

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4419-09T1

LINDA HAWKINS,

Plaintiff-Appellant,

and

ELDRIDGE HAWKINS,

Plaintiff,

v.

WEICHERT TITLE AGENCY,  
FIDELITY NATIONAL TITLE  
INSURANCE COMPANY,  
TRACY TRALLO, ROBERT  
BRITTINGHAM, DONNA  
SULLIVAN and BEHRE and  
BEHRE ASSOCIATES,

Defendants-Respondents.

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Argued January 31, 2011 – Decided September 28, 2011

Before Judges A. A. Rodríguez, C. L. Miniman  
and LeWinn.

On appeal from the Superior Court of New  
Jersey, Law Division, Sussex County, Docket  
No. L-0159-09.

Eldridge Hawkins, Sr., argued the cause for  
appellant.

Russell M. Fineststein argued the cause for respondents Robert Brittingham, Tracy Trallo and Weichert Title Agency (Fineststein & Malloy, attorneys; Mr. Fineststein and Geoffrey C. Jacobson, on the brief).

Derrick R. Freijomil argued the cause for respondents Fidelity National Title Insurance Company and Donna Sullivan (Riker Danzig Scherer Hyland & Perretti, attorneys; Mr. Freijomil and Michael R. O'Donnell, of counsel and on the brief; and Jonathan M. Sandler, on the brief).

Respondent Behre and Behre Associates has not filed a brief.

PER CURIAM

Linda Hawkins appeals from the May 3, 2010 order, granting summary judgment to Weichert Title Agency (Weichert) and its agents, Robert Brittingham and Tracy Trallo; Fidelity National Insurance Company (Fidelity) and its agent, Donna Sullivan; and Behre and Behre Associates. We affirm.

These are the relevant facts. In 2003, Linda Hawkins and her husband Eldridge Hawkins purchased a parcel of land in Lake Hopatcong.<sup>1</sup> They obtained title insurance from Fidelity through Weichert. Weichert retained Dana J. Behre of Behre Associates, "to certify a survey upon which the title agency would insure the property in question." On December 14, 2003, Behre certified the accuracy of the survey. Weichert and Fidelity

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<sup>1</sup> Eldridge Hawkins transferred his interest in the property to his wife on February 13, 2004.

relied upon the surveyor's metes and bounds description in determining the boundaries of the Hawkins property. A title policy was issued by Fidelity, which stated that "[t]he above description was drawn in accordance with a survey prepared by Behre Associates P.C. dated 12/14/03."

In early September 2005, a boundary dispute arose when the owners of the next-door property, Kenneth and Nancy Ernst, sued to quiet title with respect to a small portion of their contiguous property. It is not necessary to discuss in detail the boundary dispute allegations. Suffice it to say, the metes and bounds description of the Hawkins's title policy indicated that the boundary line between their property and the Ernsts stopped at a maple tree stump at the "original high-water mark" of the lake. The accuracy of the metes and bounds at the time the survey was made was not challenged by either side. The dispute, in a nutshell, was about the effect that accretion of land over time had on the high-water mark. In short, the high water mark had moved.

Linda contacted Fidelity and Weichert seeking coverage. Fidelity and Weichert disclaimed on the grounds that the disputed property was outside of the metes and bounds description. The Ernsts obtained a summary judgment in their favor in the trial court. However, we reversed and remanded

because the matter presented contested issues of fact. Ernst v. Hawkins, No. A-5431-06 (App. Div. June 12, 2008) (slip op. at 17).

In February 2009, Linda and Eldridge filed this suit against defendants alleging: breach of contract; breach of implied covenant of good will and fair dealing; malicious interference with the Hawkins's beneficial economic advantage; breach of defendants' fiduciary duty to the Hawkins; professional malpractice; negligence and recklessness; commercial fraud; "aiding, abetting and conspiracy"; and theft.

All defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule 4:6-2(e). Linda and Eldridge opposed the motion. Judge Edward V. Gannon granted the motion. First he found that Eldridge lacked standing to sue because he had transferred his interest in the property. Linda does not challenge that ruling in this appeal.

Second, the judge also dismissed all of Linda's claims against the individually named defendants (Trallo, Brittingham and Sullivan) because the complaint did not allege that they acted outside the normal course of business, and therefore, they were not subject to liability in their individual capacity. Third, the judge dismissed all contract-based claims, because the policy did not cover the disputed property.

Finally, the judge dismissed all other claims sounding in tort or fraud, based on the holding in Walker Rogge, Inc. v. Chelsea Title and Guar. Co., 116 N.J. 517, 529 (1989), which defined the relationship between title insurance agencies and their insureds as essentially contractual in nature.

On appeal, Linda contends that: (a) "the motions which resulted in her complaint being dismissed were actually R. 4:46-2 motions, which were improperly brought and substantively ruled upon"; (b) Judge Gannon "did not search the complaint in depth with liberality to see if a cause of action could be gleaned even from an obscure statement"; and (c) because these actions require determinations of state of mind or intent, waiver, bad faith, fraud or duress, summary judgment was improperly granted. We reject all of these contentions and concur with Judge Gannon's analysis.

Linda claimed breach of a title insurance policy contract. However, as Judge Gannon found, the policy does not entitle Linda to the remedy she seeks. Specifically, she failed to assert a coverage claim for property insured under the title policy. She sought coverage to quiet title to property that falls outside the parcel of land insured in the title policy. The metes and bounds description in the title policy and the property survey clearly show that the adjoining property line

between the Hawkins and their neighbors stops at a maple stump at the "original high-water mark" of the lake. The land disputed by the Ernsts is beyond that point. Therefore, the claims for breach of contract, the implied covenant of good faith and fair dealing, and bad faith failure to provide coverage fail as a matter of law.

Linda's other claims, not based on the title policy, are also without merit. She failed to state any additional duty assumed by any of the defendants or other basis to support the non-title claims against defendants. In short, she failed to allege any relationship or duty other than an ordinary insurer-insured relationship and a duty to provide title coverage.

Lastly, we reject Linda's claim that the judge improperly considered matters outside the four corners of the pleadings without treating the motion as one for summary judgment. We find no merit in this argument. The judge examined the complaint and found no duty by any defendant giving rise to any of the causes of action. We concur with that determination.

We also affirm as to Behre based on the same analysis. No one disputes the accuracy of the metes and bounds description in the survey. The dispute focused on how the passage of time had affected the high-water mark, which is a part of the description in the survey and the title policy.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION