

[Cite as *Guernsey Bank v. Milano Sports Ents., L.L.C.*, 2011-Ohio-2162.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Guernsey Bank, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 09AP-1015  
 : (C.P.C. No. 04CVE-01-955)  
 Milano Sports Enterprises, LLC et al., :  
 : (REGULAR CALENDAR)  
 Defendants-Appellees, :  
 :  
 (Commonwealth Land Title Insurance :  
 Company, :  
 :  
 Defendant-Appellant). :  
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D E C I S I O N

Rendered on May 5, 2011

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*McFadden Winner Savage & Segerman, Joseph C. Winner, Holly W. Wallinger and Mary Jane McFadden*, for appellee Guernsey Bank.

*Giffen & Kaminski, LLC, Kerin Lyn Kaminski and Rachael L. Israel*, for appellant Commonwealth Land Title Insurance Company.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Commonwealth Land Title Insurance Company ("appellant" or "Commonwealth"), appeals the judgment of the Franklin County Court of

Common Pleas granting summary judgment in favor of plaintiff-appellee, Guernsey Bank ("appellee" or "Guernsey Bank"), and denying appellant's cross-motion for summary judgment. For the following reasons, we affirm in part and reverse in part.

### **I. Facts and Procedural History**

{¶2} The instant appeal arises out of the filing of an amended supplemental complaint by appellee, in which it asserts claims for breach of contract and promissory estoppel against Commonwealth. However, the litigation in this matter originally began as an action in foreclosure in which there was a priority dispute involving a mortgage on real property and several mechanics' liens.

{¶3} In May 2003, Milano Sports Enterprises, LLC, Joseph Milano, Jr., and Mary Jo Milano (collectively "MSE") obtained a loan from Guernsey Bank in the amount of \$600,000. The loan was secured by a mortgage on the real property located at 6810 Oak Creek Drive, Columbus, Ohio 43229 ("the property"), in favor of Guernsey Bank. Guernsey Bank purchased a policy of insurance from Commonwealth in order to insure that its mortgage was the first and best lien and that the mortgage had priority over all other encumbrances, including mechanics' liens. MSE defaulted on the loan and a foreclosure action was initiated in January 2004. Several contractors asserted mechanics' liens and claimed to have priority over the mortgage held by Guernsey Bank. Additional parties were later added to the action as defendants as a result of the mechanics' liens. This would ultimately require a determination as to the priority of multiple liens on the real property.

{¶4} Guernsey Bank notified Commonwealth of the claimed priority of the mechanics' liens. In response, Commonwealth acknowledged the claim and issued a letter to Guernsey Bank advising that, pursuant to its preliminary review, Commonwealth had a duty to provide Guernsey Bank with coverage. However, Commonwealth reserved the right to ultimately deny the claim.

{¶5} In June 2004, Commonwealth retained counsel to represent Guernsey Bank in order to resolve the issue involving the priority of the mechanics' liens with respect to Guernsey Bank's mortgage. Commonwealth chose to litigate the lien issues and challenged the claimed priority of the mechanics' liens, arguing there was no defect in the title.

{¶6} In July 2004, the trial court granted summary judgment in favor of Guernsey Bank on the note and mortgage and ordered the foreclosure and sale of the property. While the priority of the liens was being litigated, the foreclosure sale proceeded. In preparing for the sale, at which Guernsey Bank planned to bid on the property, Guernsey Bank issued a letter to Commonwealth setting forth Guernsey Bank's understanding of Commonwealth's final determination regarding coverage for any losses associated with the dispute involving the priority of the mechanics' liens.

{¶7} In its letter, Guernsey Bank indicated it intended to bid on the property but needed to confirm its understanding, based upon a September 9, 2004 telephone conversation,<sup>1</sup> that Commonwealth would indemnify Guernsey Bank if it was ultimately

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<sup>1</sup> Commonwealth disputes that it agreed to revoke its reservation of rights during this telephone conversation.

determined that the mechanics' liens had priority over the mortgage. Guernsey Bank requested immediate notification in the event that its understanding was incorrect.

{¶8} On September 24, 2004, Guernsey Bank made a bid of \$525,000 at the sheriff's sale and was the highest bidder. On October 20, 2004, prior to the confirmation of the sheriff's sale, Guernsey Bank entered into a contract to sell the property to a third party for \$650,000. This contract was contingent upon confirmation of the sheriff's sale on or before December 20, 2004. In October 2004, Guernsey Bank requested that Commonwealth bond off the mechanics' liens claiming priority over the mortgage. However, Commonwealth refused to do so. As a result, the prospective purchaser of the property exercised its right to terminate the contract to purchase the property.

{¶9} Following the sheriff's sale, Commonwealth refused to confirm that coverage existed for Guernsey Bank with respect to the mechanics' liens claims. In April 2005, Guernsey Bank filed a supplemental complaint against Commonwealth seeking a declaratory judgment that Guernsey Bank was entitled to be indemnified by Commonwealth for the loss it would suffer if the mechanics' liens were ultimately found to be superior to the mortgage. Commonwealth filed an answer to the supplemental complaint and moved for summary judgment, arguing the policy at issue did not require it to indemnify Guernsey Bank. Guernsey Bank then filed a cross-motion for summary judgment asserting the policy required indemnification.

