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STATE OF VERMONT
ADDISON COUNTY

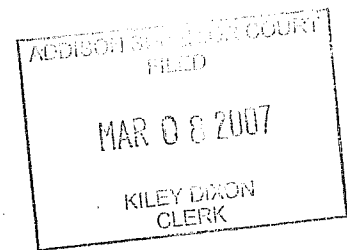
Burak, Anderson & Melloni

HARPERVILLE MANAGEMENT, LLC,
Plaintiff,

v.

AMERICAN LAND TITLE, TICOR TITLE
INSURANCE COMPANY,
JOHN KIRK, ESQ., HARRY CURTH AND
NANCY CURTH, BICKNELL REAL
ESTATE & INSURANCE, INC.,
NORMAN K. BICKNELL
Defendants

ADDISON SUPERIOR COURT
Docket No. 251-11-05 Ancv



RULING ON MOTIONS FOR SUMMARY JUDGMENT

Defendants, American Land Title and John Kirk (American Land Title), Harry and Nancy Curth (the Curths), Bicknell Real Estate & Insurance, Inc. and Norman K. Bicknell (Biknell), and Tigor Title Insurance Company (Tigor) have all filed motions for summary judgment arguing they are not liable to Plaintiff for damages Plaintiff claims it suffered as a result of an alleged title defect arising out of a purchase of property from the Curths. Plaintiff in turn has filed motions for summary judgment against American Land Title, John Kirk, and Tigor Title.¹ For the reasons set forth below, Defendants' motions for summary judgment are granted.

¹ Plaintiff filed one motion for summary judgment for all three Defendants. The motion consists of a long series of factual assertions interspersed with legal conclusions that are unsupported by any legal authority. Accordingly, the court declines to consider Plaintiff's motion for summary judgment for a lack of adequate briefing. See *Brennen v. Mogul Corp.*, 151 Vt. 91, 96 (1988) (noting that failure to cite any case, statute or other authority in support of argument was tantamount to inadequate briefing).

Undisputed Material Facts²

On July 18, 1994, the Curths and Middlebury Associates, LLC (Middlebury Associates) entered into a Right of First Refusal Agreement in which the Curths granted Middlebury Associates a right of first refusal to acquire certain property they owned on U.S. Route 7 in Middlebury, Vermont. The agreement provided in relevant part as follows:

2. Notice. If Grantors receive an offer to sell the Property (the "Original Offer"), Grantors shall notify Grantee by written notice The notice shall include the terms of the Original Offer and shall give Grantee thirty (30) days from the date of receipt in which to exercise its right to purchase the Property. Grantors shall also give notice of any material changes in the Original Offer in the same manner as the original price.

3. Exercise of Right. Grantee shall give notice of its election to purchase or not to purchase the Property by written notice . . . within thirty (30) days of receipt of the notice of the Original Offer

If Grantee fails to act within the thirty (30) day period, this right of first refusal is automatically terminated as to the Original Offer described in the notice, provided that the property is transferred pursuant to the terms of such offer.

6. Successors and Assigns Bound. This right of first refusal shall be binding upon Grantors, their heirs, successors, executors, administrators and assigns, and shall for the benefit of Grantee and its heirs, successors, executors, administrators or assigns.

See Right of First Refusal Agreement.

² The recited facts are based on the undisputed material facts submitted by Defendants pursuant to V.R.C.P. 56(c)(2). Plaintiff did not respond to Tigor's motion for summary judgment and therefore Tigor's facts are admitted to the extent that they are material and supported by the record. Plaintiff filed a response to the other Defendants' statements of undisputed material facts, but only disputed a small number of these facts, none of which was material. Therefore, Defendants' undisputed material facts are admitted to the extent that they complied with V.R.C.P. 56(c)(2). However, any facts not material to the parties' motions or any facts not contained in the record were omitted.

