

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JEFFREY R. JABLONSKI
JUDGE



BRENNAN COURTHOUSE
583 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306
(201) 795-6660 (TELEPHONE)
(201) 795-6762 (TELEFAX)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINONS

Thursday, August 31, 2017

William Wallach, Esq.
McCarter & English
4 Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

John Piskora, Esq.
Loeb & Loeb
345 Park Avenue
New York, New York 10154

Re: 212 Marin Boulevard v. Chicago Title Insurance CO.
Docket No. HUD-L-5801-09

Dear Counsel:

This is the Court's decision and order following the two-day, non-jury trial that was held on April 3 and 4, 2017.

Procedural history:

This litigation began when certain entities that are designated as the LLCs for this opinion¹ sued Chicago Title

¹ The LLCs include: Consolidated Rail Corporation (Conrail) SLH's assignees, 212 Marin Boulevard, LLC, 247 Manilla Avenue, LLC, 280 Erie Street LLC, 280 Erie

requesting that Chicago Title defend the LLCs from a perceived title defect after the LLCs purchased premises in Jersey City that included a parcel that is colloquially known as the Embankment. Conrail sold the entire parcel to the LLCs on July 13, 2005. After the purchase, Jersey City challenged the LLCs' title arguing that abandonment of the Embankment by the Surface Transportation Board (STB) had not been obtained and that this lack of action rendered the transfer invalid. Chicago Title challenged the LLCs' request to defend title, and the LLCs ultimately moved for summary judgment as part of the litigation seeking a determination of that responsibility. The law division judge concluded that Chicago Title was responsible to defend its insureds and to reimburse the LLCs for the legal fees that those entities incurred to obtain this coverage. The Court, however, did not reach the question of Conrail's obligation to indemnify Chicago Title.

The coverage determination was appealed. In May 2015, the Appellate Division affirmed the law division judge's conclusions. However, the Appellate Division remanded the matter to the trial court to consider additional fees that might be due to the LLCs. Ultimately, the LLCs and Chicago Title settled their dispute for \$5 million.

Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue LLC,

The present litigation before this Court concerns the third party claim that Chicago Title filed against Conrail seeking indemnification and contribution toward any monetary responsibility assumed by Chicago Title. Specifically, Chicago Title seeks to recoup the \$5 million settlement proceeds plus interest that it paid to the LLCs under the theory that Conrail made false representations of material facts pre-closing. Conrail disagrees and argues that there were no material factual misrepresentations about the nature of the Embankment and that there were any damages that were proximately caused by Conrail.

The Court, after reviewing the pleadings, and considering both the testimony of the witnesses who appeared and the documentary evidence admitted, makes these findings of fact:

Findings of fact:

1. The premises that are at issue are located on Sixth Street in Jersey City, New Jersey. The premises measures 6.2 acres and includes 8 separate parcels.
2. The premises were conveyed to Conrail by deed on March 31, 1976 from Fairfax Leary, the trustee of the property of the United New Jersey Railroad and Canal Company.
3. The premises included a former railroad facility known as the Sixth Street Embankment (the Embankment).

4. The Embankment consists of a series of elevated structures made of earth-filled stone retaining walls and connected by bridges.
5. Conrail used part of the embankment as a turnaround space for trains until 1994, according to Robert Ryan, the Director of Real Estate for Conrail.
6. As noted by Mr. Ryan, "Conrail acquired portions of the Harsimus Cove Yard and the elevated lead (the "embankment lead" into that yard. From the beginning the Harsimus Cove Yard and embankment lead served only a switching function for a handful of shippers, as well as providing storage and turnaround space for cars and trains."
7. "Conrail always treated these yard properties as subject to liquidation without federal regulatory approval", according to Mr. Ryan.
8. Mr. Ryan noted that the description of the premises is not consistent with a line of railroad determination. Specifically, the area in question was characterized as "CP Waldo" and designated as milepost 0.0 or the end of the rail line.
9. The branch described by General Order #1, the embankment lead and Harsimus cove Yard track was not part of the line since the line of railroad was deemed to be between CP

