclosed easement," and (2) the trial court abused its discretion when it denied plaintiff's motion for leave to amend its complaint. We address plaintiff's arguments in turn.

¶ 40 A. Plaintiff's Failure To Appeal the Trial Court's  
Exclusion of Brian Finch's Testimony

¶ 41 As an initial matter, defendant argues that plaintiff, by failing to appeal the exclusion of Brian Finch's testimony, has failed to preserve the issue of the proper measure of damages for review. In other words, because Finch's testimony was barred as a result of defendant's motion *in limine*, the record contains no basis on which plaintiff can seek a larger judgment. We disagree.

¶ 42 In this case, the trial court found in favor of defendant on plaintiff's motion for summary determination, concluding the proper measure of damages was not the cost of moving the gas main but, rather, diminution in value. As a result of this finding, the court barred Finch's deposition testimony and appraisal report because he did not offer an opinion using the proper measure of damages—he simply added a 10% contingency to the costs incurred by the Trails. Here, plaintiff appealed from the court's finding in relation to the proper measure of damages under the policy. If we determine the court's finding was error, Finch's testimony could become relevant. Further, the record contains a copy of Finch's report and deposition testimony.

Therefore, we conclude plaintiff's failure to argue that the exclusion of Finch's testimony was error does not result in forfeiture of the ultimate issue on appeal: whether the court erred in determining the proper measure of damages was diminution in value.

¶ 43 B. The Measure of Damages

¶ 44 Plaintiff argues the language of the policy supports an award equal to, or close to, the costs associated with moving the gas main. Plaintiff's contention requires us to interpret the language in paragraph seven of the conditions and stipulations of the policy, which limits defendant's liability under the policy.

¶ 45 When interpreting the language of an insurance policy, our aim is to ascertain and effectuate the parties' intent as expressed in the language of the policy. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433, 930 N.E.2d 999, 1003 (2010). To this end, we must construe the policy as a whole and give effect to every provision. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371, 875 N.E.2d 1082, 1090 (2007). "If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy." *Munoz*, 237 Ill. 2d at 433, 930 N.E.2d at 1003-04. Language is ambiguous where it is subject to more than one reasonable interpretation. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17, 823 N.E.2d 561, 564 (2005). We consider only reasonable interpretations of the policy language and will not strain to find ambiguity where none exists. *Id.* "Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous." *Id.* The construction of an insurance policy is a question of law, which we review *de novo*. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479-80, 687 N.E.2d 72, 75 (1997).

¶ 46 Paragraph seven of the conditions and stipulations provides, in pertinent part:

"This policy is a contract of indemnity against 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 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."

¶ 47 Generally, the parties to any contract, including one for title insurance, are free to limit the damages that may be recovered in the event of a breach. *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 512, 589 N.E.2d 1034, 1037 (1992). Here, the parties agreed the damages recoverable under the policy would be limited to the lesser of the (1) amount of insurance, or \$2,855,700; and (2) difference between the value of the property as insured and the value of the property subject to the defect in title. The plain language of the policy does not provide coverage for the costs associated with moving the gas main incurred by a noninsured; rather, the proper measure of damages under the policy is the difference between the value of the property as insured and the value of the property subject to the defect in title—in this case, the Nicor easement.

¶ 48 Plaintiff argues the above-quoted language "provides coverage for the devaluing effect of the costs associated with moving the gas main because the devaluing effect was sustained or incurred by [plaintiff] by reason of the defect in title." At the time it transferred title to parcel two to the Trails, plaintiff argues, "the property had been devalued by the future reasonable costs associated with moving the gas line, which ended up being \$574,000."

¶ 49 Plaintiff's attempt to equate the expenditures made by the Trails to move the gas main with the amount the land was devalued invites us to eliminate the long-recognized distinction between two separate measures of damages—the cost of repair and diminution in value. See *Myers v. Arnold*, 83 Ill. App. 3d 1, 7, 403 N.E.2d 316, 321 (1980) (recognizing the two measures of damages are distinct). We decline to remove this distinction.

¶ 50 Plaintiff next contends the trial court's judgment, awarding it \$4,200, deprived it of the benefit of the insurance for which it paid, citing *Radovanov v. Land Title Co. of America, Inc.*, 189 Ill. App. 3d 433, 437-38, 545 N.E.2d 351, 354-55 (1989). In *Radovanov*, the issue before the appellate court was whether the trial court correctly found the title commitment did not provide coverage for the plaintiff's claim. *Id.* at 435, 545 N.E.2d at 353. In finding the title commitment provided coverage for the plaintiff's claim, the appellate court explained, "[e]ven in doubtful cases, courts should be quick to find facts which support coverage and language of the policy should be liberally construed in favor of coverage so that the insured is not deprived of the benefit of the insurance for which he paid, except where the terms of the policy clearly require a different result." *Id.* at 438, 545 N.E.2d at 355.

¶ 51 Plaintiff's reliance on *Radovanov* is misplaced. Whether the policy provided coverage to plaintiff is not the issue before this court; rather, the issue presented is whether the trial court erred in its determination of the amount of damages. In this case, plaintiff received the

benefit of the insurance for which it paid—the court determined the policy provided coverage for its claim. Plaintiff and defendant were free to agree to the measure of damages under the policy.

See *Hicks v. Airborne Express, Inc.*, 367 Ill. App. 3d 1005, 1011, 858 N.E.2d 48, 54 (2006).

Plaintiff's dissatisfaction with the amount of damages the court ultimately awarded is not a basis to rewrite the provision establishing the extent of defendant's liability.

¶ 52 Plaintiff also argues the language in the policy does not require removal of the easement, contrary to defendant's argument the easement must be moved in order for plaintiff to recover the costs of moving the gas main. Although we agree the policy contains no language requiring the removal of the easement, for the reasons stated below, we need not address this argument.

¶ 53 C. Plaintiff's Motion To Amend

¶ 54 Plaintiff also argues the trial court erred by (1) failing to estop defendant from raising its argument that plaintiff was not entitled to recoup the costs of moving the gas main because the easement had not been removed from the property, and (2) denying its motion for leave to amend the second amended complaint. However, because we have determined the court applied the proper measure of damages independent of defendant's removal-of-the-easement argument and no amendment would change the outcome, we decline to address plaintiff's argument.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.