2015 IL App (2d) 140677-U
No. 2-14-0677
Order filed June 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL WARCZAK, Plaintiff-Appellant, v. ATTORNEYS' TITLE GUARANTY FUND, INC., Defendant-Appellee (U.S. Bank National Association, as successor in interest to Park National Bank, and Grace A. Distilo, Defendants).	)	Appeal from the Circuit Court of Kane County. No. 09-L-674 Honorable Edward C. Schreiber, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting ATGF's motion to dismiss count I of plaintiff's third amended complaint, in which he sought to recover under a title insurance policy; even though a land trustee was the named insured, plaintiff could still seek coverage as the trust's beneficiary. We did not find any error in the trial court's grant of summary judgment for ATGF on counts II and III, which respectively claimed professional negligence and breach of implied contract for ATGF's failure to discover a tax lien on the property. Specifically, count II was barred by the *Moorman* doctrine, and ATGF did not owe plaintiff a duty to discover and report the unpaid taxes during the closing. Regarding count III, there was no genuine issue of material fact showing an implied contract to convey accurate title

information during the closing, beyond the guarantees through the title insurance. Therefore, we affirmed in part, reversed in part, and remanded the cause.

¶ 2 Plaintiff, Michael Warczak, brought suit against defendant, Attorneys' Title Guarantee Fund (ATGF), after unpaid taxes not disclosed in the title commitment resulted in a tax buyer obtaining the property at issue. The trial court granted ATGF's motion to dismiss count I, through which plaintiff sought to recover under ATGF's title insurance policy. The trial court granted summary judgment for ATGF on counts II and III, alleging professional negligence and breach of implied contract. We affirm the trial court's grant of summary judgment on counts II and III but reverse its dismissal of count I and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On October 23, 2009, plaintiff filed a two-count complaint against Park National Bank. Plaintiff alleged that he was the beneficiary of a land trust for which the bank was the trustee; that property was deeded to the trust in 2005; that the bank received notice of tax proceedings against the property based on unpaid property taxes from 2003; that the bank failed to notify plaintiff of the proceedings; and that as a result, the property was transferred to a tax buyer without plaintiff's knowledge.

¶ 5 Plaintiff filed a first amended complaint on July 2, 2010. The first two counts were largely unchanged. Plaintiff added two counts against Grace Distilo, who sold the subject property. Plaintiff alleged that Distilo was responsible for paying the 2003 property taxes but failed to do so, resulting in the tax sale. Plaintiff also added a fifth count, against ATGF, alleging that ATGF was liable for coverage under its title insurance policy for the property.

¶ 6 Distilo subsequently filed a counterclaim and amended counterclaims against ATGF. She additionally filed a third-party complaint against Rita Thomas, the attorney who represented her at the real estate closing. Distilo alleged that Thomas also acted as an agent for ATGF by

selling Distilo an owner's title insurance policy. In January 2012, the trial court granted ATGF's motion to dismiss Distilo's third amended complaint with prejudice.

¶ 7 Plaintiff filed a second amended complaint on July 23, 2012. He re-alleged the first five counts and added a negligence count against ATGF.

¶ 8 On August 22, 2012, the trial court entered an agreed order stating that plaintiff and third-party defendant Thomas had reached a confidential settlement agreement. The order stated that as a result, plaintiff's claims against Distilo were dismissed with prejudice, as were Distilo's claims against Thomas.

¶ 9 Another settlement was memorialized through a court order entered on February 14, 2013. The order stated that plaintiff and the bank had reached a settlement and that plaintiff's claims against the bank were dismissed with prejudice.

¶ 10 On March 13, 2013, plaintiff filed a third amended complaint against ATGF; this complaint is the subject of the instant appeal. Count I, seeking a declaratory judgment, alleged as follows. On August 3, 2005, plaintiff entered into a written contract with Distilo to purchase a parcel of unimproved real property in West Dundee for $130,000. On August 1, 2005, ATGF, through Thomas as its agent, issued a commitment for title insurance for the property, naming plaintiff as the proposed insured. Thomas also represented Distilo as the property's seller. On August 29, 2005, plaintiff, through his attorney, directed Thomas to have the property deeded to Cardunal Savings Bank, FSB, as trustee of an Illinois land trust. The real estate closing occurred on September 2, 2005, at Thomas's law offices. ATGF provided closing services through its agents, Suzanne Benner and Thomas. The sale closed with a deed from Distilo to Cardunal Savings Bank as trustee under the provisions of a trust agreement dated July 15, 2004, known as trust number 98-446. Plaintiff was the trust's sole beneficiary.

¶ 11 Plaintiff further alleged as follows. On September 12, 2005, ATGF issued an owner's title insurance policy insuring the subject property, with the land trust as the named insured. As the trust's beneficiary, plaintiff was the intended direct beneficiary of the title insurance policy. At the time the policy was issued, real estate taxes for 2003 had not been paid by the property's seller but rather had been sold to a third party in November 2004. The non-payment of the taxes constituted a lien or encumbrance on the property's title. Pursuant to the unpaid 2003 taxes, a tax deed was issued to Conrad Gacki on October 20, 2007, and recorded July 21, 2008. Plaintiff did not have knowledge of this until about May 22, 2009, when he called the county to inquire about not receiving a bill for 2008 taxes. The same day, plaintiff made an insurance claim with ATGF. ATGF denied coverage in a letter dated July 27, 2009. In count I, plaintiff sought a declaration that coverage existed under the policy and that he was entitled to collect the proceeds.

