NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

IFEOMA UKOHA, Plaintiff and Appellant, v. PROVIDENT TITLE COMPANY et al., Defendants and Respondents.	B291107 (Los Angeles County Super. Ct. No. BC675869)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Affirmed.

Herbert Wiggins, and Herbert N. Wiggins for Plaintiff and Appellant.

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

Early Sullivan Wright Gizer & McRae, Eric P. Early and Sophia S. Lau for Defendant and Respondent Stewart Title Guaranty Company.

Plaintiff Ifeoma Ukoha purchased an apartment building that she later lost to foreclosure due to the seller's misappropriation of her payments. In this lawsuit, she sues the title insurer and title guaranty company, alleging they colluded with the seller to defraud her. Defendants' demurrers were sustained without leave to amend. Ukoha essentially contends that a title insurer and title guaranty company that know a seller has entered into prior property transactions that resulted in lawsuits, bankruptcies and foreclosures owes a duty to inform the buyer that the current purchase might also be problematic. We reject the contention, and affirm.

BACKGROUND

We take the facts from the first amended complaint, accepting them as true for purposes of this appeal.

A. Instant Property Transaction

In 2005, Ukoha purchased a 17-unit apartment building on Gibraltar Avenue in Los Angeles for $1.85 million from a trust controlled by David Behrend. Behrend obtained title insurance for the transaction from Stewart Title Guaranty Company (Stewart). Title Policy No. CNJP-1597-789148 named Ukoha as the insured, Stewart as the insurer, and Provident Title Company (Provident) as the underwritten title company and issuing agent.

The title policy insured against loss or damage sustained or incurred by reason of: "1. Title to the estate or interest . . . being vested other than as stated"; "2. Any defect in or lien or encumbrance on the title"; or "3. Unmarketability of the title."

The policy defined "unmarketability of title" as "an alleged or apparent matter affecting the title to the land, not excluded or

excepted from coverage, which would entitle a purchaser of the [property] . . . to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title."

The policy excluded from coverage any "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to [September 30, 2005]."

Ukoha made a $500,000 down payment to Behrend, executed a promissory note in favor of the trust he controlled, retained him to manage the property, and sent payments on the note to him with the understanding that he would forward them to the note holder.

Behrend instead misappropriated the funds, and Ukoha lost the property to foreclosure in 2012.

Ukoha filed the instant lawsuit against Stewart and Provident on September 15, 2017. In her first amended complaint she asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, concealment, promissory fraud, and violation of California Business and Professions Code section 17200/unfair competition, and seeks declaratory relief.

Ukoha alleges that Stewart and Provident had done business with Behrend for several years prior to the 2005 transaction, and knew that between 2002 and 2012 he was involved in approximately 17 property transactions, at least eight of which had led to civil and criminal litigation due to his mismanagement of properties and financing. Having insured at least nine properties that Behrend sold, Stewart and Provident were effectively his business partners. They knew that because Ukoha lived in Riverside County, while the Gibraltar property

was in Los Angeles, she would depend on Behrend to maintain the property but at the same time be unlikely to discover that he was "allowing his various properties to become unlivable, to the point that he and the properties became engulfed in civil and criminal litigation."

Ukoha alleges that "[d]espite the personal knowledge of officers, directors, and or owners of Provident and Stewart Title, of the business practices of Mr. Behrend and his entities, to wit, knowing that by buying the Gibraltar property, Plaintiff was buying a lawsuit, such as criminal prosecution and class action," defendants deliberately concealed the risk of the investment from Ukoha. Instead, they issued the subject insurance policy, in which they falsely represented that she would receive marketable title and promised to pay benefits to her if she did not. Defendants in fact knew that Ukoha would not receive marketable title and had no intention to pay benefits under the policy. In sum, defendants "concealed information which would have caused a reasonable person to decline the transaction with Behrend."

Ukoha alleges that she received a copy of the policy for the first time in March 2014, and submitted a claim for coverage to Stewart in early 2015. She alleged that Stewart mishandled and unreasonably processed her claim, unreasonably denied it in August 2015, and refused to arbitrate her objection to the denial.

B. Demurrers and Judgment

Stewart and Provident demurred to the complaint, arguing that a post-transaction foreclosure was not a title defect, and as a title insurer and title insurance issuing agent they owed no duty to warn Ukoha about the risk of her investment. The court

sustained the demurrers without leave to amend, and Ukoha appeals from the resulting judgment.

