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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID MELLINGER et al.,

Plaintiffs and Appellants,

v.

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA,

Defendant and Respondent.

A092663

(Contra Costa County
Super. Ct. No. C 96-01614)

Plaintiffs David Mellinger, Uri Eliahu, Paul Guerin, Geoffrey Strong, and Shalom Eliahu sought coverage under a title insurance policy for damages allegedly caused by an encroachment. The trial court found no coverage as a matter of law. We reverse, concluding the question should have been submitted to a jury. We will remand the matter for trial in accordance with the views expressed in this opinion.

I. BACKGROUND

Plaintiffs, under the partnership name "The Redwood Group," entered into a contract to purchase a parcel of property in Concord, California. The parcel was approximately two acres in size and the purchase price was $470,000. Plaintiffs intended to resell the property to a builder after obtaining government approval for subdivision of the property. The purchase agreement provided for a lengthy escrow, allowing plaintiffs to seek approval of the subdivision before the close of escrow.

The City of Concord approved plaintiffs' tentative map for a six-lot subdivision of single-family homes. Plaintiffs then completed their purchase of the property, receiving

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II-A.2, II-B.1 and II-B.2.

title as tenants in common, with the close of escrow taking place on March 2, 1990. At that time they also purchased a title insurance policy from defendant Ticor Title Insurance Company of California (TICOR).

On March 13, 1990, plaintiffs made a claim on the title insurance policy based on a discrepancy in the location of the northwest property line. TICOR investigated plaintiffs' claim and found no problem with the northwest boundary and no covered claim. Further investigation by plaintiffs, however, revealed a problem on the south side of the property—Treat Boulevard, a busy street, encroached onto the property up to 20 feet (the Treat Boulevard encroachment). Plaintiffs apparently did not resubmit their claim.

On April 20, 1990, plaintiffs entered into a contract to sell the property to S&H Properties. In September 1990, plaintiffs and S&H Properties applied to the City of Concord for a variance from a zoning requirement of 15,000 square foot lots. Plaintiffs and S&H Properties proposed to dedicate ownership of the portion of the property underlying Treat Boulevard to the City as a condition of the variance. The City's Planning Commission approved the variance conditioned only on the building of acceptable fencing.

For reasons not clearly reflected in the record, the sale to S&H Properties was not completed. According Uri Eliahu, the boundary discrepancy caused delays that led S&H Properties to call off the transaction.

Plaintiffs apparently received final approval of their subdivision map in late 1992, and they did deed all or part of the area underlying the Treat Boulevard encroachment to the City of Concord. They continued to hold the property after obtaining final approval of the subdivision map.

In 1994, they sued TICOR. Their complaint was vague as to the basis for any claim against TICOR. Ultimately they stipulated to the dismissal of that action. The stipulation allowed them to submit a new claim to TICOR, presumably for damages resulting from the Treat Boulevard encroachment, and TICOR agreed to waive all defenses it could have asserted based on statutes of limitations or laches.

The new claim asserted a loss of $658,550, including lost profits, holding costs, and lost interest income. When payment in that amount was not forthcoming, plaintiffs filed this action in April 1996.[1] They alleged breach of the insurance contract and bad faith.

At the beginning of trial, the court held a hearing to consider the admissibility of testimony from plaintiff Uri Eliahu on the issue of damages. (See Evid. Code, § 402.) During the hearing, the trial court identified the issue of coverage as one of law and ordered a court trial on the issue. Plaintiffs' counsel pointed out that this was a breach of contract action not a declaratory relief case, and that there were factual issues to be decided. The trial court disagreed and directed plaintiffs to present their witnesses on the issue of coverage. After hearing testimony from Shalom Eliahu and an expert on real property descriptions, the trial court found no coverage under the insuring clause of the policy and entered judgment in favor of TICOR.

II. DISCUSSION

A. *Coverage*

1. *Marketability of Title*

Plaintiffs contend the Treat Boulevard encroachment rendered their title unmarketable within the meaning of the coverage provisions of their insurance policy. The policy was a standard form ALTA Residential Policy (June 1, 1987). It covered 14 separate "title risks." TICOR agreed to insure plaintiffs against actual loss resulting from any of the title risks and to defend plaintiffs' title in any court case based on a covered title risk. Under title risk number 11, TICOR's duties arose when: "Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan."