¶ 12 Count II, claiming professional negligence, alleged many of the previous facts and additionally alleged as follows. ATGF charged a fee of $410 for its real estate closing services, and plaintiff and Distilo each paid one-half of the fee. Part of ATGF's services was to discover and disclose recorded liens against property through its process of preparing a title commitment, and to secure the payoff or other disposition of unresolved liens at the closing. When ATGF prepared a commitment for title insurance on August 1, 2005, for the property, the lien for the 2003 unpaid taxes was in place. The commitment listed unpaid taxes for 2004 but did not report the lien for the 2003 taxes. ATGF had a duty to discover and resolve tax liens but breached this duty, which allowed the title to be conveyed by a tax deed to a third party, which in turn damaged plaintiff.

¶ 13 Count III, claiming breach of contract, alleged the same general facts surrounding the

transaction as alleged in counts I and II. It also alleged as follows. According to the ATGF website, the title insurance commitment provided a guide for the real estate closing by showing the condition of the property's title and listing what steps were necessary to complete the title transfer. Plaintiff and ATGF had an agreement that ATGF would provide real estate closing services for the property. The terms of ATGF's contract included: (1) the discovery of unpaid and past due real estate taxes that created a lien on the property, (2) the disclosure in the title commitment of such unpaid and past due taxes, and (3) the facilitation of payment by the seller of the aforementioned taxes through the closing process. ATGF breached each of these terms, damaging plaintiff.

¶ 14 On April 9, 2013, ATGF filed a motion to dismiss under sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 619 (West 2012)). ATGF argued that count I should be dismissed under section 2-615 because plaintiff failed to plead his performance of all contractual conditions required of him; ATGF did not receive timely notice of the claim; and plaintiff did not plead any facts showing that he was entitled to recover as an insured under the policy. It argued that count II should be dismissed under section 2-615 because plaintiff did not plead any facts showing a duty, a breach of duty, and damages. ATGF argued that count II should also be dismissed under section 2-619 because it was barred by the five-year statute of limitations, the *Moorman* doctrine,[1] and paragraph 15 of the policy. ATGF argued that count III should be dismissed under section 2-615 for the failure to plead facts to show a contract, including offer, acceptance, terms, breach and damages. It also argued that, under section 2-619, count III was barred by the five-year statute of limitations.

¶ 15 On June 27, 2013, the trial court granted ATGF's motion in part and dismissed count I

[1] *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982).

with prejudice. It denied the motion as to counts II and III. We summarize its reasoning regarding count I. Plaintiff issued the check for the title insurance but directed his attorney to have the property deeded to the trust before closing. Plaintiff had a beneficial interest in the trust and a potential cause of action against the trust, which was apparently settled with the bank. Plaintiff had an equitable interest in the trust but not a legal interest in the trust, because if he had both, the trust could not exist. The "bottom line" was that plaintiff was not an insured under the title insurance policy, rather the trustee was the insured, so plaintiff could not recover under the policy.

¶ 16 ATGF filed a motion for summary judgment on February 24, 2014, on the remaining counts. ATGF argued that its policy indemnified certain title defects and that Cardunal Savings and Loan was the named insured, not plaintiff. Regarding count II specifically, it argued that the economic loss doctrine foreclosed a tort action premised on a title insurer's duty to search and disclose title defects, and no exception applied in this case. It also argued that there was no genuine issue of material fact to prove that ATGF's real estate closing services were negligently performed, because a closer's function is purely ministerial and requires only following the information in the commitment. Regarding count III, ATGF argued that there was no genuine issue of material fact that the September 2, 2005, written agreement governing closing services was never amended, nor did plaintiff ever claim that the agreement was breached. ATGF additionally argued that the buyer and seller agreed in their contract that the title insurance commitment would be conclusive evidence of title, and there was no contract implied-in-fact.

¶ 17 On April 1, 2014, plaintiff filed a motion for partial summary judgment on the issue of ATGF's liability. He argued that ATGF should be found liable under counts II and III because it failed to discover, disclose, and remedy the existence of the lien for the 2003 real estate taxes

through the process of its closing services.

¶ 18 On June 11, 2014, the trial court granted ATGF's motion for summary judgment and denied plaintiff's motion for partial summary judgment. It entered judgment in ATGF's favor, reasoning as follows. Plaintiff entered into a contract with Distilo to purchase real estate on July 31, 2005. It was undisputed that Thomas represented Distilo in the sale and that Thomas was also an agent for ATGF. ATGF was in the business of providing real estate settlement closing services, which it did in this case. ATGF also issued policies of title insurance commitments, and it did so here as well. Title insurance meant insuring interested parties against loss or damage from liens and encumbrances, but the policy's scope was limited by contractual language. The printed title insurance policy initially named plaintiff as the proposed insured,[2] but at closing his name was crossed off and Cardunal Savings Bank was inserted as trustee. It was undisputed that the title was encumbered by a 2003 tax lien which was not disclosed in the title insurance policy. According to Thomas, the unpaid taxes for 2003 should have been paid off at closing. The trial court did not think it could be disputed that Thomas and ATGF were negligent in failing to disclose the cloud on the title, and that but for the negligence, the property would not have been lost pursuant to the tax sale. That was not to say that they were the only negligent parties or that they were responsible for the property not being redeemed after the tax sale. Plaintiff was not the named insured on the title commitment, and in closing documents, he was named as the land trust's beneficiary. Even the seller's warranty deed named Cardunal as the trustee. The intent here was to insure the trust and to transfer the property into the trust at closing, which was done to insulate plaintiff and keep him personally out of the transaction. He

[2] The title insurance commitment, not the title insurance policy, actually listed plaintiff as the proposed insured.

had a beneficial and equitable interest in the trust but not a legal interest. The trust was therefore the party to the transaction, and only parties could enforce a contract. There was no genuine issue of material fact showing that the closer should have done more than what was contained in the agency escrow disbursement agreement and disclosed in the title commitment, or that plaintiff even had standing to bring the suit or had privity of contract. Therefore, the trial court granted summary judgment for ATGF on counts II and III and entered judgment in its favor.