{¶10} Meanwhile, the litigation involving the priority of the liens continued. The trial court ultimately determined that the mechanics' liens were superior to the mortgage and that the title insurance policy required Commonwealth to cover the loss incurred by

Guernsey Bank due to the superiority of the mechanics' liens over the mortgage. A final judgment entry was issued on April 10, 2007, which resolved the lien priorities, declared that Guernsey Bank was entitled to coverage under the title insurance policy, and confirmed the sheriff's sale that had taken place on September 24, 2004. This final judgment entry required Commonwealth, rather than Guernsey Bank, to pay \$386,988.31 to the sheriff in order to clear the mechanics' liens.

{¶11} On appeal, Guernsey Bank continued to dispute the priority of the liens. While the appeal was pending, Commonwealth refused to make the \$386,988.31 payment to the sheriff in order to clear the mechanics' liens. Without such payment or without the payment of a bond, the sheriff could not complete the sale or deliver the deed to Guernsey Bank. Consequently, Guernsey Bank filed a motion to compel Commonwealth to comply with the April 10, 2007 judgment order. The trial court granted said motion to compel and permitted Commonwealth to file a bond in an amount twice the judgment amount as an alternative to paying the sheriff. On October 4, 2007, an order was filed approving the bonds and discharging the mechanics' liens. Guernsey Bank received the sheriff's deed on December 18, 2007, thereby acquiring marketable title to the property.

{¶12} On January 2, 2008, Guernsey Bank submitted its "proof of loss" under the title policy to Commonwealth for losses it alleged had been incurred as a result of its three-year delay in obtaining title. Guernsey Bank asserted damages in the amount of \$81,517.23 and claimed those expenditures were made within the scope of the provision of Section 2(c)(ii) of the title policy, and that such expenses would not have been incurred

prior to the acquisition of title but for the mechanics' liens that claimed priority over the mortgage. However, while the appeal on the issue of the priority of the mechanics' liens was pending, Commonwealth declined to address the proof of loss.

{¶13} On May 20, 2008, this court affirmed the trial court's determination that the mechanics' liens were superior to the mortgage, but reversed and remanded on the issue of prejudgment interest.<sup>2</sup> In June 2008, Guernsey Bank entered into a new contract to sell the property for \$575,000. On October 16, 2008, Guernsey Bank filed its first amended supplemental complaint against Commonwealth, asserting claims for promissory estoppel and breach of contract, which are the claims at issue in the instant appeal. Specifically, Guernsey Bank asserted it suffered losses in the amount of \$81,517.23 as a result of Commonwealth's refusal to pay under the title policy because it had incurred various legal fees and expenses related to the property, as well as expenses for real estate taxes, insurance, maintenance, and utility costs.<sup>3</sup> Guernsey Bank also claimed lost profits in the amount of \$75,000<sup>4</sup> due to its reliance upon Commonwealth's alleged oral promise in September 2004 to provide coverage with respect to the lien priority dispute.

{¶14} In November 2008, Guernsey Bank filed a motion for summary judgment on its first amended supplemental complaint. Commonwealth filed a response, as well as its own cross-motion for summary judgment. On September 3, 2009, the trial court issued a

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<sup>2</sup> See *Guernsey Bank v. Milano Sports Enterprises, LLC*, 177 Ohio App.3d 314, 2008-Ohio-2420.

<sup>3</sup> Guernsey Bank claimed it incurred expenses of \$26,678.77 in legal fees/expenses; \$28,032.86 in real estate taxes; and \$26,805.60 in insurance, maintenance and utility costs. These losses total \$81,517.23.

<sup>4</sup> The \$75,000 in lost profits is the difference between the sale amount of \$650,000 negotiated in the first sale in 2004 that was ultimately withdrawn by the purchaser due to Guernsey Bank's inability to provide clear title as a result of the mechanics' liens, and the sale amount of \$575,000 negotiated in the second sale, which closed in November 2008.

decision granting Guernsey Bank's motion for summary judgment and denying Commonwealth's cross-motion for summary judgment. On October 1, 2009, the trial court issued a final judgment entry ordering judgment in favor of Guernsey Bank in the amount of \$81,517.23 plus interest on the breach of contract claim, and ordering judgment in the additional amount of \$75,000 plus interest on the promissory estoppel claim.

## **II. Assignments of Error**

{¶15} On October 28, 2009, Commonwealth filed a timely notice of appeal and asserts the following five assignments of error for our review:

1. The Trial Court erred in denying Commonwealth's Motion for Summary Judgment on Guernsey Bank's breach of contract claim because Commonwealth's payment of the mechanic's liens fully satisfied its obligations under the Title Policy.
2. The Trial Court erred in finding that Commonwealth breached the Title Policy because the policy provisions requiring payment of the insured's loss do not apply in circumstances where Commonwealth clears all asserted title defect.
3. The Trial Court erred in denying Commonwealth's Motion for Summary Judgment on Guernsey Bank's promissory estoppel claim because an alleged oral promise cannot alter the terms of the parties' written contract and, alternatively, because Commonwealth fulfilled the alleged oral promise.
4. The Trial Court erred in granting Guernsey Bank's Motion for Summary Judgment on its promissory estoppel claim because, when the evidence is viewed in Commonwealth's favor, genuine issues of material fact exist regarding the nature of Commonwealth's alleged oral promise and the reasonableness of Guernsey Bank's reliance.

