Appeal No. 21-CV-735

DISTRICT OF COLUMBIA COURT OF APPEALS

SANTORINI CAPITAL, LLC, *et al*.

Appellants,

v.

WFG NATIONAL TITLE INSURANCE COMPANY, LLC

Appellee.

On Appeal from the Superior Court of The District of Columbia
2020 CA 003854 B
(The Honorable William M. Jackson)

BRIEF OF APPELLEE

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STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties in this case are Santorini Capital, LLC, SC Holdings PF2, LLC, and WFG National Title Insurance Company.

Below and on appeal, Santorini Capital, LLC and SC Holdings PF2, LLC are represented by Roger C. Simmons, Esq. On appeal, Santorini Capital, LLC and SC Holdings PF2, LLC are also represented by Joey Leavitt, Esq.

Below and on appeal, WFG National Title Insurance Company is represented by the undersigned, Robert C. Gill, II, Esq. On appeal, WFG National Title Insurance Company is also represented by Kyra A. Smerkanich, Esq.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, WFG National Title Insurance Company states that its parent corporation is Williston Holdings. No publicly held corporation holds 10% or more of WFG National Title Insurance Company's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

APPELLATE JURISDICTION

This appeal is taken from a final order of the Superior Court for the District of Columbia. This Court has jurisdiction over this appeal pursuant to D.C. Code §11-721(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether the lower court correctly granted judgment on the pleadings where the plain, unambiguous language of the loan policy of title insurance at issue contained an exclusion barring coverage where there is "no loss", and it contained a policy condition requiring that the insured seek consent before settling any claim or suit, and the undisputed record shows that the insured loan was paid in full, and that the policyholder entered into a settlement agreement without obtaining the insurer's prior written consent?

STATEMENT OF THE CASE

This is a straightforward insurance coverage dispute. The matter was appropriate for resolution based upon the allegations in the pleadings, the undisputed facts, and the plain language of the insurance policy.

Appellant Santorini Capital, LLC ("Santorini") is a real estate investment firm. In connection with a loan it made for property located at 226 Anacostia Road, SE, Washington, DC 200019 (the "Property"), it obtained a loan policy of

title insurance (the "Policy") from WFG Title Insurance Company, LLC ("WFG"). The Policy limit was for the amount of Santorini's loan, $299,850.

Appellant SC Holdings PF2, LLC ("SC Holdings") is an "affiliate" of Santorini. SC Holdings was not a party to the Policy. It is not the Named Insured, nor does it come within the definition of "Insured" as set forth in the Policy. Accordingly, SC Holdings is not a proper party to this action.

The Policy limits WFG's indemnity obligation to specified types of losses. These specified losses are referred to in the Policy as "Covered Risks." The Policy also specifically excludes certain matters that it does not cover. These are referred to in the Policy as "Exclusions."

Exclusion 3(c) states clearly that no coverage is owed for defects, liens, encumbrances, adverse claims, or other matters that result in "no loss or damage."

Finally, the Policy has certain conditions which apply to coverage (the "Conditions"). If these conditions are not satisfied, then WFG does not have an obligation to provide coverage. Condition 9 requires that before Santorini may settle a claim or suit and voluntarily assume liability, it must obtain WFG's "prior written consent."

As more fully explained below, Appellants are seeking to recover $167,000, consisting of: (1) $42,000 that Santorini paid as part of a settlement agreement; (2) and $125,000 in "additional expenses" for upkeep of the Property, including

marketing costs, interest, real estate taxes, and insurance. The record shows that Santorini paid the $42,000 settlement *before* it even sought WFG's written consent, which consent was never given. It is undisputed that the insured loan was repaid in full. Moreover, the facts show that the Property was sold for $525,000, which was $225,000 in excess of the amount of Santorini's loan. Accordingly, there was no "loss" under the Policy. Because there plainly is no coverage for the claimed amounts under the Policy, the lower court correctly granted judgment on the pleadings.

STATEMENT OF FACTS

A. The Parties and Transaction At-Issue

Appellant Santorini is a real estate investment firm. (JA 007[1]). In July of 2016, Santorini agreed to provide financing to Project 2 Funding, LLC ("Project 2 Funding"), in order to enable Project 2 Funding to acquire the Property. (JA 007, 012 – 021). The sole member of Project 2 Funding was Andre D. Strickland. (JA 016). In connection with this loan, Santorini obtained a loan policy of title insurance issued by WFG (the "Policy"). (JA 008).

Project 2 Funding used the loan it obtained from Santorini to satisfy and release an existing deed of trust on the Property, and to vest title in 5037 Meads Street, LLC. (JA 008). The sole member of 5037 Meads Street, LLC also is

[1] Documents in the Joint Appendix are cited as (JA---) indicating the page in the Appendix where the document can be found.