¶ 19 Plaintiff timely appealed.

¶ 20 II. ANALYSIS

¶ 21 A. Count I

¶ 22 On appeal, plaintiff first argues that the trial court erred in granting ATGF's motion to dismiss count I under section 2-615 of the Code. A section 2-615 motion to dismiss attacks the complaint's legal sufficiency. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. In ruling on a section 2-615 motion, a court must accept as true the complaint's well-pleaded facts and all reasonable inferences. *Id.* A court should not dismiss a cause of action under section 2-615 unless no set of facts can be proved entitling the plaintiff to recover. *Id.* The main inquiry is whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *Id.* We review *de novo* an order granting a section 2-615 motion to dismiss. *Id.*

¶ 23 ATGF cites *Knox College v. Celotex Corp.*, 88 Ill. 2d 407 (1981), for the proposition that although well-plead facts are taken as true for the purposes of a motion to dismiss, pleadings are to be strictly construed against the pleader. Plaintiff counters that this principle does not apply here because this case is procedurally distinguishable from *Knox College*. Plaintiff also argues that the principle appears to no longer be "good law" because the *Knox College* court applied an

abuse of discretion standard of review, rather than a *de novo* standard, and because recent authority requires the complaint's allegations to be construed in the light most favorable to the plaintiff when reviewing a motion to dismiss.

¶ 24 Contrary to plaintiff's argument, although rulings on motions to dismiss are generally reviewed *de novo*, they are sometimes reviewed under an abuse of discretion standard, such as where the trial court has weighed factors to determine whether to grant a dismissal or stay of proceedings. See *Overnight Transportation Co. v. International Brothers of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO*, 332 Ill. App. 3d 69, 73 (2002). More to the point, years after *Knox College*, courts continued to cite the principle of construing pleadings strictly against the pleader. See, *e.g.*, *Delaney v. Marchon, Inc.*, 254 Ill. App. 3d 933, 939 (1993). *Knox* has also not been overruled. The principle may best be understood as allowing the admission of all well-pleaded facts (see *Layne v. Builders Plumbing Supply Co., Inc.*, 210 Ill. App. 3d 966, 969 (1991)) but not legal conclusions, speculation, and conjecture (see *Butitta v. First Mortgage Corp.*, 218 Ill. App. 3d 12, 15 (1991)). See also *Harvey v. Mackay*, 109 Ill. App. 3d 582, 586 (1982) (a motion to dismiss does not admit conclusions of law or fact unsupported by allegations of specific facts, or opinions, argument, or irrelevant material). It is in this manner that we will apply the principle.

¶ 25 In addition to involving a motion to dismiss, count I also involves contractual interpretation. In construing a contract, the primary objective is to give effect to the parties' intent, and we will look first to the contract's language to determine that intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We construe a contract as a whole, viewing each provision in light of other provisions. *Id.* If the contract's words are clear and unambiguous, they will be

given their plain, ordinary, and popular meaning. *Id.* We review a contract's interpretation *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 26 Plaintiff notes that the trial court granted the motion to dismiss as to count I because it accepted ATGF's position that only the named insured, the land trustee, could pursue a claim on the insurance policy. Plaintiff cites four rationales for reversing the dismissal of count I. His first basis is that he could recover under the title insurance policy as a direct third-party beneficiary. To support this status, plaintiff cites his allegations that: ATGF knew that he was the actual purchaser of the property and the land trust's beneficiary; the policy's definition of insured included those succeeding the named insured's interest by operation of law, and he fell into this category because he succeeded any interest the trustee had in the insurance policy's proceeds; and only he, not the land trustee, suffered actual monetary loss and damage within the policy's meaning.

¶ 27 Plaintiff argues that the fact that he was not the named insured is irrelevant because Illinois law allows a third party to sue on a contract entered into for his direct benefit. He cites several cases that apply this proposition to various contexts. Plaintiff argues that the parties could not have intended that the land trustee would be entitled to collect on the insurance policy because under Illinois law,[3] the warranty deed in trust,[4] and the trust agreement,[5] the land trustee

[3] See 765 ILCS 430/1 (West 2012) (defining land trust as arrangement where, among other things, "the exclusive right to the earnings, avails and proceeds of said property is in the beneficiary of the trust").

[4] The warranty deed in trust contained language similar to the statute.

[5] The trust agreement stated that the beneficiary had the right "to receive the proceeds from rentals and from mortgages, sales or other disposition of said premises, and that such right

had no right to any proceeds or monetary value arising from the property. Plaintiff argues that as the title insurance policy's third-party beneficiary, he was entitled to enforce the policy.

¶ 28 Plaintiff's second basis for reversal is that a land trust beneficiary, in particular, has the right to maintain litigation regarding the land trust under Illinois caselaw. He cites a series of cases in support. In *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 755 (2008), the court stated that a land trust beneficiary has standing in litigation involving his rights and liabilities with respect to the management and control, use, or possession of the property pursuant to the trust agreement. The court held that a partnership could bring suit on a contract regarding the property because after the property was sold, the land trust was legally terminated, and the partnership was the only entity that could enforce the contract. *Id.* at 756. The court stated that the partnership also had standing because the trust agreement and land trust gave it the right to proceeds from the property's sale, and the trustee could no longer protect the partnership's interests following the trust's termination. *Id.* Plaintiff argues that the instant case is analogous because the trust agreement and warranty deed gave him the right to the property's proceeds, and the land trust no longer held title to the property after it was deeded to the tax buyer. See also *La Salle National Bank v. 53rd-Ellis Currency Exchange, Inc.*, 249 Ill. App. 3d 415, 431 (1993) (where land trustee had signed lease as landlord, beneficiary could rescind lease without trustee's involvement); *Azar v. Old Willow Falls Condominium Ass'n*, 228 Ill. App. 3d

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in the avails of said property shall be deemed personal property." It also stated that the beneficiary shall manage the property "and control the selling, renting and handling thereof, and shall collect, apply and handle the rents[,] earnings, avails and proceeds thereof," and the trustee "shall have no duty *** in respect to insurance, litigation or otherwise, except on written direction as herinabove provided."

