In re Ayoub

Circuit Court of Loudoun County, Virginia

June 14, 2019, Filed

Civil Case No.: CL 120280

Reporter
2019 Va. Cir. LEXIS 1059 *

Re: Edward N. Avoub and Maria H. Ayoub v. Title Resources Guaranty Company

Core Terms

title insurance policy, Demurrer, right-of-way, breach of fiduciary duty, declaratory judgment, driveway, fiduciary duty, cause of action, plea in bar, adjacent landowner, attorney's fees, Records, Dedication, settlement, covered risk, title insurance, adjacent, accrued, drawing, parties, right to use, title search, real estate, landowner's, rights, statute of limitations, breach of contract, allegations, reservation, breached

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Judges: Douglas L. Fleming, Jr., Circuit Court Judge.

Opinion by: Douglas L. Fleming

Opinion

JEFFREY W. PARKER, JUDGE

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STEPHEN E. SINCAVAGE, JUDGE

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LETTER OPINION

Dear Counsel,

This matter came before the Court on June 13, 2019 for argument on the Defendant's Demurrer and Plea in Bar. After hearing argument of counsel the Court took the matter under advisement. This Letter Opinion follows.

Background

This case arises from the Complaint filed by Edward N. Ayoub and Maria H. Ayoub ("Plaintiffs") on March 8, 2019, seeking compensation under a title insurance policy from Title Resources Guaranty Company ("Defendant") for their loss of the use of a right-of-way on an adjacent landowner's property to **[*2]** access their residential property. Plaintiffs also seek an award of attorney's fees.

Plaintiffs allege in the Complaint that, in connection with their purchase of the house and property located at 41321 Red Hill Road in Leesburg ("Property") on July 16, 2012, they obtained an owner's title insurance policy from Defendant (attached to the Complaint as Exhibit A) "to protect themselves against loss from matters affecting their right to use and enjoy the [P]roperty as stated in the definition of 'title insurance' under ... *Code § 38.2-123*." A survey drawing of the Property allegedly included as an attachment to the title insurance policy issued by Defendant shows that, despite the Property fronting on Red Hill Road, the only driveway to the house on the Property is located approximately 180 feet along a "50' R[ight-of-]W[ay] Reservation" running over the adjacent landowner's property in a generally southwestern direction from Red Hill Road and abutting the northeastern boundary of the Property. The same drawing confirms that the asphalt driveway off of the 50-foot right-of-way reservation shown on the survey drawing is the only driveway on the Property and thus the sole existing means of motor vehicle **[*3]** ingress and egress to and from Plaintiffs' house on the Property.

On or about May 7, 2018, Plaintiffs received a letter from the owner of the adjacent property advising them that they held "no right-of-way, easement, or agreement for ingress/egress upon his property" and that they were trespassing upon his property every time they used the gravel driveway on his property that connected Plaintiffs' paved driveway and Red Hill Road (attached to the Complaint as Exhibit B). The adjacent landowner demanded that Plaintiffs "cease and desist all unauthorized use of his real estate."

On or around May 30, 2018, Plaintiffs notified Defendant that they were making a claim under their title insurance policy on the Property based on the adjacent landowner's claim in the cease and desist letter that Plaintiffs did not have a 50-foot right-of-way over his property to access their asphalt driveway (attached to Complaint as Exhibit C). Plaintiffs allege that, upon investigating the claim, Defendant informed the adjacent landowner, on behalf of Plaintiffs, that "Plaintiffs have a right to use the right of way to access their property."

On or around October 29, 2018, Plaintiff received a final cease-and-desist **[*4]** notice from the adjacent landowner advising them that the subject 50-foot right-of-way upon his property "was never dedicated for public use and has, and continues to be, a private [right-of-way] solely for the private use of the [adjacent landowner]" and demanding that Plaintiffs "immediately cease and desist [their] further use of the [right-of-way] for ingress/egress onto [Plaintiffs'] property at 41321 Red Hill Road." That letter also referenced the letter received from Defendant claiming Plaintiffs had the right to use the subject right-of-way to access the Property, as follows:

"Our office received a letter dated July 17, 2018 from Sara Rollan, your Claim's Counsel at Title Resources Guaranty Company. However, Ms. Rollan's assessment is completely inaccurate. A review of Loudoun County land records shows that while the [adjacent landowner's] driveway is on a 50-foot ROW, the ROW was specifically retained by the owner and never made a part of the parcel dedicated for public use. I have taken the liberty of re-attaching the survey enclosed with Ms. Rohan's Letter. *See* Survey attached as Exhibit 1 and incorporated herein by reference. Also attached is the Deed of Dedication recorded **[*5]** at Deed Book 391, Page 156 of the Real Property Records of Loudoun County, Virginia (hereinafter "Land Records"). *See* Deed of Dedication attached hereto as Exhibit 2 and incorporated herein by reference. I have also enclosed a clearer copy of the 1959 Plat referenced in the Deed of Dedication which is recorded at Deed Book 391, Page 159, along with an enlarged copy for your convenience. *See* Plat attached at Exhibit 3 and incorporated herein by reference.

