A Legal Update for the Title Insurance Industry

*By Michael J. Heller and Matthew V. Spero**

The authors discuss recent court decisions of note involving title insurance.

This article discusses the following court rulings:

- An appellate court in New York has ruled that an exclusion in a title insurance policy precluded coverage of a claim asserted by the policyholders.
- A federal district court in Illinois has rejected an insured's lawsuit for breach of a title insurance policy, finding that the insured did not plead a loss or damage and explaining that the title insurance policy did "not cover future or possible damages or loss."
- A Florida court has decided that an insurance company did not have to defend a title company in a lawsuit brought by a purchaser of property alleging that the title company wrongfully charged the purchaser a $300 fee instead of charging that fee to the seller of the property.
- The Supreme Court of Virginia has concluded that property owners could not enforce the terms of certain restrictive covenants because "changed circumstances" defeated the purpose of those restrictive covenants.
- The New Jersey Supreme Court has ruled that a three-day attorney review clause was not required in a sales contract executed after an absolute auction of residential real property.
- An appellate court in New Jersey has determined that a plaintiff's claim to a continuing interest in certain property could not be sustained because a foreclosure sale cut off any further right the plaintiff may have had to purchase the property.
- An appellate court in Florida has reversed a trial court's decision and decided that a reciprocal easement agreement among three entities was binding on one of the entities' successors.

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EXCLUSION IN TITLE INSURANCE POLICY BARRED COVERAGE OF POLICYHOLDERS' CLAIM, NEW YORK APPEALS COURT DECIDES

An appellate court in New York, affirming a trial court's decision, has ruled that an exclusion in a title insurance policy precluded coverage of a claim asserted by the policyholders.

The Case

By deed dated July 20, 2001, the plaintiffs in this case obtained title to certain real property located in Scarsdale, New York (the "property"), abutting Elizabeth Street and Healy Avenue. A driveway leading from the residence on the property provided access to Elizabeth Street, a private road.

In connection with the plaintiffs' purchase of the property, Chicago Title Insurance Company issued a title insurance policy to the plaintiffs.

In 2011, amid an ongoing dispute and litigation with a neighboring property owner regarding ownership and use of the driveway, the plaintiffs filed a claim with Chicago Title seeking, among other things, coverage under the title insurance policy based on their alleged lack of a right of access to and from the property, and seeking to recover the legal fees and expenses they said had accrued and were continuing to accrue in the litigation with the neighboring property owner.

Chicago Title denied those portions of the plaintiffs' claim based on, among other things, an exception in the title insurance policy from coverage with regard to driveway encroachments north of the property line as shown on a certain survey, in particular onto an adjacent property and Elizabeth Street.

The plaintiffs sued Chicago Title, seeking to recover damages for breach of contract and for a judgment declaring that their losses were covered under the policy.

Chicago Title moved for summary judgment dismissing the breach of contract cause of action and declaring that the plaintiffs' losses were not covered under the policy. The trial court granted the motion, and the plaintiffs appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that a title insurer's liability to its insured was based, in essence, on contract law. As such, the appellate court continued, that liability was governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy.

Here, the appellate court ruled, Chicago Title met its burden of establishing its entitlement to judgment as a matter of law by demonstrating that the plaintiffs' claim fell within an exception to coverage under the policy.

The appellate court concluded that because the plaintiffs failed to raise a triable issue of fact, the trial court had properly granted Chicago Title's motion for summary judgment dismissing the breach of contract cause of action and declaring that the plaintiffs' losses were not covered under the policy.

The case is *Pierot v. Chicago Title Insurance Company*, 202 A.D.3d 1010, 159 N.Y.S.3d 729 (2d Dep't 2022).

FEDERAL COURT RULES THAT TITLE INSURANCE POLICY DID NOT COVER FUTURE OR POSSIBLE DAMAGES OR LOSS

A federal district court in Illinois has rejected an insured's lawsuit for breach of a title insurance policy, finding that the insured did not plead a loss or damage and explaining that the title insurance policy did "not cover future or possible damages or loss."

The Case

In 2007, James Stewart obtained a home mortgage from Washington Mutual Bank. At that time, he also bought owner's title insurance from First American Title Insurance Company ("First American").