753 (1992) (where land trust beneficiary had right to management and control of property, he could bring action challenging the imposition of condominium's special assessment).

¶ 29 Plaintiff further cites *Redfield v. Continental Casualty Corp.*, 818 F.2d 596 (7th Cir. 1987), a federal case which applied Illinois law. There, three fire insurance contracts were in the names of a trustee for three respective land trusts. *Id.* at 599. The properties were destroyed by fire, but when the beneficiary sought coverage, the insurer refused to pay on the loss. *Id.* Due to circumstances not relevant here, the trustee was subsequently unable to file suit. The Seventh Circuit concluded that the insurance company was on notice that the beneficiary was the real party in interest under the policies, rather than the trustee. *Id.* at 609. The court stated that the beneficiary should also be able to proceed against the insurer because the trustee had disclaimed all interest in the insurance policies by failing to seek recovery under them. *Id.* Plaintiff argues that similar to *Redfield*, here the named insured land trustee lost its insurable interest when the title was transferred to the tax buyer, so he, as the property's true owner, should be entitled to collect the insurance proceeds.

¶ 30 Plaintiff's third rationale for his right to enforce the title insurance policy is that he has an "insurable interest" under *Ryding v. Cincinnati Special Underwriters Insurance Co.*, 2013 IL App (2d) 120833. There, this court stated that a person generally has an insurable interest in property if he or she would gain an advantage by its continued existence or suffer a disadvantage by its destruction. *Id.* ¶ 8. We stated that where the public guardian had obtained insurance coverage to protect a ward's property interest, the ward's estate was intended to be an insured under the policy, and the damage to the ward's property was a covered loss. *Id.* ¶ 13. Plaintiff argues that, likewise, a land trust beneficiary suffers a loss when the property's title is

involuntarily deeded out of the trust, and the beneficiary is entitled to insurance proceeds when the insurable interest is destroyed.

¶ 31 Plaintiff's fourth and final rationale for being able to recover under the title insurance policy relies on the policy's terms. He notes that the policy covers "the insured named in Schedule A, and *** 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 representative, next of kin, or corporate or fiduciary successors." Plaintiff cites *Butera v. Attorneys' Title Guaranty Fund, Inc.*, 321 Ill. App. 3d 601, 603-04 (2001), where the court interpreted almost identical language. The court defined "successors by operation of law" to be those who acquire enforceable property rights without the need for conveyance of a deed, as opposed to those who purchase property, with the paper title changing hands. *Id.* at 606. The court stated that title insurance is unusual in that it has a single premium rather than recurring payments, and the policy remains outstanding forever to protect the property owner. *Id.* at 607. It further stated that the policy at issue anticipated changes in the title owner and, thus, changes in the named insured. *Id.* Plaintiff argues that because he is the property's true owner and the only one with the right of compensation for its loss, and because the land trustee no longer has any remaining interest in the property, he should be found to succeed any interest of the land trustee by operation of law under the policy terms.

¶ 32 Plaintiff also cites insurance policy language stating: "This policy is a contract of indemnity against the actual monetary loss or damage sustained or incurred by the insured claimant." Plaintiff argues that this language is consistent with the principle that property insurance insures the party's interest rather than the property itself. See *Spirit of Excellence, Ltd. v. Intercargo Insurance Co.*, 334 Ill. App. 3d 136, 148 (2002). Plaintiff maintains that he, rather

than the land trustee, suffered monetary damages, and therefore he has the insurable interest under the policy.

¶ 33 For its part, ATGF cites the policy language defining the insured and points out that Schedule A of the policy identified Cardunal Savings Bank, FSB, as trustee of Trust 98-446 as the insured. ATGF argues that plaintiff's complaint lists no facts or citations to authority recognizing a land trust beneficiary's right to succeed by operation of law to land trustee's authority and rights.

¶ 34 ATGF argues that plaintiff also cannot plead himself into the status of a third-party beneficiary, but rather there must be an express contractual provision identifying the third-party beneficiary. See *Schmitz v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 405 Ill. App. 3d 240, 246 (2010); *Wheeling Trust & Savings Bank v. Tremco, Inc.*, 153 Ill. App. 3d 136, 140 (1987). ATGF maintains that there is no legal consequence to the allegations that it knew that plaintiff purchased the property and was the land trust's beneficiary. ATGF argues that although a land trust beneficiary has the right to insurance proceeds, this does not support the status of a third-party beneficiary under the title insurance policy, and "[n]o facts are alleged to identify insurance proceeds claimed by Plaintiff." ATGF also argues that plaintiff's argument that only he, not the trustee, suffered loss or damage within the policy's meaning is a legal conclusion. ATGF argues that the complaint's exhibits actually contradict this statement, as the loss claimed was that a tax buyer got title to the lot, but plaintiff never had title in the first place.

¶ 35 ATGF further argues that plaintiff did not plead facts to show that he, as a beneficiary, was authorized to act on the trustee's behalf. ATGF points to language in the land trust agreement stating: "No beneficiary hereunder shall have the authority to contract for or in the name of the trustee." ATGF argues that the proper procedure was for the beneficiary to instruct

the trustee to make a claim. ATGF argues that plaintiff, for whatever reason, created a separate legal entity to hold legal and equitable title, and he ordered a title insurance policy that identified the land trustee as the insured. ATGF argues that as far as the record shows, plaintiff never directed the trustee to make a claim on the policy, even though he made the successor trustee a party defendant to the case.

¶ 36 We agree with plaintiff's second rationale in support of reversing the dismissal of count I,[6] in that a land trust beneficiary has the right to maintain litigation regarding the trust under certain circumstances. ATGF emphasizes that only the trustee was the named insured on the title insurance policy, but an action does not always have to be prosecuted in the name of the person insured. *Mack v. Liverpool & London & Globe Insurance Co.*, 329 Ill. 158, 161 (1928) (receiver in charge of property could sue to recover damages under fire insurance property).

¶ 37 In Illinois, a land trust is an arrangement in which a trustee holds legal and equitable title to real property, and the beneficiary's interest is personal property, not a direct interest in the real estate *res* of the trust. *Firstmerit Bank, N.A. v. Soltys*, 2015 IL App (1st) 140100, ¶¶ 19, 22. However, in contrast to a traditional trust where the trustee has broad powers over the trust property's management and disposition, in a land trust the beneficiary maintains full management and control of the property, and the land trustee may act only at the beneficiary's direction. *Id.* ¶¶ 19, 21. A land trust beneficiary has the power to possess, manage, and physically control the property; receive income the property generates; direct the trustee in dealing with the property's title; and receive proceeds from the property's sale made pursuant to the power of direction. *Id.* ¶ 23. An Illinois land trust is essentially a form of real property

[6] While we rely specifically on the second rationale plaintiff sets forth, we note that some of the logic overlaps in the other rationales.

ownership. *Id.* ¶ 21. Every attribute of real property ownership is retained by the beneficiary, except title. *Id.* ¶ 23. As such, even through a beneficiary's interest may be labeled as personalty, courts have recognized that the beneficiary is the owner of and has an interest in the real estate *res*. *Id.*

¶ 38 "The Illinois land trust primarily serves 'as a useful vehicle in real estate transactions for maintaining secrecy of ownership and allowing ease of transfer.' " *Id.* ¶ 19 (quoting *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 487 (1979)). Our supreme court has described a land trust as a legal fiction that is a useful instrument for handling real estate transactions, with true ownership of the property lying with the beneficiary. *Chicago Title & Trust Co.*, 75 Ill. 2d at 492. The only ownership attribute that the trustee has is related to title, and third parties may rely on this in transactions where title to the real estate is of primary importance. *Id.* at 488. In contrast, beneficiaries are responsible for things such as real estate tax obligations because revenue collection focuses on ownership realities rather than legal title. See *id.* at 492-93. Land trust beneficiaries can also pursue litigation regarding the property in situations relating to the property's management and control. See *23-25 Building Partnership*, 381 Ill. App. 3d at 755 (land trust beneficiary had standing in litigation that involved his rights and liabilities with respect to the management and control, use, or possession of the property); *Azar*, 228 Ill. App. 3d at 757 (land trust beneficiary could bring legal action challenging condominium's special assessment because it related to management and control of land trust).

¶ 39 The Seventh Circuit addressed a situation similar to the one at bar in *Redfield*, 818 F.2d 596, which we briefly summarized earlier. [7] The *Redfield* court recognized that, given the unique nature of land trusts:

[7] Federal court decisions, other than those by the United States Supreme Court, are not

> "A problem naturally arises where the trustee is for some reason either unable or unwilling to initiate recovery under an insurance policy pursuant to a loss. If traditional insurance law, which restricts recovery to the named insured, is controlling, the beneficiary is left without a remedy, and a forfeiture of the policy will result." *Id.* at 608.

This is the result advocated by ATGF. However, the *Redfield* court went on to state:

> "Unlike the conventional real estate trust where the trustee exercises dominion and control over the trust property, however, a land trustee is a mere titleholder. The beneficiary is the party who contracts with the insurer, pays the premiums, and ultimately receives any insurance proceeds paid to the trustee on his behalf. Just as the beneficiary is deemed to be the true owner of the property held in trust, so is he the true 'insured' under the policy even though he is not expressly named. Thus if the insurance policy is otherwise valid and in effect at the time of the loss, the beneficiary should not be left helpless merely because the land trustee, the proper party to seek recovery under the policy, either will not or cannot do so. In such a situation, the beneficiary under the land trust should be able to proceed directly against the insurer." *Id.*

¶ 40 We agree with this logic. In construing an insurance contract, we must give effect to the ordinary insured's expectations that the policy will be construed to fairly achieve its purpose of indemnifying the insured for the losses covered by the insurance. See *National Discount Shoes, Inc. v. Royal Globe Insurance Co.*, 99 Ill. App. 3d 54, 61 (1981). We disfavor forfeitures on technical grounds which have no substantial relationship to the insurer's risk. *Id.* Here, even though plaintiff was not the named insured under the title insurance policy, under the

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binding on Illinois courts, but we may use them as persuasive authority. See *Werderman v. Liberty Ventures, LLC*, 368 Ill. App. 3d 78, 84 (2006).

complaint's allegations it was clear to all parties involved that he was the true property owner. Among other things, he was the property's purchaser, the commitment for title insurance was issued to him, and he was named as the land trust's beneficiary. Thus, as in *Redfield*, the insurer was on notice that plaintiff was the real party in interest under the policy rather than the trustee. See *Redfield*, 818 F.2d at 608; see also *National Discount Shoes, Inc.*, 99 Ill. App. 3d at 60 (it was clear to the contracting parties that land trust beneficiary was the party whose interest was to be protected by the insurance policy, and the trustee was listed as the insured only because Illinois law required that the party with legal title be named as the insured). Accordingly, under the circumstances of this case, in which the trustee no longer has title to the property due to the tax sale, plaintiff should be allowed to seek coverage under the title insurance policy. *Cf. Redfield*, 818 F.2d at 608-09.