Waldo (MP 0.0) and Lane (M.P 9.3). The branch was, therefore, spur track because to Conrail:

- The yard was always treated as a "yard and switching track."
- Conrail considered the embankment lead and Harsimus Cove Yard track as separate from any auxiliary to the "line of railroad" that served the area.
- Conrail did not downgrade the status of the Embankment lead nor what remained of the rest of the Harsimus Cove Yard Track. That trackage was already downgraded before Conrail began its operations.
- On March 29, 1994, discussions took place between the City Engineer and the Conrail engineer regarding an "authorization for expenditure vis-à-vis the need for abandonment and that, according to Mr. Ryan, included discussion about different concepts concerning the demolition at the premises did not require any intermediate regulatory steps.
- Conrail disclosed to the City a list of spur decisions made by the Conrail Law Department that revealed that in April 1994, that the Harsimus Br. Track was a spur track.
- National Bulk Carriers reached a similar conclusion in 1994.

10. By 1997, all tracks and bridges on the Embankment were removed and the Embankment was no longer used. After the removal "the individual embankment properties have not been physically connected to each other and have served no railroad or other practical or useful function."
11. In the late 1990's Conrail opened discussions with the Jersey City Redevelopment Authority (JCRA) about developing the Embankment to "realize [the Embankment's] real estate value" and specifically for residential housing.
12. These efforts ceased, however, when a group of citizens was successful in having the State of New Jersey designate the Embankment as a "historic place" over the objection of Conrail as noted in its June 4, 1999, letter to the Department of Environmental Protection.
13. On December 17, 2002, Conrail expressed its intentions to sell all of the Embankment properties.
14. In 2003, Conrail put the premises out for bid.
15. Soon thereafter, Conrail opened negotiations with SLH Holdings Company to sell the Embankment to the separate LLCs that SLH Holdings created for development purposes.
16. These negotiations occurred after Conrail sought other bidders for the project as noted in the Bid Tracking Report.

17. Conrail sent twenty-three bid packages between October 24, 2002, and January 2, 2013.
18. The first bid package, designated bid package #201, was sent directly to the Jersey City Redevelopment Agency (JCRA). This bid package was sent on October 24, 2002. However, the City never demonstrated any interest in making a formal bid to purchase the property in response to it.
19. On January 13, 2013, John Fiorilla, Esq., the attorney for Conrail, wrote to the JCRA to follow up on the bid request. There was no response.
20. Following the enactment of the Jersey City ordinance declaring the Embankment as historic property, Mr. Fiorilla followed up with the JCRA again. There was no response.
21. SLH Holding Co, LLC was the only bidder that had met Conrail's minimum bid requirements.
22. On June 24, 2003, Conrail agreed to sell and SLH agreed to purchase the entirety of the parcel, including the Embankment. The contract was modified on October 27, 2004.
23. In paragraph 12 of the original contract, the parties agreed that Conrail had not made any representations nor warranties to the Purchaser concerning the property,

including any representation or warranty as to the condition of the property or the quality of Conrail's title to the property.

24. Further, the parties agreed that in the event that the conveyance was contrary to any law, regulation or other of any governmental authority, the agreement would be terminated and all parties released from liability.

25. In contract paragraph 15(n), it was agreed that Conrail would not have any obligation to provide the Purchaser to the title insurance company or to any party whatsoever an affidavit of title or any similar document that may be customarily used at closing on a sale of real property.

26. After the sale, the LLCs began to improve the property. This action prompted Jersey City to petition the Surface Transportation Board (STB) to declare that Conrail's sale of the Embankment to SLH was void because Conrail did not obtain abandonment authorization from the STB. Substantial collateral, but related, litigation ensued in the District of Columbia District Court and the United States Court of Appeals for the D.C. Circuit since the appeals taken from the STB by the aggrieved parties before that board were venued in the District of Columbia. Specifically;

- In January 2006, Jersey City, Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Coalition and State Assemblyman Louis M. Manzo petitioned the Surface Transportation Board (STB) for an order declaring that Conrail was required to obtain authorization from the STB to abandon the Embankment.