At some point after Stewart closed on the 2007 loan, Washington Mutual Bank sold the loan to Freddie Mac. During the 2008 financial crisis, Stewart's loan was sold to JP Morgan Chase. In 2011, Stewart refinanced his mortgage. He made mortgage payments to Chase through 2016. Stewart asserted that when he attempted to communicate with Chase about the status of the mortgage in 2017 and 2018, Chase filed foreclosure complaints against him.

Stewart claimed that, in 2019, he learned that 33 years before he bought his home, title to the property was placed in an express trust, ultimately making Stewart's title to the home defective. At that time, he filed a claim with First American based on defective title; First American denied the claim because Stewart was unable to establish any loss.

Stewart sued First American for breach of contract. The U.S. District Court for the Northern District of Illinois granted First American's motion to dismiss, finding that Stewart failed to state a valid breach of contract claim because Stewart could not state that he suffered any damages.

Stewart filed a motion asking the district court to reconsider. He claimed that the 33-year-old defect in his title should have warranted recovery through his title insurance based on future speculative damages, including that the "merchantability of the real estate" was "impaired by reason of the clouded title."

The District Court's Decision

The district court denied Stewart's motion.

In its decision, the district court explained that the contract between Stewart and First American was "clear" that the insurance only protected against loss or damages. Thus, the court continued, to state a valid breach of contract claim, Stewart had to plead a loss or damage. The court found that he had "not done so."

The court rejected Stewart's contention that First American should reimburse him for all of his mortgage payments or the face value of the policy, ruling that the title insurance policy did "not cover future or possible damages or loss."

Concluding that Stewart had not stated a plausible breach of contract claim, the court declined to further reconsider its finding.

The case is *Stewart v. JP Morgan Chase Bank, N.A.*, 2022 WL 294763 (N.D. Ill. 2022).

INSURER NEED NOT DEFEND TITLE COMPANY IN CLASS ACTION LAWSUIT, FLORIDA COURT SAYS

A Florida court has decided that an insur-

ance company did not have to defend a title company in a lawsuit brought by a purchaser of property alleging that the title company wrongfully charged the purchaser a $300 fee instead of charging that fee to the seller of the property.

The Case

In July 2016, Antoni Kruk agreed to purchase real estate from Mark and Julie Coleman. The purchase agreement required the Colemans to designate the closing agent for the deal, and they chose Coastline Title of Pinellas, LLC. The purchase agreement also obligated the Colemans to pay for the owner's "title policy premium, title search[,] and closing services" (collectively, the "Owner's Policy and Charges").

The agreement obligated Kruk to "pay the premium for [his] lender's policy and charges for closing services related to the lender's policy, endorsements and loan closing." Because Kruk agreed to pay with cash, he had no lender to pay. Kruk asserted, however, that Coastline nevertheless charged him a "Closing Services Fee" of $300.

Kruk, viewing this charge as a violation of his purchase agreement, which he thought obligated the seller to bear sole responsibility for the closing services fee, sued Coastline in a Florida court. On behalf of himself and others similarly situated, Kruk brought claims for gross negligence, negligence, breach of fiduciary duty, and unjust enrichment and alleged that he and the putative class members were damaged by paying fees "they should not have paid." Kruk based his claims on Coastline's alleged failure to adhere to Kruk's purchase agreement. Both the negligence claims and the breach of fiduciary duty claim alleged that Coastline breached its duty of care to Kruk by failing to adhere to the contractual requirements. Kruk's unjust enrichment claim alleged that Coastline received a benefit it was not entitled to because the fee was not "authorized in the Contract."

After Kruk filed suit against Coastline, Coastline filed a claim with its insurer, RLI Insurance Company, requesting RLI to defend it and to indemnify it against any damages from Kruk's lawsuit. RLI denied the claim, asserting that the insurance policy neither obligated it to defend the lawsuit nor to indemnify Coastline.

RLI denied Coastline's claim for coverage and then brought an action against Coastline seeking a declaratory judgment that RLI was not responsible for defending Coastline in the state court action brought against Coastline by Kruk.