Andre D. Strickland. (JA 044 - 045, 060 – 061). 5037 Meads Street, LLC then conveyed the Property by deed of gift to Project 2 Funding. (JA 008). Project 2 Funding later defaulted on its obligations under the loan agreement it entered into with Santorini. (*Id*.). Santorini foreclosed on its loan, and purchased the Property at foreclosure through its affiliate, SC Holdings. (*Id*.). In January 2020, SC Holdings sold the Property to non-parties Matthew Chamberlain and Maria-Fernanda Chamberlain for the sum of $525,000. (JA 044, 054 – 055).

At the time the Property was transferred from 5037 Meads Street, LLC to Project 2 Funding, LLC, 5037 Meads Street, LLC was in a pending Chapter 11 bankruptcy. (JA 008). By then 5037 Meads Street, LLC had already been in bankruptcy for over a year, since July of 2015. (*Id*.). This meant that 5037 Meads Street, LLC could not legally convey title to the Property, or dispose of any of its assets, without first obtaining permission from the bankruptcy court. (*Id*.). It failed to do so. (*Id*.). Mr. Strickland – the sole member of both 5037 Meads Street, LLC *and* Project 2 Funding – also had filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. (JA 044 - 045, 060 – 061).

After learning of the conveyance of the Property from 5037 Meads Street, LLC to Project 2 Funding, the trustee for the bankruptcy estate of 5037 Meads Street, LLC filed a motion to avoid the transfer of title. (JA 008). On January 3, 2019, the Bankruptcy Court granted the motion. (*Id*.). Santorini, following

negotiations with the trustee for the bankruptcy trustee for 5037 Meads Street, LLC, agreed to pay the trustee $42,000 to resolve the trustee's claim. In exchange, the trustee agreed to release its claim to the Property. (JA 009).

On October 15, 2019, after the settlement with the trustee, Santorini requested that WFG "contribute" to the $42,000 settlement it agreed to pay to the bankruptcy trustee. (JA 009). When Santorini asked WFG to make an unspecified "contribution," it had already paid this amount. (*See* JA 106 (Santorini's attorney represented to WFG that it "paid" the $42,000 to the trustee, and offered to provide copies of the wire transfer). Because this amount was plainly not covered under the Policy, WFG declined the request for indemnity. (*Id*.).

B. The Insurance Policy

WFG issued to and in the name of Santorini as lender the Policy, which was a Loan Policy of Title Insurance in the amount of $299,850, representing the amount of the mortgage at issue. (JA 030). The Policy expressly defined who qualifies as an "Insured." (JA 025).

Condition 1 (Definition of Terms), Section (e) of the Policy states that "Insured" means "The Insured named in Schedule A." (*Id*.). The Name of the Insured listed in Schedule A is "SANTORINI CAPITAL, LLC, its successors and/or assigns, as their interest may appear." (JA 030). SC Holdings is *not* identified as an "Insured" on the Policy.

In addition to only insuring the defined Insured, the Policy only applies to certain, specified risks. These specific risks are enumerated in the "Covered Risks" section of the Policy. (JA 022 – 024).

The Policy also contains various exclusions from coverage. (JA 024). Where an excluded event occurs, no coverage is owed, and WFG "will not pay loss or damage, costs, attorneys' fees, or expenses[.]" (*Id*.). Relevant exclusions include the following:

- Exclusion 3(b) – "Defects, liens, encumbrances, adverse claims, or other matters…not known to the Company, not recorded in the Public Records at Date of Policy, but known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy";
- Exclusion 3(c) –"Defects, liens, encumbrances, adverse claims, or other matters…resulting in no loss or damage to the Insured Claimant"; and
- Exclusion 6 – "Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is…(a) a fraudulent conveyance or fraudulent transfer, or (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy."

(*Id*.).

The Policy also includes certain conditions which must be met in order for coverage to be owed. (JA 025 – 029). The conditions section of the Policy contains a provision which imposes express limitations of liability. (JA 029). One of those limitations of liability provides that WFG "shall not be liable for loss or

damage to the Insured for liability voluntarily assumed by the insured in settling a claim or suit without the prior written consent" of WFG. (*Id*.).

C. Procedural Posture

On September 3, 2020, Santorini and SC Holdings filed suit against Assure Title, LLC ("Assure") and WFG. (JA 001). In addition to seeking reimbursement for the $42,000 Santorini paid to the bankruptcy trustee, the lawsuit sought to recover "additional expenses in excess of $125,000," that allegedly "resulted from the cloud on title to the Property following its contracted buyer's termination of the sale." (JA 010). The Complaint consists of two counts: breach of contract (Count I) and bad faith (Count II). WFG timely filed an answer on September 29, 2020.

