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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1483**

Mattson Ridge, LLC,
Respondent,

vs.

Clear Rock Title, LLP, et al.,
Appellants.

**Filed June 6, 2011
Affirmed in part, reversed in part, and remanded
Harten, Judge***

Chisago County District Court
File No. 13-CV-07-1136

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Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Harten,
Judge.

UNPUBLISHED OPINION

HARTEN, Judge

Respondent, an insured, brought this action against appellants, a title insurer and its agent, seeking consequential lost profit and mechanic's lien damages for the insurer's

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

breach of contract and a declaratory judgment that the insurer was obliged to defend and indemnify respondent under its title insurance policy. Respondent moved successfully for summary judgment on the issue of the insurer's liability. Following a bench trial on damages, the district court denied respondent's request for consequential damages and issued judgment against appellants for the amount of the policy plus the cost of curing the title defect. The district court denied appellants' motion for a new trial or amended findings.

Appellants now challenge the summary judgment and the damages award. By notice of related appeal, respondent challenges the denial of consequential damages. Because we see no genuine issue of material fact and respondent was entitled to judgment on liability as a matter of law, we affirm the summary judgment on appellants' liability; because the district court erred in concluding that respondent could not recover damages for breach of contract in excess of the amount of the policy, we reverse that determination; because the mechanic's lien damages did not proximately result from appellants' breach of contract, we affirm the denial of those damages.

FACTS

In March 2005, respondent Mattson Ridge LLC, a developer (Mattson), entered into a purchase agreement to buy a parcel of vacant, undeveloped real property outside Chisago City (the property) for \$1,286,000. Title insurance in that amount had been procured from appellant Ticor Title Insurance Co. through its agent, appellant Clear Rock Title, LLP (collectively, Ticor). The legal description of the property included a

reference to “the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City.”

On 30 August 2005, a Ticor employee noted on an “authorization to exceed contractual liability limitation” that the “vague legal description” of this property was a “usual or extrahazardous risk.” In September 2005, Mattson closed on the purchase.

In October 2005, Mattson entered into a purchase agreement to sell the property to another developer, Thompson Builders and Contractors, Inc., (Thompson) for \$2,900,000.¹ Thompson began developing the property. The closing date was set for May 2006. The purchase agreement required Mattson to provide marketable title by 30 days after the closing; if it failed to do so, either party could cancel the purchase agreement, and Mattson would have to refund Thompson’s earnest money.

A Thompson employee noticed the ambiguity in the legal description of the property, and, in November 2005, Thompson notified Ticor of this. Ticor did not respond. On 30 November 2005, Ticor issued a title insurance policy for \$1,286,000 to Mattson; among other things, it insured against loss or damage due to unmarketability of title. In May 2006, Thompson obtained preliminary plat approval. Thompson’s title company issued a title commitment stating that “[t]he legal description [of the property] appears ambiguous and should be surveyed and reformed. An exchange of quit claim deeds with adjacent property owners may be required.” Thompson was unable to obtain

¹ By this time, the property had been annexed to Chisago City and sewer and water lines had been extended to it. The demand for undeveloped residential property in the area peaked in mid-2005 and 2006 and declined in 2007.

title insurance on the property and notified Mattson that the defect had to be cured before Thompson would close. The closing date was extended.

In July 2006, the final plat approval was conditioned on, among other things, resolution of the title problem. In August 2006, Mattson notified Ticor of the defect and asked Ticor to remedy it under the policy. Mattson proposed that Ticor provide title insurance that would insure over the defect so Thompson could close on the property.

On 31 October 2006, Ticor denied Mattson's claim under the policy on the ground that the alleged ambiguity concerned roadways and the policy excluded roadways from its definition of land. Mattson then instructed its counsel to begin a title registration proceeding to remove the defect. On 16 July 2007, the defect was cured when the district court entered a title registration order, thereby making the property marketable.

By this time, the residential real estate market in the area had declined. Thompson and Mattson negotiated a reduction in price from \$2,900,000 to \$2,600,000, but Thompson was unable to obtain affordable financing and did not close. The purchase agreement was ultimately amended to establish a closing date of May 2008, when Thompson, still unable to obtain financing, decided it could not proceed with the development project and did not close.