- Conrail had not obtained abandonment authorization from the STB before selling the Embankment to the LLCs.

- In August 2007, the STB concluded that the Embankment property sold to the LLCs remained part of the national rail system subject to the STB's exclusive jurisdiction until appropriate abandonment authority is obtained.

- Conrail appealed this determination to the United States Court of Appeals for the D.C. circuit.

- On June 26, 2009, the Court of Appeals vacated the Board's orders and held that the STB's orders were jurisdictionally infirm. Conrail v. Surface Transportation Board, 571 F.3d 13, 20 (D.C. Cir. 2009). Specifically, the Court ruled that the STB did not have authority to determine whether a railroad track is a "line" or a "spur" for purposes of abandonment authorization. Id. That analysis and decision was exclusive to the District Court. Id. On the other hand, the

decision to authorize an abandonment was determined to be exclusive to the STB. Id.

- In separate litigation, City of Jersey City v. Consolidated Rail Corp, 968 F. Supp.2d 302 (D.C. Dist. 2013), the District Court noted that the City of Jersey City, Conrail, and 212 Marin LLC stipulated that the Harsimus Branch was conveyed to Conrail as a line and not as a spur. Id. at 308. Therefore, the decision as to whether to authorize the abandonment was subject to STB's jurisdiction. Id. The Court of Appeals affirmed this decision in 2014. City of Jersey City v. Conrail, 2014 U.S. App. LEXIS 3067 (2014).

- The regulatory proceedings before the STB remain Open to date.

27. SLH was represented in the transaction by Carmine Alampi, Esq., and Conrail, by Mr. Fiorilla.

28. On May 30, 2004, Vested Title, as agent for Chicago Title, issued a title commitment to SLH for the properties.

29. In correspondence dated August 30, 2004, Robert Narucki, Agency Counsel for Chicago Title, indicated to Vested Title that he had "reviewed the commitment in the captioned matter and find the same to be in order except" for the completion of a policy approval form and the inclusion of an insurance description of the premises.

30. That letter concluded with authorization "to take whatever steps are necessary, consistent with sound underwriting practices, to close the title and to issue the policy or policies, notwithstanding the fact that the amount thereof may exceed your agency's contractual limit."
31. Chicago Title used the Handbook of New Jersey Title Practice that was authored by Lawrence Fineberg, Esq. for guidance as to address the issues that arise from the conveyance of property from a railroad.
32. Section 9806(4) of that treatise notes that in order to insure a conveyance from a railroad, one should require, "approval by the STB pursuant to 40 USC Sec. 1 et seq. or, in the alternative, proof that such approval is not required."
33. Section 9806(5) notes that "if STB approval is required, proof of compliance with the ninety (90) day notice provisions of N.J.S.A. 48:12-125.1, et. seq. with respect to the state of New Jersey, the County of ____ and the [municipality] of _____." In the comments section, it is noted as to sections 3 and 4 of Sec. 9806, "if approvals are not required, a letter or affidavit from the railroad is normally sufficient."

34. On July 8, 2005, Mr. Ryan e-mailed SLH's principal and attorney regarding the "possibility of closing this transaction next week in order to accommodate a like-kind exchange and that a decision is imminent from you as to whether or not you desire to take this route."
35. On July 10, 2005, Bridget McLaughlin, a legal assistant, e-mailed Vested Title and noted that "we must close these properties on Wednesday-July 13, 2005!! (morning closing)."
36. On July 11, 2005, Mr. Fiorilla responded with a list of points of information. Included in that list was item #6 that noted: "the properties abandoned constituted "spur tracks" over which the STB and previously the ICC had not authority pursuant to 49 USC Sec. 10906. Therefore, no formal abandonment of the property was ever filed."
37. Vested Title relied on that representation, and issued the title insurance policies.
38. The closing occurred on July 13, 2005, and the LLCs took title, by quitclaim deed, to the 8 parcels including the Embankment property.
39. On October 4, 2005, Mr. Fiorilla wrote to Mr. Alampi:
Recently, I met with our clients and reviewed with them the status of the abandonment of the

line that formerly traversed the Jersey City Embankment parcels. Based on this review, the line at issue was reviewed and we continue to be confident that it was properly abandoned under the governing criteria for spur lines under the applicable federal statute and that no filing was required before the Interstate Commerce Commission at that time (nor would there be any requirement to file before the Subsurface transportation Board at this time).

