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IN THE
COURT OF APPEALS OF INDIANA

Springbrook Village Batesville LLC, and Eunoia Development Group LLC,

Appellants-Plaintiffs,

v.

Southeast Indiana Title Inc., Douglas C. Amberger, and Chicago Title Company Inc.,

Appellees-Defendants.

September 1, 2022

Court of Appeals Case No. 21A-CT-2603

Appeal from the Marion Superior Court

The Honorable Christopher Haile, Magistrate Judge

Trial Court Cause No. 49D06-2106-CT-19692

Robb, Judge.

Case Summary and Issues

[1] Springbrook Village Batesville LLC ("Springbrook Village") and Eunoia Development Group LLC ("Eunoia") (collectively, "Springbrook") filed a complaint against Southeast Indiana Title Inc. and Douglas Amberger (collectively, "S.E. Title"), and Chicago Title Company, LLC ("Chicago Title"). S.E. Title and Chicago Title both filed motions to dismiss which the trial court granted. Springbrook now appeals, raising multiple issues for our review which we consolidate and restate as: (1) whether the trial court erred by precluding Springbrook from amending its complaint; and (2) whether the trial court erred by granting S.E. Title's and Chicago Title's motions to dismiss.

Concluding that Springbrook failed to show it was prejudiced by the trial court denying it the right to amend its complaint and the trial court did not err by granting the motions to dismiss, we affirm.

Facts and Procedural History

[2] Springbrook Village entered into a contract with members of the Nobbe family for the purchase of sixty acres of land located in Franklin County ("Nobbe Contract"). The Nobbe Contract was scheduled to commence on March 25, 2018, and to close on August 18, 2020. In December 2018, Springbrook Village assigned the Nobbe Contract to Eunoia with the permission of the Nobbe family.

[3] In November 2018, Springbrook Village and Margaret Mary Community Hospital ("Hospital") entered into a contract wherein the Hospital would purchase fourteen- and one-half acres of the sixty-acre parcel. However, this purchase agreement did not close and expired by its terms on March 31, 2019. On April 1, 2019, after the purchase agreement's expiration, the Hospital filed a Memorandum of Purchase Agreement with the Franklin County, Indiana Recorder's Office. *See* Appellants' Appendix, Volume II at 22-23.

[4] Subsequently, the Hospital and the Nobbe family entered into a purchase agreement for the entire sixty-acre parcel of land. S.E. Title was hired to conduct the title search and handle the closing. Chicago Title underwrites the title policies for S.E. Title. On June 4, 2019, on behalf of Chicago Title, S.E.

Title issued a preliminary title commitment to the Hospital that did not include the April 1 Memorandum of Purchase Agreement. The commitment stated that it "excludes coverage for any loss resulting from a contractual relationship and or litigation between Springbrook Village [] and/or [Eunoia] against [the Hospital] and the sellers." *Id.* at 44. On June 11, the Hospital filed a Termination and Release of Memorandum of Purchase Agreement.

[5] On June 13, 2019, Springbrook sent the Hospital a letter informing it that Springbrook had an existing purchase agreement with the Nobbe family for the sixty-acre parcel of land. The next day, the Hospital sent the letter to S.E. Title. The purchase agreement between the Hospital and the Nobbe family closed the same day and the Nobbe family conveyed the sixty-acre parcel to the Hospital via warranty deed. The deed was recorded in the Franklin County Recorder's Office. Chicago Title then issued the Hospital its final policy of title insurance. On August 22, the Hospital filed a Complaint to Quiet Title against Springbrook in the Franklin Circuit Court. Eunoia filed a counterclaim against the Hospital.

[6] On June 10, 2021, Springbrook filed a Complaint for Damages against both S.E. Title and Chicago Title raising the following counts:

> [Count I] Negligent Misrepresentation, Negligence, and In Concert Liability against S.E. Indiana Title Inc.
>
> * * *

> [Count II] Negligent Misrepresentation, Negligence[,] and In Concert Liability against Douglas C. Amberger
>
> * * *
>
> [Count III] Negligent Misrepresentation and In Concert Liability against Chicago Title

Id. at 14-17.

[7] Subsequently, both S.E. Title[1] and Chicago Title[2] filed motions to dismiss Springbrook's complaint pursuant to Indiana Trial Rule 12(B)(6). On October 18, 2021, a hearing on the motions to dismiss was held. The trial court thereafter issued its order stating: "The Court having considered the motions and opposition thereto now GRANTS the Motions to Dismiss." Appealed Order at 1. The trial court dismissed the Complaint "with prejudice." *Id.* Springbrook now appeals.

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[1] S.E. Title also moved to dismiss Springbrook's complaint pursuant to Indiana Trial Rule 12(B)(8), arguing the same action is pending in another Indiana state court. Because we conclude the trial court did not err in dismissing Springbrook's complaint for failure to state a claim upon which relief can be granted, we need not also address S.E. Title's 12(B)(8) argument.

[2] In Footnote 1 of Chicago Title's motion to dismiss it argues that Springbrook incorrectly named "Chicago Title Company, LLC" as a defendant when Chicago Title's full business name is "Chicago Title Insurance Company[.]" Appellants' App., Vol. II at 181. However, we note that "Chicago Title Company, LLC" is the name used on Chicago Title's application for certificate of authority with the Indiana Secretary of State. Appellants' App., Vol. III at 79.