On April 4, 2021, WFG filed its Motion for Judgment on the Pleadings (the "Motion").[2] In the Motion, WFG argued that: (1) the "losses" Santorini claimed – voluntary payment of the bankruptcy trustee settlement, and alleged additional expenses in the nature of consequential damages, which included "upkeep of the property," marketing costs, interest, real estate taxes, and insurance – did not fall within any of the categories of "Covered Risks" enumerated in the Policy; (2) Exclusions 3(b), 3(c), and 6 bar coverage; (3) Santorini failed to comply with Condition 9, when it settled with the bankruptcy trustee without first obtaining

[2] Between the filing of its answer and the filing of the Motion, the parties did not engage in any discovery. During the same time period, Plaintiff was attempting to effectuate service on Assure. (JA 003). Appellants later dismissed Assure without prejudice on March 8, 2021.

WFG's written consent; and (4) SC Holdings lacks standing because it is not an insured, or an intended beneficiary.[3]

On April 19, 2021, Appellants timely filed a Statement of Opposing Points and Authorities (the "Opposition"). (JA 003). WFG submitted its reply brief in support of the Motion on April 26, 2021. (*Id*.).

By Order dated October 4, 2021, the lower court granted WFG's Motion, holding that: (i) Santorini failed to obtain WFG's written consent before settling the claim with the bankruptcy trustee for $42,000, and under the Policy's terms that WFG is not liable to Santorini for the claimed loss; and (ii) because Santorini admitted to making a profit of $58,000 on the sale of the Property, it did not incur a loss, and under Exclusion 3(c) WFG is not responsible for the claimed loss.

This appeal followed.

STANDARD OF REVIEW

This Court reviews de novo a motion granting judgment on the pleadings. *See D.C. v. Beretta, U.S.A., Corp*., 872 A.2d 633, 639 (D.C. 2005).

[3] In its Reply in support of the Motion WFG withdrew its argument based on Exclusion 3(b). It did so in response to Santorini's argument that it was unaware that 5037 Meads Street, LLC was in Bankruptcy at the time it conveyed the Property for no consideration, to preclude Santorini from being able to argue the existence of a factual dispute. (JA 116).

ARGUMENT

I. Standard of Review Employed by the Lower Court

A. Rule 12(c)

Rule 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." D.C. Super. Ct. Civ. R. 12(c). "Judgment on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment." *Bennings Assocs. v. Joseph M. Zamoiski Co*., 379 A.2d 1171, 1173 (D.C. 1977); *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) ("a Rule 12(c) motion requires the court to consider and decide the merits of the case, on the assumption that the pleadings demonstrate that there are no meaningful disputes as to the facts such that the complaint's claims are ripe to be resolved at this very early stage in the litigation"). "In considering such a motion the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id*.

Appellants spent the majority of their brief debating whether trial courts should consider motions for judgment on the pleadings under the standard applied to motions to dismiss under Rule 12(b)(6), rather than the standard applied to motions for summary judgment under Rule 56. Appellee will not burden this Court with further discussion of this issue, which was not the basis for the lower

court's ruling, nor is it an issue presented on appeal. Under either standard the lower court properly granted judgment on the pleadings.

B. Interpretation of Insurance Policies under District Law.

The Complaint contained two counts: (1) breach of contract; and (2) bad faith. The contract at-issue is the Policy issued by WFG to Santorini.[4] See *Cameron v. USAA Prop. & Cas. Ins. Co*., 733 A.2d 965, 968 (D.C. 1999) ("An

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[4] Although the lower court did not address this issue in its ruling, as argued in WFG's Motion, Appellant SC Holdings lacks standing to sue on the Policy. (JA 077 – 078; *see also* JA 009 – 011) (in both counts, it is "Santorini [that] demands judgment", not SC Holdings). SC Holdings is not a party to the Policy. It is not the named Insured on Schedule A of the Policy, and there are no allegations that it comes within the definition of "Insured" as set forth in Condition (1)(e). There are no allegations that it had any involvement with the financing transaction between Santorini and Project 2 Funding which led to the issuance of the Policy. The Policy is not an owner's policy, but a loan policy. *See Aronoff v. Lenkin Co*., 618 A.2d 669, 686 (D.C. 1992) (citing *Hooper v. Commonwealth Land Title Ins. Co*., 285 Pa. Super. 265, 269, 427 A.2d 215, 217 (1981) ("The duty of the insurer runs only to its insured and not to third parties who are not a party to the contract")). As this Court explained in *Aronoff*, "[a]ny benefit accruing to the seller in the form of enhanced marketability of title is merely an incident of the insurance contract, not one directly intended by the parties." *Id*.