RLI moved for summary judgment. RLI argued that it had no duty to defend Coastline because Kruk's complaint alleged that Coastline received remuneration that it was not entitled to receive - a claim that was barred by an exclusion in the insurance policy RLI had issued to Coastline.

The RLI Policy

In its policy, RLI assumed the "duty to defend any Claim to which [the insurance policy] applies." The policy defined a "Claim" as a "demand for money as compensation for a Wrongful Act" or a lawsuit against the insured that sought to hold the insured "responsible for a Wrongful Act." The policy defined a "Wrongful Act" as "any actual or alleged error, omission or negligent act, committed solely in the rendering of or failure to

render Professional Services by an Insured." In addition, the policy covered "Claim Expenses," which were those "legal fees and expenses incurred by the Insurer or by any attorney designated by the Insurer to defend any Insured" as well as "all other fees[or] costs . . . resulting from the investigation, adjustment, defense and appeal of a Claim."

The policy excluded "Damages [and] Claim Expenses in connection with any Claim . . . in any way involving" Coastline profiting in a way that it was "not legally entitled." Furthermore, the policy excluded "salaries, wages, overhead or benefits expenses of any Insured."

The Court's Decision

The court ruled that RLI had no duty to defend Coastline against Kruk's action because Kruk alleged that Coastline received remuneration it was not entitled to receive.

In its decision, the court pointed out that Kruk alleged that Coastline retained a fee for its closing services that Coastline "was not authorized to collect from" from Kruk and other class members. The court then decided that this allegation precluded coverage under Coastline's insurance policy.

The court explained that under an exclusion in Coastline's insurance policy, RLI had no duty to defend Coastline if Coastline was sued to recover renumeration that it had no legal right to receive. To invoke this policy exclusion, the court continued, RLI had to show that the underlying complaint alleged that Coastline received remuneration it had no right to receive. The court added that RLI did not have to show that the underlying complaint alleged that Coastline received its remuneration through illegal activity, but only that Coastline was not "legally entitled" to the remuneration.

Here, the court reasoned, Coastline's insurance claim concerned a lawsuit against it for charging buyers $300 that it should not have charged - in other words, the claim alleged errors and negligent conduct that "involv[ed]" Coastline receiving remuneration that it had no legal right to receive. The court added that Kruk alleged that Coastline lacked authority to receive the compensation because the contract permitted Coastline to charge fees only from the sellers. Therefore, the court found, in the absence of a contractual right by Coastline to take fees from Kruk, any money it took from Kruk must have been remuneration to which Coastline allegedly lacked a legal right. Kruk's complaint, the court ruled, did not allege conduct that "fairly and potentially bring[s] the action within policy coverage."

The court was not persuaded by Coastline's contention that Kruk alleged that the closing services fee was only negligently and improperly charged to Kruk because "the seller agreed to pay it," not that Coastline's conduct was "illegal, excessive, or unlawful." In the court's view, even if Kruk alleged that Coastline taking the money was negligent or that it constituted a breach of contract, he also alleged that Coastline lacked authority to take the money from him. This allegation, according to the court, rendered his complaint against Coastline a claim "in any way involving" Coastline receiving remuneration for which it lacked legal entitlement.

The court also rejected Coastline's argument that Kruk's complaint did not allege that Coastline lacked authority to retain the fee because Florida law authorized title insurance

companies to retain a fee for closing services. The court reasoned that whether RLI had a duty to defend Coastline depended on the allegations in the complaint, not on whether the legal theory was valid or ultimately proved groundless.

Finally, the court rejected Coastline's argument that RLI could not escape its duty to defend because the state court had not yet determined that Coastline's actions were unlawful. As the court observed, Florida law was "clear" that an insurer's duty to defend depended on "the complaint in the underlying action, not its merits."

The case is *RLI Insurance Company v. Coastline Title of Pinellas, LLC*, 2022 WL 686274 (M.D. Fla. 2022).

VIRGINIA SUPREME COURT RULES THAT PROPERTY OWNERS COULD NOT ENFORCE RESTRICTIVE COVENANTS

The Supreme Court of Virginia, affirming a trial court's decision, has ruled that property owners could not enforce the terms of certain restrictive covenants because "changed circumstances" defeated the purpose of those restrictive covenants.