As you know, the Deed of Dedication dedicates to public use portions of the parcel of land described therein "to the extent and in the manner indicated on said plat. ..." *See* Exhibit 2 at pp. 2. A review of the plat map shows the 50-foot ROW which encompasses [the adjacent landowner's] asphalt driveway was in fact "Reserved By Owner." *See* Exhibit 3. These words are unmistakable on the Plat. It is clear that the ROW was never dedicated to public use and was instead intended for the sole private use of the owner. A review of the survey supports this fact as well. The survey clearly and unmistakably states "50' R.O.W. RESERVATION." [Emphasis added]. *See* Exhibit 1. Once again, there is no disputing the fact that the ROW was not dedicated **[*6]** for public use. It is surprising and utterly astounding that Ms. Rollan incorrectly assessed the ROW as the language of the documents in Land Records are indisputable. Nonetheless, it could not be clearer that the ROW was in fact reserved by the owner and thereafter transferred to the [adjacent landowner] for their sole private use.

Based on the foregoing, you have no right to use the ROW. Your continued use of the ROW constitutes trespass under Virginia law for which the [adjacent landowner is] entitled to be compensated."

Plaintiffs further allege in the Complaint that, following their forwarding of the adjacent landowner's final cease and desist notice to Defendant, Defendant notified Plaintiffs "that it denie[d] title insurance coverage for the matter in dispute."

Plaintiffs also allege that they

"cannot access their driveway, garage and house by motor vehicle without driving on the right of way and that it would cost in excess of $40,000 for engineering work, permits, removal of large trees and construction of a new driveway from the Plaintiffs' house to Red Hill Road, if one can be approved and constructed in the first place due to set back requirements from the boundary line, septic **[*7]** field as well as a storm water drain."

Plaintiffs assert the following causes of action in their Complaint:

• Count I: Breach of Contract, in which Plaintiffs request an award of $95,000 in compensatory damages and assert, in support of that request, that Defendant's "refus[al] to honor its obligations under the title insurance policy to defend and otherwise resolve the dispute" constitutes a breach of the following provisions of the title insurance policy:

(A) Item #5 in the policy: Someone else has a right to limit your use of the land;

(B) Item #11: You do not have actual vehicular and pedestrian access to and from the land;

(C) Item #12: You are forced to correct or remove [a]n existing violation of any covenant, condition or restriction affecting the land;

(D) Item #14: [T]he violation or enforcement of those portions of any law or government regulation concerning: (a) building; (b) zoning; (c) land use, etc;

(E) Item #16: Because of an existing violation of a subdivision law or regulation affecting the land: (a)..., (b) you are required to correct or remove the violation;

(F) Item #29: Your title is unmarketable, which allows someone else to refuse to perform a contract to purchase the **[*8]** land, lease it or make a mortgage loan on it.

• Count II: Declaratory Judgment, in which Plaintiffs seek a declaration that the dispute between Plaintiffs and their neighbor ... "is a covered risk under the title insurance policy issued by the Defendant to the Plaintiffs."

• Count III: Breach of Fiduciary Duty, in which Plaintiffs request an award of $95,000 in compensatory damages and assert, in support of that request, (a) that RGS Title, a title settlement company, breached its fiduciary duty to Plaintiffs by failing, upon conducting a title search in anticipation of Plaintiffs' purchase of the Property, to timely disclose to Plaintiffs "that a significant issue exist[ed] with regards to accessing the Property over the disputed right of way" and (b) that Defendant "is vicariously liable to Plaintiffs for their loss" as a result of RGS Title's breach of its fiduciary duty because "Defendant appointed RGS Title as its agent for the purpose of performing title searches, issuing title insurance commitments, policies and endorsements on real estate located in Virginia and to otherwise act on its behalf with those purchasing title insurance."

On April 12, 2019, Defendant filed a Demurrer **[*9]** to the Complaint ("Demurrer") and a Plea in Bar. On May 10,2019, Plaintiff filed a Motion to Overrule Demurrer ("Opposition to Demurrer")[1] and a Memorandum in Opposition to Plea in Bar ("Opposition to Plea in Bar"), to which Defendant filed replies on May 22, 2019.

Analysis

The two distinct matters that will be before the Court at the April 25, 2019 hearing, namely, Defendant's Demurrer and Plea in Bar, are addressed separately below.