No interpretation of this policy provision appears to be required in this case. Plaintiffs do not argue the coverage provision is ambiguous. Instead, they rely on the meaning of marketable title established by the California Supreme Court: "'A

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[1] After the complaint was filed, on May 6, 1996, TICOR offered the appraised value of the portion of the property deeded to the City of Concord, $28,000, plus interest.

marketable title, to which the vendee in a contract for the sale of land is entitled, means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept.'" (*Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, 649-650.) Marketable title "must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value." (*Mertens v. Berendsen* (1931) 213 Cal. 111, 113 (*Mertens*).) A mere suspicion or speculative possibility of a future defect in title does not render a title unmarketable. (*Ibid.*)

We reject plaintiffs' assertion that the Treat Boulevard encroachment rendered their title unmarketable as a matter of law. But we find merit in their alternative argument that whether their title was rendered unmarketable was a question of fact for the jury. The trial court appears to have gone beyond its duty to interpret the insurance policy, which is a question of law (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115), by determining a factual question as to whether the Treat Boulevard encroachment actually affected the marketability of title (see Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2000) [¶] 4:2, p. 4-1 [determining factual issues affecting coverage]).

The trial court found no coverage "[g]iven the absence of any title in the City of Concord," and that this case came squarely within the holdings of *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* (1991) 231 Cal.App.3d 1654 (*Lick Mill*) and *Native Sun Investment Group v. Ticor Title Ins. Co.* (1987) 189 Cal.App.3d 1265, 1275 (*Native Sun*). But the fact the City of Concord apparently did not have title to any part of plaintiffs' property does not resolve the question of marketability.

Based on the meaning of marketable title established by the Supreme Court, the question is whether a reasonable purchaser, knowing that a third party might claim an interest in the property, would nevertheless proceed with the transaction. Though many of the facts in this case are undisputed, the question of whether a reasonable purchaser

would buy plaintiffs' property knowing the City of Concord or the public might have a vested right to continued use of the Treat Boulevard encroachment remains unanswered. (See *Wilson v. Pacific Coast Title Ins. Co.* (1951) 106 Cal.App.2d 599, 602 [whether title was defective or unmarketable were questions for the trier of fact].) Plaintiffs offered evidence on the question, but it was not submitted to a trier of fact.

TICOR argues and the trial court found the Treat Boulevard encroachment merely affected market value, not marketability of title. It is undisputed that there is no coverage for physical conditions of property that merely affect land value. (See e.g., *Hocking v. Title Ins. & Trust Co., supra,* 37 Cal.2d at p. 652; *Lick Mill, supra,* 231 Cal.App.3d at pp. 1660-1662.)

The Treat Boulevard encroachment represented both a physical condition and possible interest in plaintiffs' property. To the extent it was a road that crossed a portion of plaintiffs' property, it might have affected the market value of the property. But it also had the potential to affect plaintiffs' ownership or title to a portion of the property. The potential effect of an encroachment on marketability of title was discussed in *Mertens*. In *Mertens*, a purchaser of real property sought to rescind a real estate sales contract after discovering a building on the property encroached onto an adjoining city street. "The question presented by these facts is, of course, whether the encroachment renders the title of the vendor defective." (*Mertens, supra,* 213 Cal. at p. 113.) Title generally need only be marketable; i.e., free from reasonable doubt. (*Ibid.*) "We think that if it should appear that the city has a right of action based upon the encroachment and that the enforcement of that right would cause substantial loss to the owner, the title cannot be said to be free from reasonable doubt. A purchaser should not be compelled to rely upon past acquiescence or mere indifference on the part of city officials to substantial interference with the property rights of the people." (*Id.* at pp. 114-115.)

Ultimately, the Supreme Court found in *Mertens*, as a matter of law, that the encroachment was so insignificant (two- to seven-eighths of an inch) that it would not affect the marketability of title. (*Mertens, supra,* 213 Cal. at pp. 115-116.) And even if

the city took action, it would have no right to have the encroachment removed and the owner could not be required to pay more than nominal damages. (*Ibid.*)

We are not inclined to find as matter of law that the Treat Boulevard encroachment was insignificant, or that the City of Concord would have had no right to assert continued use, if not ownership, of a portion of plaintiffs' property (see e.g., *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820-823 [discussing implied dedication of private property]). One Illinois court has held that whether title to real estate is marketable is a question of law. (*Rackouski v. Dobson* (1994) 261 Ill.App.3d 315; 634 N.E.2d 1229, 1231.) We agree that in many cases marketability can be determined as a matter of law. The uncertainty regarding title may be trivial, as in *Mertens*, or it may be so substantial, such as a competing claim to ownership of the entire parcel, that it is unnecessary to submit the question to a trier of fact. The instant case, however, defies categorization. The Treat Boulevard encroachment affects only a small portion of plaintiffs' property, but arguably it could have dissuaded someone from purchasing the property.