5. The Trial Court erred in awarding damages to Guernsey Bank for attorney fees and lost profits because such damages are not available, as a matter of law, under the claims asserted against Commonwealth.

### III. Standard of Review

{¶16} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶17} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶18} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court

of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

#### **IV. Breach of Contract**

{¶19} For ease of discussion, we shall address some of appellant's assignments of error jointly and out-of-order.

{¶20} In its first and second assignments of error, appellant argues the trial court erred by granting summary judgment in favor of Guernsey Bank on its breach of contract claim and by denying Commonwealth's motion for summary judgment on that same claim.

{¶21} Commonwealth submits that when an insured's interest in real property is tainted by a defect, lien or encumbrance that purports to have seniority, Commonwealth, as the title company, has three possible ways to satisfy its obligation under the title insurance policy: (1) establish that the alleged defect does not exist ("Option A"); (2) clear

the defect by paying the third party and thus provide the insured with clear title ("Option B"); or (3) compensate the insured for the loss caused by the defect, in accordance with the terms of the policy ("Option C"). Commonwealth argues that choosing which option to pursue is a matter within its sole discretion.

{¶22} Appellant argues it fulfilled all of its obligations under the title policy by clearing title to the property and, as a result, it has no further obligations to Guernsey Bank. Appellant contends its payment of the mechanics' liens cleared title to the property and fully satisfied its obligations under the title policy, since the policy provisions requiring payment of losses does not apply where Commonwealth has cleared all title defects. Commonwealth argues it litigated under Option A and paid the mechanics' liens under Option B, thereby fulfilling its obligation by clearing title to the property. Commonwealth further argues that awarding damages to Guernsey Bank when Commonwealth in fact performed its obligations pursuant to the terms of the policy is error.

{¶23} Commonwealth contends the trial court erred in finding that it breached the title policy in failing to pay Guernsey Bank for "the expenses it paid to maintain the property, pay taxes and insurance on it, and the legal costs it incurred[.]" (Sept. 3, 2009 decision granting plaintiff's motion for summary judgment and denying defendant's cross-motion for summary judgment; R. 404-405 at 9.) Commonwealth submits that this finding ignores its right to choose which option to pursue and requires it to pay under Option C, despite the fact that it has already paid under Option B.

{¶24} In support of its position that it has fulfilled its obligations, appellant relies upon Section 8(a) of the title policy at issue, which provides in relevant part:

If the Company 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, or otherwise establishes the lien of the insured mortgage, 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.**

(Emphasis added.)

{¶25} Commonwealth submits that Section 8(a) is unambiguous and clearly establishes that once it has removed the mechanics' liens and established the priority of the mortgage, it has fully performed its obligations and cannot be liable for any loss or damage which is caused by "that matter." Commonwealth argues the phrase "that matter" refers to "the alleged defect, lien or encumbrance," and that it now has no liability for damages purportedly caused by the alleged defect, lien or encumbrance.

{¶26} Guernsey Bank, on the other hand, relies on Section 8(d) of the title policy, and advances the position that Commonwealth's decision to litigate the priority of the mortgage, rather than to immediately pay off the mechanics' liens, means Commonwealth is liable for Guernsey Bank's carrying costs on the property during the time period when the litigation was pending. Commonwealth, however, asserts that the title policy gives it the option to clear the title to the property or pay Guernsey Bank for its actual losses, up to the policy limits, but it does not give Guernsey Bank the right to choose which option Commonwealth will use, and it does not give Guernsey Bank the right to recover both clear title and reimbursement for damages caused by the title defect. Commonwealth

further submits its rights and responsibilities under the title policy are not dependent upon whether it is successful in the underlying litigation.

{¶27} Commonwealth disputes the trial court's determination that Commonwealth is responsible for and must pay Guernsey Bank's losses for the time period during which the litigation was pending and up to the time when the title was finally cleared. Commonwealth asserts these costs are not covered under the policy because the trial court's reliance upon Section 7 of the title policy is misplaced. Commonwealth contends Section 7 would only be applicable if Commonwealth had pursued "Option C" and compensated Guernsey Bank for the loss caused by the defect, in accordance with the terms of the policy, which was not the option Commonwealth pursued. Instead, because Commonwealth provided Guernsey Bank with clear title, appellant argues it has fully performed its obligations under Section 8(a), and Section 7 does not apply. Under Commonwealth's interpretation, Section 7 would only apply if it was unable or unwilling to clear title to the property. Furthermore, Commonwealth argues it had no duty to remove the defect prior to the completion of litigation. (See Section 4(c).)

{¶28} Contrary to Commonwealth's position, Guernsey Bank argues the expenses it incurred during the time period when the priority of the liens was being litigated are covered under any sensible and fair construction of the title policy. Appellee cites to page one of the loan policy in support of this, which states, inter alia, the policy insures against loss or damage incurred by any defect, lien, or encumbrance on the title, unmarketability of title, and the lack of priority of the lien of the insured mortgage. Guernsey Bank also cites to Section 14 of the title policy, which states that in interpreting

any provision of the policy, the policy must be considered as a whole. Guernsey Bank further argues that Commonwealth's obligations are not completely fulfilled simply by the clearing of title defects. Rather, Guernsey Bank argues the title policy covers losses incurred in protecting the property, as well as losses incurred in protecting the lien of the insured mortgage, where the losses are sustained prior to the curing of the title defects. Guernsey Bank relies on Section 7(a)(i), as well as Section 2(c)(ii), and/or Section 7(a)(ii) and 8(d), to support this position.

{¶29} Section 7 of the title policy is entitled "Determination and Extent of Liability." It states the 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." Section 7(a) reads in relevant part as follows:

The liability of [Commonwealth] under this policy shall not exceed the least of:

- (i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance **as defined in Section 2(c)** of these Conditions and Stipulations;
- (ii) the amount of the **unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8** of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time of loss or damage insured against by this policy occurs, together with interest thereon; or
- (iii) if a 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.

(Emphasis added.)

{¶30} Section 2(c) reads in relevant part:

Amount of Insurance: The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, **expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements**, but reduced by the amount of all payments made[.]

(Emphasis added.)

{¶31} There are two applicable constructions here, either of which would obligate Commonwealth to provide coverage for Guernsey Bank's expenses incurred between October 2004 and December 2007. First, Section 7(a)(i) and Section 2(c)(ii) clearly provide indemnification for expenses of foreclosure, as well as advances to protect the mortgage or to comply with applicable laws and to prevent deterioration of the property, so long as this indebtedness is less than the policy amount. Therefore, the expenses at issue would be covered and Commonwealth's reliance upon Section 8(a) and/or (b) would be irrelevant.

{¶32} Alternatively, under Section 7(a)(ii), Commonwealth is liable for the unpaid principal indebtedness as limited by or provided for under Section 8. While Commonwealth argues that Section 8(a) limits its liability and excludes liability for losses

or damages incurred as a result of any defect in title or any claim of unmarketability of title if Commonwealth has cleared the title, this interpretation completely ignores Section 8(d).

{¶33} Pursuant to Section 8(d):

The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy **except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts extended to prevent deterioration of improvements[.]**

(Emphasis added.)

{¶34} In reading Section 7(a)(ii) with Section 8(d), Section 8(d) provides a specific exception regarding Commonwealth's liability for indebtedness that occurs after the date of the policy. Under Section 8(d), the policy provides for coverage of the necessary expenses incurred by Guernsey Bank in protecting its mortgage.

{¶35} Yet, Commonwealth submits that because it cleared the mechanics' liens under "Option B" pursuant to Section 6(b)(i), Section 7 is not applicable, but Section 8(a) is applicable, which in turn shields Commonwealth from further liability with respect to any loss or damage caused by the defect or unmarketability of title. Under this theory, Commonwealth argues that the phrase "that matter" in Section 8(a) can only refer to "the alleged defect, lien or encumbrance," and once it has established clear title or removed the lien, it is not liable for any loss or damage which was caused by the defect or lien. Essentially, Commonwealth submits that once it has cleared the lien and established title, it is responsible for nothing else and cannot be obligated to cover any losses or damages that may have been incurred during the course of time during which this process was ongoing. Thus, Commonwealth asserts clearing the liens takes care of all of its

responsibilities and obligations. We disagree, as this interpretation would require us to ignore Section 8(d), which clearly provides for expenses incurred to protect the mortgage and to prevent deterioration. Such an interpretation would go against various established principles of contract law.

{¶36} When a court is interpreting an insurance policy, its task is to "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11; see also *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶17. A court must read the contract as a whole and give effect to every provision of the contract, if possible. *Clark v. Humes*, 10th Dist. No. 06AP-1202, 2008-Ohio-640, ¶12; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361-62, 1997-Ohio-202; *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 10th Dist. No. 09AP-6, 2009-Ohio-5671, ¶23. The intent of each part is to be gathered from consideration of the contract as a whole. *Foster Wheeler Enviresponse, Inc.* at 361-62; *Erkis* at ¶23. If contract provisions are susceptible to more than one interpretation, they "will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus. "[P]olicies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured." *Butche v. Ohio Cas. Ins. Co.* (1962), 174 Ohio St. 144, 146. Furthermore, "an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657,

665. To defeat coverage, an insurer must establish that its interpretation is the only interpretation that can be placed on the policy language, not merely that the policy is capable of the interpretation that it favors. *Erie Ins. Exchange v. Colony Dev. Corp.*, 10th Dist. No. 02AP-1087, 2003-Ohio-7232, ¶37, quoting *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 2001-Ohio-1607; *Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina*, 172 Ohio App.3d 196, 2007-Ohio-494, ¶27.

{¶37} As stated above, we disagree with appellant's interpretation of Section 8(a). While that section can be interpreted to limit Commonwealth's liability with respect to the actual monetary loss or damage that is attributable to actually clearing the defect or lien, Section 8(d) specifically finds liability for advances expended to protect the mortgage of the insured and for preventing deterioration to the property. Section 8(a) does not preclude indemnification for losses attributable to advances made to protect the mortgage. To construe Section 8(a) as denying coverage for expenses incurred to protect the mortgage and to prevent deterioration to the property would render Section 8(d)(i) meaningless.

{¶38} Again, Section 7 states the 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." Section 7(a) then states that liability shall not exceed the least of (i) the \$600,000 amount of insurance set forth in Schedule A, or (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as provided for under Section 8.

{¶39} Here, Guernsey Bank clearly incurred losses for "matters insured against by this policy," such as unmarketability of title, when it incurred expenses to maintain the property and also paid the taxes and the insurance on the property. In reading Section 7 in conjunction with Section 8, it is evident that the policy can be interpreted to provide for Guernsey Bank's out-of-pocket expenses related to protecting the mortgage and preventing deterioration expenses even though Commonwealth eventually established clear title by bonding off/paying off the mechanics' liens. Section 8(d) supports this interpretation and to find otherwise would produce an absurd result which would permit Commonwealth to delay resolution of the defects while Guernsey Bank's losses and expenses continued to accumulate.

{¶40} We agree that Commonwealth has the ability to choose the manner in which it defends/indemnifies Guernsey Bank. Yet, Commonwealth's selection of a particular course of action does not automatically prevent Guernsey Bank from receiving indemnification, nor immediately release Commonwealth of its obligations. Commonwealth chose to litigate, which produced an unsuccessful result and ultimately resulted in Commonwealth paying off the liens in order to deliver clear title. Despite eventually delivering clear title, the title policy, through Section 8(d), still provides an exception to releasing Commonwealth from liability specifically with respect to any losses or damages which relate to indebtedness advanced to protect the lien and to prevent deterioration.

{¶41} We disagree with Commonwealth's contention that Section 7 would only be triggered in the event that Commonwealth chose to compensate Guernsey Bank for the

loss caused by the defect under Option C. Instead, we find Section 7 also applies in this circumstance, where the title conflict was unsuccessfully litigated, the liens were eventually paid off, and Guernsey Bank has incurred expenses to protect the mortgage and to prevent deterioration of improvements during that time period. We further find the authority cited by appellant, which interprets purportedly similar contract language under purportedly similar factual scenarios, to be inapplicable to these circumstances and/or unpersuasive.

{¶42} Based upon the foregoing, we find the trial court did not err in granting summary judgment in favor of Guernsey Bank on its breach of contract claim or in denying Commonwealth's motion for summary judgment on the same claim. Under the terms of the policy, Commonwealth was not relieved of its obligations simply because it eventually paid off the mechanics' liens and cleared title to the property. Under the terms of the policy, Commonwealth was required to indemnify Guernsey Bank for certain losses related to the protection of the mortgage and the prevention of deterioration to the property. The specific amount of those losses shall be discussed in more detail below when we address appellant's fifth assignment of error.

{¶43} Accordingly, we overrule appellant's first and second assignments of error.

## **V. Promissory Estoppel**

{¶44} In his fourth assignment of error, appellant argues the trial court erred in granting summary judgment in favor of Guernsey Bank on its promissory estoppel claim. Appellant argues genuine issues of material fact exist with respect to the nature and

substance of the alleged oral promise and the reasonableness of Guernsey Bank's reliance upon that promise. Specifically, Commonwealth contends: (1) appellant, through Attorney Timothy J. Clarke, denies making an oral promise; (2) the evidence upon which Guernsey Bank relies to establish the alleged oral promise □ the September 14, 2004 letter written by Attorney Joseph C. Winner and the affidavit of Mr. David B. Erickson □ is inadmissible hearsay; and (3) that evidence is internally inconsistent and creates a genuine issue of material fact as to what was promised.

{¶45} We begin by noting that Commonwealth did not object to the submission of either the September 14, 2004 letter or the affidavit of Mr. Erickson as inadmissible hearsay evidence at the trial court level. For purposes of our analysis here, we shall assume, *arguendo*, that said evidence is admissible and focus our discussion upon whether or not there are genuine issues of material fact with respect to the elements of the promissory estoppel claim on which summary judgment was granted in favor of Guernsey Bank.<sup>5</sup> Also, see *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179 (issues not raised in the pleadings below and which were not tried cannot be raised for the first time on review).

{¶46} Commonwealth argues the trial court's reliance upon the Erickson Affidavit and/or Attorney Winner's letter is insufficient to establish a clear and unambiguous promise. Commonwealth also disputes the determination that there are no genuine issues of material fact as to whether the Bank's reliance was reasonable. Commonwealth

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<sup>5</sup> Even if the hearsay challenge had been raised and specifically addressed, it is unlikely that appellant would have prevailed on that challenge. See Evid.R. 803(5), Evid.R. 801(C), and *Knowles v. Ohio State Univ.*, 10th Dist. No. 02AP-527, 2002-Ohio-6962.

argues it was not reasonable for Guernsey Bank to rely upon any alleged oral promise, particularly given the alleged importance of the information.

{¶47} Promissory estoppel is "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶23, quoting Restatement (Second) of Law (1981), Contracts, 242, Section 90. The elements required to prove a promissory estoppel claim are: (1) a clear, unambiguous promise; (2) the person to whom the promise is made relies on the promise; (3) reliance on the promise is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise. *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶35; *Holt Co. of Ohio v. Ohio Mach. Co.*, 10th Dist. No. 06AP-911, 2007-Ohio-5557, ¶30, citing *Patrick v. Painesville Commercial Properties, Inc.* (1997), 123 Ohio App.3d 575, 583.

{¶48} Upon review, we find the trial court erred in granting summary judgment in favor of Guernsey Bank on the promissory estoppel claim, as there are genuine issues of fact that remain.

{¶49} First, there are genuine issues of material fact as to whether or not there was a clear, unambiguous promise made. The September 14, 2004 letter written by Attorney Winner, counsel for Guernsey Bank, to Attorney Clarke, a claims attorney for Commonwealth, reads in relevant part as follows:

In order to formulate its bidding strategy, it is critically important for the Bank to have assurance the Company will

indemnify the Bank for any loss sustained if the Court ultimately determines that **either or both the Hertz Equipment and/or the Esco Electrical mechanic's lien has priority** over the mortgage. Based upon my telephone conversation with you of last Thursday, September 9, it is my understanding the Company will so indemnify the Bank. The purpose of this letter is to confirm that I correctly understand the Company's final decision regarding coverage for these claims. It is imperative that you notify me immediately if I am mistaken in any way regarding the Company's position.

In reliance upon your advice the Company will indemnify, the Bank will bid at the Sheriff's sale **as if these two mechanic's liens** had already been determined to be junior to the mortgage. If the Bank makes the successful bid, and if the Court rules that either or both of the disputed mechanic's liens has priority over the mortgage, it is our understanding **the Company will reimburse the Bank for the amount that must be paid to Hertz Equipment and/or Esco Electrical in order to clear title**. If a bidder other than the Bank is successful, and if the Court rules that either or both of the disputed mechanic's liens has priority over the mortgage, it is our understanding the Company will pay the Bank the portion of the sale proceeds, if any, that would have been distributed in satisfaction of the mortgage if not for the seniority of the mechanic's lien(s).

(September 14, 2004 letter, at 2.) (Emphasis added.)

{¶50} Guernsey Bank has also submitted the affidavit of Attorney Winner, in which he avers that he had previously received a letter on June 9, 2004 from Attorney Clarke, which included a reservation of rights. Attorney Winner further averred as follows:

On September 14, [2004], I faxed and mailed a letter to Mr. Clarke[.] \* \* \* Mr. Clarke did not respond to my letter of September 14, 2004, and he did not correct the Bank's understanding that a final decision had been made by Commonwealth that the Bank was entitled to coverage.

(Winner Affidavit, at ¶5.)

{¶51} On the other hand, however, Commonwealth submitted the affidavit of Attorney Clarke, in which he swore that he had received a letter from Attorney Winner in May 2004 which gave notice of a potential claim and listed only two mechanics' liens: Hertz Equipment Rental Corporation, which claimed \$9,701.17, and Esco Electrical Contractors, Inc., which claimed \$70,944.<sup>6</sup> Attorney Clarke averred that he responded to that letter on June 9, 2004, stating that Commonwealth would accept tender of the claim pursuant to the terms, conditions, and provisions of the policy, but that it "does not waive, invalidate, forfeit, or modify any of its rights under the policy." (Clarke Affidavit, at ¶6.)

{¶52} In his affidavit, Attorney Clarke acknowledged receipt of a letter prior to the September 24, 2004 sheriff's sale. The letter was from Attorney Winner and was dated September 14, 2004. It requested assurance that Commonwealth would indemnify Guernsey Bank in the event either or both the Hertz and/or Esco mechanics' liens were found to have priority over the mortgage. Attorney Clarke's affidavit also acknowledged a telephone conversation with Attorney Winner, but he averred that they had only discussed the Esco and Hertz liens and further swore that he did not revoke the reservation of rights and was not asked to do so.

{¶53} Based upon all of this, we find there is a genuine issue of material fact as to whether or not a promise was made. While appellee argues Attorney Clarke did not deny promising that Commonwealth would indemnify Guernsey Bank and that Attorney Clarke's statement that he was not asked to revoke the reservation is simply an issue of semantics, we disagree. We find the trial court was presented with conflicting evidence on the issue of whether there was a promise. Furthermore, even if a promise was made,

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<sup>6</sup> The total amount of the liens involved was \$386,988.31.

it is unclear as to what this promise entailed. It appears that both parties have acknowledged discussing two of the mechanics' liens (the Hertz and the Esco liens), but the record, as well as our previous decision in this matter, indicates that there were additional mechanics' liens involving Sauer, Inc., Turner, Thomas, and Yankle, and that the sum of all of the liens at issue totaled at least \$386,988.31. The Hertz and Esco liens referenced above amount to far less than this, making it apparent that there were additional liens at issue which were not specifically referenced in this letter.

{¶54} In addition, issues of fact remain as to the reasonableness of Guernsey Bank's reliance on the alleged oral promise. Although Guernsey Bank, through Attorney Winner, indicated in its September 14, 2004 letter that it was "critically important" for the bank to have assurance that it would be indemnified if either or both the Hertz and/or Esco mechanics' liens had priority over the mortgage, Guernsey Bank relied upon its understanding that indemnification would be provided without taking steps to require affirmative confirmation on the part of Commonwealth. Guernsey Bank did not require written confirmation of indemnification or written confirmation that Commonwealth had revoked its reservation of rights. Instead, Guernsey Bank merely indicated in its letter that it was "imperative that you notify me immediately if I am mistaken in any way regarding [Commonwealth's] position." Upon receiving no response from Commonwealth, Guernsey Bank went ahead and placed the high bid (\$525,000) on the property and successfully purchased the property.

{¶55} Guernsey Bank then went on to enter into a contract with a third party to sell that property within a very short period of time and included a contingency that the sale

be confirmed in less than 60 days, knowing that the priority of the mortgage and the mechanics' liens were still in dispute, but apparently without making Commonwealth aware of these details in advance of negotiating the sale. Appellee argues it was foreseeable that it would seek to sell the property to a third party, given that it is not in the business of owning and operating real estate. However, genuine issues of material fact remain and reasonable minds could come to more than one conclusion as to whether or not these actions by Guernsey Bank were reasonable and foreseeable, and, as a result, Guernsey Bank is not entitled to summary judgment as a matter of law.

{¶56} Moreover, as noted by appellant, the insurance industry could collapse entirely if an insured could simply guarantee his desired coverage merely by sending a letter to his insurer "confirming" that such coverage had been promised.

{¶57} Thus, we sustain appellant's fourth assignment of error.

{¶58} In his third assignment of error, Commonwealth asserts the trial court erred in denying its cross-motion for summary judgment on Guernsey Bank's claim for promissory estoppel. Commonwealth argues promissory estoppel is not available to alter the terms of the title policy. Appellant submits an alleged oral promise cannot alter the terms of the written policy, and notes the policy includes a clause stating that any amendments or changes must be made in writing. Alternatively, appellant argues that even if the alleged oral promise could alter the written terms, Commonwealth has fulfilled the alleged oral promise.

{¶59} While Commonwealth has denied that the oral promise asserted by Guernsey Bank was actually made and has also denied that the bank's reliance on said

promise was reasonable, for purposes of its own summary judgment motion and this assignment of error only, appellant ignores those denials and presumes the promise was made and that reliance upon it was reasonable. In this circumstance, Commonwealth argues Guernsey Bank cannot recover for promissory estoppel because any alleged oral promise cannot modify the terms of the written title insurance policy.

{¶60} In our analysis of appellant's fourth assignment of error, we determined that genuine issues of material fact remain with respect to the terms of the oral promise and the reasonableness of relying upon it. However, even if we were to presume the existence of a clear, unambiguous promise, upon which Guernsey Bank reasonably relied, this argument fails. The coverage and the other terms and conditions contained within the title policy are distinct, independent, and separate from the issue of Commonwealth's reservation of its right to reverse its initial determination that coverage existed and to later deny coverage. The purported promises at issue □ that coverage existed and that Commonwealth had made a final determination, promising to withdraw its reservation of rights to deny coverage and therefore accept liability □ are not dependent upon the title policy and did not alter the terms of the policy.

{¶61} However, because genuine issues of material fact remain with respect to the terms of the promise and the reasonableness of any reliance thereon, it is unnecessary for us to address Commonwealth's contention that it did not breach said promise at this time.

{¶62} Accordingly, Commonwealth's third assignment of error is overruled.

## VI. Attorney's Fees and Lost Profits

{¶63} In its fifth assignment of error, Commonwealth contends the trial court erred in awarding damages to Guernsey Bank for attorney's fees and lost profits. Upon review, this assignment of error is sustained.

{¶64} The award of \$75,000 in lost profits was predicated on the trial court's grant of summary judgment on the promissory estoppel claim in favor of Guernsey Bank. That sum was awarded as damages for the promissory estoppel claim and was granted to return Guernsey Bank to the position it would have been in, had Commonwealth performed its purported promise. Because we have found that the granting of summary judgment on the promissory estoppel claim was improper, the award of \$75,000 in lost profits was also improper. Therefore, as to the issue of lost profits, appellant's fifth assignment of error is sustained.

{¶65} Next, we shall address the issue of the award of attorney's fees to Guernsey Bank in the amount of \$26,678.77. This award was part of the \$81,517.23 in losses claimed by Guernsey Bank in its proof-of-loss. Specifically, these claimed losses included \$26,678.77 in legal fees and legal expenses; \$28,032.86 in real estate taxes; and \$26,805.60 in insurance, maintenance and utility costs. (See Affidavit of Lynda S. Howard.) The trial court awarded Guernsey Bank the full amount, \$81,517.23, plus interest.

{¶66} As noted in our analysis of appellant's first and second assignments of error, the title policy provides for expenses such as real estate taxes, as well as insurance, maintenance, and utility costs, which fall within the provisions covering

amounts advanced to protect the mortgage and to prevent deterioration of improvements.<sup>7</sup> As a result, an award for these expenses is appropriate. To the extent that appellant's fifth assignment of error generally attempts to challenge this portion of the award within the broad context of "attorney's fees," we reject such a challenge.

{¶67} However, the next issue that arises is whether or not Guernsey Bank's actual legal fees and expenses are covered, either pursuant to the title policy or as a result of appellant's lack of good faith, as found by the trial court. We find that Guernsey Bank is not entitled to such legal fees and expenses.

{¶68} Ohio follows the "American rule" with respect to attorney fee awards. *McConnell v. Hunt Sports Enterprises* (1992), 132 Ohio App.3d 657, 699. Under this rule, each party involved in litigation pays his or her own attorney fees, in most circumstances. *Sorin v. Bd. of Edn. of Warrensville Heights School Dist.* (1976), 46 Ohio St.2d 177, 179. Thus, a prevailing party in a civil action generally cannot recover attorney fees as part of the costs of litigation. *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 33-34. Yet, some exceptions to this rule exist, such as when a contractual provision between parties shifts the costs of defending, where there is a finding of bad faith, or where there are statutory provisions which specifically provide for a prevailing party to recover attorney fees. *Pegan v. Crawmer*, 79 Ohio St.3d 155, 156, 1997-Ohio-176; *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St.3d 75, 77, 1993-Ohio-11; *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 556, 1992-Ohio-24; and *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶7.

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<sup>7</sup> This amount totals \$54,838.46.

{¶69} Here, the trial court appears to have awarded Guernsey Bank its attorney's fees as a result of its determination that Commonwealth breached its duty to act in good faith. Due to the special insurer-insured relationship between Commonwealth and Guernsey Bank, the trial court determined Commonwealth had a duty to act in good faith with respect to the September 14, 2004 letter. In failing to respond to the letter and in allowing Guernsey Bank to rely upon it, which in turn caused Guernsey Bank to incur significant attorney's fees, the trial court determined Commonwealth failed to act in good faith.

{¶70} To the extent the trial court awarded Guernsey Bank attorney's fees and legal expenses in the amount of \$26,678.77 on the grounds that Commonwealth failed to act in good faith by failing to respond to the September 14, 2004 letter and by allowing Guernsey Bank to rely upon its understanding that Commonwealth would indemnify the bank, we find such an award was improper. Such an award appears to be conditioned upon the trial court's determination that Guernsey Bank proved all of the elements of its claim for promissory estoppel, specifically a clear, unambiguous promise and reasonable reliance thereon. However, because we have determined that genuine issues of material fact exist with respect to whether or not there was a clear, unambiguous promise, and whether or not Guernsey Bank's reliance upon said promise was reasonable, we find appellee is not entitled to these attorney's fees and expenses on the grounds that Commonwealth failed to act in good faith. The issue of the alleged promise and the subsequent conduct of both parties is still unresolved.

{¶71} To the extent the attorney's fees and expenses were actually awarded on the grounds that they were contractually provided for pursuant to the terms of the title policy, which Commonwealth breached, we reject that contention as well.

{¶72} Guernsey Bank has cited to *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, 242, which states: "an indemnitor's *express agreement to indemnify an indemnitee for qualified legal expenses* incurred is enforceable and is not contrary to Ohio's public policy. In the event that the indemnitor wrongfully refuses to honor its obligation, the indemnitee may recover its legal expenses." (Emphasis added.) However, we find this case to be inapplicable to the instant case.

{¶73} We find the title policy here does not provide for the recovery of Guernsey Bank's attorney's fees. Appellee argues that its legal fees and expenses are covered under Section 2(c)(ii), which is incorporated by reference into Section 7(a)(i), as "expenses of foreclosure." However, we disagree. Assuming these particular provisions of the title policy are indeed applicable, these provisions do not expressly provide for payment of Guernsey Bank's attorney's fees. Other provisions of the title policy also fail to provide for recovery of Guernsey Bank's attorney's fees under these circumstances. See Section 4(a) (Commonwealth shall have the right to select counsel of its choice and shall not pay the fees of any other counsel) and Section 6(b)(i) (Commonwealth shall pay attorney's fees and costs which were *authorized* and which it is obligated to pay). Thus, the trial court erred in awarding judgment in favor of Guernsey Bank with respect to the portion of the \$81,517.23 award which includes the \$26,678.77 for legal fees and expenses, and we sustain appellant's fifth assignment of error on that issue as well.

**VII. Disposition**

{¶74} In conclusion, we overrule appellant's first, second, and third assignments of error but sustain appellant's fourth and fifth assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part.

*Judgment affirmed in part and reversed in part;  
cause remanded for further proceedings.*

SADLER and FRENCH, JJ., concur.

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