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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHAEL ABIKASIS et al., Plaintiffs and Appellants, v. PROVIDENT TITLE COMPANY, Defendant and Respondent.	B266058 (Los Angeles County Super. Ct. No. BC540872)

APPEAL from an order of the Superior Court of Los Angeles County. Mitchell L. Beckloff, Judge. Affirmed.

Herbert Abrams for Plaintiffs and Appellants.

Gaglione, Dolan & Kaplan, Robert T. Dolan and Amy J. Cooper for Defendant and Respondent.

This case arises out of a purportedly failed real estate sales transaction. Plaintiffs and appellants Michael Abikasis and Laurie Abikasis (plaintiffs), the owners of the subject property, contend the transaction failed because defendant and respondent Provident Title Company (Provident) breached its duty to issue a policy of title insurance for the property, thereby preventing the close of escrow. They further contend the trial court erred by dismissing their negligence and breach of contract action against Provident after sustaining, without leave to amend, Provident's demurrer to their second amended complaint.

The second amended complaint fails to allege facts showing the existence of any contractual obligation by Provident or the breach of any duty of care owed to plaintiffs. We therefore affirm the order dismissing the action.

FACTUAL BACKGROUND

On August 27, 2013, Provident issued to Encore Escrow Company a preliminary report on certain real property owned by plaintiffs and located at 3420 Cordova Drive in Calabasas, California (the property). The preliminary report stated that Provident was "prepared to issue, or cause to be issued as of the date hereof, a policy or policies of title insurance describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of any defect, l[i]en or encumbrance not shown or referred to as an exception in schedule B . . . ." Schedule B listed various encumbrances that would be excepted from coverage under any policy of title insurance to be issued. The encumbrance relevant here was a lis pendens described on schedule B as "[a] pending court action as disclosed by a recorded notice" against plaintiffs by Nevada Equity Partners, LLC (Nevada Equity) "to establish . . . title to the real property."

Nevada Equity's attorney, Robert Weissman, sent a letter to Encore Escrow on October 10, 2013, enclosing a notarized withdrawal of the lis pendens Nevada Equity had recorded against the property. The letter instructed Encore to hold the withdrawal "***in trust***" and not to record it "***until you have received verbal confirmation from me or Rosalinda Kramer that the underlying Settlement Agreement has been signed*** by my

client ***and only upon disbursal by Escrow of the payment of the sum of $525,000.00 to Nevada Equity Partners*** as directed by me or Rosalinda Kramer, under a separate c***onfidential*** instruction."

On October 17, 2013, the Drug Enforcement Administration (DEA) sent to Encore Escrow a seizure warrant under section 981 of title 18 of the United States Code for funds in the amount of $525,000 to be disbursed from the escrow account for the property to Nevada Equity, based on probable cause that those funds were traceable to monies derived from marijuana trafficking. In an affidavit submitted in support of the warrant, the DEA described its investigation of an established marijuana trafficker named Andrew Kramer (Kramer). According to the DEA, Kramer had no source of income unrelated to marijuana trafficking and used various business entities in order to conceal income and assets derived from his unlawful activities.

The DEA affidavit stated that Kramer and Michael Abikasis entered into an agreement to develop the property, that Michael Abikasis contributed the property, and that Kramer funded the construction costs. A dispute arose when Kramer demanded that the property be transferred to Nevada Equity, resulting in a lawsuit by Nevada Equity against Michael Abikasis and the recording of a lis pendens against the property. The lawsuit settled, and under the terms of the settlement, Nevada Equity was to receive $525,000 from the proceeds of the sale of the property. That $525,000 was the subject of the DEA seizure warrant.

On October 18, 2013, Nevada Equity's attorney sent Encore Escrow a second letter authorizing Encore Escrow to record the withdrawal of the lis pendens and to disburse $530,000 to Nevada Equity "as directed by me or Rosalinda Kramer, under a separate ***confidential*** instruction."

Also on October 18, 2013, a title officer from Provident sent an email to Encore Escrow that stated:

> "I have discussed the file with the lead underwriter and his requirement is for Attorney Robert Weissman to issue a letter on his letterhead to be signed, scanned and emailed to Provident Title. The letter must provide Provident Title authority to unconditionally record the

> original Withdrawal of Notice of Pending Action dated October 10, 2013 and also confirm that the conditions/terms contained in the letter/demand dated October 10, 2013 that accompanied said withdrawal have been rescinded. Once I have the letter I will resubmit to the underwriter for final approval."

On October 20, 2013, Provident's chief title officer, Ralph Khelil, sent an email to Nevada Equity's attorney stating that "[y]our letter to escrow requiring payment of $530,000 to your client as a condition to the recording of the release of the notice of action is unacceptable because we have knowledge that a third party has placed a claim on said funds." The email further stated: "On counsel's advice we are requiring a letter from your office addressed to us instructing us to unconditionally record the Release of the Lis Pendens and rescinding and cancelling your prior demand for funds to be paid to your client." Later that same day, Khelil sent a second email to Nevada Equity's attorney advising him that the "requirement for an unconditional instruction to release the title from the recorded lis pendens and the rescission/cancellation of the prior demand is sine qua non to our ability to record and insure the buyers and their lender's title."