Demurrer

The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted. *Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 557 (2011)*. A demurrer tests the legal sufficiency of a pleading and can be sustained if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action. *W.S. Carnes, Inc. v. Bd. of Supervisors, 252 Va. 377, 384 (1996)*. For purposes of evaluating a demurrer, a court assumes that all material facts, implied facts and reasonable inferences from those facts that are properly alleged in the complaint are true. *Assurance Data, Inc. v. Malyevac, 286 Va. 137, 143 (2013)*. The court does not,

[1] Although styled as a "motion," Plaintiffs' Motion to Overrule Demurrer is essentially nothing more than an opposition to Defendant's Demurrer and will be treated as such here.

however, admit the correctness of conclusions of law. *Thompson v. Skate Am., Inc., 261 Va. 121, 128 (2001)*. Moreover, the court is not bound by "conclusory allegations" in reviewing a demurrer. *Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 66 (2007)*. "Thus, the sole question to be decided by the trial court is whether the facts **[*10]** thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant." *Thompson, 261 Va. at 128*. When a complaint "contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." *CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24 (1993)*. "[E]ven though a ... complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer." Id. Moreover, the court is limited to review of the complaint and any attachments to the complaint. *TC MidAtlantic Dev., Inc. v. Commonwealth, 280 Va. 204, 212 (2010)*. Additionally, when a party voluntarily states the grounds of his demurrer in writing, the court's consideration is limited to the grounds stated. *Klein v. National Toddle House. 210 Va. 641, 643 (1970)*; *Virginia & S.R. Co. v. Hollingsworth, 107 Va. 359, 363-64 (1907)*; *Va. Code § 8.01-273(A)*.

Here, Defendant demurs to all three counts of the Complaint as well as to Plaintiffs' request for attorney's fees. Accordingly, each count and Plaintiffs' request for attorney's fees will be addressed separately below.

(A) Count I: Breach of Contract

As noted above, Plaintiffs assert in Count I of the Complaint that Defendant breached the title insurance policy they obtained from Defendant **[*11]** "to protect themselves against loss from matters affecting their right to use and enjoy the [P]roperty" pursuant to *Code § 38.2-123*. Specifically, Plaintiffs assert Defendant breached the title insurance policy by refusing to honor its obligations under the title insurance policy to cover Plaintiffs' inability to use the subject 50-foot right-of-way reservation or any other existing right-of-way to access their driveway and house.

Under *Code § 38.2-123*, title insurance is "insurance against loss by reason of liens and encumbrances upon property, defects in the title to property, and *other matters affecting* the title to property or *the right to the use and enjoyment of property."* (Emphasis added.)

In Virginia, to state a cause of action for breach of contract, the plaintiff must allege "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George. 267 Va. 612, 619 (2004)*.

Defendant demurs to Count I of the Complaint on the ground that Plaintiffs did not and "cannot allege a legal obligation that [Defendant] allegedly violated in the [title insurance p]olicy" because the title insurance policy "does **[*12]** not cover Plaintiffs' use" of the 50-foot right-of-way reservation shown on the survey drawing. While Defendant addresses in its Demurrer each of the six allegedly applicable covered risks upon which Plaintiffs rely in their Complaint and the exclusions set forth in the title insurance policy that purportedly "eliminate [Defendant's] duty to indemnify Plaintiffs for the alleged loss," the essence of Defendant's Demurrer is that the title insurance policy does not provide coverage for Plaintiffs' inability to use the subject 50-foot right-of-way because (a) the private right-of-way is not included within the definition of Plaintiffs' "land"; (b) Plaintiffs' desire to use someone else's land is not covered in the policy; (c) Plaintiffs' land has access to Red Hill Road, a public street; and (d) the title insurance policy expressly exempts coverage for "claims of Easements ... not shown by the Public Records."

Thus, Defendant concludes, as the title insurance policy does not cover any risks associated with Plaintiffs' use of the private right-of-way, Defendant "has not violated any duty under the [p]olicy, and Count I should be dismissed." In other words, Defendant is claiming that the **[*13]** terms of the title insurance policy preclude the coverage alleged by Plaintiffs in their Complaint as a matter of law.

Plaintiffs argue that the allegations in the Complaint are sufficient to establish that "Defendant's attempt to escape any obligation to ... provide coverage for this matter, which involves the basic ability of a homeowner to drive onto his property, is a blatant breach of both the express provisions of the title insurance policy and the spirit and intent of title insurance policies as defined by Virginia law."

I agree with Plaintiffs' position that, in light of the circumstances of this case, Plaintiffs' breach of contract claim is not a matter that can properly resolved on demurrer in Defendant's favor.