The Case

In 1964, Virginia and Linda Yeatts subdivided their property on Smith Mountain Lake, Virginia, into 12 lots.

On July 10, 1970, the Yeattses sold Lots 1 and 2 to John H. Dilworth and Charles L. Oehler. The deed conveying Lots 1 and 2 to Dilworth and Oehler contained eight restrictive covenants, including Restriction Number 4, which stated that "[n]o more than one cabin or residence shall be built on a single lot unless the lot exceeds one acre. Lots 1 and 2 shall be considered one lot," and Restriction Number 8, which stated that "Lot No. 1 herein conveyed shall not be sold unless Lot No. 2 is sold to the same person at the same time."

On December 28, 2016, Sean and Carolyn Beville purchased Lots 1 and 2. The deed conveying the property to the Bevilles expressly acknowledged that the conveyance was "subject to such restrictions and covenants as set forth in the . . . deed of July 10, 1970, if and as to the extent they may still be applicable or enforceable."

The Bevilles subsequently sold Lot 2 to Mark and Emily Wells. The deed that conveyed Lot 2 to the Wellses did not specifically reference the restrictive covenants set forth in the July 10, 1970, deed. The deed that conveyed Lot 2, however, observed that the conveyance was "subject to easements, conditions and restrictions of record insofar as the same may lawfully affect the property."

Several months after the Bevilles sold Lot 2 to the Wellses, the Bevilles entered into a contract to sell Lot 1 to John Rodenbough. When the Wellses learned about the pending sale, they attempted to purchase Lot 1 from the Bevilles. The Bevilles, however, refused to sell Lot 1 to the Wellses.

On January 30, 2020, the Wellses filed a declaratory judgment action against the Bevilles and Rodenbough requesting an interpretation of the restrictive covenants set forth in the July 10, 1970, deed. The Wellses argued that the Bevilles violated the restrictive covenants at issue when they entered into a contract to sell Lot 1 separately from Lot 2. Therefore, the Wellses requested that the trial

court: (1) set aside the contract between the Bevilles and Rodenbough regarding the sale of Lot 1, and (2) order the Bevilles to convey Lot 1 to the Wellses "after arriving at a price" for the property.

The Bevilles and Rodenbough responded that the restrictive covenants set forth in the July 10, 1970, deed were unenforceable following the separate sale of Lot 2 to the Wellses. The trial court agreed and entered judgment in favor of the Bevilles and Rodenbough.

The Wellses appealed to the Virginia Supreme Court. They argued that the "plain and unambiguous language" of the restrictive covenants required Lot 1 to be sold contemporaneously with Lot 2. Therefore, they asserted that the Bevilles could not sell Lot 1 to Rodenbough.

The Decision of the Supreme Court of Virginia

The Virginia Supreme Court affirmed, ruling that the restrictive covenants were unenforceable.

In its decision, the court explained that, in general, restrictive covenants were not favored in Virginia. As a result, the court continued, restrictive covenants "are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions." Because restrictive covenants were disfavored, the court added, they would "not be aided or extended by implication."

The court then said that a restrictive covenant was unenforceable when "conditions . . . have changed so substantially that the essential purpose of the covenant is defeated." In this case, the court ruled, changed circumstances "have defeated the purpose of the restrictive covenants at issue."

According to the court, the restrictive covenants suffered from "a fatal flaw." Specifically, while the restrictive covenants expressly required Lot 1 to be sold contemporaneously with Lot 2, the covenants did not contain any reciprocal language requiring Lot 2 to be sold contemporaneously with Lot 1. "Under the terms of the restrictive covenants, then, Lot 2 may be sold separately from Lot 1," the court stated. Thus, it found, the Bevilles did not violate the restrictive covenants when they sold Lot 2 to the Wellses.

In fact, the court continued, the separate sale of Lot 2 to the Wellses "defeated the essential purpose" of Restrictions Number 4 and 8. Although the restrictive covenants contemplated that Lots 1 and 2 would be owned by a single party and treated as "one lot," the separate sale of Lot 2 to the Wellses made this objective "an impossibility." The court reasoned that, following the sale of Lot 2 to the Wellses, Lots 1 and 2 were two separate parcels of land owned by different parties, and the application of the restrictive covenants under these circumstances "would substantially limit the alienability of Lot 1."

