

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: 10-38088 CA 14

INDIGO REAL ESTATE LLC, a Delaware
limited liability company,

Plaintiff,

vs.

FIDELITY NATIONAL TITLE INSURANCE
COMPANY, a California corporation,

Defendant.

**FINAL SUMMARY JUDGMENT IN FAVOR OF
FIDELITY NATIONAL TITLE INSURANCE COMPANY**

This matter came before the Court at a hearing on September 19, 2016, on Indigo Real Estate LLC's ("Indigo") Motion for Partial Summary Judgment and Fidelity National Title Insurance Company's ("Fidelity") Motion for Partial Summary Judgment on Condition Precedent, Policy Exclusions, and Limitation of Damages along with Indigo's Renewed Motion to Compel and Fidelity's Motion for Leave to Amend its Answer and Affirmative Defenses.

The Court, having reviewed the Motions and the opposing papers, having heard argument of counsel, and being otherwise fully advised, hereby ORDERS AND ADJUDGES as follows:

UNDISPUTED PROCEDURAL FACTS

1. On September 17, 2010, Indigo filed its initial Complaint against Fidelity. On February 24, 2015, Indigo's operative complaint, the Amended Complaint, was deemed filed.
2. On March 13, 2015, Fidelity filed its Answer and Affirmative Defenses (the "Answer to the Amended Complaint"). The Answer to the Amended Complaint included

affirmative defenses regarding Indigo's failure to give Fidelity notice of its claim prior to filing this lawsuit¹ (the "Notice Affirmative Defenses") along with affirmative defenses regarding the Loan Policy's terminating upon transfer of Indigo's interest in the Property to third parties² (the "Termination Affirmative Defenses").

3. On June 29, 2016, Indigo filed a Motion for Partial Summary Judgment. The Motion included arguments regarding Fidelity's Termination Affirmative Defenses.

4. On August 22, 2016, Fidelity filed a Motion for Partial Summary Judgment on Condition Precedent, Policy Exclusions, and Limitation of Damages ("Fidelity's Motion for Summary Judgment on Condition Precedent"). The Motion included arguments regarding Fidelity's Termination Affirmative Defenses and how Indigo and its predecessors in interest failed to give Fidelity notice of a claim prior to this suit.

5. On September 14, 2016, Fidelity filed its Response to Plaintiff's Motion for Partial Summary Judgment. Indigo did not file a response to Fidelity's Motion for Summary Judgment on Condition Precedent, but did file the following documents relating to Fidelity's Motion: Plaintiff's Objection to and Motion to Strike Argument From Defendant's Summary Judgment Motion, Plaintiff's Notice of Supplemental Authority in Opposition to Defendant's Motion for Partial Summary Judgment, Plaintiff's Objection to and Motion to Strike Defendant's Summary Judgment Affidavits of attorneys Lochrie and Coffy, Plaintiff's Second Notice of Supplemental Authority in Opposition to Defendant's Motion for Partial Summary Judgment, and Plaintiff's Opposition to Defendant's Motion for Leave to Amend Its Answer.

¹ See Affirmative Defenses 1 and 7.

² See Affirmative Defenses 2 and 9.

UNDISPUTED MATERIAL FACTS

6. On September 15, 2005, **Progresso Lofts of Fort Lauderdale, LLC** (“**Progresso**”) executed and delivered to **BFSPE, LLC** a Promissory Note (the “**Note**”) in the amount of \$5,396,749.00 and a Mortgage (the “**Mortgage**”) secured by the real property at issue in this action (the “**Property**”). (See Def.’s Mot. for Summ. J., at ¶1; Pl.’s Mot. for Summ. J., at ¶2.)

7. In connection with the Property, **Fidelity** issued an Owner’s Policy of Title Insurance No. 1332-8886 dated September 19, 2005, insuring **Progresso** (the “**Owner’s Policy**”), and a Loan Policy of Insurance No. 1482-75817 dated September 19, 2005, insuring **BFSPE, LLC**, its successors and/or assigns (the “**Loan Policy**”). (See Def.’s Mot. for Summ. J., at ¶3; Pl.’s Mot. for Summ. J., at ¶¶4-5.)

8. The Loan Policy contains Section 2, which is a policy provision that delineates how the Loan Policy terminates, as follows:

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee’s sale, conveyance in lieu of foreclosure, or other legal matter which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject any rights or defenses the Company may have against any predecessor insureds; and . . .

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. . . .