Several years later, the Curths decided to sell the property and entered into an agreement with Bicknell in which Bicknell was to act as the Curths' real estate agent and market the property. *See Exclusive Marketing Agreement, February 1, 2002.* On April 3 2002, Plaintiff, through its authorized principal, William J. Hutchins, offered \$280,000 to purchase the Curths' property and a car wash located on the property. Under the terms of the purchase and sale agreement, Plaintiff was to obtain a mortgage for \$210,000 and the remaining \$70,000 was to be financed by a second mortgage provided by the Curths. The purchase and sale agreement specifically provided that the right of first refusal was to become part of the agreement. *See Purchase and Sale Agreement.*

The same day, Norman Bicknell sent a letter to Myron Hunt of Middlebury Associates notifying him that the Curths had received an offer to purchase their business for \$280,000. The letter included the amount of the Curths' proposed second mortgage and a closing date of June 10, 2002, and advised Hunt that Middlebury Associates had thirty days to purchase the property under the terms of the right of first refusal agreement. *See Letter from Norman Bicknell to Myron Hunt, April 3, 2002.* A few days later, the Curths accepted Plaintiff's offer. *See Purchase and Sale Agreement.*

On April 12, 2002, Andrew Hunt of Middlebury Associates wrote to Bicknell advising him that Middlebury Associates was interested in exercising its right of first refusal, but needed a "fair allocation of the \$280,000 purchase price between the business, real property and equipment." *See Letter from Andrew Hunt to Norman Bicknell, April 12, 2002.*

A few weeks later, Myron Hunt wrote to Bicknell advising him that Middlebury Associates could not make a decision on whether to exercise its right of first refusal until

it received a response to its earlier letter. *See* Letter from Myron Hunt to Norman Bicknell, April 30, 2002.

On May 17, 2002, Bicknell wrote to Myron Hunt advising him that the purchase price for the property, excluding carwash equipment, inventory and goodwill, was \$250,000. Bicknell also advised Hunt that the purchase was subject to the acceptance of a one year lease back to Harry Curth. Bicknell asked that Hunt indicate whether he was interested in the proposal within ten days because the closing was scheduled for June 10, 2002. *See* Letter from Norman Bicknell to Myron Hunt, May 17, 2002.

The following month, Myron Hunt wrote to Bicknell advising him that he assumed, having heard nothing to the contrary, that the sale of the Curths' property had closed on June 10, 2002 pursuant to the price and terms contained in the purchase and sale contract and that the Curths had taken back a mortgage of \$70,000. Hunt further advised that Middlebury Associates had chosen not to exercise its right of first refusal based on the purchase and sale contract, but that the right would continue to be binding upon Plaintiff and its successors and assigns for the benefit of Middlebury Associates, its successors and assigns. Hunt indicated that the letter was conditioned on Plaintiff signing the letter and sending back the original to Middlebury Associates.

Hutchins countersigned the letter on June 25, 2002. *See* Letter from Myron Hunt to Norman Bicknell, June 13, 2002. At the time he countersigned, Hutchins did not want the right of first refusal to be binding on Plaintiff. *See* Jamie Hutchins Deposition, pp. 82-83.

In July of 2002, Plaintiff's attorney, David Olenick, wrote to Defendant Kirk advising him that he was going to refer Hutchins to him for a title search on the property

Plaintiff was buying from the Curths. *See* Letter from Dave Olenick to John Kirk, July 10, 2002. At the time, Kirk was employed by American Land Title, which was an agent for Ticor for the purposes of selling title insurance. Hutchins ended up hiring Kirk to conduct a title search prior to the closing. *See* Hutchins Depo., p. 108; Kirk Depo., p. 144. Kirk conducted the title search and issued a title commitment to Plaintiff in the amount of \$250,000 in July of 2002.

The title commitment provided that “the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company.” One of the exceptions listed stated as follows: “Subject to the Right of First Refusal Agreement dated July 18, 1994 and recorded in Book 153, Page 607 of the Town of Middlebury Land Records.” *See* American Land Title Association Commitment, Schedule B-Section 2(21).

Several days before the closing, Kirk called Hutchins and told him that the closing was scheduled for November 22, 2002, and that “[e]verything ha[d] been taken care of.” Hutchins took that to mean that the right of first refusal “had been cleared up.” *See* Hutchins Depo., p. 84.

Later that year, Plaintiff and the Curths agreed to change the financing terms so that the Curths would take back a \$90,000 mortgage and the remaining amount would be financed by a \$15,000 note, a \$165,000 mortgage issued by First Bank, and \$10,000 in cash payable at closing. *See* Addendum to the Purchase and Sale Contract executed on October 9, 2002. The following month, the Curths conveyed the property to Plaintiff by warranty deed. The warranty deed provided in part as follows:

Grantors gave notice of the right of first refusal to Middlebury Associates in accordance with its terms.

Middlebury Associates responded on June 13, 2002, that it was not exercising said right of first refusal with respect to this transaction. The right of first refusal shall continue to be binding upon Grantee, its successors and assigns, for the benefit of Middlebury Associates, its successors and assigns.

The deed was recorded on November 27, 2002. *See* Warranty Deed, November 22, 2002.

The Vermont Property Transfer Tax Return associated with this conveyance reflects that the real property sold for \$250,000 and that the personal property sold for \$30,000. *See* Vermont Property Transfer Tax Return, November 27, 2002.

Plaintiff's title insurance policy was issued by Ticor on November 27, 2002. It contained the same exception from coverage listed in the earlier title commitment. This exception stated as follows: "Subject to the Right of First Refusal Agreement dated July 18, 1994 and recorded in Book 153, Page 607 of the Town of Middlebury Land Records." *See* American Land Title Association Owner's Policy, Schedule B(20). Hutchins did not read this or any of the other policy's exclusions. *See* Hutchins Depo., pp. 108-09.

At the end of 2003, Plaintiff entered into negotiations with Merchants Bank regarding a possible lease of the property it had purchased from the Curths. However, when a title search revealed that the property was subject to a right of first refusal, the bank's attorney demanded confirmation that any future sale of the bank would not trigger the right of first refusal. *See* E-mail from Diane McCarthy, December 15, 2003.

Plaintiff wrote to Middlebury Associates requesting that it execute a Waiver of Right of First Refusal with respect to the proposed lease to Merchants Bank. Middlebury Associates responded by stating that the June, 2002 waiver of its right of first refusal was null and void because the terms of the sale of the Curths' property were "materially

changed” from what had been originally represented to Middlebury Associates. According to Middlebury Associates, the change in the financing terms, the failure to close on June 10, 2002, and the failure to include, as part of the sale agreement, a lease to the Curths for one year were all material changes to the terms of the sale that were never communicated to them. Middlebury Associates requested that they be advised as to the exact terms and conditions of the transaction between Plaintiff and the Curths so that they could have the opportunity to purchase the property on the same terms and conditions. *See* Letter from Middlebury Associates to Jamie Hutchins, February 13, 2004. Plaintiff never sued Middlebury Associates to determine whether or not the right of first refusal had been validly waived. *See* Hutchins Depo., p. 115. The proposed lease with Merchants Bank then fell through as a result of concerns the bank had about the right of first refusal.

In response to a claim made under the title insurance policy, Ticor denied Plaintiff coverage based on the policy’s exception to coverage relating to the right of first refusal. *See* Letter from Ticor to Andrew Jackson, dated November 2, 2004.

In November of 2005, Plaintiff conveyed to Middlebury Associates the property he had purchased from the Curths as well as a 0.66 acre lot adjoining the property for \$400,000. Plaintiff estimates that the 0.66 acre lot was worth about \$50,000 at the time of the sale. *See* Hutchins Depo., pp. 115-16.

Discussion

Summary judgment is appropriate where there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); Greene v. Stevens Gas Service, 2004 VT 67, ¶ 9, 177 Vt. 90. The nonmoving party is

“entitled to the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists,” and the “facts bearing on the issue must be clear, undisputed or unrefuted.” Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 48 (1990).

I. Plaintiff’s Claim Against American Land Title

In its motion for summary judgment, American Land Title argues that it is not liable to Plaintiff on its claim that American Land Title failed to obtain a proper release of right of first refusal from Middlebury Associates.³ American Land Title claims that the right of first refusal was extinguished, as a matter of law, when Plaintiff purchased the property from the Curths because Middlebury Associates technically and explicitly waived its right of first refusal and because a right of first refusal is a personal covenant that does not run with the land. Therefore, according to American Land Title, Plaintiff’s claimed damages flow from a mistaken view that the property was encumbered at the time of the purchase. Accordingly, American Land Title argues that even if it did breach the applicable standard of care, that breach did not cause Defendant’s damages.