Because Restriction Number 8 stated that Lot 1 "shall not be sold unless Lot No. 2 is sold to the same person at the same time," Lot 1 could only be sold if the Wellses decided to sell Lot 2 at some future date, the court reasoned. Even then, Lot 1 could only be sold to the "same person" that decided to purchase Lot 2 from the Wellses. The court pointed out

that if that person chose not to purchase Lot 1, the property would remain inalienable for another indefinite period of time (i.e., until a future purchaser eventually agreed to purchase Lots 1 and 2 simultaneously).

The court concluded that the separate sale of Lot 2 to the Wellses brought about a change in circumstances that defeated the essential purpose of Restrictions Number 4 and 8. Accordingly, it said, the trial court correctly determined that the Wellses could not enforce these restrictive covenants.

The case is *Wells v. Beville*, 2022 WL 974211 (Va. 2022).

NEW JERSEY SUPREME COURT SAYS THREE-DAY ATTORNEY REVIEW CLAUSE WAS NOT REQUIRED IN SALES CONTRACT EXECUTED AFTER ABSOLUTE AUCTION OF RESIDENTIAL REAL PROPERTY

Nearly 20 years ago, in *New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards*, the Supreme Court of New Jersey held that a licensed real estate broker or salesperson who prepared a contract for the sale of certain categories of residential real estate did not engage in the unauthorized practice of law, provided that the agreement contained a three-day attorney review period during which either party's counsel could cancel the contract.

Now, the New Jersey Supreme Court has ruled that its *State Bar Ass'n* decision does not apply to a sales contract executed after an absolute auction (that is, an auction without reserve) of residential real property and, accordingly, that a sale contract that did not include the three-day attorney review period was enforceable.

The Case

As the court explained, Mengxi Liu was the successful bidder in a real estate auction conducted by Max Spann Real Estate and Auction Co. ("Max Spann"). Liu subsequently asserted as a defense to the seller's breach of contract action that the contract she signed to purchase the property was void and unenforceable.

The trial court found Liu in breach of her contract, and Liu appealed, arguing that the agreement was unenforceable because a licensed real estate salesperson employed by Max Spann wrote her name and address as the buyer and wrote the purchase price information on blank spaces in a template sales contract following the auction. Liu contended that this activity constituted the unauthorized practice of law because the contract did not provide for the three-day attorney review period that was mandated in the *State Bar Ass'n* ruling.

An intermediate appellate court declined to apply the *State Bar Ass'n* mandate to the absolute auction. Noting that Max Spann advised Liu prior to the auction that there would be no three-day attorney review period and that it encouraged her to consult a lawyer, the appellate court concluded that the New Jersey Supreme Court did not intend the *State Bar Ass'n* requirement to govern in the circumstances of Lui's case.

A dissenting judge reasoned that because the New Jersey Supreme Court in *State Bar Ass'n* identified no exception for sales of residential property by auction, the appellate court majority exceeded its authority when it excluded auction sales from the attorney review requirement.

The case reached the New Jersey Supreme Court.

The New Jersey Supreme Court's Decision

The New Jersey Supreme Court affirmed the appellate court's holding that the contract was enforceable.

In its decision, the New Jersey Supreme Court reasoned that a residential real estate sale by absolute auction was distinct from a traditional real estate transaction in which a buyer and seller negotiated the contract price and other terms and memorialized their agreement in a contract. In an absolute auction, the court continued, the owner unconditionally offered the property for sale and the highest bid created a "final and enforceable contract at the auction's conclusion," subject to applicable contract defenses.

According to the New Jersey Supreme Court, if it were to impose the three-day attorney review prescribed in *State Bar Ass'n* on residential real estate sales conducted by absolute auction, it would "fundamentally interfere with the method by which buyers and sellers choose to conduct such sales."