9. The Loan Policy contains Section 3, which is a policy provision that delineates how notice is given, as follows:

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required, provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

10. **Progresso** discovered the existence of an easement in favor of the City of Fort Lauderdale dated November 13, 1984, and recorded on January 8, 1985, in the Public Records of Broward County, Florida, under Official Records Book 12248, Page numbers 250-51 (the “Easement”), which was not disclosed in the Owner’s Policy or the Loan Policy. On March 24, 2006, **Progresso** delivered a written notice to **Fidelity** under the Owner’s Policy demanding that the easement be vacated. **Fidelity** acknowledged the title claim on April 5, 2006, and accepted it on April 12, 2006. (See Def.’s Mot. for Summ. J., at ¶21; Pl.’s Mot. for Summ. J., at ¶¶6-7.)

11. On February 7, 2007, **BFSPE, LLC** assigned the Mortgage to **BFWest, LLC**. This assignment was recorded on February 27, 2007, in the Public Records of Broward County, Florida, under Official Records Book number 43667, Page numbers 65-66. (See Def.’s Mot. for Summ. J., at ¶6; Pl.’s Mot. for Summ. J., at ¶12.)

12. Also on February 7, 2007, **BFWest, LLC** delivered a collateral assignment of the Mortgage and Loan Documents to **WestLB AG, New York Branch**, which had provided a

credit facility to **BFWest, LLC**, as security for repayment of the credit facility. This assignment was recorded on February 27, 2007, in the Public Records of Broward County, Florida, under Official Records Book number 43667, Page numbers 67-69. (*See* Def.'s Mot. for Summ. J., at ¶7, Ex. E.)

13. On May 15, 2007, the Fort Lauderdale City Commission enacted an ordinance vacating the easement. The ordinance was recorded on July 17, 2007, in the Public Records of Broward County, under Official Records Book 44341, Page numbers 1007-1009. (*See* Def.'s Mot. for Summ. J., at ¶22; Pl.'s Mot. for Summ. J., at ¶8.)

14. **Progresso** defaulted under the Note and Mortgage on March 15, 2008. (*See* Pl.'s Mot. for Summ. J., at ¶9.)

15. On April 23, 2008, **BFWest, LLC** executed and delivered an Absolute Assignment of Note, Mortgage and Other Loan Documents to **Indigo**, as assignee for **WestLB AG, New York Branch**. This assignment was recorded on May 22, 2008, in the Public Records of Broward County, under Official Records Book 45393, Page numbers 40-42. (*See* Def.'s Mot. for Summ. J., at ¶8; Pl.'s Mot. for Summ. J., at ¶13.) **Indigo** acquired its interest in the Property after the Easement was vacated. (*See* Def.'s Mot. for Summ. J., at ¶24; Pl.'s Mot. for Summ. J., at ¶13.)

16. **Progresso** had defaulted on the loan prior to **BF West, LLC**'s delivering the Absolute Assignment of Note, Mortgage and Other Loan Documents to **Indigo**. Also, by that time, on April 8, 2008, **Progresso** had sued Fidelity in Broward County Circuit Court (the "Progresso Action") alleging negligent misrepresentation. (*See* Pl.'s Mot. for Summ. J., at ¶10.)

17. On June 22, 2009, the Progresso Action was dismissed with prejudice. The dismissal was affirmed on appeal. *See Progresso Lofts of Ft. Lauderdale, LLC v. Progresso Lofts, LLC*, 44 So. 3d 260 (Fla. 4th DCA 2010). (*See* Pl.’s Mot. for Summ. J., at ¶11.)

18. On February 12, 2009, Indigo sued **Progresso** in Broward Circuit Court, Case No. 09-8484 CA 21, for defaulting on the Note and to foreclose the Mortgage (the “Foreclosure”). (*See* Def.’s Mot. for Summ. J., at ¶10; Pl.’s Mot. for Summ. J., at ¶14.) On December 16, 2009, the Court entered a Final Judgment of Foreclosure After Default in the amount of \$8,129,961.24 in **Indigo**’s favor, which was recorded on January 4, 2010, in the Public Records of Broward County, under Official Records Book 46771, Page numbers 1486-90. (*See* Def.’s Mot. for Summ. J., at ¶11; Pl.’s Mot. for Summ. J., at ¶14.) **Progresso** did not contest the amount of this judgment. (*See* Def.’s Resp. to Pl.’s Mot. for Summ. J., at p. 3, n.2.)