It is first worth noting that a trial court is "not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [pleading], but only may determine whether the factual allegations of the [pleading] are sufficient to state a cause of action." *Harris*

v. Kreutzer, 271 Va. 188, 195-96 (2006). Indeed, the Virginia Supreme Court has repeatedly warned Virginia's trial courts about granting motions that "short circuit" the legal process and deprive litigants of their "day in court" and deprive **[*14]** the appellate courts of the "opportunity to review a thoroughly developed record on appeal." *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship, 253 Va. 93, 95 (1997)*; see also CaterCorp, *246 Va. at 24, Renner v. Stafford, 245 Va. 351, 353 (1993)*; *Carson v. LeBlanc, 245 Va. 135, 139-40 (1993)*. This is particularly true in the context of demurrers, the resolution of which, as noted, does not permit the trial court to decide the merits of the case but only the adequacy of pleadings. *Fuste v. Riverside Healthcare Ass'n, Inc., 265 Va. 127, 131-32, 575 S.E.2d 858, 861 (2003)*. Additionally, the court must "consider as true the facts alleged [in the complaint], the facts impliedly alleged, and the reasonable inferences of fact that can be drawn from the facts alleged." *Almy v. Grisham, 273 Va. 68, 77 (2007)*. Here, Plaintiffs may or may not prevail at trial, but that question is not properly before the Court at this point in the proceedings. Instead, the proper question is strictly whether Plaintiffs alleged sufficient facts in the Complaint to survive demurrer.

It is also worth noting that, notwithstanding the various references thereto in the parties' pleadings and associated documents, some of the relevant documents in the county land records, such as the "1959 Plat referenced in the Deed of Dedication" and referred to in the October 29, 2018 final cease-and-desist notice received by Plaintiffs from the adjacent landowner, have not been attached to the Complaint and are thus not before **[*15]** the Court for consideration.[2] Hence, the Court's determination as to whether Plaintiffs have sufficiently alleged a legally enforceable obligation that Defendant owed to Plaintiffs must be based solely on the provisions of the title insurance policy and the discernable facts contained in the Complaint and the exhibits referred to therein and attached thereto, including the survey drawing. Moreover, it is clear from the arguments that Defendant makes in its Demurrer that Defendant is relying strictly on the terms of the title insurance policy and the survey drawing attached to the Complaint as the basis for its Demurrer. Indeed, as noted above, Defendant essentially contends that the terms of the policy preclude the coverage asserted by Plaintiffs.

Hence, the core issue that will need to be resolved in this matter, with respect to Plaintiffs' breach of contract claim, is whether Plaintiffs have sufficiently alleged that the losses suffered by Plaintiffs as a result of not being able to use the subject right-of-way on the adjacent landowner's property is covered by the title insurance policy issued by Defendant to Plaintiffs.

As alleged in the Complaint, Covered Risk #5 of the title insurance **[*16]** policy provides coverage if "[s]omeone else has a right to limit [Plaintiffs'] use of the Land." Covered Risk #11 provides coverage if Plaintiffs "do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right." Covered Risk #12 provides coverage if Plaintiffs "are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land." "Land" is defined in the title insurance policy as "the land or condominium unit... and any improvements on the Land which are real property."

As noted above, the survey drawing of the Property included with the title insurance policy clearly shows that, although the front of the Property borders Red Hill Road, the asphalt driveway to the house on the Property is accessible only via the subject right-of-way on the adjacent landowner's property. The survey drawing also clearly shows that the asphalt driveway is the only driveway on the Property and thus the sole means of motor vehicle ingress and egress to and from Plaintiffs' house on the Property. It is therefore reasonable to conclude from the survey drawing, the only drawing currently before the Court, that Plaintiffs were **[*17]** entitled to, and indeed had to, use the right-of-way to access to access their house on the Property. Certainly, that is the conclusion Defendant reached when it initially accepted Plaintiffs' claim under the title insurance policy and informed the adjacent landowner, in the letter dated July 17, 2018 from Sara Rollan, that Plaintiffs had the right to use the right-of-way to access the Property. Indeed, it was only after the adjacent landowner pointed to the Deed of Dedication and the 1959 Plat referenced in the Deed of Dedication, both of which are recorded in the land records, to refute Defendant's position that Defendant rejected Plaintiffs' claim of coverage under the title insurance policy.

Clearly, then, the adjacent landowner had the right to limit Plaintiffs' reasonable use of the "Land" by forbidding them from using the right-of-way, the only designated means of access Plaintiffs had to the Property and to their house. Not only did the adjacent land owner's preclusion of Plaintiff's use of the right-of-way mean that Plaintiffs were left with no actual vehicular and pedestrian access to and from the Property and their house, Plaintiffs were forced into the position of having **[*18]** to correct the violation of their right to have legal access to the Property

[2] Nor, as best as I can tell, have such documents been otherwise included in the Court's file.

and their house by constructing, if they can, a new driveway off of Red Hill Road, a condition that plainly affected the Land and Plaintiffs' reasonable use thereof. Indeed, Plaintiffs allege in the Complaint that they "cannot access their driveway, garage and house by motor vehicle without driving on the right of way" and that it will "cost in excess of $40,000" to build a new driveway from Plaintiffs' house to Red Hill Road, if that is even possible.