The court added that it viewed the notice and template sales contract that Max Spann provided to Liu prior to the auction - cautioning her that any sale at the auction would be final with no attorney review period - to serve the consumer protection objectives that it sought to achieve in *State Bar Ass'n*.

Accordingly, the court found no unauthorized practice of law in this case and it held that the contract signed by Liu was valid and enforceable.

The case is Sullivan v. Max Spann Real Estate & Auction Co., No. 085225 (N.J. June 9, 2022).

FORECLOSURE SALE EXTINGUISHED PLAINTIFF'S CLAIM TO CONTINUING INTEREST IN PROPERTY, NEW JERSEY APPEALS COURT HOLDS

An appellate court in New Jersey has ruled that a plaintiff's claim to a continuing interest in certain property could not be sustained because a foreclosure sale cut off any further right the plaintiff may have had to purchase the property. In so holding, the appellate court rejected a 2004 trial court decision that held to the contrary.

The Case

On August 25, 2011, Woodmont Properties, LLC, entered into a contract to purchase approximately 30 acres of undeveloped land in Westampton, New Jersey, from Hovbros Burlington LLC for $5,800,000. A week after Woodmont and Hovbros entered into their contract, TD Bank, N.A., lent Hovbros $3,500,000, the repayment of which was secured by a mortgage on the property.

According to Woodmont, TD Bank knew of its contract with Hovbros and knew that the contract itself or other oral discussions precluded Hovbros from encumbering the property in an amount greater than 80 percent of the purchase price yet, despite that knowledge, TD Bank later encumbered the property in an amount in excess of the purchase price.

Hovbros defaulted on its obligations to TD Bank before the transaction between Woodmont and Hovbros could close. Then, on March 6, 2014, TD Bank filed a complaint

seeking foreclosure on the property and two weeks later it recorded a notice of lis pendens. Woodmont did not then - or ever - record its contract with Hovbros; in fact, that action would have constituted a default under the contract between Woodmont and Hovbros. TD Bank did not name Woodmont as a party to the foreclosure action despite, as Woodmont alleged, being aware of Woodmont's interest in the property.

On the other hand, Woodmont also made no attempt to intervene despite its knowledge of the foreclosure action.

A final judgment of foreclosure, which also fixed Hovbros' indebtedness at slightly in excess of $5,900,000, was entered on September 25, 2015.

Seventeen months after entry of the foreclosure judgment, the property was struck off at a sheriff's sale. TD Bank was the highest bidder and it assigned its interest to COBA, Inc., which later received a sheriff's deed. COBA thereafter contracted to sell the property to MRP Industrial NE, LLC.

Woodmont, filed a lawsuit against COBA, MRP and Westampton. It alleged, among other things, that:

- Through its efforts, Westampton designated the property as an area in need of redevelopment;
- In September 2014 - months after TD Bank commenced its foreclosure action - Westampton enacted an ordinance that declared the land a redevelopment area;
- In November 2014, Woodmont and Westampton entered into a redevelopment agreement; and
- In October 2018, Westampton terminated the redevelopment agreement because Woodmont failed to obtain title to the property, a contingency in the agreement.

The trial court dismissed Woodmont's claims, and Woodmont appealed.

The Appellate Court's Decision

The appellate court ruled that the transfer of the sheriff's deed to COBA cut off both Hovbros' right of redemption and Woodmont's unrecorded interest, which derived solely from its contract with Hovbros.

In its decision, the appellate court began its analysis by assuming that TD Bank knew of Woodmont's contract with Hovbros when it encumbered the property in an amount beyond the contract price, when it sought foreclosure, and when the property was sold at the sheriff's sale. The appellate court also assumed that Hovbros agreed with Woodmont not to over-encumber the property, that Hovbros nevertheless over-encumbered the property, and, that by doing so, Hovbros materially breached its contract with Woodmont. Further, the appellate court assumed that TD Bank knew all this, too.

The appellate court then examined whether Woodmont still had an enforceable interest in the property. In particular, the appellate court said that it had to determine whether TD Bank's assumed knowledge of Woodmont's contract with Hovbros somehow limited the consequence of the foreclosure sale.