19. On February 22, 2010, **Indigo** assigned its bid to **Indigo Land Progresso Lofts, LLC** through an Assignment of Bid recorded on February 23, 2010, in the Public Records of Broward County, under Official Records Book 46894, Page numbers 1305-07. (*See* Def.’s Mot. for Summ. J., at ¶12; Pl.’s Mot. for Summ. J., at ¶15.) **Indigo Land Progresso Lofts, LLC** was not the parent or wholly owned subsidiary of **Indigo**. (*See* Def.’s Mot. for Summ. J., at ¶13.)

20. In connection with the Foreclosure and the Assignment of Bid, a Certificate of Title was issued on March 8, 2010, in favor of **Indigo Land Progresso Lofts, LLC**, vesting title to the Property in favor of **Indigo Land Progresso Lofts, LLC**. The Certificate of Title was recorded on March 11, 2010, in the Public Records of Broward County, under Official Records Book 46933, Page number 1219. (*See* Def.’s Mot. for Summ. J., at ¶15.)

21. **Indigo** filed its Complaint against **Fidelity** in this action on September 17, 2010.

22. On December 13, 2011, **Indigo Land Progresso Lofts, LLC** sold the Property for \$725,000.00 and transferred title to **Emanto Holdings Corp.**, through a Special Warranty Deed that was recorded on December 19, 2011, in the Public Records of Broward County, under Official Records Book 48385, Page numbers 368-70. (*See* Def.'s Mot. for Summ. J., at ¶18.)

23. Prior to filing its Complaint, neither **Indigo**, nor any of its predecessors in interest, provided **Fidelity** with notice of a claim under the Loan Policy or otherwise made a claim to **Fidelity** thereunder. (*See* Def.'s Resp. to Pl.'s Mot. for Summ. J., at ¶26.) Neither **Indigo**, nor any of its predecessors, has submitted a sworn proof of loss to **Fidelity** regarding the damages **Indigo** claims in its lawsuit. (*See* Def.'s Resp. to Pl.'s Mot. for Summ. J., at ¶27.) **Fidelity** never made a formal coverage determination to **Indigo** due to **Indigo's** failure to submit a claim to **Fidelity** under the Loan Policy. (*See* Def.'s Resp. to Pl.'s Mot. for Summ. J., at ¶28.)

24. William Isenberg, one of the owners of **Progresso**, testified that "**Fidelity** would not have done anything different had the lender also delivered actual notice to **Fidelity** at or around the time that **Progresso** [] delivered its notice of the title defect to **Fidelity**. . . . **Fidelity** was not prejudiced by the fact that the lender did not give the same notice of the title defect that **Progresso** [] gave to **Fidelity**." (*See* Affidavit of William Isenberg, at ¶8.)

25. Charles McCall, a representative of **Fidelity**, testified that "[i]f the lender had written [**Fidelity**] and said, 'Look, this is taking way too long. We need . . . this done sooner,' we would have gone back to the law firm and seen if there was anything that could be done to expedite the process, or we could have looked at another firm perhaps to do what needed to be done." However, if the lender was "simply submitting a claim to get the easement removed, which is what the owner did, that was already in process." (*See* Charles McCall Dep. Tr., at p. 72:6-23.)

26. Robert Lochrie and Laura Coffy, two of the attorneys of the firm retained to vacate the Easement, testified that they do not recall any person or entity, including Indigo and Progresso, “ever complaining about a lack of diligence or unreasonable delay in vacating the Easement or about the speed with which the Easement was being vacated.” (See Def.’s Resp. to Pl.’s Mot. for Summ. J., at ¶25; see also Pl.’s Objection to and Mot. to Strike Def.’s Summ. J. Affs.)

CONCLUSIONS OF LAW

A party is entitled to summary judgment when “there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law.” Fla. R. Civ. P. 1.510(c). Here, Fidelity is entitled to summary judgment because, as a matter of law, the Loan Policy terminated prior to Indigo’s bringing suit and because Fidelity was never provided with notice of a claim by any of the insureds under the Loan Policy.

I. The Loan Policy Terminated Prior to Indigo’s Bringing Suit.

“Because an insurance policy is a contract between the insurer and the insured, contract principles apply to its interpretation.” *Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (citations omitted). “When the language of an insurance policy is clear and unambiguous, a court must interpret it according to its plain meaning, giving effect to the policy as it was written.” *E. Florida Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 676 (Fla. 3d DCA 2005). “Florida law cautions that courts must not add meaning to the terms of an insurance policy to create an ambiguity where none exists.” *Ajax Bldg. Corp. v. Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004) (internal citations omitted).

The Loan Policy has terminated, pursuant to Section 2 prior to Indigo’s bringing suit. Indigo did not retain any interest in the Property or the Mortgage; nor does Indigo have any

liability by reason of covenants of warranty made to anyone in connection with its transfer or conveyance of its interest in the Property or the Mortgage. (*See* Def.’s Mot. for Summ. J., at ¶16.) The Certificate of Title extinguished Indigo’s coverage under the Loan Policy because Indigo Land Progresso Lofts, LLC is not the parent or wholly owned subsidiary of Indigo. (*See* Def.’s Mot. for Summ. J., at ¶17.)

Specifically, coverage does not continue under Section 2(a)(i) because Indigo did not acquire “all or any part of the estate or interest in the land by foreclosure” because the Certificate of Title was issued in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in Indigo Land Progresso Lofts, LLC. Section 2(a)(ii) does not continue coverage to Indigo because Indigo Land Progresso Lofts, LLC is not the parent or wholly owned subsidiary of Indigo (*i.e.*, Indigo Real Estate LLC).

Coverage does not continue under Section 2(b) because Indigo did not retain any interest in the Property or the Mortgage and has no liability by reason of covenants of warranty made to anyone in connection with its transfer or conveyance of its interest in the Property or the Mortgage.

Therefore, based upon the unambiguous terms of the Loan Policy, the Loan Policy terminated, as a matter of law, when Indigo transferred its interest in the subject property. Indeed, the Court finds the nationwide body of cases interpreting policy provisions like the Loan Policy’s Section 2 persuasive in confirming that coverage ends upon the transfer of property to another distinct legal owner. *See, e.g., Second Benton Harbor Corp. v. St. Paul Title Ins. Corp.*, 337 N.W.2d 585, 587 (Mich. Ct. App. 1983) (affirming trial court’s ruling that whatever rights the insured may have had under the policy were extinguished when it conveyed the property to a third party); *Willow Ridge Ltd. P’ship v. Stewart Title Guar. Co.*, 706 F. Supp. 477, 486 (S.D.

Miss. 1988) (finding that coverage under title policy ceased after the insured lost its interest in the subject property through foreclosure); *Gebhardt Family Inv., L.L.C. v. Nations Title Ins. of N.Y., Inc.*, 752 A.2d 1222, 1227 (Md. Ct. Spec. App. 2000) (finding that coverage is terminated, even where the interest in the property is transferred to a related entity); *Butera v. Attorneys' Title Guar. Fund, Inc.*, 747 N.E.2d 949, 955 (Ill. App. Ct. 2001) (affirming summary judgment in favor of title insurer and holding that coverage under the policy extinguished after insured relinquished its interest in the property); *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759, 764-65 (4th Cir. 2004) (title policy coverage only continues through ownership); *Stevens v. Dakota Title Ins. & Escrow Co.*, 2004 WL 2381386, *7 (Neb. Ct. App. Oct. 26, 2004) (following *Gebhardt* and holding that appellant was not entitled to insurance coverage after property transfer); *Shotmeyer v. N.J. Realty Title Ins. Co.*, 948 A.2d 600, 607-08 (N.J. 2008) (title insurance coverage terminated after property transfer occurred); *Kwok v. Transnation Title Ins. Co.*, 89 Cal. Rptr. 3d 141, 145 (Cal. Ct. App. 2009) (transfer by limited liability company to its two sole members terminated coverage under the title policy as a matter of law); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E. 2d 168, 177 (Ill. App. Ct. 2005) (affirming summary judgment in favor of title insurance company because policy termination provisions were unambiguous); *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co.*, 146 P.3d 677, 680 (Idaho 2006) (individuals were not entitled to recover under the policy for easement on real property because they conveyed to their limited liability company *before*, not after, *they had made their claim*); *Londen Land Co., LLC v. Title Res. Guar. Co.*, 467 Fed. Appx. 708, 710 (9th Cir. 2012) (under the terms of the title insurance policy, the policy terminated when insured conveyed the property); *Gumapac v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 3150657, *7 (C.D. Cal. July 30, 2012) (dismissing breach of contract claim with prejudice because claim

extinguished at foreclosure when title policy extinguished); *Durbano & Garn Inv. Co., LC v. First Am. Title Ins. Co.*, 330 P.3d 119, 123 (Utah Ct. App. 2014) (affirming district court’s ruling in favor of the title insurance company because plaintiff ceased to be insured under the policy when it transferred the property by quit claim deed).