PROCEDURAL HISTORY

Original complaint

On March 27, 2014, plaintiffs filed a complaint for negligence against Provident. The complaint alleged that Provident, "[i]n contravention of the legal standards applicable to . . . a California title company," sent three emails (attached as exhibits to the complaint) "solely for the purpose of preventing and evading the closing of escrow as a subterfuge to avoid being placed in a position which it unilaterally determined was against its own interests"; failed to furnish a title report as required by the preliminary report and California law; and prevented closing of the escrow for the sale of the property.

Provident demurred on the grounds that it had no duty to issue a preliminary report or a policy of title insurance to anyone, that it had no duty to close the purported escrow, and the complaint failed to allege any facts showing that Provident owed plaintiffs a duty

of care. Provident argued that the complaint alleged no facts showing that plaintiffs were "party to, involved with, privy to, or in a transaction with [Provident]" as there were no facts about the escrow, the parties to the escrow, or whether Provident owed or breached a duty to anyone in relation to the escrow. The trial court sustained the demurrer with leave to amend.

First amended complaint

Plaintiffs filed a first amended complaint that included a new cause of action for breach of contract. As to this cause of action, plaintiffs alleged that Provident "was in beach of its contractual obligations under the Preliminary Title Report agreement" by not issuing a title insurance policy, thereby preventing the close of escrow and precluding disbursement of monies to be paid pursuant to an escrow settlement statement attached to the amended complaint. The negligence allegations were substantially unchanged from the original complaint.

Provident demurred to the negligence claim on the same grounds as its demurrer to the original complaint. Provident also demurred to the new breach of contract cause of action on the grounds that no contract existed between it and plaintiffs and that leave to amend had been granted only as to the negligence claim. The trial court accorded plaintiffs the benefit of the doubt that its leave to amend had allowed them to add a breach of contract claim. The court concluded, however, that the amended allegations did not establish the existence of a contract. The trial court found nothing in the preliminary report or the emails attached to the amended complaint that obligated Provident to issue a policy of title insurance that removed the lis pendens as an exclusion. The trial court also found that the amended complaint alleged insufficient facts as to why escrow did not close: "It is further not clear whether Plaintiffs were unwilling to close escrow with a title insurance policy issued in a manner consistent with the exclusions in [the preliminary report] (including the lis pendens). If Plaintiffs were unwilling to accept the terms under which [Provident] was willing to issue a policy of title insurance, there can be no liability. . . ." The trial court nevertheless accorded plaintiffs another

opportunity to plead a viable claim against Provident by granting them 10 days leave to amend.

Second amended complaint

Plaintiffs filed a second amended complaint that was nearly identical to the first amended complaint, except for the additional claim that Provident breached the covenant of good faith and fair dealing. Provident again demurred. Based on the reasons stated in its February 6, 2015 minute order, the trial court sustained the demurrer without leave to amend. An order of dismissal was filed on July 28, 2015.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Breach of contract

Plaintiffs contend the preliminary report issued by Provident "constituted a contract to issue a title policy upon satisfaction of the conditions set forth therein" and that Provident breached its obligation to provide a title insurance policy once the lis pendens was withdrawn.

A preliminary report is statutorily defined as an "offer[] to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein." (Ins. Code, § 12340.11.) It is "a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted." (*Ibid.*) The issuer's offer is accepted and a contract is formed when the insured (typically, a buyer or lender in a real estate transaction) purchases a title policy. (*Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 597 (*Lee*).)

Plaintiffs maintain that a preliminary report is a "firm" or contractually binding offer to issue a policy of title insurance and that the title company cannot refuse to issue a policy pursuant to a previously issued preliminary report. They cite *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784 (*Wolschlager*) as support for this argument. That case is inapposite. The plaintiff in *Wolschlager* purchased a title insurance policy, which the title company issued pursuant to a preliminary report the plaintiff received and approved. (*Id.* at p. 787.) The issue presented was whether the plaintiff was bound by an arbitration clause that was not included in a description of proposed coverage attached to the preliminary report but that was contained in the title insurance policy. The court in *Wolschlager* held the insured bound by the arbitration clause. As support for its holding, the court paraphrased Insurance Code section 12340.11 as follows: "The insured's approval and acceptance of the conditions set forth in the preliminary report create a binding contract on the terms set forth in the report and any materials that are incorporated therein by reference. [Citation.]" (*Wolschlager*, at pp. 790, 791.) The *Wolschlager* court's paraphrasing of the statutory language has been criticized as "incorrect and misleading." (3 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 7:25, p. 7-66, fn. 20.) As one source as observed: "The cited Insurance Code section does not mention whether the 'offer' embodied in the preliminary report is contractually binding, and the usual form of preliminary report disclaims an intent to be bound contractually absent purchase of a commitment or a binder." (*Ibid.*)

Language disclaiming an intent to be contractually bound appears on the first page of the preliminary report issued by Provident in this case. That language is standard in the form of preliminary report used in California[1] and provides as follows:

> "This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby. If it is desired that liability be assumed prior to the issuance of a policy of title insurance, a binder or commitment should be requested."