In their Opposition before the lower court, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Appellants took the position that SC Holdings has standing because it "shared in the economic detriment of holding title to a property which was unmarketable until the issue with the title was resolved." (JA 100). That case dealt with an organization's standing. "Sharing in" a harm does not sufficiently allege an injury-in-fact. What is more, the argument ignores the fact that "a stranger to a contract may not sue to enforce its terms[.]" *Sidibe v. Traveler's Ins. Co*., 468 F. Supp. 2d 97, 100 (D.D.C. 2006). This is an independent reason why judgment was proper as to SC Holdings.

insurance policy is a contract between the insured and the insurer, and in construing it [the court] must first look to the language of the contract."). Appellant's bad faith claim is necessarily premised upon the Policy. (*See* JA 010 – 011) ("In failing to pay under the Policy, WFG has acted in bad faith"). This is in accord with District law, which does not recognize bad faith as a separate tort claim. *See Choharis v. State Farm Fire & Cas. Co*., 961 A.2d 1080, 1087 (D.C. 2008) ("Disputes relating to the respective obligations of the parties to an insurance contract should generally be addressed within the principles of law relating to contracts, and bad faith conduct can be compensated within those principles."); *Nkpado v. Standard Fire Ins. Co*., 697 F. Supp. 2d 94, 98 (D.D.C. 2010) ("The District of Columbia does not recognize a tort action for bad faith failure to settle with an insured.").

"Because an insurance policy constitutes a contract, [District courts] construe it according to contract principles." *Stevens v. United Gen. Title Ins. Co*., 801 A.2d 61, 66 (D.C. 2002); *id*., at fn. 3 ("the terms of a title insurance policy are subject to the same rules of construction applicable to insurance policies in general." (citing *Brown v. St. Paul Title Ins. Corp*., 634 F.2d 1103, 1107 (8th Cir. 1980)). "The terms of the policy, so long as they are clear and unambiguous, express the contract between the parties and will be enforced by the courts unless they violate a statute or public policy." *Robinson v. Aetna Life Ins. Co*., 288 A.2d

236, 238 (D.C. 1972). An "insurer may validly limit the scope of its liability by a policy provision and [courts] may not presume that any such limitation was idly inserted into the policy." *Robinson*, 288 A.2d at 238.[5]

Following these principles, courts routinely grant judgment if, on the face of the policy, it is clear that no coverage is owed. This is true even under the "very low" Rule 12(b)(6) standard that Appellants suggest should apply. *See, e.g., GCDC LLC v. Sentinel Ins. Co., Ltd.*, No. CV 20-1094 (TJK), 2021 WL 4438908, at *4 (D.D.C. Sept. 28, 2021) (granting Rule 12(b)(6) motion to dismiss where "the policy precludes coverage for Plaintiff's losses. Thus, Plaintiffs cannot state a claim for relief under the policy."); *Washington Exec. Servs., Inc. v. Hartford Cas. Ins. Co.*, No. CV 20-2119 (TJK), 2021 WL 4439060, at *6 (D.D.C. Sept. 28, 2021)

[5] In their Opposition to the Motion below, Appellants misstated the standard of review applicable to insurance policies. Appellants alleged that "a court's disposition, particularly in considering applicable exclusions, skews against the denial of coverage." (JA 088 – 098). The cases cited by Appellants concerned situations where policy language was found to be ambiguous. *See Holt v. George Washington Life Ins.*, 123 A.2d 619, 622 (D.C. 1956) ("Failing such unambiguous language, doubt should be resolved in favor of the insured"); *Cameron v. USAA Prop. & Cas. Ins. Co*., 733 A.2d 965, 968–69 (D.C. 1999) ("Since insurance contracts are written exclusively by insurers, courts generally interpret any ambiguous provisions in a manner consistent with the reasonable expectations of the purchaser of the policy. However, when such contracts are clear and unambiguous, they will be enforced by the courts as written"). Appellants did not claim below that the Policy's terms were ambiguous, and Appellants now concede that the terms of the Policy are unambiguous and that "[t]he terms of the contract are not in dispute." Brief, at 13. Thus, this Court need not resolve any "doubt…in the insured's favor" as Appellants incorrectly aver. JA 089.

(granting Rule 12(b)(6) motion to dismiss "because coverage is explicitly barred by the contract here, Hartford could not breach that contract by denying coverage.").[6]

[6] In its Motion WFG also argued that the losses Appellants claim – (1) $42,000, representing the amount Santorini paid to the bankruptcy trustee in exchange for the trustee's agreement to convey title to the Property (JA 009); and (2) $125,000, representing unspecified "additional expenses" Santorini allegedly incurred as a result of "the cloud on title to the Property following its contracted buyer's termination of the sale" (JA 010) – do not fall within the fourteen (14) categories of covered loss set forth in the "Covered Risks" section of the Policy. (JA 074). The Policy is not an all-risks policy, wherein all risks are covered unless expressly excluded. *Id*. If a loss does not fall within one or more of these categories of "Covered Risks," it is not covered by the Policy and no coverage is owed. *Id*. It is therefore incumbent upon the insured to prove entitlement to coverage in the first place. *See Grp. Hospitalization, Inc. v. Foley*, 255 A.2d 499, 501 (D.C. 1969) ("to recover benefits under an insurance policy the burden is on the insured to prove coverage under the contract."). The lower court did not discuss this argument in its Order. If, on *de novo* review, this Court agrees with WFG that Santorini's losses do not come within any of the categories of "Covered Risks", then this ends the inquiry.

The arguments raised by Appellants in their Opposition below are unavailing. Appellants claimed that the losses for which indemnity is sought fall within Covered Risk No. 2: "any defect in or lien of encumbrance on the Title." (JA 022). In reality, the losses Appellants seek are far more attenuated. They are seeking to recover funds paid under a settlement agreement, and "additional expenses associated with the holding and upkeep of the property", which are in the nature of consequential damages. (JA 009). These are not covered losses under the Policy. Appellants' Opposition illustrates this, as it relies on mental gymnastics in an effort to show that the alleged "economic harm[s]" relate back to the claimed defect and encumbrance. (JA 090). Further, Covered Risk No. 2 carves out "loss from…fraud" as a non-covered risk. As set forth *infra* at Section IV, the defect with Santorini's lien resulted from a fraudulent conveyance, further demonstrating that Appellants' purported losses are not a covered risk.

II. The Lower Court Correctly Held That Santorini Did not Obtain WFG's Consent Before Settling With the Bankruptcy Trustee.

The lower court found that "the plain meaning of Section 9 of the policy at issue requires [Santorini] to seek consent from [WFG] prior to settling any claim or suit." (JA 122). Finding that Santorini "lack[ed] the defendant's written consent," the lower court went on to find that "by the policy terms the defendant is not liable for the loss to the plaintiff." (*Id*.).

Appellants concede that for the $42,000 settlement "to be covered under the policy, [WFG] would have to give prior written consent for a settlement." Brief, at 10; *see also* JA 028 ("[WFG] shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company"). This was a condition precedent, which Santorini was required to satisfy for coverage to be owed. *Washington Props., Inc. v. Chin, Inc*., 760 A.2d 546, 549 (D.C. 2000) ("A condition precedent may be defined as an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."); *Robinson*, 288 A.2d at 236 (limitations on coverage are not "idly inserted into the policy.").

Incredibly, Appellants now claim that they *did* obtain WFG's prior written consent. Appellants make this change in litigation strategy in spite of the lower

court's express finding that Appellants "ma[de] no argument that it sought or obtained [WFG's] written consent." (JA 122; *see also* JA 096 – 099). Indeed, in their Opposition to the Motion below, Appellants admitted that they sought WFG's consent after they agreed to pay the $42,000. (*See* JA 00098 ("after Santorini's counsel requested Defendant's payment under the Policy, Defendant denied the request on a wholly separate basis, asserting that there was no compensable loss. Indeed, Santorini's settlement was never mentioned, raised as being problematic, or cited as the basis for denial.").

For the first time, and in a clear attempt to manufacture a dispute of fact where none exists, Appellants now allege:

> The emails between Plaintiffs and Defendant show that Defendant was aware of the potential settlement and, despite numerous opportunities, never objected to the terms. See App. at 105-112. Due to this notice and lack of objection, among other things, a reasonable jury could find that Plaintiffs obtained prior written consent when emailing Defendants about the settlement discussions and therefore could return a verdict requiring Defendants to pay the $42,000 it cost to clear the title.

(Brief, at 11-12). This argument takes liberties with the record. Appellants attached to their Opposition to the Motion the "emails between Plaintiffs and Defendant" which they claim constitute WFG's prior written consent. (*See* JA 105 – 112). Those emails show as follows:

- On June 20, 2019, Bill Leahy, counsel for Santorini Capital LLC, wrote to Bill Sempertegui, of WFG, forwarding him an email that Santorini had sent to the bankruptcy trustee. That email described the history of the loan, and asked that the trustee "reconsider" its position and "permit [Santorini] to sell

this white elephant without the additional burden of ensnarement in the 5037 Meads/Strickland bankruptcies." (JA 110 -11).