In response, Plaintiff argues that Middlebury Associates did not waive its right of first refusal because (1) Kirk concerned himself with the right of first refusal issue after Middlebury Associate’s June 2002 letter in which it indicated it was waiving its right of first refusal; and (2) William Schroeder, Esq. stated in an affidavit that the right of first refusal had not been waived. Plaintiff also argues that because the Vermont Supreme Court has not determined whether a right of first refusal touches and concerns the land, “it can hardly be argued that there is no problem with the manner in which Kirk and

³ In its complaint, Plaintiff alleges that American Land Title is liable to them in tort and in contract and under the Vermont Consumer Fraud Act for failing to obtain a proper release of the right of first refusal from Middlebury Associates. See Counts II, III, and VI of Plaintiff’s complaint.

American Land Title conducted the title issue of the right of first refusal.” Plaintiff failed to cite any legal authority to support either argument.

1. Whether Middlebury Associates Waived Its Right Of First Refusal

The court declines to address whether Middlebury Associates waived its right of first refusal either implicitly or explicitly because even if it did, it did so only with respect to Plaintiff’s offer to purchase. The Right of First Refusal Agreement provides that: “If Grantee fails to act within the thirty (30) day period, this right of first refusal is automatically terminated *as to the Original Offer* described in the notice, provided that the property is transferred pursuant to the terms of such offer.” (Emphasis added.) In its letter to Plaintiff in June of 2002, Middlebury Associates stated that it was not exercising its right of first refusal based on the purchase and sale contract between Plaintiff and the Curths. Therefore, even if Middlebury Associates did waive its right of first refusal, it did so only with respect to Plaintiff’s offer to purchase the property from the Curths. Accordingly, American Land Title’s claim on the issue of waiver fails.

2. Whether A Right Of First Refusal Runs With The Land

A party who is not the original covenantee of a covenant may not enforce the covenant unless it “runs with the land.” See Chimney Hill Owners’ Ass’n, Inc. v. Antignani, 136 Vt. 446, 454 (1978). In order for a restrictive covenant to run with the land, four requirements must be met: “(1) the covenant must be in writing; (2) the parties to the covenant must have intended that the covenant run with the land; (3) the covenant must ‘touch and concern’ the land; and (4) privity of estate must exist between the parties.” Gardner v. Jefferys, 2005 VT 56, ¶ 6, 178 Vt. 594.

American Land Title concedes the first, second, and fourth of the aforementioned requirements were met, but argues that the third requirement, that the covenant touch or concern the land, was not.⁴ A covenant touches and concerns the land if it is bound up with the land and benefits the covenantee as landowner. Albright v. Fish, 136 Vt. 387, 394 (1978); Kellogg v. Robinson, 6 Vt. 276, 279-80 (1834). Although the Vermont Supreme Court has not considered whether a right of first refusal is a covenant that touches and concerns the land, other courts that have considered this issue have concluded that it does not.⁵

In Fleishman v. Ottinger, 138 B.R. 641, 644 (Bankr. D. Mass. 1992), the court explained that

the Right of First Refusal does not touch and concern the land. It does not confer a direct physical advantage to the occupation of the Premises, nor does it relate to the mode of occupying or enjoying the land or the ability to control development or commercial use. It cannot be interpreted to be inherent in or attached to the land. The Right of First Refusal only relates to the contractual right of [the holder] or its assigns to select its neighbors.

Similarly, in Clark v. Caldwell, 132 A.D.2d 171 (N.Y. App. Div. 1987), the court noted that a right of first refusal contained in a deed “did not touch and concern the land since the covenant did not in purpose and effect substantially alter the rights of the covenantor in the land.” Id. at 174. Finally, in Feider v. Feider, 699 P.2d 801 (Wash. Ct. App. 1985), the court considered the enforceability of a right of first refusal agreement entered into by two brothers (Francis and Andrew Feider) that purported to bind the brothers’

⁴ Although there is no doubt the right of first refusal was in writing and that the parties intended that it to run with the land, it is not entirely clear that there was privity of estate between the parties. However, because American Land Title concedes the point, the court need not resolve the issue.