40. In that same letter, Mr. Fiorilla wrote that:
- In any event, since the City of Jersey City and the State of New Jersey were given the opportunity to purchase the parcels and specifically decided not to purchase same, the sale to your client should not be disturbed. Neither the City nor the State has been disadvantaged in any way by Conrail's abandonment of the property. It was offered for sale to the City and the City chose not to bid. The City still has the right to equally condemn the property should it so choose. Accordingly, the ICC/STB issue, we respectfully submit, is a red herring.

41. On January 31, 2006, Carmine Alampi, Esq., on behalf of the LLCs, wrote to Vested Title and noted "as you may know, the issue of whether or not Conrail was required to submit a formal application for abandonment with the Federal Surface Transportation Board, has been raised as a challenge to the transfer of title."

42. Immediately, in response, Vested Title wrote back to Mr. Alampi and noted that the "Embankment has been the subject of historical interest in the City of Jersey city for many years, but this is the first time that I have heard of a suit or petition being filed."

43. Vested considered the letter from Mr. Alampi as a claim based upon the claim to the title and consequently corresponded with Mr. Fineberg, State Counsel to Chicago Title to inform him of this development.

44. That letter notes the following:

this was the sale of a former freight spur in Jersey City that is known as the Embankment because it sat for years at the top of an embankment that ran 7 or 8 blocks. For years, residents have been begging jersey City to buy the property from Conrail so that it would not be developed. Last year, Conrail sold the property to a developer and residents went

bonkers because of the development threat. While no one is sure of the exact date, it seems to be accepted fact that Conrail used the embankment occasionally into the early 1990s. Conrail considers the property exempt from the reach of the current Surface Transportation Board by virtue of 49 U.S.C. 10906.

45. Following a determination that Chicago Title had a duty to defend its insureds, and appellate affirmance of that decision, Chicago Title settled its claims with the LLCs for \$5 million on December 21, 2015.

46. Payment of this sum was made on the same date.

In light of these facts, and following consideration of the concurrently submitted summations, the Court makes these legal conclusions:

Conclusions of law:

In Counts 5 and 6 of its third-party complaint, Chicago Title seeks contribution and indemnification from Conrail alleging that they were joint tortfeasors. To that end, Chicago Title seeks compensation from Conrail premised on two legal theories: (1) that Conrail's representations were fraudulent and

either in addition or alternatively, (2) that Conrail negligently misrepresented that abandonment was unnecessary when, in actuality, it was. Chicago Title (through Vested Title) detrimentally relied on those assertions that Chicago Title characterizes as "knowingly false and material pre-closing representations" This resulted in damages in the form of the settlement proceeds paid for which Chicago Title now seeks recoupment.

For the reasons that follow, Chicago Title has not proven either than the statements made pre-closing by Conrail were fraudulent, nor has it proven that those statements were made negligently.

Chicago Title has not established by clear and convincing evidence that the statements as to the nature of the Embankment were fraudulent.

To recover damages on the basis of fraud, Chicago Title must prove, by evidence that is clear and convincing, that 1. Conrail made a false representation of fact to Chicago Title; 2. Conrail knew or believed the representation was false; 3. Conrail intended to deceive Chicago Title; 4. Chicago Title believed and justifiably relied upon the statement and was induced by it to take certain action; and 5. as a result of Chicago Title's reliance upon the statement, Chicago Title sustained damage. See Model Jury Charge (Civil) 3.30E, Fraud-

Deceit (1992); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 611 (1997); Stochastic Decisions v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)

Clear and convincing evidence is evidence that "produces in [a factfinder's mind] a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause [a factfinder] to come to a clear conviction of the truth of the precise facts in issue." See Model Civil Jury Charge 1.19, Burden on Proof- Clear and Convincing Evidence (2011). The "clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes [a factfinder] to be convinced that the allegations sought to be proves are true." Id. Evidence is "clear and convincing when it produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Jobes, 198 N.J. 394, 408 (1987) (citing State v. Hodge, 95 N.J. 369, 376 (1984)).

In this case, Chicago Title has failed to provide any evidence that the statements made by Conrail were fraudulent and

that Chicago Title was induced to enter the agreements through any willful misrepresentations as to the status of the subject rail lines and whether abandonment approval was required. Although substantial arguments are made as to the perceived knowledge of the character of the premises, the record evidence suggests that although Conrail was aware of the distinction between rail lines and spur tracks, there was no credible proof (and certainly not clear and convincing evidence) that Conrail made a false representation about the nature of the Embankment that detrimentally and prejudicially induced Chicago Title to rely on those statements.

Central to this Court's conclusion was the credible testimony provided by Mr. Fiorilla. The Court observed Mr. Fiorilla as he testified and noted that his testimony was both reasoned and logical, and was also entirely consistent with the documentary evidence that he believed that the conveyance was legally permissible without the necessity to secure abandonment permission and specifically that the properties abandoned constituted spur tracks "over with the STB and previously the ICC had no authority under 49 U.S.C. Sec. 10906." He later followed up on that opinion and confirmed that the parcel was a spur track and no additional governmental action was necessary to abandon it.

Supportive of this testimony, and further confirming Conrail's knowledge as to the nature of the Embankment as a spur track, was the similarly-credible testimony of Robert Ryan, the Director of Real Estate for Conrail. As did Mr. Fiorilla, Mr. Rayan similarly testified consistently, directly, and credibly, that it was his belief at the time of the closing that the premises at issue was a spur track rather than a rail line for which it was his belief that no abandonment authorization would be necessary. Mr. Ryan testified that Conrail used and treated the parcel as a yard and switching track. The portion of the parcel at issue, according to Mr. Ryan, was separate from any line of railroad that served the area. Conrail never downgraded the area, since the area had already been downgraded. As early as March 29, 1994, when discussions took place about demolition in the area and the need for governmental approval for those actions, none was necessary. Conrail provided to Jersey City in April 1994, that the Harsimus Dr. Track was a spur track.

Despite cross examination that revealed only that these two individuals were aware of the distinction between spur track and a rail line, no credible proof exists that either party knew that the parcel was a designated rail line and, nevertheless, represented otherwise. The opinions expressed by Mr. Fiorilla, in his pre-closing notification were just that-- an opinion. As noted, quite clearly in the Model Jury Charge governing Fraud-

Deceit, this statement made by Conrail and its representatives, is a "statement of opinion rather than a statement of fact. [As such], a defendant cannot be held responsible, for opinions are matters of judgment for which . . . the law does not impose liability" Model Jury Charge (Civil) 3.30E, Fraud-Deceit (1992).

In its summation, Chicago Title notes that another Court, in proceedings that took place approximately 8 years after the closing of title in this matter, "squarely held" that that premises "was conveyed . . . as 'part of [the rail carrier's] railroad lines" subject to the STBs abandonment jurisdiction." Pl. Brief at 6 citing City of Jersey City v Consolidate Rail Corp, 968 F.Supp 2d. 302, 308 (D.D.C. 2013). However, this ruling was not reached following an analysis of the facts in this case, and only reflects a stipulation of the status of the Embankment by the parties. This fact notwithstanding, Chicago Title now seeks to use this later determination to establish the fact that the representation made by Conrail in 2005 was "false", and that its counsel knew that the representation was false at the time that it was made." This determination is not supported by the record as established at trial. Rather, the opposite is true- that Conrail reasonably believed that the Embankment was spur track and not subject to abandonment authority and so informed the pertinent parties.

