

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILMINGTON SAVINGS FUND)
SOCIETY, FSB,)
Plaintiff,)
)
v.)
)
)
STEWART GUARANTY)
COMPANY, STEWART TITLE)
OF DELAWARE, ATTORNEYS)
TITLE SERVICES, and MELVYN)
MONZACK)
Defendants.)

C.A. No.: 11C-04-031 FSS/
6735-JS
(E-FILED)

Submitted: May 10, 2012
Decided: August 31, 2012

ORDER

Upon All Defendants' Motions to Dismiss - *GRANTED*.

This breach of contract and negligence case stems from a golf course construction project debacle. After the project failed, the lender turned on its title company and settlement attorney, blaming them because it believed its loans did not have priority thanks to Defendants, and the lender believed, therefore, that it had to buy a purchase money mortgage to protect its position. This decision turns on the undisputed fact that the lender's perceived need to buy the PMM was due to the

lender's concern that had lost its priority.

I.

In 2004, Plaintiff, Wilmington Savings Fund Society, FSB, agreed to loan money to Saint Anne's Golf Club, LLC, to build a golf course and bought title insurance from Defendant Stewart Guaranty Company. Defendant Melvyn Monzack, Esquire, who represented Stewart, drafted an opinion letter regarding liens on the property, stating there only was a Wilmington Trust lien on the property that was to be paid off. WSFS loaned Saint Anne's \$3 million, secured by a "first priority" mortgage.

Monzack also represented Saint Anne's, which bought land from non-party Middletown Greenways, LLC, on September 29, 2004, secured by a purchase money mortgage. Monzack recorded both Middletown's PMM and WSFS's construction loan mortgage on the same day.

For purpose of WSFS's argument, it bears mention that if Monzack had held-off recording Middletown's PMM for five days, the delay would have given WSFS priority under Delaware's race recording statute.¹ It also bears mention that such a delay might have given Middletown a cause of action against Monzack.

¹ 25 *Del. C.* § 153 ("A deed concerning lands or tenements shall have priority from the time it is recorded in the proper office[.]"). *See also id.* § 2108.

What matters most is that Middletown's PMM contained a subordination clause, giving WSFS priority. That priority was only conditioned on WSFS's holding the loan proceeds in escrow and releasing them only for the golf course construction. In other words, Monzack indisputably left WSFS with its expected priority. As discussed below, WSFS somehow feared it had lost priority and this is now about how WSFS got into that predicament.

On March 6, 2006, WSFS increased its loan to Saint Anne's to \$3.5 million. On May 18, 2006, WSFS further increased the loan to \$5.1 million. On April 11, 2008, WSFS foreclosed on Saint Anne's. On May 28, 2008, WSFS moved for default judgment against Saint Anne's. On May 30, 2008, Middletown intervened to protect its PMM's priority. So, at some point between the loan's 2004 recording and Middletown's 2008 intervention, WSFS allegedly lost its priority status.

On August 1, 2008, WSFS settled with Middletown, buying the PMM, keeping its construction loan's first priority and the August 12, 2008 sheriff's sale date.² When WSFS settled the foreclosure, the court had held the PMM's subordination clause was unambiguous, but it had not resolved the priority issue.

² See *Eastern Sav. Bank, FSB v. CACH, LLC*, — A.3d ---, 2012 WL 3631484, at *5 (Del. Aug. 24, 2012) (“[C]onsistent with the race recording statute, [sheriff sale] proceeds [shall] be distributed according to a first in time, first in line priority of recording.”).

Saint Anne's filed for bankruptcy on August 12, 2008, which automatically stayed the sale until the bankruptcy stay was lifted on June 23, 2009. The sheriff's sale finally occurred on August 11, 2009.

On April 5, 2011, WSFS sued, alleging breach of contract and negligence. After briefing, the court heard oral argument on July 14, 2011. On July 27, 2011, WSFS filed an amended complaint here and a verified complaint in the Court of Chancery, alleging negligent misrepresentation. On August 29, 2011, the court was cross-designated to hear WSFS's equitable claim.³ After briefing a second time, the court heard oral argument on May 10, 2012. So, this case turns on WSFS's concern that it had lost its priority and who is responsible.