⁵ In In re Coordinated Financial Planning Corp., 65 B.R. 711, 713 (B.A.P. 9th Cir. 1986), the court held that a right of first refusal was a covenant that ran with the land. However, the court based its ruling on a statutory provision. See id.

heirs and assigns. Id. at 802. Andrew died and Francis subsequently sold the property without first offering to sell it to Andrew's children. Id. Andrew's children then filed suit seeking specific performance or damages for breach of the right of first refusal agreement on the basis that it was a covenant enforceable by Andrew's heirs. Id. The court rejected the plaintiffs' argument in part because there was no evidence that the agreement touched and concerned the land. Id. at 804. The court explained that "no interest in land is created by a right of first refusal; only personal rights are affected. A preemptor acquires no present right to affect the property but holds only a right to acquire a later interest should the property owner decide to sell." Id.

This court agrees with the analysis of the Massachusetts, New York, and Washington Courts, and concludes that the right of first refusal at issue in this case did not touch and concern the land and consequently did not run with the land. Therefore, the right of first refusal was extinguished at the time the Curths sold the property to Plaintiff. However, this does not fully resolve this case, as explained below.

According to Plaintiff, it was because of Middlebury Associates' claim that it was still entitled to exercise a right of first refusal on Plaintiff's property that Plaintiff was forced to abandon the proposed lease arrangement with Merchant's Bank and to sell the property to Middlebury Associates. Had the right of first refusal still been valid after Plaintiff purchased the property, this argument might make sense because Plaintiff would have possessed a defective title. However, Middlebury Associates' assertion that it could still exercise a right of first refusal did not mean that Plaintiff's title was defective. *See Miller v. Tigor Title Insurance Co.*, 93 P.3d 88, 92 (Or. Ct. App. 2004) (noting that a mere claim by a third party against a property's title did not qualify as a title defect). It

was Plaintiff's subjective belief that the title was defective and not any actual title defect that caused Plaintiff's damages.⁶ Therefore, the court concludes, as a matter of law, that even if American Land Title breached any duty to Plaintiff, that breach did not cause Plaintiff's damages. In addition, although American Land Title did not explicitly address Plaintiff's breach of contract allegation in its summary judgment motion, the court also concludes, as a matter of law, that even if a breach of contract occurred, that breach likewise did not cause Plaintiff's damages. Accordingly, American Land Title's motion for summary judgment is granted with respect to Plaintiff's negligence and contract claims.⁷

II. Plaintiff's Claim Against The Curths

In their motion for summary judgment, the Curths argue that they are not liable to Plaintiff on its claim that they breached the warranties contained in the warranty deed by failing to extinguish the right of first refusal. Like American Land Title, the Curths argue Middlebury Associates waived its right of first right of first refusal by either failing to exercise the right within 30 days of Bicknell's May 17, 2002 letter, or by explicitly waiving the right in the June 13, 2002 letter. The Curths also argue that they did not

⁶ If Plaintiff truly believed that the right of first refusal had not been extinguished, it could have sought judicial adjudication of the status of the right of the first refusal. Instead, Plaintiff chose to simply sell the property to Middlebury Associates. See James v. Partin, No. CA2001-11-086, 2002 WL 1058152, at *3 (Ohio Ct. App. 2002) (admonishing plaintiffs for voluntarily conveying part of their property to individual claiming ownership, instead of seeking to quiet title).