In light of these circumstances and the inclusion of "improvements on the Land which are real property" in the definition of "Land" in the title insurance policy, the Court would be hard pressed to conclude that Covered Risks #5, #11, and #12 do not constitute legally enforceable obligations arising from the title insurance policy that Defendant allegedly violated.[3]

Moreover, the two exceptions set forth in the title insurance policy upon which Defendant relies—any loss arising from (a) the "[l]ack of a right... to any land outside the area specifically described [in the title insurance policy] and ... in streets [or] alleys ... that touch the land" and (b) "[e]asements, **[*19]** or claims of easements, not shown by the Public Record"—are not applicable here because, first, the loss for which Plaintiffs seek compensation arises not from Plaintiffs' lack of a right to use the subject right-of-way or any easement claimed by Plaintiffs thereon but rather from Defendant's failure to timely inform them that they did not have a right to use the right-of-way or any easement thereon. Second, nothing in the Complaint or the documents attached thereto establishes what the Public Records do or do not say with respect to the subject right-of-way. Indeed, as previously alluded to, other than the Deed reflecting Plaintiffs' purchase of the Property, which only states that the "Real Estate is conveyed subject to all recorded easements, conditions, restrictions, and agreements that lawfully apply to the Real Estate or any part thereof," the relevant documents in the Public Records have not been attached to the Complaint and are thus not before the Court for consideration.

Accordingly, the Court rejects Defendant's claim that the title insurance policy does not provide coverage for Plaintiffs' inability to use the subject right-of-way and overrules Defendant's Demurrer to Count **[*20]** I of the Complaint.

(B) Count II: Declaratory Judgment

As noted above, Plaintiffs seek in Count II of the Complaint a declaration by the Court that the dispute between Plaintiffs and the adjacent landowner regarding Plaintiffs' use of the subject right-of-way "is a covered risk under the title insurance policy issued by the Defendant to the Plaintiffs." Defendant demurs to Count II on the ground that Plaintiffs fail to state a claim for declaratory judgment because "the relief requested seeks a determination of a disputed issue rather than adjudication of the parties' rights." Thus, Defendant concludes, "declaratory relief is improper."

In response, Plaintiffs argue that declaratory judgment is appropriate in this case because there "are uncertainties over future events that are appropriately resolved by a declaratory judgment stating that the allegations in the Complaint either do or do not give rise to a covered risk." I disagree with Plaintiffs and agree with Defendant's position.

Under the Declaratory Judgment Act, *Code §§ 8.01-184 through 8.01-191*, Virginia courts "have power to make binding adjudications of right" in cases of "actual controversy." *Va. Code § 8.01-184*. That power may be exercised in "instances of actual antagonistic **[*21]** assertion and denial of right." Id. The purpose of the declaratory judgment statutes is "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor." *Va. Code § 8.01-191*.

Thus, as the Virginia Supreme Court has explained, the "purpose of a declaratory judgment proceeding is the adjudication of rights." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. Of Supervisors, 285 Va. 87, 98 (2013)*. "The General Assembly created the power to issue declaratory judgments to resolve disputes 'before the right is violated.'" Id. (quoting *Patterson v. Patterson, 144 Va. 113, 120 (1926)*). Indeed,

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[3] The same cannot be said with regards to the other Covered Risks set forth in the title insurance policy upon which Plaintiffs rely—i.e., Covered Risks #14, #16, and #29—since the Complaint does not implicate any law, governmental regulation, subdivision law, or regulation that affects the Property or establish that Plaintiffs' title to the Property is unmarketable. While the value of the Property will certainly be lowered by the lack of access via the right-of-way, that situation will not allow a knowing purchaser, lessee, or mortgagor "to refuse to perform a contract to purchase the Land, lease it, or make a Mortgage loan on it." Although Plaintiffs' reliance on those risks is misplaced, I do not feel that Defendant's Demurrer to Count I of the Complaint needs to be separately sustained with respect to those specific risks since Count I is otherwise sufficient, in my view, to survive demurrer.

"[t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct.... with a view rather to avoid litigation than in aid of it." Id. (quoting *Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 421 (1970)*). "As a rule, this authority will not be exercised when some other mode of proceeding is provided. *USAA Cas. Ins. Co. v. Randolph, 255 Va. 342, 346 (1998)*. Moreover, "when a declaratory judgment regarding a disputed fact **[*22]** would be determinative of issues, rather than a construction of definite stated rights ..., the case is not appropriate for declaratory judgment." Id. "The authority to enter a declaratory judgment is discretionary and must be exercised with great care and caution." Id.

For instance, in Bishop, involving a dispute between insurers, the Supreme Court held that the disputed claim was not appropriate for resolution by means of declaratory judgment because, "when the petition for declaratory judgment was filed, the various claims and rights asserted had accrued and matured, and the wrongs alleged had been suffered" and "other modes of proceeding were available for resolution of the dispute." *211 Va. at 421*. In Randolph, in which Randolph sought a declaration that USAA was liable for his injury under certain insurance policies issued by USAA, the Court held that the case was "inappropriate for declaratory judgment because [it did] not involve a determination of rights, but only ... a disputed issue [(namely, whether Randolph's injuries arose out of and in the course of his employment)] to be determined in future litigation between the parties." *255 Va. at 347*.