DISCUSSION

A. Legal Principles and Standard of Review

On review of a trial court's order sustaining a demurrer we "examine the complaint de novo." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

B. Breach of Contract and Covenant

Ukoha contends her allegation that defendants breached the title insurance policy by failing to provide benefits under it supported her cause of action for breach of contract. We disagree.

The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Ukoha alleges no contract between herself and Provident, the underwritten title company. An underwritten title company is a corporation "engaged in the business of preparing title

searches, title examinations, title reports, certificates or abstracts of title upon the basis of which a title insurer writes title policies." (Ins. Code, § 12340.5.) A title report "is furnished in connection with an application for title insurance and is an *offer* to issue a title insurance policy. . . . [¶] [I]t is not a contract." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) Provident therefore cannot be held liable for breach of the title insurance policy.

As to Stewart, Ukoha alleges no breach because she alleges no title defect or unmarketable title, but rather post-policy events that were specifically excluded by the policy.

As noted above, the policy insured against loss or damage sustained or incurred by reason of title "being vested other than as stated," any "defect in or lien or encumbrance on the title," or "[u]nmarketability of the title," and excluded from coverage any "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to [September 30, 2005]."

" 'The words "defective title" mean that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land.' " (*Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, 649 [234 P.2d 625].) Ukoha makes no assertion that Behrend possessed incomplete title to the Gibraltar property when he sold it to Ukoha, (nor does she assert that any liens or encumbrances existed at the time of sale). " ' "Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued." ' [Citation.] Changes in the condition of title after the insurer issues the policy are outside the scope of coverage. [Citation.] 'Title insurance, as opposed to other types of insurance, does not insure

against future events. It is not forward looking. It insures against losses resulting from differences between the actual title and the record title as of the date title is insured. . . .' [T]itle insurance protects against the possibility that liens or other encumbrances exist, even though they were missed in the title search or the preliminary title report." (*Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2013) 217 Cal.App.4th 62, 75, fn. omitted (*Liberty Nat'l Enterprises, L.P.*).)

The policy defined "unmarketability of title" as a "matter affecting the title to the land" that would entitle Ukoha "to be released from the obligation to purchase" the land. Ukoha alleged no matter affecting title to the land before she purchased it.

Here, Ukoha alleges she lost the property through Behrend's post-sale wrongful conduct. That conduct did not constitute a title defect existing at the time of sale. (See *Safeco Title Ins. Co. v. Moskopoulos* (1981) 116 Cal.App.3d 658, 666 [intentional post-policy misconduct is not a title defect].) At best, Behrend's post-sale misconduct gave rise to "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to" the sale, which were specifically excluded from coverage. Because Ukoha's injury was not insured, but on the contrary was specifically excluded from coverage, her breach of contract claim against Stewart fails.

Ukoha argues that Behrend's misfeasance with respect to other properties before the sale of the Gibraltar property constitute a defect in the Gibraltar property's title because it subjected the property to future "loss as a result of government action, civil damages remedies, or other legal processes." The argument is without merit. To reiterate, a title defect is some

circumstance that deprives the seller of complete title to the property being sold. Behrend's mismanagement of other property effected no such deprivation.

Relying on *Ward v. Downey* (1950) 95 Cal.App.2d 680, 684-685 (*Ward*), which held that possible future government action against title to property rendered the title unmarketable, Ukoha argues that foreseeable bankruptcy proceedings against the Gibraltar property likewise rendered its title unmarketable at the time she bought it. The argument is without merit.

In *Ward*, sellers of real property held title in joint tenancy with a third person who had died, leaving possible estate tax obligations. The purchase agreement obligated the sellers to provide title that was "marketable and free of all encumbrances," but they were unable until a week after close of escrow to obtain documents requested by the title company clearing the decedent's estate tax obligations, resulting in the buyer backing out of the purchase. (*Ward*, *supra*, 95 Cal.App.2d at pp. 681-682.) In the sellers' action for specific performance, the appellate court held that "in view of the failure of [the sellers] to submit documents to the title company enabling it to determine the possibility of an estate tax, a defect in the title resulted which made it unmarketable *within the meaning of the terms of the offer to purchase*." (*Id*. at pp. 684-685, italics added.)