II.

In a Rule 12(b)(6) motion to dismiss, the court must determine whether WSFS has stated a claim upon which relief can be granted.⁴ The court must accept all factual allegations in the complaint, and deny the motion unless WSFS could not recover under any reasonably conceivable circumstances.⁵ While a motion to dismiss turns on the pleadings, that also includes documents integral to a plaintiff's

³ Del. Const. Art. IV, § 13(2).

⁴ Super. Ct. Civ. R. 12(b)(6).

⁵ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

complaint, or incorporated by reference.⁶ And, judicial notice is also available.⁷

III.

A.

WSFS alleges Stewart Guaranty breached its contract. Specifically, WSFS alleges Stewart's contract obligated it to defend WSFS against priority claims, like Middletown's, and Stewart breached its contract by refusing to participate in settlement negotiations with Middletown. Stewart responds that the contract required WSFS to obtain Stewart's written consent to settle claims, which WSFS failed to do. According to Stewart, therefore, WSFS's failure to seek Stewart's consent excuses Stewart from assuming WSFS's liabilities.

Moreover, it is undisputed that Stewart provided defense counsel for WSFS. WSFS, however, for its own reasons and relying on its own counsel, decided settling with Middletown was best, and WSFS, on its own, settled with Middletown without obtaining Stewart's consent. WSFS nevertheless now seeks damages and settlement costs.

The consent-to-settle provision reads:

[Stewart] shall not be liable for loss or
damage to [WSFS] for liability voluntarily

⁶ *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

⁷ *See* D.R.E. 201

assumed by [WSFS] in settling any claim or suit without the prior written consent of [Stewart].

The consent-to-settle provision is clear. Stewart is not liable for loss by WSFS assumed by its unilaterally settling a claim.

According to WSFS's complaint and its brief, "WSFS [settled] with Middletown in order to mitigate damages and preserve the August 12, 2008 sheriff sale date." The complaint and brief also state, "Stewart . . . was specifically requested to participate in the settlement negotiations as they were occurring and to consent to a settlement. Stewart Guaranty refused." Thus, WSFS denies it unilaterally settled with Middletown. In essence, WSFS inaptly equates its asking for consent with Stewart's giving consent.

When WSFS asked for Stewart's consent to settle, Stewart refused. Thus, it is undisputed that WSFS settled without Stewart's consent. WSFS's asking Stewart to approve the Middletown settlement does not satisfy the consent-to-settle provision. WSFS does not allege, nor does it appear it has reason to allege, that Stewart somehow wrongfully withheld consent. Therefore, as a matter of law, based on undisputed facts, Stewart is not liable under the contract for defense costs and indemnity. After that holding, the only potential liability Stewart faces is from its employing Monzack. But, as discussed next, WSFS fails to state a claim against

Monzack. Stewart and its alter egos, Stewart Title and Attorneys Title, are out.

B.

WSFS alleges Monzack was negligent. Specifically, WSFS argues Monzack breached his professional duty of care to WSFS by recording Middletown's PMM within 25 *Del. C.* § 2108's five-day time period, rather than holding-off recording. As mentioned above, but for that alleged negligence, WSFS's construction loan would have had priority over Middletown's PMM as a matter of law.

Monzack first argues he did not have to be careful for WSFS's sake because he "did not represent WSFS, had no relationship with WSFS, and was not in privity with WSFS." WSFS alleges Monzack owed it a duty because Monzack's job as title agent was to ensure WSFS's priority.⁸ That is probably true, but the court does not have to decide that because WSFS does not adequately allege Monzack breached a duty.

According to the pleadings, Monzack drafted Middletown's PMM and recorded the WSFS and Middletown mortgages on the same day. The same-day recording should have given Middletown's PMM priority over WSFS.⁹ The PMM,

⁸ See, e.g., *Farmers Bank of Willards v. Becker*, 2011 WL 3925428 (Del. Super. Aug. 19, 2011) (Johnston, J.) ("In Delaware, an attorney may provide legal services to more than one party in a real estate transaction Because an attorney may provide legal services for more than one party in a real estate transaction, the Court finds that a real estate settlement . . . generally is not an adversarial proceeding for purposes of determining whether duties are owed to third parties.").

⁹ 25 *Del. C.* § 2108.

however, contained a subordination clause, clearly subordinating it to any mortgage used to develop Saint Anne's, including WSFS's construction loan. Simply put, WSFS wanted first priority and Monzack gave it first priority.

WSFS also argues Monzack breached his duty by drafting the subordination clause even though "[he] expressly knew . . . a problem with the subordination language existed." In the foreclosure case, however, the court held the subordination clause is unambiguous.¹⁰ WSFS let that stand and it is collaterally estopped from re-alleging the clause's ambiguity here. As a matter of law, the clause did what WSFS wanted. It subordinated the PMM to the construction loan. So what went wrong?

As mentioned, the subordination clause, which is at the heart of the claim against Monzack here, made subordination contingent on WSFS's looking after the loan proceeds and not letting them be used by the borrower for other projects. WSFS refers to the foreclosure litigation in its pleadings. As far as it goes, the record in that litigation must form a part of the original record here.

It may be that if this case went to discovery, WSFS would make a better showing about how it handled the loans or it might otherwise develop the record to

¹⁰ See *Wilmington Savings Fund Society, FSB, v. Saint Annes Club, LLC*, 2010 WL 663947, at *4 (Del. Super. Jan. 29, 2010) (Silverman, J.) ("The [Middletown] subordination clause is unambiguous.").

its advantage. Nevertheless, even at the dismissal stage, there is no reason why the court may not recall what it did in the underlying foreclosure and that case's settlement came amidst full-blown litigation over the way proceeds were used and accounted for. When it settled, WSFS was staunchly defending the subordination clause's efficacy. WSFS never agreed that its loan was behind the PMM, and the court never said it was.

Thus, it is fair to observe here that when WSFS settled the foreclosure case, the subordination clause's efficacy was under attack based on WSFS's neglect, not the clause's drafting. And, when WSFS settled, at most it was an open question whether the clause was invalid because WSFS had let the borrower use the loan proceeds elsewhere. Here, it does not matter whether WSFS protected the proceeds properly, or not. What matters now is that WSFS chose to end the foreclosure by buying the PMM and proceeding with the impending sheriff's sale.

The reason for referring to this background is that it brings into sharper focus why Monzack cannot be blamed for WSFS's predicament. Whatever problem there was with the construction loan's priority did not come from Monzack's recording the mortgages together.

C.

Last, WSFS alleges Monzack negligently misrepresented the PMM's

priority. This is an equitable claim. Generally, WSFS must allege: (1) a false representation, usually one of fact, made by Monzack; (2) with an intent to induce WSFS to act or to refrain from acting; (3) WSFS's justifiable reliance on the representation; and (4) damage due to the reliance.¹¹ Equitable fraud does not require that the Monzack knew the representation was false, or Monzack was recklessly indifferent to the truth.¹²

WSFS alleges Monzack performed a title search on the Saint Anne's property and issued a title commitment, failing to inform WSFS that Middletown's PMM had priority. Additionally, WSFS alleges Monzack recorded Middletown's mortgage as a purchase money mortgage without notifying WSFS. Thus, WSFS suffered damages by justifiably relying on Monzack's misrepresentations.

The holding on WSFS's negligence claim dispatches this claim as well. At least when it was recorded, the PMM was subordinate to the construction loan. Thus, it cannot be said that Monzack, wittingly or otherwise, misrepresented the loans' relative priority. There is no claim that Monzack misled WSFS about its need to control the proceeds properly. Monzack is out.

¹¹ *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1060-61 (Del. 1996).

¹² *Id.* at 1061 (*quoting Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

IV.

For the foregoing reasons, all Defendants' Motions to Dismiss are

GRANTED.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

oc: Prothonotary (Civil)

pc: Seth J. Reidenberg, Esquire

John A. Elzufon, Esquire

Gary W. Alderson, Esquire

Christopher Viceconte, Esquire