- On July 8, 2019, not having heard from Santorini, Mr. Sempertegui asked if Santorini had received a response from the bankruptcy trustee. (JA 110). Mr. Leahy responded that he had a "conversation" with the trustee about Santorini being "a good faith purchaser." (JA 109). According to Mr. Leahy, the trustee said he would get back to him, but this "[n]ever happened." (*Id*.). Mr. Leahy indicated that he "[had] a call in" to the trustee. (*Id*.).
- More than a month passed. Not having heard from Santorini's counsel, on August 12, 2019, Mr. Sempertegui asked about the status of the "conversation with the trustee." (*Id*.).
- According to the Complaint, on August 16, 2019, "the Bankruptcy Court issued an Order approving the compromise between Santorini and the trustee." (JA 009). *Thus, no later than mid-August of 2019 Santorini had agreed to pay $42,000 to the bankruptcy trustee*.
- Still not having heard from Santorini's counsel, on September 13, 2019, Mr. Sempertegui again asked about the status of the "conversation with the trustee." (JA 108).
- Yet another month passed. Having not heard from Santorini's counsel for more than three months, on October 15, 2018, Mr. Sempertegui again asked about the status of the "conversation with the trustee." (JA 108).
- On October 15, 2018, Mr. Leahy and Mr. Mr. Sempertegui spoke by phone. (JA 106). Following that conversation, Mr. Leahy sent WFG an email in which he attached "two Orders entered by the Bankruptcy Court releasing any claim of the Bankruptcy estate in 226 Anacostia Road in consideration of $42,000 that Santorini Capital *paid* to the Trustee." (*Id*.). (emphasis added). Mr. Leahy went on to "request that WFG make a contribution to this $42,000 payment." (*Id*.).
- Mr. Sempertegui responded less than two weeks later, declining to contribute to the $42,000 payment Santorini had previously agreed to make.

It is disingenuous to claim, based on these emails, that "a reasonable jury could find that Plaintiffs obtained prior written consent." (Brief, at 11). The email communications conclusively disprove this argument. By its own admission,

Santorini did not even seek "a contribution" until *after* the $42,000 had been "*paid*" to the bankruptcy estate. (JA 108) (emphasis added).

It is misleading to claim that WFG was even "aware of the potential settlement" discussions and the terms thereof based on these emails. (Brief, at 11). The written communications show that Appellants did not keep WFG informed about the settlement discussions with the bankruptcy trustee, and only sought some unspecified "contribution" after Santorini had entered into an agreement with the bankruptcy trustee to pay $42,000, and after multiple inquiries by counsel for WFG about the status of the matter.

Tellingly, in its Opposition submitted to the lower court, Santorini did not argue that it obtained WFG's written consent. To the contrary, it argued that WFG "tacit[ly] endorse[ed]…the settlement negotiations" and that this "likely [rose] to the level of waiver, if not ultimately manifesting in actual consent." (JA 098).

"Tacit" approval is not the equivalent of express approval, and in any event, tacit approval does not constitute "written consent." Although Santorini does its best to not admit the obvious, it failed to meet its burden of even alleging prior written consent as required by the Policy. Under well-established principles of judicial estoppel, Appellants should not be permitted to contradict their position "according to the vicissitudes of self interest." *Porter Novelli, Inc. v. Bender*, 817 A.2d 185, 188 (D.C. 2003) (internal citations and quotations omitted)); *see also*

Brown v. M St. Five, LLC, 56 A.3d 765, 780 (D.C. 2012) ("if a party has taken a position before a court of law, whether in a pleading, in a deposition, or in testimony, judicial estoppel may be invoked to bar that party, in a later proceeding, from contradicting his earlier position" (internal citations and quotations omitted)).

For WFG to be obligated to provide an indemnity under the Policy, the insured (Santorini) must comply with the conditions in the Policy. Condition 9(c) unambiguously states that WFG "shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the insured in settling a claim or suit without the prior written consent" of WFG. (JA 028). The Complaint does not allege that WFG's prior written consent was obtained.[7] Nor could it. The evidence in the record *submitted by Appellants* shows that WFG was never even informed of the settlement payment until after it was paid.[8] Santorini certainly did not obtain written consent before entering into the settlement. Judgment based on Condition

[7] If this Court applies the standard applicable to Rule 12(b)(6) motions to dismiss, *i.e.*, that the Court should determine whether the complaint has stated a plausible claim, Appellants' claims fail.

[8] If this Court applies the standard for Rule 56 motions for summary judgment, *i.e.*, that the Court should determine whether there are genuine issues of material fact, Appellants' claims fail.