Because Thompson was therefore unable to pay the contractors that had begun work on the property, a mechanic's lien was filed against the property. Mattson paid \$50,000 and \$12,228 in attorney fees to settle the lawsuit arising out of this lien. Although Thompson signed a promissory note to reimburse Mattson, the district court

found that Mattson had not received any payments and that Thompson did not anticipate ever being able to pay.

By May 2009, the property's value had declined to \$1,000,000, or \$286,000 less than Mattson had paid for it in September 2005. Mattson had no success in finding a new buyer.

At trial, unrebutted testimony indicated that the value of land with an unmarketable title declines between 75% and 90%. The district court, relying on policy language limiting Ticor's liability to the lesser of the amount of the policy (here, \$1,286,000) or the difference between the value of the property as insured (here, \$2,900,000) and its value as encumbered by the defect (here, \$290,000 - \$725,000), concluded that the amount of the policy (\$1,286,000) was less than the difference in value (\$2,610,000 - \$2,175,000) and awarded Mattson \$1,297,169 in damages (the policy limit of \$1,286,000 plus the undisputed \$11,169 it paid to cure the defect).

The district court also found that Mattson's consequential damages included the \$1,900,000 decrease in the property's value, \$11,169 to cure the title defect, and \$50,000 plus \$12,228 in attorney fees to settle a mechanic's lien lawsuit, but concluded that, except for the cost of curing the title defect, Mattson was not entitled to consequential damages resulting from Ticor's breach because the policy did not mention consequential damages.

Ticor challenges the summary judgment on liability and the award of damages in excess of the cost of remedying the defect in the title; Mattson challenges the denial of consequential damages.

DECISION

1. Summary Judgment on Appellants' Liability

On a challenge to a summary judgment, we review de novo both whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

The district court noted that “[t]he sole issue [on summary judgment] is whether the reference to Charles Magnuson’s place [i.e., “the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City”] in the legal description was ambiguous and therefore made the property unmarketable.” The district court concluded that the reference was inherently ambiguous and the property unmarketable, rejecting Ticor’s arguments that Thompson’s title company had said only that the reference “appears ambiguous” and that the policy excluded “roads” from its definition of “land.”²

“Whether a title is marketable—i.e., a title that is free from reasonable doubt—must be tested from the prospective purchaser’s standpoint, and not from the viewpoint either of the seller or of the court.” *Lucas v. Ind. Sch. Dist. No. 284*, 433 N.W.2d 94, 97 (Minn. 1988). A written description is ambiguous if, “judged by its language alone and without resort to extrinsic evidence, it is reasonably susceptible to more than one meaning.” *Prairie Island Indian Cmty. v. Minn. Dep’t of Pub. Safety*, 658 N.W.2d 876,

² Appellants also argue that, in communicating the title defect to them, Mattson “did not identify the ambiguity.” But Mattson’s attorney’s letter to Ticor says that “the ambiguity in the legal description is clear on its face.” (Emphasis added.)

889 (Minn. App. 2003) (quotation omitted). Whether a statement is ambiguous is a question of law. *Mollico v. Mollico*, 628 N.W.2d 637, 641 (Minn. App. 2001).

The phrase, “the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City,” is ambiguous because it is susceptible of various meanings. A “place” could be a workplace, a farm, or a residence; Charles Magnuson could have more than one “place” in Sunrise City; and there could be, or have been, more than one Charles Magnuson. A potential purchaser could not ascertain the meaning of the legal description boundary of this property without first ascertaining when it was drafted; who, at that time, was the relevant Charles Magnuson; and where his “place”—whatever it was—could be found. The district court did not err in concluding that “[t]he reference to Charles Magnuson’s place is reasonably susceptible of more than one interpretation based on its language alone. Therefore, the legal description is ambiguous.”

Ticor challenges this conclusion on the ground that it “creates a bright-line rule that references to adjacent property are *per se* ambiguous.” But the district court’s conclusion does not refer to adjacent property generically; it refers to adjacent property described by reference to a named individual’s “place” rather than to a permanent landmark or a measurement.

In any event, the issue is not whether a legal description may refer to adjacent property; it is whether a potential purchaser—not a seller or a court—could reasonably

have been deterred from purchasing this property because of the defect in title caused by the ambiguity. *See Lucas*, 433 N.W.2d at 97.³

Because the reference to “at or near Charles Magnuson’s place” in the legal description of the property was ambiguous, the title to the property, considered from the perspective of a potential purchaser, was unmarketable. Ticor, as title insurer, was liable for damages resulting from the unmarketable title. We affirm the summary judgment against Ticor.