Chicago Title has not proven by clear and convincing evidence that the statement, that it characterizes as a representation, was anything other than a reasoned and informed opinion as to the belief that the parcel was a spur track. Similarly, and to that end, Conrail continued to maintain that position permitting the determination that it believed in the truth of that opinion. Despite the arguments advanced by Chicago Title that there was nefarious purpose in making these statements with the knowledge of their falsity, the record simply does not support this conclusion. The action was certainly not made with the intention to deceive the Plaintiff, but was only made as would be necessary pursuant to the Handbook of New Jersey Title Practice, to insure the title since approval would not be required and that a letter or affidavit from the railroad would be sufficient.

Chicago Title has not established that the statements made by Conrail as to the characterization of the Embankment were negligently made by Conrail.

To prevail on a claim for negligent misrepresentation, Chicago Title must prove to prove that Conrail breached a duty of care owed to Chicago Title and that Chicago Title suffered damages proximately caused by that breach. Highlands Ins. Co. v. Hobbs Group 373 F.3d 347, 351 (3rd Cir. 2004) (citing Weinberg v. Dinger, 106 N.J. 469 (1987)). Negligent misrepresentation is

an "incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance." Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000) (quoting H. Rosenblum, Inc., v. Adler, 93 N.J. 324, 334 (1983) superseded by statute on other grounds. To prove a claim of negligent misrepresentation, Chicago Title must prove by a preponderance of the credible evidence that (1) Conrail negligently provided false information; (2) Chicago Title was a reasonably foreseeable recipient of that information; (3) Chicago Title justifiably relied on the information; and (4) the false statements were a proximate cause of the plaintiff's damages. McCall v. Metropolitan Life Ins., 956 F.Supp. 1172, 1186 (D.N.J. 1996). Negligent misrepresentation does not require scienter as an element. Kaufman, supra, 165 N.J. at 110.

Although Chicago Title retains the burden of proof as to this point, it must still prove its claim by a preponderance of the credible evidence. To sustain the burden, the evidence supporting Chicago Title's claim must weigh heavier and be more persuasive than the contrary evidence. If, however, the evidence is of equal weight, then the burden of proof has not been carried and the party with the burden is not entitled to a verdict.

In this case, it is apparent that Conrail intended that Chicago Title rely on the statements that it made regarding its belief as to the nature of the Embankment. All parties to the transaction certainly wanted to close the transaction. However, reliance upon the representations is not the issue presented here. Whether those statements on which reliance was based, however, was negligently made, is.

Considering the pertinent standard to support the cause of action, Chicago Title has similarly failed to provide this Court with evidence of negligence on the part of Conrail when it made the statements about the nature of the Embankment. It has not been established, at all, that the representations were, at the time that they were made, incorrect. Instead, as noted previously, Conrail's statements were learned predictions stemming from a reasoned analysis of the historical treatment and regard of the parcel by Conrail. They were rendered by an individual who was most experienced in the field of railroad law. At worst, these statements appear to be nothing more than predictions of the future and mere opinion rather than statements of fact. At best, they represent that which Conrail acknowledged the Embankment to be based on the historical use of that property. In either scenario, the statements were made after a considered analysis and historical consideration of their own parcel. Negligence must always be proved and is not

generally presumed. Although Chicago Title again attempts to interject some nefarious purpose to highlight the purported carelessness of the parties, proof of this carelessness is not established in this record. The record does not bear out the contentions that Conrail's representatives failed to act properly in making their determinations. The Plaintiff has failed to meet its burden of proof that Conrail's representatives so far deviated from the standard expected in making their statements in order to meet its obligations to close this transaction as required between the parties.

Judgment, therefore, is entered in favor of the Defendant, and the Plaintiff's complaint is dismissed with prejudice.

IT IS SO ORDERED.

Very truly yours,

Jeffrey R. Jablonski, J.S.C.

JRJ:ms