⁷ American Land Title also filed a motion to dismiss Count VI of Plaintiff's complaint, in which Plaintiff alleged that American Land Title violated Vermont's Consumer Fraud Act by telling Plaintiff that it had "clear title." American Land Title argues that its representations to Plaintiff constituted opinions rendered by a lawyer and that therefore the statute did not apply. However, in light of the court's conclusion that the right of first refusal was extinguished when Plaintiff purchased the property, it is unnecessary to address whether American Land Title's representations were opinions. One of the elements a plaintiff must establish under the Consumer Fraud Act is that the defendant made a representation, practice, or omission that was likely to mislead. See Peabody v. P.J.'s Auto Village, Inc., 153 Vt. 55, 57 (1989). Assuming American Land Title told Plaintiff that it had "clear title," that was an accurate statement, given that the right of first refusal was extinguished, and therefore was not "likely to mislead." Therefore, American Land Title's motion to dismiss Count VI is granted.

breach any duty to Plaintiff, that Plaintiff cannot establish causation or damages, and that Plaintiff's recovery would in any event be barred under the doctrine of laches.

Relying again on an affidavit of William Schroeder, Plaintiff argues that the right of first refusal was not discharged, and that therefore, there was a defect in the title resulting in a breach of the covenant of general warranty contained in the warranty deed. Plaintiff also argues that it established causation and damages based on Merchants Bank's failure to go through with the lease. Finally, Plaintiff argues that the doctrine of laches does not apply because Plaintiff brought the right of first refusal issue to the Curths' attention prior to Merchants Bank's withdrawal from the lease negotiations.

As discussed earlier, the right of first refusal was extinguished at the time the property was conveyed to Plaintiff. Also, as discussed earlier, the mere claim by a third party against a property's title, without more, does not qualify as a defect in title. *See Miller*, 93 P.3d at 92. In Booker T. Washington Construction & Design Co. v. Huntington Urban Renewal Authority, 383 S.E.2d 41 (W. Va. 1989), the court explained:

The "necessity" that the title be defended requires that there actually be a defect in the title as a prerequisite for the covenantor's liability under his general warranty deed. "[T]he covenantee is clearly not entitled to demand of the covenantor expenses in defending a suit which sustains the title as valid, for the covenant does not bind for any outlays necessitated by the simple existence or assertion of an adverse claim." In this sense, the covenant is not really a promise to defend the title "against the claims and demands of all persons whomsoever," but rather a promise to defend the title against all such claims that would prevail.

Id. at 45 n. 9 (alteration in original) (citation omitted). In this case, because there was no defect in the title, there was no breach of the covenant of general warranty contained in the warranty deed. Therefore, the Curths did not breach any duty to Plaintiff.

Accordingly, the Curths' motion for summary judgment is granted. Because the motion for summary judgment is granted, it is not necessary for the court to consider the Curths' remaining arguments.

III. Plaintiff's Claim Against Bicknell

In its motion for summary judgment, Bicknell argues that it is not liable to Plaintiff on its claims that Bicknell breached its duty to use reasonable care to properly obtain a release of the right of first refusal from Middlebury Associates and violated Vermont's Consumer Fraud Act by telling Plaintiff it had clear title. Bicknell argues that it did not owe Plaintiff a duty to obtain a release from Middlebury Associates, that it failed to breach such duty, and that even if it did breach this duty, this breach was not the proximate cause of Plaintiff's damages. Bicknell also incorporates by reference the arguments contained in American Land Title's and the Curths' motions for summary judgment.

In addition, pursuant to V.R.C.P. 12(b)(6), Bicknell has moved to dismiss Plaintiff's Consumer Fraud Act claims for failure to state a claim upon which relief can be granted. Bicknell also argues that with respect to Plaintiff's claim against Norman Bicknell as an individual, this claim should be dismissed for failure to pierce the corporate veil.

In response, Plaintiff argues that Bicknell is liable under a negligence theory for failing to obtain a proper release of the right of first refusal. Again, Plaintiff relies on the affidavit of William Schroeder, as evidence that the right of first refusal was not properly released. However, given that the right of first refusal was extinguished when the Plaintiff purchased the property, it is irrelevant that Bicknell allegedly failed to obtain a

release of the right of first refusal or that he said that he would. Therefore, this court grants Bicknell's motion for summary judgment with respect to all Plaintiff's claims against Bicknell including Plaintiff's Consumer Fraud Act claim. Because summary judgment is granted, it is unnecessary for the court to consider Bicknell's motion to dismiss.