The appellate court pointed out that, except for a trial court's 2004 ruling in *PNC Bank v. Axelsson*, 373 N.J. Super. 186, 860 A.2d 1021 (Ch. Div. 2004), there was no New Jersey de-

cision recognizing a legal impediment to TD Bank's right to have Woodmont's unrecorded rights cut off by the final act in a foreclosure action. The appellate court noted that *Axelsson* found significance in a foreclosing party's knowledge of an unrecorded interest on the foreclosed property. The appellate court then decided that the trial judge in *Axelsson* "was mistaken in ruling as he did," and it concluded that the *Axelsson* holding - that purchasing property at a foreclosure sale with knowledge of an unrecorded interest did not unencumber the property of that unrecorded interest - was inconsistent with New Jersey law, N.J.S.A. 2A:50-30.

Accordingly, the appellate court ruled, the transfer of the sheriff's deed to COBA cut off both Hovbros' right of redemption and Woodmont's unrecorded interest, which derived solely from its contract with Hovbros. Thus, Woodmont's claim to a constructive trust on "or any other interest" in the property failed. In addition, its claims against Westampton failed because the redevelopment agreement was conditioned on Woodmont obtaining title to the property, the appellate court said.

The case is *Woodmont Properties, LLC v. Township of Westampton*, 470 N.J. Super. 534, 270 A.3d 415 (App. Div. 2022).

FLORIDA APPELLATE COURT DETERMINES THAT RECIPROCAL EASEMENT AGREEMENT WAS BINDING ON SUCCESSOR

An appellate court in Florida, reversing a trial court's decision, has ruled that a reciprocal easement agreement among three entities was binding on one of the entities' successors.

The Case

As the court explained, in 2003, Realmark Cape Marina, LLC ("Marina"), Realmark Marina Grill, LLC ("Grill"), and Realmark META, LLC ("META"), entered into a reciprocal parking easement. Each entity owned a parcel of land in a planned development project known as Cape Harbour. At the time, all three entities were controlled by one person - William Stout.

In 2014, in a self-described "deed in lieu of foreclosure" transaction, Marina, through Stout, agreed to deed the Marina Parcel to CRE Cape Harbour Marina, LLC; CRE Cape Harbour Land, LLC; and CRE GS CL23, LLC (collectively, the "CRE Entities"). The conveyance did not include the parking facilities located on the META Parcel, which, by 2014, were owned and operated by entities also controlled by Stout.

In 2017, the CRE Entities conveyed the Marina Parcel to SHM Cape Harbour, LLC ("SHM"), the successor in title to Marina.

After SHM purchased the Marina Parcel, a number of the Realmark companies (collectively, the "Realmark Defendants") began charging for parking in the facilities located on the META Parcel. SHM then sued the Realmark Defendants, alleging in part that the 2003 reciprocal easement was being violated and seeking, among other claims, declaratory relief.

In their motion for summary judgment as to SHM's easement claims, the Realmark Defendants argued that the 2003 easement was unambiguous and must be read in its favor.

The trial court agreed and granted their motion. The trial court determined that the

2003 reciprocal easement did not inure to the benefit of the owners of the Marina Parcel or the Grill Parcel or their respective successors and assigns; that the easement was extinguished and abandoned as to successors and assigns of META and was not an easement, perpetual or otherwise, over the META Parcel; and that the easement did not run with the land and did not in any way encumber the META Parcel.

SHM appealed. In its primary argument as to the judgment addressing the 2003 reciprocal easement, SHM contended that the easement was unambiguous and must be read as binding upon META's successors and, therefore, in favor of SHM, as a matter of law.

The Easement

Paragraph 1 of the easement had three subparagraphs, each setting forth one party's grant of rights. Paragraph 1(c) set forth the rights META granted to Marina and Grill, providing:

> META hereby grants to Grill and Marina *and to their respective guests, invitees, licensees, agents, tenants, employees, officers, directors, successors and assigns*, a perpetual, non-exclusive easement for: (i) *use of any parking areas that may now or hereafter be constructed*, from time to time, within the META parcel; and (ii) vehicular ingress and egress over, through and across any roadways that may now or hereafter be constructed, from time to time, within the META parcel; and (iii) pedestrian ingress and egress over, through and across any walkways that may now or hereafter be constructed, from time to time, within the META Parcel. (Emphasis added.)

Paragraphs 1(a) and 1(b) were identical in substance to Paragraph 1(c) except for the respective positions of the parties: Paragraph 1(a) set forth the grant of rights from Marina to Grill and META, and Paragraph 1(b) set forth the grant of rights from Grill to Marina and META.

Paragraph 4 of the easement provided:

> This Easement Agreement shall become effective upon its recordation in the Public Records of Lee County, Florida, and *shall run with the land, regardless whether specifically mentioned in any subsequent deed or conveyance of all or a part of the land and shall be binding on all persons subsequently acquiring all or part of the land*. This Easement Agreement may be amended or modified only by an instrument signed by the owners of each of the parcels. No amendment shall become effective prior to a duly executed and acknowledged copy being recorded in the Public Records of Lee County, Florida. (Emphasis added.)

Paragraph 7 of the easement provided:

> The Easement Agreement shall *inure to the benefit of*, and be binding upon, *Marina and Grill and their respective successors and/or assigns*. (Emphasis added.)

The Appellate Court's Decision

The appellate court ruled that the easement was "unambiguous" and that it dictated that the benefits and burdens ran with the land and were binding upon subsequent owners of any part of the land subject to the easement.

In its decision, the appellate court reasoned that the purpose of the easement was clear: to provide reciprocal parking rights and pedestrian access. In the appellate court's view, there was "no ambiguity as to intent."

In particular, the appellate court ruled that the language of Paragraph 1 "unequivocally" established "a perpetual easement in favor of the parties and their successors and assigns," and that the language of Paragraph 4 "equally as unequivocally" established that the easement was appurtenant (meaning that it ran with the land and passed as an incident to it)

and was "binding on all persons subsequently acquiring all or part of the land."

The appellate court was not persuaded by the Realmark Defendants' argument that Paragraph 4 was essentially meaningless as boilerplate and generic, ruling that it was neither, as proven by the "multitude of cases" interpreting easements that did not specify whether they were perpetual and ran with the land.

Moreover, the appellate court added, even if Paragraph 4 were boilerplate and generic, "it must still be given effect" and could "not be ignored."

Likewise, the appellate court continued, Paragraph 7 had to be given effect. The appellate court rejected the Realmark Defendants' focus on the absence of META from Paragraph 7, finding that their argument ignored Paragraph 7's "express language" that the easement "inure[d] to the benefit of" Marina and Grill and their successors and assigns. The appellate court explained that the estate that received the benefit of an easement was the "dominant estate" and that, in this case, the Marina and Grill Parcels were the dominant estates as to the easement over the META Parcel.

Therefore, the appellate court ruled, as the owner of a servient estate, META's grant of rights to Marina and Grill inured to their benefit as dominant estate owners and, thus, was an appurtenant easement.

Moreover, the appellate court then stated, the easement did "not prevent transfer." The appellate court observed that the law of easements was "clear" and that, unless prevented by the terms of its creation, an easement appurtenant was transferred with the dominant property even if this was not mentioned in the instrument of transfer. Therefore, the appellate court said, a person who succeeded to the possession of the dominant estate was "entitled to enjoy any easement appurtenant thereto."

The appellate court noted that, when SHM took title to the Marina Parcel, the Realmark Defendants "were on notice that the easement appurtenant transferred with it because the easement had been recorded." Accordingly, the appellate court said, applying the law of easements and giving effect to the language of Paragraph 4 in conjunction with the perpetual reciprocal rights specified in Paragraph 1, Paragraph 7 could "only be reasonably read to bind META's successors and assigns in addition to binding the successors and assigns of Marina and Grill."

The appellate court concluded that Paragraphs 1, 4, and 7 of the easement, and the easement as a whole, "unambiguously" provided that the rights and benefits described were "appurtenant and for the benefit of Marina's and Grill's successors," which included SHM. The appellate court, therefore, reversed the summary judgment entered in favor of the Realmark Defendants as to the 2003 easement.

The case is *SHM Cape Harbour, LLC v. Realmark META, LLC*, 335 So. 3d 754 (Fla. 2d DCA 2022).