We are also not persuaded that *Mertens* is distinguishable because the encroachment in that case was onto adjoining land, where as here the encroachment is onto plaintiffs' property. According to TICOR, *Mertens* "illustrates that it is the City of Concord that had no title to the encroachment." How *Mertens* illustrates that fact or why that fact is relevant is not explained. What is important was that the Treat Boulevard encroachment represented a possible third-party interest in the land described by plaintiff's deed. (See *Davis v. Stewart Title Guar. Co.* (Mo.Ct.App. 1987) 726 S.W.2d 839, 850 [easement for parking in favor of third-party rendered fee title of plaintiff at least doubtful].)

The instant case is distinguishable from *Lick Mill*, in which there was no allegation of a possible third-party claim to an interest in the plaintiffs' property. Instead, the plaintiffs discovered hazardous substances on their property and incurred costs to remove them. They then sought indemnity from their title insurer for the cleanup costs. (*Lick Mill, supra,* 231 Cal.App.3d at p. 1660.) The Court of Appeal noted the plaintiffs had

pled facts relating to marketability of the land rather than marketability of title. (*Id.* at p. 1662.) The hazardous substances merely affected the physical condition of the property and not title; therefore, there was no coverage under the insuring clause for unmarketability of title. (*Ibid.*)

Native Sun, the other case cited by the trial court, might be instructive once the underlying factual issues are resolved in this case. *Native Sun* did involve a government claim to an interest in the plaintiff's coastal property. The defendant, TICOR, agreed to defend and indemnify the plaintiff against the claims made by the State of California. (*Native Sun, supra,* 189 Cal.App.3d at p. 1270.) That policy, as does the policy in the instant case, excepted easements, liens or encumbrances not shown by public records from coverage. Based on this exception, TICOR advised that it would not indemnify for any loss resulting from state enforcement of so called *Gion-Dietz* rights based on historic public use (*Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29). The appellate court affirmed the trial court's finding that the only claims to the property asserted by the state with merit were excluded *Gion-Dietz* claims. (*Native Sun, supra,* at pp. 1275-1276.) Any other claims had no merit and did not affect the marketability of title. (*Ibid.*)

TICOR has not shown, factually or legally, that a claim by the City of Concord to an interest in plaintiffs' property would have had no merit. Of course there are certain exceptions and exclusions in the policy that may apply unless the Treat Boulevard encroachment was reflected in the public records.[2] Plaintiffs had an expert witness who opined the encroachment was reflected in the public records. TICOR stated it had an expert who would testify to the contrary. A jury will need to resolve the question. TICOR acknowledges it has the burden to prove plaintiffs' claim was excluded. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188.)

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[2] Plaintiffs' policy excepted from coverage any rights, interests or claims of parties in possession of the land not shown by the public records. It also excepted any facts about the land that a correct survey would disclose and which were not shown by the public records. The trial court noted there was no need to reach the question of exclusions, but it did observe certain exclusions would apply. The exclusions and exception appearing in the policy, if applicable, may eliminate coverage or limit the amount of damages plaintiffs can recover (see part B, *post*).

The judgment must be reversed and the matter remanded for trial of the disputed factual issues raised by plaintiffs' allegations. Because we reverse, we will discuss the additional points raised by plaintiffs for guidance of the trial court on remand.

2. *Existence of Easement*

Plaintiffs contend the trial court abused its discretion when it refused to allow them to argue in the alternative for coverage based on the existence of an easement by dedication under Civil Code section 1009, subdivision (d).[3] Title risk number 10 covered losses caused by: "Someone else has an easement on your land."

Plaintiffs did not plead the existence of an easement on their property. Other than an off-hand comment at a pre-trial hearing, plaintiffs did not assert this basis for coverage until trial. We can hardly say the trial court abused its discretion when it refused to consider their belated assertion. We reject, however, the implication in the statement of decision and TICOR's brief that a nonsuit was appropriate for failure to present evidence on the question. Plaintiffs cannot be blamed for failing to present evidence on a claim they were barred from pursuing. We further observe that nothing prohibits plaintiffs from requesting leave to amend their complaint on remand. (See *Estate of Horman* (1971) 5 Cal.3d 62, 72-73.)