2. Calculation of Damages

The policy provides:

³Ticor relies on four cases permitting the use of extrinsic evidence to construe legal property descriptions, but none of these cases holds that a potential purchaser is unreasonable in declining to buy property with an ambiguous legal description. *See City of N. Mankato v. Carlstrom*, 212 Minn. 32, 36, 2 N.W.2d 130, 133 (1942) (holding that a marketable title is one free from reasonable doubt and “one that a prudent person, with full knowledge of all the facts, would be willing to accept” and that marketability of title is “considered from the standpoint of the intending purchaser” and rejecting defendant purchaser’s contention that plaintiff seller lacked marketable title to land plaintiff had owned for more than 72 years because of defects in legal description in deed prepared 86 years earlier); *Nat’l Bond & Sec. Co. v. Bd. of Comm’rs of Hennepin Cnty.*, 91 Minn. 63 68, 97 N.W. 413, 415 (1903) (holding that description of land in tax judgment that excepted streets and railroad not yet laid out was sufficiently definite because “[t]here is no uncertainty in the judgment as to what land it is against” although a person would have to look at public records to determine where the streets and railroad were laid out); *St. Paul Land Co. v. Dayton*, 42 Minn. 73, 73-74, 43 N.W. 782, 782-83 (1889) (holding that because there was only one lot in St. Paul that could be described as lot 6, of 6.70 acres, upon the Mississippi River, that description was sufficiently definite as to be enforceable against the seller); *Triple B&G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53, 54 (Minn. App. 1992) (affirming settlement based on offer to sell 5.13 acres because, although it “was arguably ambiguous since it did not specify which land was to be sold,” the parties “seemed to know which property was the subject of their negotiations” and “establishing the boundary line would not be difficult since the location of the north, west, and south lines is known”).

Ticor . . . insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, sustained or incurred by the insured by reason of:

- ...
2. Any defect in or lien or encumbrance on the title;
 3. Unmarketability of the title.

....

7. DETERMINATION, EXENT OF LIABILITY AND COINSURANCE

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of [Ticor] under this policy shall not exceed the least of:

- (i) the Amount of Insurance stated in Schedule A [\$1,286,000]; or
- (ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien, or encumbrance insured against by this policy.

....

9. LIMITATION OF LIABILITY

(a) If [Ticor] establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

Ticor did not remove the defect.

The district court concluded that “the difference between the value of the Property as insured (\$2,900,000) and the value of Property subject to the defect (between \$290,000 and \$725,000) [i.e., a difference in value of between \$2,610,000 and \$2,175,000] is

greater than the policy amount [i.e., \$1,286,000]” and awarded Mattson the policy amount.

The majority rule for calculating damages for a loss due to a title defect under a title insurance policy is the difference between the value of the property immediately before the discovery of the defect and its value immediately after the discovery. *See, e.g., Overholtzer v. N. Counties Title Ins. Co.*, 253 P.2d 116, 130 (Cal. Dist. Ct. App. 1953). Ticor argues that, because the defect was discovered around November 2005, both values should be measured at about that time, and no document indicates a change in the property’s value. But Ticor does not argue that a defect in title would have had no effect on the value of the property, and unrebutted testimony indicated that property with a defective title is worth 75% to 90% less than its worth without a defective title.

Ticor also argues that Mattson’s damages should be limited to \$11,169, the cost of curing the defect, based on the policy language that Ticor indemnifies only “actual monetary loss or damages sustained or incurred by the insured claimant” in correcting the defect in title against which the policy insured. Ticor points out that the defect was cured in July 2007 and the property was valued at \$2,600,000 in January 2008, when Mattson and Thompson entered into the second amendment to the purchase agreement. Thus, the reduction in the property’s value was due not to the defect in the title but to market conditions, against which the policy did not insure.

But Ticor reads into the policy a requirement that, unless the property’s value is permanently diminished by a title defect, the insurer’s liability is limited to either correcting the defect or reimbursing the insured for correcting the defect. The policy

actually provides that it insures “against loss or damage . . . incurred by the insured by reason of . . . [a]ny defect in . . . the title [or] . . . [u]nmarketability of the title,” not just against the loss incurred in removing the defect or in making the title marketable.