Ward is materially distinguishable. There, the title company believed that a presale event—the sellers' joint tenant's death—might result in post-sale legal proceedings resulting in an estate tax lien. Here, the cloud posited by Ukoha is the possibility that Behrend's past misconduct with respect to other properties might be repeated after the sale here, resulting in some future action against her title. Assuming for purposes of

argument that the word "unmarketable" here means the same as it did in the purchase agreement at issue in *Ward*, the court did not hold that a potential future event leading to possible future legal proceedings constitutes a present blemish on title so as to render it unmarketable, no matter how foreseeable the future event or legal proceedings might be. To so hold would effectively turn the question of marketability into a foreseeability/negligence question, which would inject uncertainty into title searches and title insurance. No principle of which we are aware suggests that such a change in the law concerning titles is needed or wise. We therefore hold that the possibility of future seller misconduct does not render title to property presently unmarketable. (See *Liberty Nat'l Enterprises, L.P.*, *supra*, 217 Cal.App.4th at p. 75 [title insurance does not insure against future events].)

Because Ukoha alleged no viable breach of contract claim, her claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35-36 ["if there is no *potential* for coverage . . . , there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer"].)

C. Fraud

Ukoha contends defendants' failure to inform her about Behrend's malfeasance constituted fraud and promissory fraud. We disagree.

"One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers." (Civ. Code, § 1709.) "A deceit, within the meaning of the last section, is . . . [¶] . . . [¶]

[t]he suppression of a fact, by one who is bound to disclose it . . . ." (Civ. Code, § 1710.) The elements of fraud are " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 612-613.) A mere failure to disclose, absent a duty to disclose, does not constitute fraud. (*Crayton v. Superior Court* (1985) 165 Cal.App.3d 443, 451.)

" 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 638.) "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Ibid*.) "In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Ibid*.)

Here, Ukoha alleges nothing giving rise to a duty owed by either Provident or Stewart to inform her about Behrend. Nothing in the policy required such a disclosure, nothing in the law establishes such a duty, and Ukoha represents she had no dealings with either Provident or Stewart until many years after the title insurance policy—which Behrend procured on his own—was issued. A title insurance company owes the insured no duty of disclosure outside the policy. (*Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 596; *Alfaro v. Cmty. Hous. Imp. Sys. & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1389 [title insurer owes no duty for the negligent preparation of preliminary title reports]; *Southland Title Corp. v. Super. Ct.* (1991) 231 Cal.App.3d 530, 538 [same].)

Neither does Ukoha allege facts suggesting Stewart had no intention of providing the benefits set forth in the title insurance policy, nor that it fraudulently induced her to enter into the policy.

Citing several cases involving homeowner's and general liability insurance, Ukoha argues that an insurer owes its insured a duty to disclose matters that might undermine the insured's ability to receive insurance benefits under the policy issued. But as discussed above, nothing undermined Ukoha's ability to receive insurance benefits here. She purchased from defendants only title insurance. That insurance provided benefits only in the event of defective or unmarketable title at the time of sale, but Ukoha has alleged no defective nor unmarketable title.

Ukoha argues that Insurance Code section 332 obligated Stewart to disclose to her information material to the policy. We agree. Section 332 states: "Each party to a contract of insurance

shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract . . . ." But as discussed, Behrend's malfeasance was not material to the title insurance policy, which concerned only the property's title at the time of sale, not post-sale misconduct, litigation, or loss.

D. Violation of Business and Professions Code section 17200 and Declaratory Relief

Ukoha's causes of action for violation of the Business and Professions Code (UCL) and her prayer for declaratory relief (which is presented as a cause of action) fail for lack of a predicate. "The UCL defines unfair competition as any unlawful, unfair or fraudulent business practice and any unfair, deceptive, untrue or misleading advertising. [Citations.] In effect, the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." (*Lazar v. Hertz Corp*. (1999) 69 Cal.App.4th 1494, 1505.) Ukoha asserts no UCL claims not predicated on defendants' fraud and breach of contract. As we have already determined that she states no cause of action for either, no necessary predicate of her UCL claims exists.

E. Leave to Amend was Properly Denied

Because Ukoha alleged no facts indicating she had any viable cause of action, defendants' demurrers were properly sustained. Because she offers no alternate, cognizable theory on appeal, nor any indication that she could successfully amend, and none appearing from the record, leave to amend was properly denied.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WHITE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.