9(c) was proper. *See Robinson*, 288 A.2d at 236 (courts should not "presume" that limitations on coverage are "idly inserted into the policy.").[9]

III. The Lower Court Correctly Held that Exclusion 3(c) Bars Coverage.

The lower court also determined that no coverage is owed because of Exclusion 3(c). That exclusion states that no coverage is owed for "Defects, liens, encumbrances, adverse claims, or other matters…resulting in no loss or damage to the Insured Claimant." (JA 024). In its Order Granting Motion for Judgment on the Pleadings, the lower court found that:

> According to the Complaint, the plaintiff provided financing to Project 2 Funding in the amount of $299,850. The property ultimately sold for $525,000. The plaintiff incurred expenses of $42,000 to clear title to the property and $125,000 in additional expenses. Including all additional expenses incurred, the plaintiff still made a profit of $58,000, meaning the plaintiff did not incur a loss. Therefore, by the policy's terms, defendant need not pay loss or damage, costs, or attorney's fees in this matter.

(JA 123).[10] In their Brief Appellants claim that "they did suffer a loss because, but for the expenses associated with clearing the title, the sale would have been much more profitable." (Brief, at 10-11; *see also id*., at 12) ("A reasonable jury could

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[9] This case is exemplary of why judgment on the pleadings exist as a potential remedy. Why force the parties to undergo the time and expense of discovery and further motions practice, if, as the lower court correctly found, no coverage was owed on account of Santorini's failure to comply with the terms of the Policy, demonstrated by the record evidence that Appellants themselves produced?

[10] Although the Complaint requested "attorneys' fees incurred in prosecuting this matter" it did not state on what basis. (JA 011). Attorneys' fees are not authorized by the Policy, nor are they recoverable here under the American Rule.

find that, despite making some profit, Plaintiffs still suffered a loss such that Exclusion 3(c) does not apply." By Appellants' own admission, *the sale of the Property was profitable*. It simply was not as profitable as Appellants hoped. The plain language of Exclusion 3(c) operates to bar coverage where there is "no loss." This Exclusion does not support Appellants' strained damage theory.

This is true regardless of the standard used to resolve Appellants' claims. Taking Plaintiffs' well-pleaded facts as true, the Complaint does not state a plausible clam for relief. Santorini provided financing of $299,850 (Complaint, ¶ 9), paid a settlement amount of $42,000 (Complaint, at ¶15), and incurred "additional expenses" associated with owning and upkeep of the Property, such as marketing costs, interest, real estate taxes, and insurance. (Complaint, at ¶ 14). These sums total $466,850. (JA 008 – 009). Santorini then sold the Property for $525,000, meaning that even according to its calculations it realized a profit on the sale of $58,150. (JA 030). There are no material facts in dispute on this issue.[11] Under the plain, unambiguous language of Exclusion 3(c), Santorini's loan was paid in full, and there was "no loss" and, therefore, no coverage.

[11] At best, Appellants present a dispute over interpretation of the terms "loss" and "damage." (*See* JA 092 – 093). This is an issue of legal interpretation, not a genuine dispute of material fact. Further, the lower court implicitly rejected this argument when it held that "the plaintiff did not incur a loss" and that "defendant need not pay loss or damage." (JA 123).

Appellants seem to have lost sight of the fact that the Policy is a loan policy rather than an owner's policy of insurance. The Policy only insured the loan which Santorini made to Project 2 Funding. (JA 022) (the Policy is entitled "LOAN POLICY OF TITLE INSURANCE Issued by WFG NATIONAL TITLE INSURANCE COMPANY"; this appears at the very top of the Policy); (JA 030 (showing the "Amount of Insurance" and "Mortgage Amount" being the same amount: $299,850.00)). Because Santorini's loan was paid in full, there was no loss with respect to the loan. No coverage is owed based on Exclusion 3(c).

IV. Exclusion 6 Also Bars Coverage.

Appellants' Brief also addresses the argument raised by WFG in its Motion that Exclusion 6 bars coverage. (*See* Brief, at 11-12). The lower court's order did not address the parties' arguments concerning applicability of this exclusion. To avoid any suggestion of waiver, Appellee also addresses this exclusion.

Exclusion 6 excludes "[a]ny claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage is (a) a fraudulent conveyance or fraudulent transfer, or (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy." (JA 024). WFG attached to its Answer the Complaint Objecting to Discharge that was filed in Mr. Strickland's Chapter 7 bankruptcy proceedings by the bankruptcy trustee. (JA 057 – 062). In that filing

the trustee objected to Mr. Strickland's discharge, *inter alia*, because Mr. Strickland failed to disclose his interest in 5037 Meads Street, LLC; his interest in Project 2 Funding, LLC; and/or his interest in the Property. (*Id*.). According to the trustee, Mr. Strickland did so to "hinder, delay, or defraud the chapter 7 trustee[.]" (JA 060). This conduct falls squarely within Exclusion 6, and constitutes another reason why no coverage is owed to Santorini.