The "binder" and "commitment" referred to in the above disclaimer are contractually binding alternatives to a preliminary report. A commitment includes language that creates a contractually binding offer by the insurer to issue a title policy subject to stated terms and conditions. (3 Miller & Starr, Cal. Real Estate, *supra*, § 7:28, pp. 7-70 to 7-71.) A binder is a written contract that obligates the insurer to issue a title insurance policy that reflects the condition of the property as of a specific date. (*Id.* at § 7:31, pp. 7-74 to 7-75.)[2] The second amended complaint does not allege that Provident issued or agreed to issue either a binder or commitment.

A preliminary report is not a contract and cannot be the basis for a breach of contract claim. (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453 (*Stockton Mortgage*).) A preliminary report is merely "an offer identifying '. . . "precisely the risk which [the insurer] will agree to assume"' [Citation.]" (*Lee, supra*, 188 Cal.App.4th at p. 597.) No contract is formed until the offer is accepted by the insured's purchase of a title policy. (*Ibid.*)

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[1] The California Land Title Association has promulgated a form of preliminary report used almost universally in California. (3 Miller & Starr, Cal. Real Estate, *supra*, § 7:25, pp. 7-62, 7-64.)

[2] The contractually binding aspect of these alternatives to a preliminary report comes at a higher price. Title companies charge substantial fees for issuing a binder or commitment (3 Miller & Star, Cal. Real Estate, *supra*, § 7:25, pp. 7-65 to 7-66), whereas no fee is charged for a preliminary report when a policy of title insurance is purchased and only a nominal fee is charged for a preliminary report when a title policy is not obtained. (*Id.* at § 7:25, p. 7-63.)

Plaintiffs have alleged no facts establishing the existence of a contract. They do not allege to have purchased or paid for a policy of title insurance or for any contractually binding alternative to the preliminary report.

The preliminary report issued by Provident in this case specifically excluded the lis pendens from coverage under any proposed policy of title insurance. The issuer of a title insurance policy is entitled to define the extent of its liability under the policy. (See *Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 545.) Nothing in the preliminary report indicates that Provident agreed to issue a title policy that did not exclude the lis pendens, and plaintiffs have not alleged that Provident agreed to do so. The trial court accordingly did not err by sustaining the demurrer to the breach of contract cause of action.

Plaintiffs' claim for breach of the covenant of good faith and fair dealing fails for the same reason that their breach of contract claim fails. A cause of action for breach of the covenant of good faith and fair dealing requires the existence and breach of an enforceable contract (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 57), and plaintiffs have failed to allege the existence of an enforceable contract.

III. Negligence

Plaintiffs contend that Provident's refusal to issue a title policy after Nevada Equity's attorney notified the escrow company that it could record the withdrawal of the lis pendens when subsequently directed to do so "under a separate ***confidential*** instruction" was negligence, "in derogation of [Provident's] obligations as a title insurer," "in contravention of the legal standards applicable to . . . a California title company" and in violation of the DEA seizure warrant and federal and California law.

"'"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion."' [Citation.]" (*Stockton Mortgage*, *supra*, 233 Cal.App.4th at p. 455, quoting *Artiglio v. Corning Inc.* (1988) 18 Cal.4th 604, 614.) Plaintiffs fail to allege facts establishing the existence of any duty of care owed to them by Provident.

A preliminary report is merely an offer to issue a title policy and cannot serve as the basis for a negligence claim. (*Lee, supra*, 188 Cal.App.4th at p. 596.) "'"The issuer of a preliminary merely intends to induce the prospective insured to purchase a policy of title insurance and to declare in advance of such purchase precisely the risk which it will agree to assume.". . . .'" (*Ibid.*) The preliminary report issued by Provident specifically excluded the lis pendens from coverage. It included no representation or undertaking by Provident to remove that exclusion from any proposed policy to be issued.

Plaintiffs also failed to establish any breach of duty owed to them by Provident. The preliminary report specified the terms under which Provident was willing to issue a proposed policy of title insurance. Plaintiffs' unwillingness to accept those terms cannot be a basis for liability on Provident's part.

The trial court did not err by sustaining the demurrer to the negligence cause of action.

IV. Denial of leave to amend

Plaintiffs fail to suggest how they would amend their second amended complaint to correct the defects discussed above. The burden of proving a reasonable possibility of amending the complaint to state a cause of action "is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court therefore did not abuse its discretion by sustaining the demurrer without leave to amend.

DISPOSITION

The order dismissing the action is affirmed. Provident is awarded its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST