

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION—CIVIL

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LEM 2Q, LLC *et al.*

*Plaintiffs*

v.

GUARANTY NATIONAL TITLE COMPANY,  
FIDELITY NATIONAL TITLE INSURANCE COMPANY,

ROBERT J. VOEGEL,  
ROBERT ROTHSTEIN,  
JOSEPH P. CACCIATORE,  
JOHN DOE 1

and

JANE DOE 2

*Defendants*

: July Term, 2010  
:  
: Case No. 01398  
:  
: Commerce Program  
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:  
:  
: Control No. 14112071  
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ORDER

AND NOW this 26<sup>th</sup> day of November, 2014, upon consideration of the motion for reconsideration of plaintiffs LEM2Q, LLC *et al.* the responses in opposition of defendants Fidelity National Title Insurance Company, Guaranty National Title Company, Robert J. Voegel, and Robert R. Rothstein, it is **ORDERED** that the motion is **DENIED**.

BY THE COURT,

Lem2q, Llc Etal Vs Voge-ORDOP



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MCINERNEY, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
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<b>LEM 2Q, LLC <i>et al.</i></b>	:	July Term, 2010
	:	
<i>Plaintiffs</i>	:	Case No. 01398
	:	
v.	:	Commerce Program
	:	
<b>GUARANTY NATIONAL TITLE COMPANY, FIDELITY NATIONAL TITLE INSURANCE COMPANY, ROBERT J. VOEGEL, ROBERT ROTHSTEIN, JOSEPH P. CACCIATORE, JOHN DOE 1 and JANE DOE 2</b>	:	
	:	
<i>Defendants</i>	:	Control No. 14112071
	:	
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**MEMORANDUM OPINION**

Plaintiffs’ motion for reconsideration asks this court to vacate its Order and *Memorandum Opinion* of November 6, 2014, which denied the motion for summary judgment of plaintiffs, granted the motions of summary judgment of defendants, and dismissed the action in its entirety.

The motion for reconsideration asserts the same arguments contained in Plaintiffs’ motion for summary judgment. Specifically, the motion for reconsideration makes the following assertions:

- the principals of defendant “Guaranty,” through an entity they controlled, loaned funds in excess of \$ 5 million to “Buyers,” to facilitate Buyers’ acquisition of real property (the “Property”). These loans, and the mortgages thereon, were not recorded;<sup>1</sup>

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<sup>1</sup> Motion for reconsideration, p. 2.

- subsequently, Guaranty acted as a title insurer for Buyers when Buyers acquired the Property.<sup>2</sup> At the closing of the Property, Guaranty did not issue any statement disclosing the existence of the afore-mentioned unrecorded loans and mortgages;
- after acquiring the Property, Buyers obtained a mezzanine loan from Plaintiffs, and Guaranty acted as closing escrow agent to the mezzanine loan transaction. Plaintiffs aver they “did not merely request that Guaranty perform escrow services... [rather, Plaintiffs] requested title protection from Guaranty [as set forth] in paragraph 2(B) of the ‘Closing Escrow Agreement;”<sup>3</sup>
- according to Plaintiffs, “Guaranty was obligated to make sure that no new encumbrances existed with respect to the [P]roperty in which [Plaintiffs were] investing;”<sup>4</sup>
- according to Plaintiffs, “Guaranty did not merely withhold relevant, material information from [Plaintiffs] in its role as “escrow” agent, it did so in its role as title agent as well, and this “is the point the Court’s opinion fails to appreciate.”<sup>5</sup>

### Discussion

#### **I. Guaranty had no duty to disclose the existence of unrecorded loans in its capacity as title insurer to the sale of the Property to Buyers.**

The motion for reconsideration asserts that Guaranty, in its role as title insurer to the sale of the Property, owed to Plaintiffs a duty to disclose the existence of unrecorded loans and mortgages upon the Property. Plaintiffs do not cite any law in support of this proposition, and this court has been unable to find such law. However, this court is mindful of the holding in Hicks v. Saboe, a Pennsylvania Supreme Court case, stating that “the duty of a title insurance company runs only to its insured, not to third parties who are not party to the contract.”<sup>6</sup>

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<sup>2</sup> Id., p. 3

<sup>3</sup> Id., p. 2

<sup>4</sup> Id., p. 3

<sup>5</sup> Id., p. 3.

<sup>6</sup> Hicks v. Saboe, 521 Pa. 380, 384, 555 A.2d 1241, 1243 (1989).

In Hicks, “Husband” and “Wife” owned real property as tenants in common. The couple separated and Husband unilaterally sold the property to “Buyers” by forging Wife’s signature on the deed. Husband died and Wife filed an action against Buyers to obtain rescission of the sale. In the action, Buyers joined the “Notary” who had notarized the deed, and Notary in turn joined the “Title Insurer” who had cleared the title before consummation of the sale. The trial court entered judgment against the Title Insurer who appealed. The Pennsylvania Superior Court affirmed.<sup>7</sup> The Title Insurer appealed to the Pennsylvania Supreme Court which reversed and remanded, holding that “the duty of a title insurance company runs only to its insured, not to third parties who are not party to the contract.”<sup>8</sup> In other words the Title Insurer, notwithstanding his failure to disclose the existence of a cloud upon title, had no duty whatsoever to Wife because she had not been a party to the contract; rather, the Title Insurer had a duty only toward Buyers who had hired him to perform title insurance work. The Pennsylvania Supreme Court further noted that although a title insurer owes a duty only to its insured, such a rule could be subject to an exception –specifically, in cases involving an intended third-party beneficiary to the sale of realty.<sup>9</sup>

In this case, Plaintiffs were not parties to the sale of the Property and have not alleged that they were the intended third-party beneficiaries thereof. Guaranty, in its capacity as title insurer to Buyers, did not owe any duty to Plaintiffs, and had no duty to disclose the existence of unrecorded loans made by the principals of Guaranty to Buyers.

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<sup>7</sup> Hicks v. Saboe, 521 Pa. at 383; 555 A.2d 1243.

<sup>8</sup> Hicks v. Saboe, 521 Pa. at 384; 555 A.2d 1243.

<sup>9</sup> Hicks v. Saboe, 521 Pa. at 384; 555 A.2d 1244.

**II. Guaranty had no duty to disclose the existence of unrecorded loans in its capacity as escrow agent of the mezzanine loan transaction.**

Next, the motion for reconsideration re-asserts that Guaranty, as the escrow agent to the mezzanine loan transaction, owed to Plaintiffs a duty to provide them with title protection pursuant to the terms of the Closing Escrow Agreement. According to Plaintiffs, such a duty required Guaranty to disclose the unrecorded loans at the time Plaintiffs provided their mezzanine loan. The pertinent provision of the Closing Escrow Agreement states as follows:

You [Guaranty] are unconditionally ... committed to issue a Date-Down Endorsement ... to ALTA Owner's Policy of Title Insurance no. 07000177 ... which Endorsement is attached hereto as Exhibit B and which Endorsement:

\* \* \*

- (4) shall provide coverage in the same amount as the policy;
- (5) shall show title in the fee interest in the Property vested in [Buyers]; ...
- (7) shall otherwise insure that the Policy has remained unchanged in any term, provision, exception or other matter except the effective date....

Review of the Date-Down Endorsement, which Guaranty was required to issue as escrow agent to the mezzanine loan, shows that all the requirements therein were satisfied. Specifically, the Endorsement states that the "total liability of [Buyers] ... shall not exceed, in the aggregate, the face amount of the Policy," a "Deed of Trust ... has been removed and re-conveyed to [Buyers]," taxes "have been paid in full" and fees "have been paid current."<sup>10</sup> This evidence shows that Guaranty fulfilled its duties as the escrow agent in conjunction with the mezzanine loan transaction. At the time of the

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<sup>10</sup> Proforma Endorsement, attached as Exhibit B to the Closing Escrow Agreement which is Exhibit I to the motion for summary judgment of Guaranty.

closing on the mezzanine loan, any loans from the principals of Guaranty, and any mortgages thereof, were unrecorded and did not encumber the Property. Plaintiffs have cited no law in support of their argument, and this court has already determined that any duties of the escrow holder are strictly circumscribed by the terms set forth in the escrow agreement.<sup>11</sup> The escrow agreement did not require Guaranty to disclose the existence of unrecorded loans or mortgages, and for this reason the motion for reconsideration is denied.

**By The Court,**

  
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**MCINERNEY, J.**

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<sup>11</sup> Knoll v. Butler, 675 A.2d 1308, 1312 (Pa. Commw. 1996).