Appellants aver in their Brief, in a conclusory manner, that "there was no such fraudulent conveyance or transfer," further arguing that "[a] reasonable jury could find that whatever transaction created the lien on the Property was not a fraudulent conveyance or transfer." (Brief, at 11-12). Such "vague and conclusory assertion[s]" do not pass muster. *Martin v. Santorini Cap., LLC*, 236 A.3d 386, 400 (D.C. 2020). The trustee's complaint, and the resulting judgment, are clear.

In their Opposition in the lower court, Appellants raised two additional arguments about Exclusion 6. Both arguments fail. First, they claimed WFG improperly relied on Mr. Strickland's personal bankruptcy, as opposed to the bankruptcy proceedings initiated by 5037 Meads St., and that the Complaint is merely an allegation of fraud, not a conclusive finding. (JA 094 – 095). This argument ignores the fact that Mr. Strickland is the sole member of 5037 Meads Street, LLC and Project 2 Funding, meaning that he was on both sides of the conveyance that gave rise to the proceeding in bankruptcy court. This was not an

arms' length transaction. This is illustrated by the fact that the conveyance lacked consideration and was documented by deed of gift. If the transaction had been for adequate consideration to the bankruptcy estate, the trustee would not have moved to avoid the conveyance as fraudulent. The entire basis for Count I of the Complaint Objecting to Discharge is Mr. Strickland's failure to disclose his interest in 5037 Meads Street, LLC and Project 2 Funding. To claim that Mr. Strickland's personal bankruptcy is not "relevant" is a stretch. (JA 084).

Appellants also quibble over the fact that the Complaint resulted in a default judgment, and not a judgment on the merits. However, liability is frequently established through default judgments. It is possible that Mr. Strickland opted not challenge the Complaint because he recognized the allegations were true. In any event, the unavoidable truth for Appellants is that the trustee in Mr. Strickland's Chapter 7 bankruptcy proceedings alleged that Mr. Strickland, by failing to disclose his interest in 5037 Meads Street, LLC; his interest in Project 2 Funding, LLC; and/or his interest in the Property, intended to "hinder, delay, or defraud the chapter 7 trustee" and that this allegation resulted in judgment. (JA 063 – 064). The judgment obtained by the trustee plainly triggers Exclusion 6.

Second, Appellants accuse WFG of misstating the Policy, arguing that "fraudulent transfer" takes on the meaning set forth in the United States Bankruptcy Code, which only applies to "transactions executed *before* bankruptcy

is filed." (JA 094) (emphasis original). WFG disputes Santorini's new claim, not raised below, that United States Bankruptcy law fails to embrace the possibility of fraudulent transfers after a bankruptcy proceeding has been commenced. But regardless of that legal issue, nowhere in the Policy does it say that the definitions from the Bankruptcy Code alone apply to and control interpretations of the Policy. To the contrary, the Policy states that no coverage is owed for loss or damage that arises by reason of:

> 6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the line of the Insured Mortgage, is
>
> (a) a fraudulent conveyance or fraudulent transfer…

(JA 024). Appellants' strained and unduly narrow reading of this provision would insert into the Policy terms that simply do not exist.[12] *See Chase v. State Farm Fire & Cas. Co*., 780 A.2d 1123, 1127 (D.C. 2001) (courts "may not indulge in forced constructions to create an obligation against the insurer." (internal citations and quotations omitted)). Based on the plain, and unambiguous Policy language and the undisputed evidence attached to WFG's answer, coverage is not owed because of Exclusion 6.

[12] Appellants' interpretation also ignores the fact that the phrase "by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws" is offset by commas and is intended to modify "claim," not the interpretation or meaning of "fraudulent conveyance or fraudulent transfer."

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's order grating judgment on the pleadings. Appellants did not obtain WFG's written consent before agreeing to make a $42,000 settlement payment to the bankruptcy trustee. They did not comply with Policy Condition 9, a condition precedent, which states that WFG shall not be liable for amounts voluntarily assumed by the insured without WFG's prior written consent. Exclusion 3(c) provides that no coverage is owed where the defect or encumbrance results in "no loss" to the policyholder. The amount of Santorini's loan (which is what the Policy insured) was paid in full. Even after factoring in the unauthorized settlement amount and the morass of additional claimed consequential damages Appellants allegedly incurred, they still realized a profit on the sale of the Property. Under the plain terms of the Policy, no coverage is owed. These facts are not in dispute. Even accepting the allegations in Appellants' complaint as true, they have not stated a plausible claim.

Accordingly, for all of the reasons set forth above, Appellee respectfully requests that this Court affirm the lower court's judgment.

Date: January 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2022, a copy of **APPELLEE'S BRIEF** was served by first class U.S. mail and through the Court's electronic filing service on the following:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

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21-cv-735

Case Number(s)

1/26/2022

Date