Here, the issue that Plaintiffs seeks resolution of by declaratory **[*23]** judgment—namely, whether the dispute between Plaintiffs and the adjacent landowner regarding Plaintiffs' use of the subject right-of-way is a covered risk under the title insurance policy—is before the Court for resolution in Plaintiffs' breach of contract claim. Thus, the rights of the parties have already accrued and matured, and the wrongs alleged have already been suffered. Likewise, no declaratory judgement could be issued to avoid litigation, which has already commenced. Moreover, another mode of proceeding to resolve these issues has been provided—the breach of contract action itself. Furthermore, the matters on which Plaintiff seeks declaratory judgment do not involve a determination of rights, but rather a determination of disputed issues that will need to be resolved in the breach of contract action—e.g., whether Defendant breached its obligations to Plaintiffs under the title insurance policy by refusing to cover Plaintiffs' inability to use the subject 50-foot right-of-way to access the Property and their house.

Accordingly, the resolution of this matter is not appropriate by means of declaratory judgment and Defendant's Demurrer is sustained with prejudice as to Count II **[*24]** of the Complaint.

(C) Count III: Breach of Fiduciary Duty

As noted above, Plaintiffs assert in Count III of the Complaint that Defendant is vicariously liable for RGS Title's breach of its fiduciary duty to Plaintiffs by failing, upon conducting a title search for the Property, to timely disclose to Plaintiffs "that a significant issue exist[ed] with regards to accessing the Property over the disputed right of way."

Defendant generally demurs to Count III of the Complaint on the ground that the Complaint fails to allege a sufficient factual predicate to support a claim of breach of fiduciary duty. Specifically, Defendant argues that Count III fails to establish that RGS Title is Defendant's agent for purpose of closing-related activities and fails to allege an actual breach of fiduciary duty. Defendant further argues that Plaintiffs' breach of fiduciary duty claim is barred by the source of duty rule.

In response, Plaintiffs assert that their breach of fiduciary duty claim against Defendant is properly pled and should survive demurrer because the "relationship between Defendant and RGS [Title] and the extent of RGS[Title's] fiduciary duty to Plaintiff on behalf of Defendant is very much **[*25]** in dispute and will ultimately be a question of fact at trial." Plaintiffs further argue that their breach of fiduciary duty claim is not barred by the source of duty rule. Thus, Plaintiffs conclude, Count III of the Complaint should withstand the instant Demurrer.

I agree generally with Defendant's position.

In order to state a claim for breach of fiduciary duty, Plaintiff must plead the (a) duty, (b) breach, and (c) damages sustained. See *Carstensen v. Chrisland Corp., 247 Va. 433, 444 (1994)*. A fiduciary relationship exists "when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence." *Allen Realty Corp. v. Holbert, 227 Va. 441, 446 (1984)*. To survive demurrer, the plaintiff must plead facts sufficient to support the existence of a fiduciary relationship. See *Mack v. Orion Inv. Corp., 2002 Va. Cir. LEXIS 468 (Norfolk, 2002)* (sustaining demurrer because plaintiff failed to plead any

facts in his Complaint to give rise to even an inference that parties had a fiduciary relationship).

In Count III, Plaintiffs allege that (a) "RGS Title is a title settlement company that has both common law fiduciary duties as well as duties under the Virginia Consumer Real Estate Settlement Protection Act, §55-525.16, *et seq*," (b) "Defendant appointed **[*26]** RGS Title as its agent for the purpose of performing title searches, issuing title insurance commitments, policies and endorsements on real estate located in Virginia and to otherwise act on its behalf with those purchasing title insurance," (c) "Plaintiffs retained RGS Title to perform settlement services for the purchase of 41321 Red Hill Road," (d) "RGS Title breached its duty to Plaintiffs by failing to disclose to Plaintiffs the existence of a matter that materially affects their basic ability to access the Property," and (e) "because RGS Title is an agent of Defendant..., Defendant... is vicariously liable to Plaintiffs for their loss."

As a matter of reason, Plaintiffs' breach of fiduciary duty claim cannot survive the instant Demurrer because Plaintiffs have failed to establish in the Complaint that RGS Title, the nonparty that allegedly erred by failing to disclose the problem with using the subject right-of-way to access the Property, had a sufficient relationship with Defendant at the time to make Defendant vicariously liable for RGS Title's alleged error. Indeed, while Plaintiffs allege in Count III that Plaintiffs hired RGS Title to perform settlement services and that **[*27]** Defendant generally appointed RGS Title as its agent to perform title searches, there is nothing in the Complaint, even when viewing Plaintiffs' allegations in the proper light favorable to Plaintiffs, that shows that RGT Title was acting as Defendant's agent at the time it failed to disclose the problem with the right-of-way to Plaintiffs. In other words, while Plaintiffs appear to allege that nonparty RGS Title has an independent fiduciary duty to Plaintiffs, they do not allege that RGS Title's alleged breach of that duty vicariously implicated Defendant. The mere fact that Defendant generally appointed RGS Title as its agent for the purpose of performing title searches does not sufficiently establish that RGS Title was working in that capacity when it failed to disclose the access defect to Plaintiffs.

Moreover, even had Plaintiffs factually alleged that RGS Title was acting as Defendant's settlement agent at the time of RGS Title's alleged breach of fiduciary duty, at least one court in Virginia has held that the title insurer has no respondeat superior liability for the title company's search error or breach of its closing duties. See *Wells Fargo Bank, N.A. v. Old Republic Nat'l Title Ins. Co., 2009 WL 4927145, at *7 (E.D. Va. 2009)* (observing that "a title insurer is not liable **[*28]** for the actions of its title insurance agent").

Likewise, the same court held that the Virginia Consumer Real Estate Settlement Protection Act does not "require☑ that title insurers will be held accountable for their title agents' settlement and escrow activities." Id. This is so, the court reasoned, because the Virginia Consumer Real Estate Settlement Protection Act "does not mandate that a title agent becomes a settlement agent by virtue of selling, soliciting or negotiating insurance" but, instead, "merely authorizes licensed Virginia attorneys, title insurance companies and agents, real estate brokers and financial institutions (or a subsidiary or affiliate thereof), to serve as Settlement Agents and provide escrow, closing or settlement services if they register with their respective licensing authority and meet other conditions of their regulatory agencies." Id. (internal quotation marks omitted).

Additionally, to establish a breach of fiduciary duty, as opposed to a breach of contract, a plaintiff must identify a breach of duty arising from a source other than its contractual relationship with the defendant. See *August Mutual Ins. Co. v. Mason, 274 Va. 199, 205-06 (2007)* ("To avoid turning every breach of contract into a tort, however, **[*29]** we have enunciated the rule that, in order to recover in tort, the duty tortuously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." (internal quotation marks omitted)). Indeed, as the Virginia Supreme Court observed in Mason, "[i]f the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort." *Id. at 207-08 (2007)* (internal quotation marks omitted). "The determination whether a cause of action sounds in tort or solely in contract depends on the source of the duty violated." *Id. at 205*. The majority of courts in Virginia that have addressed the issue refuse to impose extra duties not found in the controlling business contract, where such a contract exists.

Here, any fiduciary duties for which Defendant is allegedly liable to Plaintiff, be they implicated directly or vicariously, arise solely from the subject title insurance policy. Indeed, any fiduciary duty allegedly breached in this case existed solely **[*30]** because of the contractual relationship between the parties. That is to say, but for the existence of the title insurance policy no such duty

would exist. Hence, because the fiduciary duties for which Defendant is allegedly liable are derived from the title insurance policy, they cannot properly be asserted in a tort claim of breach of fiduciary duty.

Accordingly, Defendant's Demurrer is sustained with prejudice as to Plaintiffs' claim for breach of fiduciary duty in Count III of the Complaint.

(D) Plaintiffs' Request for Attorney's Fees

In addition to their request for $95,000 in compensatory damages and declaratory judgment, Plaintiff also ask in their prayer for relief in the Complaint for an award of attorney's fees. Plaintiffs provide no authority or other explanation to support that bare request.

Defendant demurs to Plaintiffs' request for attorney's fees on the ground that Plaintiffs fail to allege any statutory or contractual basis for their request for attorney's fees as required by Rule 3:25. I agree with Defendant's position.

Rule 3:25 provides, in pertinent part, as follows:

B. Demand. --A party seeking to recover attorney's fees shall include a demand therefor in the complaint **[*31]** filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. *The demand must identify the basis upon which the party relies in requesting attorney's fees.*

C. Waiver. --The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, *unless leave to file an amended pleading seeking attorney's fees is granted* under Rule 1:8.

(Italicized emphasis added.)

Here, Plaintiffs have failed to identify the basis upon which they rely in requesting attorney's fees. Hence, Plaintiffs' claims for such fees are deficient under Rule 3:25 and subject to waiver unless the Court grants Defendants leave to file an amended complaint to correct that deficiency.

For these reasons, Defendant's Demurrer is sustained as to Plaintiffs' request for attorney's fees, with leave to amend.

Plea in Bar

A plea in bar is a defensive pleading that reduces the litigation to a single issue of fact that, if proven, bars the plaintiff's right of recovery. *Smith v. McLaughlin, 289 Va. 241, 252 (2015)*. "The party asserting a plea in bar bears **[*32]** the burden of proof on the issue presented." *Hawthorne v. VanMarter, 279 Va. 566, 577 (2010)*. "The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings, or developed through the presentation of evidence supporting or opposing the plea." Id. The function of a plea in bar "is to narrow the litigation by resolving an issue that will determine whether a plaintiff may proceed to trial on a particular cause of action." Id.

Defendant asserts in its Plea in Bar that Plaintiffs' breach of fiduciary duty claim in Count III of the Complaint is barred by the applicable two-year statute of limitations set forth in *Code § 8.01-248* since it has been more than two years since the alleged breach of fiduciary duty by RGS Title occurred in 2012 when, after performing a title search in connection with Plaintiffs' purchase of the Property, RGS Title allegedly failed to disclose to Plaintiffs their inability to use the subject right-of-way to access their house. Thus, Defendant concludes, the "Court should dismiss Count III."

In response to the Plea in Bar, Plaintiffs do not challenge Defendant's assertion that Plaintiffs' breach of fiduciary duty claim is **[*33]** subject to the two-year statute of limitations. Nor do they contest Defendant's assertions that the alleged breach occurred in 2012. Instead, citing *Code § 8.01-249(1)* as analogous support, Plaintiffs argue that the statute of limitations time period does not start running until "the breach is discovered or, by due diligence, should have been discovered." Here, Plaintiffs assert, Plaintiffs did not discover that they were not allowed to use the subject right-of-way to access their asphalt driveway and their house until they received the May 7, 2018 cease and desist letter from the adjacent landowner informing them that they had no interest in, and thus could not use, the right-of-way. Thus, Plaintiffs conclude, the Court should find that their breach of fiduciary duty claim is not time barred and overrule the Plea in Bar.

I agree with Defendant's position.

It should be noted that, since the Court sustained Defendant's Demurrer as to Count III of the Complaint, Defendant's Plea in Bar technically is moot. As counsel argued the Plea in Bar alternatively, however, the Court will address the merits of the plea.

Under Virginia law, given that no limitation is otherwise prescribed for a breach of fiduciary duty **[*34]** cause of

action, a breach of fiduciary duty claim carries a two-year statute of limitations. See *Code § 8.01-248* ("Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.").

Code § 8.01-230 provides:

"In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and *the prescribed limitation period shall begin to run from the date the injury is sustained* in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu *and not when the resulting damage is discovered*, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, *§§ 8.01-249*, *8.01-250* or other statute."

(Emphasis added.) None of the exceptions in *Code § 8.01-230* apply to breach of fiduciary duty claims.

However, Plaintiffs argue that the exception set forth in *Code § 8.01-249(1)*[4] provides analogous support to their assertion that a cause of action for breach of fiduciary duty accrues on the date the breach is discovered rather than from the date of the breach itself. I disagree. *Code § 8.01-249(1)* expressly applies only to "actions **[*35]** for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence." Clearly, had the Virginia Legislature intended to have causes of action for breach of fiduciary duty accrue when the asserted breach "is discovered or by the exercise of due diligence reasonably should have been discovered," it could have and would have included such causes of action in the group of actions set forth in *Code § 8.01-248(1)* or enacted a different statute so providing. But it did not do so.

The Court must conclude, therefore, that the Legislature intended that an action for breach of fiduciary duty **[*36]** must be filed within two years from the date of the alleged breach, rather than from the discovery of that breach. See, e.g., Sun Hotel v. Summitbridge Credit Invs. III, LLC, 86 Va. Cir. 189, at *5 (Fairfax County 2013) (citing *Code § 8.01-248* and holding that "the breach of fiduciary duty claim is ... time barred because an action for breach of fiduciary duty must be filed within two years from the date of the alleged breach"); *Pathek v. Trivedi, 61 Va. Cir. 572, 576 (Chesterfield 2003)* (holding that, because "the limitations period for breach of fiduciary duty actions is prescribed by *Virginia Code § 8.01-248*, which states that the statute of limitations begins to run when the 'right to bring such an action has accrued,'" the "statute of limitations for breach of fiduciary duty is two years" and the "cause of action accrues on the date of the breach").

Here, Plaintiffs assert a cause of action for breach of fiduciary duty against Defendant in Count III of the Complaint. The breach allegedly occurred in July 2012, when, after conducting a title search for Plaintiffs' purchase of the Property, RGS Title "fail[ed] to disclose to Plaintiffs the existence of a matter that materially affect[ed] their basic ability to access the Property." Accordingly, Plaintiffs were required to file their claim for breach of fiduciary duty by July 2014. **[*37]** Plaintiffs, however, did not do so until 2019. Consequently, the breach of fiduciary claim in Count III of the Complaint is barred by the statute of limitations, and the Court sustains the Plea in Bar and dismisses Count III with prejudice.

Let Mr. Delaney prepare an appropriate order incorporating this Letter Opinion by reference, to which both counsel may note any objections.

Cordially,

/s/ Douglas L. Fleming, Jr.

Douglas L. Fleming, Jr.

Circuit Court Judge

End of Document

[4] *Code § 8.01-249(1)* provides as follows:

> The cause of action in the actions herein listed shall be deemed to accrue as follows:
>
> 1. In actions for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence, when such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered[.]