B. *Damages*

1. *Measure of Damages for Breach of Contract*

Before the trial court found no coverage, TICOR moved to limit plaintiffs' evidence of damages on the breach of contract claim. TICOR argued, inter alia, that

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[3] Civil Code section 1009, subdivision (d) provides: "Where a governmental entity is using private lands by an expenditure of public funds on visible improvements on or across such lands or on the cleaning or maintenance related to the public use of such lands in such a manner so that the owner knows or should know that the public is making such use of his land, such use, including any public use reasonably related to the purposes of such improvement, in the absence of either express permission by the owner to continue such use or the taking by the owner of reasonable steps to enjoin, remove or prohibit such use, shall after five years ripen to confer upon the governmental entity a vested right to continue such use."

liability under the title policy was measured by the diminution in the value of plaintiffs' property as of the date of discovery of the defect. TICOR sought to preclude plaintiffs from introducing evidence of any other damages allegedly incurred. The trial court, relying on *Overholtzer v. Northern Counties Ins. Co.* (1953) 116 Cal.App.2d 113, agreed that liability under the policy was measured by diminution in value. The trial court held plaintiffs were not entitled to recover lost profits or damages resulting from a "fluctuating market."

Plaintiffs assert the trial court erred in ruling that liability under a title policy is limited to the diminution in value of their property. Plaintiffs argue the measure of damages should include all losses they sustained by reason of their inability to sell their property, such as lost profit, holding costs, and a decline in market value while they held the property.

Damages for breach of contract seek to approximate the agreed-upon performance. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) TICOR agreed to pay for "actual loss" resulting from the title risks covered by the policy. The policy also provided: "If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it."

An insurer's liability under an owner's title insurance policy is generally measured by calculating (1) the cost of removing the title defect or lien, or (2) the diminution in value caused by the defect or lien. (Cal. Title Insurance Practice (Cont.Ed.Bar 2d ed. 1999) § 11.5, p. 329.) The latter method, which the trial court adopted, was announced in *Overholtzer v. Northern Counties Ins. Co., supra,* 116 Cal.App.2d 113 (*Overholtzer*).[4] Loss is measured by the diminution in value of the property caused by the defect in title as of the date of the discovery of the defect. (*Id.* at p. 130.)

Plaintiffs argue the *Overholtzer* method of calculating damages should not apply in this case because *Overholtzer* did not involve a claim based on marketability title or an

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[4] Given that the Treat Boulevard encroachment did not exist by the time of trial, measuring loss by calculating the cost of removing any title defect was not feasible.

inability to sell the property. According to plaintiffs, diminution in value does not account for all damages when property is unmarketable.

We agree with plaintiffs in theory, but not in application to the facts of this case. If plaintiffs' title was unmarketable, the solution was to clear their title of the uncertainty caused by the Treat Boulevard encroachment. Rather than a quiet title action, plaintiffs elected a more practical solution: Deed the area underlying the Treat Boulevard encroachment to the City of Concord. As far as we can tell from the complaint and the limited record before us, TICOR played no part in the decision to surrender the Treat Boulevard encroachment, and it was not called upon to free plaintiffs' title from any uncertainty caused by that encroachment. Under the circumstances, TICOR's remaining obligation, if coverage existed, was to pay for the decrease in market value caused by the surrender of a portion of plaintiffs' property to the City. (See *Overholtzer, supra,* 116 Cal.App.2d at p. 128 [measure of damages is the depreciation in market value caused by the existence of the easement].)

Plaintiffs have not alleged any facts that would justify awarding them the panoply of damages they listed in the "Statement of Claim" attached to their complaint. Their claim of lost profit, holding costs, and decline in market value might have merit had TICOR invoked its right to clear title and not done so expeditiously. (See *Nebo, Inc. v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 222, 228 [plaintiff could recover rental income lost while its insurer took over three years to perfect unmarketable title]; see also *Overholtzer, supra,* 116 Cal.App.2d at p. 124 [if "cloud" on title impairs the market value of land, the property owner is entitled to whatever damages resulted from that cloud].) Further, most if not all of the damages they listed arose from delays in the approval of a subdivision map, but the policy specifically excludes coverage for losses from laws and regulations concerning "land division."[5]

[5] Under Exclusion 1 of the policy, TICOR does not insure against loss resulting from: "Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:

- land use

The expectation under a Residential Title Insurance Policy (One-To-Four Family Residences) such as the one purchased by plaintiffs, is that the title insurer will make the property owner whole by clearing title or paying the difference between what was purchased and what was received. "Title insurance is solely a contract of indemnity and the insured is entitled to recover only his or her actual loss, and cannot make the contract one of profit to him or her, with recovery limited to the amount necessary to remove the title defect." (12 Couch on Insurance (3d ed. 1998) § 185:75, p. 185-71.) Therefore, the trial court properly limited plaintiffs' proof of damages, assuming coverage, to a showing of the diminution in value of the property caused by the Treat Boulevard encroachment as of the date of the discovery of that encroachment.

2. *Testimony of Uri Eliahu on Damages*

The trial court also ruled, before finding no coverage, that Uri Eliahu's opinion on damages was inadmissible. The trial court heard Mr. Eliahu's testimony and then found he used improper methodology, and that his opinion was speculative and without proper foundation.

Plaintiffs assert the trial court misunderstood Mr. Eliahu's testimony and misapplied the relevant law.

We review a trial court's ruling to admit or not admit evidence following a hearing pursuant to Evidence Code section 402 for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

Uri Eliahu testified not as an expert, but as an owner of the property. Evidence Code section 813, subdivision (a)(2), permits an owner to give an opinion on the value of his or her property. In stating such an opinion, however, the owner is bound by the same

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- improvements on the land
- land division
- environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date. . . ."

rules of admissibility as any other witness. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 661.) An opinion based on a matter that is not a proper basis for such an opinion may be excluded. (Evid. Code, § 803.)

Evidence of damages was circumscribed by the trial court's ruling limiting damages to the diminution in value of the property caused by the Treat Boulevard encroachment as of the date of the discovery of that encroachment. The date of discovery, according to plaintiffs, was the first week in June 1990.

In his testimony, Uri Eliahu first noted the various contracts plaintiffs had negotiated for the sale of the property in 1990 for $650,000 and $660,000. These prices reflected the approved tentative map for a six-lot subdivision. His opinion of the value of the property without the subdivision map, as of the first week in June 1990, was between $525,000 and $550,000. He believed the real estate market was "very strong based on our other dealings." He considered the "finished product prices" of plaintiffs' other holdings. Nevertheless, Mr. Eliahu believed that as a result of the Treat Boulevard encroachment, the value of the property was "very low." Based on its use as rental property, he estimated a value of $60,000 to $100,000. In his opinion, the value of the property had diminished by $400,000 to $500,000.

We fully agree with the trial court that Uri Eliahu's opinion was speculative and without proper foundation. In cases we discussed earlier in this opinion, property owners confused the impaired market value of their land, due to physical conditions, with the marketability of their title. (*Hocking v. Title Ins. & Trust Co., supra,* 37 Cal.2d at pp. 651-652; *Lick Mill, supra,* 231 Cal.App.3d at pp. 1661-1662.) Mr. Eliahu fell into the same trap, albeit in reverse. He confused the difficulty of selling property with allegedly imperfect title with the market value of the property. It might have been difficult to complete a sale in the short term, but there was no basis for his opinion that the underlying value of the property had been reduced by at least 80 percent.

The trial court did not abuse its discretion when it ruled Uri Eliahu's opinion on damages was inadmissible.[6]

III. DISPOSITION

The judgment is reversed. The matter is remanded for trial in accordance with the views expressed in this opinion. Plaintiffs shall recover their costs on appeal.

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Kay, J.

We concur:

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Reardon, Acting P.J.

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Sepulveda, J.

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[6] Plaintiffs ask this court to impose some sanction on TICOR for its failure to support statements regarding the record with appropriate citations to the record. (Cal. Rules of Court, rule 15(a).) Plaintiffs suggest striking all or a portion of TICOR's brief. It does appear that TICOR has tried to fill in some gaps in the background of this case with facts not appearing in the record. We have disregarded those facts. Further action or sanctions are not warranted.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable William M. Kolin
Counsel for Appellants:	Law Offices of Robert J. Kahn Robert J. Kahn
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