¶ 41 The arguments advanced by ATGF do not alter our result. As discussed, parties other than the named insured can be allowed to seek coverage under insurance policies. ATGF cites *Schmitz*, 405 Ill. App. 3d at 246, and *Tremco, Inc.*, 153 Ill. App. 3d at 140, for the proposition that an express provision must identify a third-party beneficiary in a contract. However, although there is the presumption that a contract's provision applies only to the contracting parties and not third parties, the presumption can be overcome where the implication that the contract applies to a third party is so strong that it is practically an express declaration. *Estate of Willis v. Kiferbaum Construction Corp.*, 357 Ill. App. 3d 1002, 1008 (2005). Here, the legal nature of a land trust presumes that the trust's beneficiary has the real interest in the insurance policy, so this test is satisfied.

¶ 42 ATGF's argument that plaintiff did not allege any fact "to identify insurance proceeds" he claims is confusing, as plaintiff is clearly seeking recovery under the title insurance policy.

We also do not find persuasive ATGF's argument that plaintiff never suffered a loss within the policy's meaning because he never had title in the first place, as the argument ignores that caselaw holds that a land trust is essentially a "legal fiction," with the beneficiary being the "real" owner of the real estate. See *Chicago Title & Trust Co.*, 75 Ill. 2d at 492. Tellingly, ATGF makes no effort to discuss and distinguish the cases plaintiff cited. As for ATGF's argument that plaintiff did not plead facts showing that he was authorized to act on the trustee's behalf, plaintiff does not claim to be acting for the trustee. Rather, he was the real party in interest under the title insurance policy and therefore was entitled to enforce it under the facts alleged here. Accordingly, we reverse the trial court's dismissal of count I.

¶ 43 B. Counts II and III

¶ 44 We now turn to plaintiff's second argument, that the trial court erred in granting summary judgment for ATGF on counts II and III. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). We review *de novo* a grant of summary judgment. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 17.

¶ 45 Plaintiff argues that the trial court apparently granted summary judgment for ATGF on counts II and III for the same reason that it dismissed count I, which was because he was not the named insured on the title insurance policy. Plaintiff argues that his arguments in count I regarding his right to enforce the title policy apply equally here. Plaintiff goes on to argue that counts II and III do not actually depend on the title insurance policy but rather are based on

defendant's real estate closing settlement services, which occurred on September 2, 2005, well before the issuance of the title insurance policy on September 12, 2005.

¶ 46 On the subject of standing, plaintiff argues that he, not the land trustee, was a party to the closing because he paid for the closing services, he had the authority to act regarding the property at the time of closing, and title did not become vested in the land trustee until the closing's conclusion. Plaintiff further argues that there was no support for the trial court's statement that he was using a land trust to "insulate" himself, as caselaw shows that the purpose of land trusts are simply to maintain confidentiality of ownership and allow for its ready transfer.

¶ 47 According to plaintiff, ATGF took the position that the Agency/Escrow Agreement (A/EA) encompassed the parties' entire agreement. Plaintiff argues that, however, counts II and III relied on the totality of ATGF's undertaking through its real estate settlement closing services, not just on the negligent misrepresentation in the title commitment *per se*. Plaintiff argues that ATGF's vice president admitted in his deposition testimony that the A/EA does not necessarily set forth all directions given to the closer, who may also be given oral directions. Plaintiff argues that the vice president also acknowledged that the closer in this case did at least one action not set forth in the A/EA, that being the payment of unpaid 2004 taxes (as opposed to the 2003 taxes which went unpaid). Plaintiff argues that this shows that the A/EA did not encompass the entire agreement. Plaintiff argues that the closing settlement services included a title search as reflected in the commitment, the preparation of a settlement statement, and the handling and processing of payments for past due real estate taxes.

¶ 48 Plaintiff argues that he alleged all of the requirements for contract formation, as ATGF admitted that he paid one-half of the consideration for the real estate closing services, and a contract can be implied because the closing services actually occurred. Plaintiff maintains that

ATGF's position that its closing services involved only the closer's ministerial actions in disbursing funds pursuant to the A/EA, and perhaps other oral directions, wrongly divorces ATGF from any responsibility for failing to discover the 2003 tax lien. Plaintiff argues that ATGF did not and cannot dispute that it had a duty as a professional provider of real estate settlement closing services to act reasonably and free from negligence. Plaintiff argues that, at a minimum, the evidence showed that there were questions of material fact as to the roles of the title commitment and A/EA in the closing services, especially since the closing services did not accomplish one of the intended purposes of paying all of the past due real estate taxes.

¶ 49 ATGF reasserts its position that plaintiff cannot maintain a cause of action on an implied contract because he has executed an unambiguous written contract on the same subject (see *Gadsby v. Health Insurance Administration, Inc.*, 168 Ill. App. 3d 460, 470 (1988)), that being the A/EA. ATGF argues that an escrowee only has an obligation to act according to the escrow instructions (see *Edelman v. Belco Title & Escrow*, 754 F.3d 389, 396-97 (7th Cir. 2014)), and here plaintiff did not allege that ATGF breached any of the A/EA's terms. ATGF argues that plaintiff also did not show a genuine issue of material fact that would provide an exception to the parole evidence rule, which requires that the written contract controls. ATGF contends that even if a contract implied in fact is considered, plaintiff did not show an issue of fact demonstrating offer, acceptance, and consideration regarding such an implied contract.