Moreover, the policy also provides that, if Ticor cures the defect, then it is not liable “for any loss or damage caused thereby.” Ticor argues that, regardless of who cures the defect, Ticor should not be liable for any loss or damage caused by the defect. Ticor provides no support for the view that “loss or damage . . . incurred by the insured by reason of . . . [a]ny defect in . . . the title” refers only to the cost of curing the defect. *See* 1 Joyce Palomar, *Title Insurance Law* § 6:23, at 6-110 (2010) (“A purchaser, assignee, or mortgagee’s refusal to close the transaction because of an encumbrance or title defect which was not excepted from a title policy also has been held sufficient to show a loss to the insured.”).

3. Breach of Contract Damages

The district court concluded that, except for the cost of curing the title defect, Mattson was not entitled to its consequential damages of \$1,973,397 (\$1,900,000 decrease in the property’s value, \$11,169 to cure the title defect, and \$50,000 plus \$12,228 in attorney fees to settle a mechanic’s lien lawsuit), because the policy did not mention consequential damages. Mattson argues that it should recover all its consequential damages from Ticor’s breach of the insurance contract because, having breached the contract by outright denial of the claim, Ticor was not entitled to require Mattson to comply with the contract term limiting Ticor’s liability to the lesser of the policy limit or the difference in the property’s value without and with the title defect. *See*

Palomar, *supra* § 10:18, at 10-79 (“It is an axiom of general insurance law that an insurer who has materially breached its contract to defend and indemnify cannot require its insured to comply with other contract terms.”).

Mattson relies on *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979). *Olson* overruled *Indep. Grocery Co. v. Sun Ins. Co.*, 146 Minn. 214, 217, 178 N.W. 582, 583 (1920) (holding that insured’s recovery is limited to policy amount plus interest) and affirmed an insured trucker’s award of lost profits resulting from the insurer’s delay in paying an undisputed amount after the insured’s trucks were damaged. “Lost profits may be recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty.” *Olson*, 277 N.W.2d at 388. “When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach.” *Id.* at 387-88; *see also Morrison v. Swenson*, 274 Minn. 127, 138, 142 N.W.2d 640, 647 (1966) (concluding that breaching party in contract case was liable for “damages arising directly as the result of the breach”).⁴

Ticor reads the word, “only,” before *Olson*’s holding that “[w]hen the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach.”

⁴ The district court dismissed *Olson* as inapplicable because it involved a casualty policy rather than a title insurance policy and relied instead on *First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833 (5th Cir. 2009) (construing a title insurance policy). But that case does not involve realty or an insurer’s absolute denial of a claim. Moreover, a Fifth Circuit case would not be dispositive here, and the district court offers no reason why a Fifth Circuit case would supercede a Minnesota Supreme Court case.

See id. at 387-88. But this reading implies that refusing or unreasonably delaying payment is the only breach that imposes liability for an insured's loss. Ticor provides no support for the implication that an insurer's breach of any other type, e.g. denying a valid claim, imposes no liability for the insured's resulting loss.

If Ticor had not breached the policy, Mattson would not be able to recover consequential damages; the policy provides that, if Ticor cures a title defect, there is no further recovery. But Ticor did not cure the defect; it denied Mattson's valid claim, thus breaching its contract with Mattson. Under the *Olson* holding that an insurer's breach of an insurance contract renders the insurer liable for the insured's loss proximately caused by the breach, Mattson may recover its lost profit damages from Ticor. *See Palomar, supra*, § 6:23, at 6-110 (purchaser's refusal to close transaction because of title defect is loss to insured); *see also Montemarano v. Home Title Ins. Co.*, 258 N.Y. 478, 481-83 (1932) (lost sale of property was "actual loss" that fell within scope of title insurance policy). Thompson refused to close on its transaction with Mattson because of the title defect. Accordingly, we reverse the denial of Mattson's lost profit consequential damages.

Finally, the district court's conclusion that Mattson's loss from Thompson's inability to reimburse Mattson for settling the mechanic's lien lawsuit was not a consequence of Ticor's breach is not contrary to Minnesota law and is adequately supported by the facts. We therefore affirm the denial of damages connected with the mechanic's lien action.

In summary, we affirm the judgment as to Ticor's liability, the award of the cost of correcting the title defect, and the denial of damages connected with the mechanic's lien action; we reverse the denial of lost profit consequential damages and the limitation of the damages award to the amount of the policy and remand to the district court to amend its judgment in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.