This determination comports with the foregoing case law, and with public policy, because “[t]itle insurance is an unusual type of insurance” in that it is not a recurring policy; instead, a single premium is paid. *See Butera v. Attorneys’ Title Guar. Fund, Inc.*, 747 N.E.2d 949, 955 (Ill. App. Ct. 2001) (affirming summary judgment in favor of title insurer and holding that coverage under the policy was not continued after the named insured relinquished its interest in the property); *Durbano & Garn Inv. Co., LC v. First Am. Title Ins. Co.*, 330 P.3d 119, 122 (Utah Ct. App. 2014) (affirming district court’s ruling in favor of the title insurance company because the plaintiff ceased to be insured under the policy when it transferred the property by quit claim deed). Moreover, the State of Florida defines the contents of the policy itself, the premium that title insurers are allowed to charge, and the risk they can assume, among other things. *See* §§ 627.7711-.798, Fla. Stat.; Fla. Admin. Code R. 69O-186. Moreover, the State of Florida defines the contents of the policy itself, the premium that title insurers are allowed to charge, and the risk they can assume, among other things. *See* §§ 627.7711-.798, Fla. Stat.; Fla. Admin. Code R. 69O-186.

II. Indigo Did Not Provide Notice of Its Claim During the Policy Period

The Court disagrees with Indigo’s position that “coverage had already been provided” before the Loan Policy terminated. No claim had ever been made *under the Loan Policy* by Indigo or its predecessors. Coverage had been provided under the Owner’s Policy, which is a

separate policy, asserting a loss relating to the Easement and not the alleged delay in vacating it, so Indigo is not able to recover on a claim for damages made after the policy terminated.

Nor is it sufficient for a loss to be suffered during the policy period, because an insured must also assert the loss during the policy period. *First Am. Title Ins. Co. v. Two Seventy Three Water Street, LLC*, 2013 WL 811878, *7 (Conn. Sup. Ct. Jan. 25, 2013); *First Am. Title Ins. Co. v. Two Seventy Three Water Street, LLC*, 117 A.3d 857, 862-63 (Conn. App. Ct. 2015) (date of loss was February 18, 2005; claim submitted on August 15, 2007; and property transferred on May 23, 2011); *Keys v. Chicago Title Ins. Co.*, 2012 WL 4510471, *7 (S.D. Miss. Sept. 28, 2012) (“Keys, individually, has standing to sustain her action against Chicago Title because she has presented evidence of loss incurred and a claim made under the Title Policy while the policy was still effective as to Keys individually”). Because Indigo did not provide notice of its claim prior to bringing suit, the Court will not allow Indigo to attempt to “use” the notice of claim given by Progresso under a separate policy of title insurance relating only to the Easement.

Thus, because the Loan Policy had been terminated prior to Indigo’s bringing suit and because neither Indigo nor its predecessors provided notice of a claim to Fidelity the Court does not find that a cause of action exists.

Accordingly, the Court:

1. **GRANTS** Fidelity’s Motion for Partial Summary Judgment on Condition Precedent, Policy Exclusions, and Limitation of Damages on the grounds of termination and notice, as discussed herein;
2. **DENIES** Indigo’s Motion for Partial Summary Judgment;
3. **DENIES** as moot Indigo’s Objection to and Motion to Strike Argument from Defendant’s Summary Judgment Motion;

4. **DENIES** as moot Indigo's Objection to and Motion to Strike Defendant's Summary Judgment Affidavits;
5. **DENIES** as moot Fidelity's Motion for Leave to Amend its Answer and Affirmative Defenses;
6. **DENIES** as moot all other pending motions and arguments raised in the parties' cross-motions for summary judgment; and
7. **DISMISSES WITH PREJUDICE** Indigo's Amended Complaint. Plaintiff, Indigo Real Estate, LLC, 1675 S. State Street, Suite B, Dover, DE 19901, takes nothing by this action, and Fidelity National Title Insurance Company, 601 Riverside Avenue, Jacksonville, FL, 32304, shall go hence without day.

DONE and ORDERED in Chambers in Broward County, this ___ day of _____, 2016.

TRUE COPY

OCT 27 2016

CARLOS A. RODRIGUEZ

HONORABLE CARLOS A. RODRIGUEZ

CC: Counsel of Record