¶ 50 ATGF additionally argues that plaintiff does not have standing to make a claim for negligent performance of closing services because he, as an individual, was not a party to the closing. Rather, argues ATGF, the land trustee was the party because plaintiff, through his attorney, signed the agreement as the trust's beneficiary. ATGF argues that plaintiff further does not have standing because he did not suffer an injury, in that he never held title to the property.

¶ 51 Last, ATGF argues that the *Moorman* economic loss doctrine forecloses a tort action for economic loss, and that no exception applies here because our supreme court held in *First Midwest Bank, N.A. v. Stewart Title Guaranty Corp.*, 218 Ill. 2d 326, 338 (2006), that a title insurer is not primarily in the business of supplying information. ATGF argues that counts II and III are both different ways to describe the same alleged oral agreement and alleged loss of title to the property. ATGF argues that plaintiff never showed a genuine issue of material fact that would, if true, be an exception to the economic loss doctrine.

¶ 52 We agree with ATGF's last argument.[8] Under the *Moorman* doctrine, also called the economic loss doctrine (*AT&T v. Lyons & Pinner Electric Co.*, 2014 IL App (2d) 130577, ¶ 4), a plaintiff cannot recover under a negligence theory for solely economic losses, but rather must pursue a remedy in contract. *Moorman Manufacturing Co.*, 91 Ill. 2d at 86. There are three main exceptions to the rule: (1) where a person suffers personal injury or property damage after a sudden or dangerous occurrence; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false misrepresentation (fraud); and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. *Id.* at 81, 88-89. There is an additional exception to the *Moorman* doctrine for (4) service providers, where the tort duty is extracontractual. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159

[8] We do not pass judgment on ATGF's additional arguments in favor of affirming summary judgment. Moreover, even though the trial court did not explicitly rely on the *Moorman* doctrine in granting summary judgment, we may affirm a grant of summary judgment on any basis in the record, regardless of the trial court's reasoning. *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 83.

Ill. 2d 137, 162 (1994); see also *Rasgaitis v. Waterstone Financial Group, Inc.*, 2013 IL App (2d) 111112, ¶ 56.

¶ 53 Applying the above caselaw to the facts of this case, we begin by noting that in count II, plaintiff alleged a theory of professional negligence, a tort. Under *Moorman* he could recover for economic losses in tort only if one of the *Moorman* exceptions applied. See *Moorman Manufacturing Co.*, 91 Ill. 2d at 86, 88-89. The first two exceptions clearly do not apply, as there was no personal injury/property damage or alleged fraud.

¶ 54 For the third exception to apply, ATGF would have to be in the business of supplying information for the guidance of others in their business transactions. Relevant to our analysis of this issue is *First Midwest Bank*, 218 Ill. 2d at 336. There, the plaintiff argued that when a title insurance company issues a title commitment, it is a pure information provider under the third *Moorman* exception in the same way as are real estate brokers and appraisers, surveyors, and home inspectors. The plaintiff reasoned that, therefore, when a title insurance company failed to conduct a proper title search and provided inaccurate information about a property's title, it could be held liable in tort for negligent misrepresentation. *Id.* The supreme court disagreed, holding that "a title insurer is not in the business of supplying information when it issues a title commitment or a policy of title insurance." *Id.* at 341. In reaching this conclusion, the supreme court accepted the argument of the American Land Title Association, which had filed an amicus curiae brief, that the sole purpose of an *abstract of title* is to provide information regarding the title, so a failure to do so is actionable in tort, whereas the purpose of a *title commitment* is just to insure a particular state of title. *Id.* at 340. Therefore, any information about the title in the title commitment is provided as notice of the limitations of the risk that the title insurer is willing to insure. *Id.* at 340-41. The supreme court stated that a guarantee in the title commitment "would

be counterintuitive since the purpose of the title commitment is to set forth the terms for issuing a policy of title insurance[,] and the purpose of the policy of title insurance is to insure against the risk of undiscovered defects, liens, and encumbrances." *Id.* at 341.

¶ 55 Here, plaintiff cannot rely on the lack of listing the 2003 unpaid real estate taxes in the title commitment to fit within the third *Moorman* exception because *First Midwest Bank* teaches us that the title commitment serves as a limitation on the risk of the title insurance, in contrast to an abstract of title, which has the primary purpose of conveying title information. Therefore, ATGF cannot be said to have been in the business of supplying information when it issued the title commitment.

¶ 56 Plaintiff argues that this situation is readily distinguishable from *First Midwest Bank* for many reasons. First, plaintiff argues that the cause of action in *First Midwest Bank* was based solely on negligent misrepresentation in a title commitment, whereas here the cause of action "does not necessarily rely on the commitment itself." Plaintiff argues that he seeks to impose liability on ATGF on the basis that it undertook, as part of its professional real estate closing services, to resolve liens against the property. Plaintiff maintains that there is no indication that the title company in *First Midwest Bank* acted as a provider of real estate closing services.