IV. Plaintiff's Claim Against Ticor

In its motion for summary judgment, Ticor argues that it is not liable to Plaintiff on its claim that Ticor breached its duty of good faith and its duty to defend Middlebury Associates' right of first refusal claim. It also argues that it is entitled to summary judgment on Plaintiff's claim that Ticor violated the Vermont Consumer Fraud Act by stating that Plaintiff had clear title to the property. Ticor maintains it had no duty to defend Middlebury Associates' claim because the policy issued to Plaintiff expressly excluded coverage for any claims relating to the right of first refusal. Ticor further maintains that Plaintiff's claim under the Consumer Fraud Act fails because the statute does not apply to insurance contracts and because Plaintiff should reasonably have known there was no coverage under the insurance policy. Plaintiff did not respond to Ticor's motion.

A. Whether The Claim Relating To The Right Of First Refusal Was Excluded Under Ticor's Policy

An insurance policy is construed "according to its terms and the evident intent of parties as expressed in the policy language." Northern Sec. Ins. Co. v. Perron, 172 Vt. 204, 209 (2001). In this case, the insurance policy contained an exception from coverage which provided as follows: "Subject to the Right of First Refusal Agreement dated July 18, 1994 and recorded in Book 153, Page 607 of the Town of Middlebury Land

Records.” It is clear that this provision is referencing the right of first refusal agreement between the Curths and Middlebury Associates. When the exclusionary language in an insurance policy is unambiguous, the language is reviewed “from the perspective of what a reasonably prudent person applying for insurance would have understood it to mean.” Maine Mut. Fire Ins. Co. v. Tinker, 2005 VT 35, ¶ 6, 178 Vt. 522 (mem.) (quotations and citation omitted). Given the plain language of exclusion at issue in this case, no reasonable person could have concluded that claims related to a right of first refusal would be covered under the policy.⁸ Since there was no possibility of coverage, there was no duty to defend. Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 368 (1992). Accordingly, the court grants Ticor’s summary judgment motion on the issue of whether it breached its duty of good faith and its duty to defend.

B. Whether Ticor Is Liable Under The Consumer Fraud Act

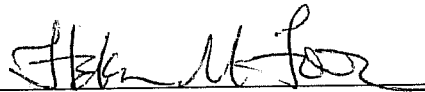
Relying on Wilder v. Aetna Life & Cas. Ins. Co., 140 Vt. 16 (1981), Ticor argues that it cannot be liable under the Consumer Fraud Act because selling an insurance policy is not a contract for “goods and services” within the meaning of the statute. *See id.* at 18 (citing 9 V.S.A. § 2461). Ticor has correctly stated the law. Therefore, Ticor’s motion for summary judgment on its liability to Plaintiff under the Consumer Fraud Act is granted.

⁸ As Ticor notes in its motion, courts in other jurisdictions that have specifically considered similar exceptions to coverage in title insurance policies have concluded that no coverage existed. *See Moreno v. Macaluso*, 817 F. Supp. 945, 945-46 (M.D. Fla. 1993) (holding that title insurance company had no duty to indemnify where policy excluded coverage for certain mortgage and mortgagee later took forced possession of property based on that mortgage); Panciocco v. Lawyers Title Insurance Corp., 794 A.2d 810, 814 (N.H. 2002) (holding that plaintiff could not reasonably expect coverage where claims at issue were expressly excepted from title insurance policy’s unambiguous language); Delessio v. Williams, 675 N.E.2d 1299, 1302 (Ohio Ct. App. 1996) (holding that title insurance company had no duty to defend claim relating to violation of plat restriction where policy excluded coverage for loss or damage relating to plat restrictions).

Conclusion

The motions for summary judgment filed by American Land Title, the Curths, and Bicknell are granted on the basis that the right of first refusal was extinguished at the time Plaintiff purchased the property from the Curths. For the same reason, American Land Title's motion to dismiss is granted. Ticor's motion for summary judgment is granted on the basis that its title insurance policy specifically excluded coverage for any claim relating to the right of first refusal and because the Vermont Consumer Fraud Act does not apply to insurance contracts. The clerk is directed to enter Judgment for Defendants.

Dated at Middlebury this 8th day of March, 2007.



Helen M. Toor
Superior Court Judge