¶ 57 On the subject of the title commitment itself, plaintiff argues that in addition to the purpose enunciated in *First Midwest Bank*, ATGF's written procedures and directive applicable to this case reflect that a title commitment also has the purpose of assuring a buyer that the title has been searched and that all matters affecting the title were set forth in the commitment. Plaintiff points to evidence that ATGF's website stated that the commitment showed "the steps necessary to transfer title." Plaintiff further references the testimony of Thomas, who was acting as ATGF's agent, that the commitment was intended to provide information about back taxes

and that the 2003 taxes should have been paid at closing. Plaintiff cites cases from other jurisdictions in which courts allowed title companies to be held liable in tort for misrepresentations on the title commitments, based on the reliance that purchasers place on such commitments in real estate transactions. See *100 Investment Limited Partnership v. Columbia Town Center Title Co.*, 60 A.3d 1 (Md. Ct. Spec. App. 2013); *Izynski v. Chicago Title Insurance Co.*, 963 N.E.2d 592 (Ind. Ct. App. 2002); *Tess v. Lawyers Title Insurance Corp.*, 557 N.W.2d 696 (Neb. 1997); *Bank of California, N.A. v. First American Title Insurance Co.*, 826 P.2d 1126 (Alaska 1992); *Shada v. Title & Trust Co. of Florida*, 457 So. 2d 553 (Fla. Dist. Ct. App. 1984). Plaintiff argues that *First Midwest Bank* does not acknowledge the factual possibility that title commitments might be customarily used for the distinct purpose of obtaining information on the state of title, and that title companies might be aware of and even compliant in the practice.

¶ 58 Plaintiff's argument is not persuasive in light of the precedent provided by *First Midwest Bank.* We see no significant difference between disclosing properly liens/unpaid taxes in the written title commitment or through some other manner during the closing process, especially where ATGF was also the company issuing the title insurance policy. In the absence of a request for an abstract of title, representations during the closing services regarding what the title search revealed could only be said to go to show ATGF's exceptions to coverage in its title insurance. See *United Community Bank v. Prairie State Bank & Trust*, 2012 IL App (4th) 110973, ¶ 71 (buyer was not entitled to rely on title commitment for information regarding the title because the purpose of the title commitment was to specify the losses the title insurer was excluding from coverage in its insurance offer). In *United Community Bank*, the court held that the title company did not owe a duty to the parties to discover a lien and went so far as to say that the title company theoretically could consciously and intentionally omit a lien from its exceptions to

coverage in the title commitment if it chose to insure against any losses resulting from the lien. *Id.* ¶ 68.

¶ 59 To fit within the *Moorman* doctrine's third exception, the defendant has to be in the business of supplying information to guide others, in contrast to information that is supplied as ancillary to or in connection with the sale of merchandise or other matter. *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 168 (1997). Therefore, even though ATGF supplied some information through its title commitment, such information can only be said to be ancillary to its sale of title insurance. Indeed, if we found that ATGF was guarantying the condition of the property's title through its title commitment and closing services, it would collapse the distinction between title commitments and title abstracts, and more significantly, undermine the very role of title insurance. See *Midfirst Bank v. Abney*, 365 Ill. App. 3d 636, 652 (2006) (purpose of title insurance is to insure against the risk of undiscovered defects, liens, and encumbrances). Accordingly, the third exception does not apply.

¶ 60 The fourth exception to the *Moorman* doctrine pertains to situations where a service provider's duty is extracontractual. *Congregation of the Passion*, 159 Ill. 2d at 162. Different types of professionals are treated differently because the "concept of duty is at the heart of the distinction drawn by the economic loss rule." *2314 Lincoln Park West Condominium Ass'n v. Mann, Fin, Ebel & Frazier, Ltd.*, 136 Ill. 2d 302, 314 (1990). For example, an architect produces something tangible, such as an architectural plan, that can be memorialized in contract. *Congregation of the Passion*, 159 Ill. 2d at 163. Therefore, the architect's responsibility arises from contract, and his duties should be measured accordingly, so the economic loss doctrine bars recovery. *Id.* at 163-63. In contrast, an attorney's or accountant's duty of competence exits

independently of any contract and does not result in something tangible, so recovery in tort is not barred by *Moorman*. *Id.*

¶ 61 In sum, the *Congregation of the Passion* exception apples to "breach of a professional duty that, because of its intangible nature, cannot be measured in contract terms." *Martusciello v. JDS Homes, Inc.*, 361 Ill. App. 3d 568, 572-73 (2005). Here, the parties' expectations regarding the closing services, particularly the extent and purpose of the title search, could have been set forth in a contract, so the exception does not apply.

¶ 62 Moreover, as mentioned, the *United Community Bank* court held that a title insurer did not owe a duty to the parties to discover a lien, because the sole purpose of the title search was to enable it to decide the exceptions to the coverage that it was willing to offer, and it was not designed to provide information to others. *United Community Bank*, 2012 IL App (4th) 110973, ¶ 68. Therefore, here ATGF did not owe plaintiff a duty to discover the unpaid taxes and report them on the title commitment. Plaintiff's argument that ATGF's duties were broader than just preparing the title commitment fails because plaintiff's losses were directly caused by the failure to include the unpaid taxes in the title commitment and, as discussed, ATGF's representations during the closing regarding what the title commitment revealed were for the purpose of showing its exceptions in coverage in its title insurance. See *supra* ¶ 58.

¶ 63 For these reasons, the trial court did not err in granting summary judgment for ATGF on count II.

¶ 64 In count III, plaintiff sought recovery under an implied contract, so count III is not prohibited by the *Moorman* doctrine. However, as discussed extensively above, given the very nature of title commitments versus title abstracts and the purpose of title insurance, we conclude that the evidence plaintiff cited failed to raise a genuine issue of material fact that there was an

implied contract guarantying the title information conveyed during closing in the same manner as title insurance. To find such an agreement under the facts here would be illogical given that the parties also contracted for title insurance, which has the purpose of insuring against undiscovered issues with the property's title, such as the tax lien that was present here. As such, the trial court properly granted summary judgment for ATGF on count III.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the Kane County circuit court's grant of summary judgment for ATGF on counts II and III. However, we reverse its dismissal of count I and remand the cause for further proceedings.

¶ 67 Affirmed in part and reversed in part; cause remanded.