Discussion and Decision[3]

I. Opportunity to Amend

[8] Springbrook argues the trial court committed reversable error under Trial Rule 12(B)(6) "by dismissing the Complaint with prejudice, without providing an opportunity to amend." Brief of Appellants at 15. Pursuant to Indiana Trial Rule 12(B), "[w]hen a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) . . . the pleading may be amended once as of right[.]" "Accordingly, a T.R. 12(B)(6) dismissal is without prejudice, since the complaining party remains able to file an amended complaint within the parameters of the rule." *Platt v. State,* 664 N.E.2d 357, 361 (Ind. Ct. App. 1996), *trans. denied.*

[9] The trial court granted S.E. Title's and Chicago Title's motions to dismiss and dismissed Springbrook's complaint "with prejudice." Appealed Order at 1. Therefore, the trial court erred. However, we have stated:

> Just as an offer of proof allows this court to determine the admissibility of evidence and the potential for prejudice if it is excluded, we likewise need specific information as to how [Plaintiff] would have amended his complaint to make a rational assessment of whether he was prejudiced by the trial court's ruling.

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[3] S.E. Title filed a motion to strike portions of Appellant's Reply Brief. By separate order, this motion is denied.

Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001), *trans. denied*.

[10] Springbrook has not shown on appeal how it would amend its complaint to avoid a 12(B)(6) dismissal. Thus, Springbrook has failed to demonstrate prejudice and we conclude that the trial court's error was harmless.

II. Motion to Dismiss[4]

A. Standard of Review

[11] We review de novo the trial court's grant or denial of a motion to dismiss based on Trial Rule 12(B)(6). *Kitchell v. Franklin,* 997 N.E.2d 1020, 1025 (Ind. 2013). "A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it." *Id.* In conducting our review, we accept as true the facts alleged in the complaint. *Trail v. Boys & Girls Clubs of Nw. Ind.,* 845 N.E.2d 130, 134 (Ind. 2006). "[W]e view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor." *Babes Showclub, Jaba, Inc. v. Lair,* 918 N.E.2d 308, 310 (Ind. 2009). A complaint may not be dismissed for failure to state a claim

[4] Springbrook also argues that the trial court failed to rule on its "request to exclude materials submitted with Motions to Dismiss, or for notice if the matters were being treated as summary judgment proceedings." Br. of Appellants at 41. There is nothing in the record to suggest the trial court treated the motions to dismiss as motions for summary judgment under Indiana Code section 12(B). Further, we see no indication that the outside materials were considered. *Cf. Milestone Contractors, L.P. v. Ind. Bell Tel. Co.*, 739 N.E.2d 174, 176-77 (Ind. Ct. App. 2000) (wherein this court inferred the consideration of information outside the pleadings when both parties submitted briefs in support or opposition of a motion for judgment on the pleadings that discussed materials extraneous to the pleadings), *trans. denied.* Therefore, we assume the trial court did not rely on any outside materials attached to the motions to dismiss when making its decision.

"unless it is clear on the face of the complaint that the complaining party is not entitled to relief." *Charter One Mortg. Corp. v. Condra,* 865 N.E.2d 602, 605 (Ind. 2007).

B. Negligence

[12] Springbrook first argues the trial court erred in dismissing its negligence claim against S.E. Title. To prevail on a claim of negligence Springbrook must show: (1) a duty owed to Springbrook by S.E. Title; (2) S.E. Title's breach of that duty by allowing its conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by S.E. Title's breach of duty. *See King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003). We find the issue of duty to be dispositive.[5] *See Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1380 (Ind. Ct. App. 1996) ("Absent a duty owed to a plaintiff by the defendant, there can be no actionable negligence."), *trans. denied*.

[13] To determine whether a duty exists where the element of duty has not already been declared or otherwise articulated, we employ a three-part balancing test considering: (1) the relationship between the parties; (2) the foreseeability of harm; and (3) public policy concerns. *Penske Truck Leasing Co., L.P. v. Dalton-McGrath,* 157 N.E.3d 5, 13 (Ind. Ct. App. 2020).

[5] Because we conclude there is no duty of care, we need not address any proximate cause arguments.

[14] A duty of reasonable care is "not, of course, owed to the world at large, but arises out of a relationship between the parties." *Williams v. Cingular Wireless*, 809 N.E.2d 473, 476 (Ind. Ct. App. 2004), *trans. denied.* Here, the record is clear that there is no contractual or professional relationship between Springbrook and S.E. Title. Further, there is no statutory relationship. Therefore, the undisputed facts demonstrate that S.E. Title had no relationship with Springbrook that would normally give rise to a duty. *See N. Ind. Pub. Serv. Co. v. Sell*, 597 N.E.2d 329, 332 (Ind. Ct. App. 1992), *trans. denied*.

[15] Next, we look at the foreseeability of harm. The foreseeability component of the duty analysis is a lesser inquiry than the foreseeability component of proximate cause. *See Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 387 (Ind. 2016) (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996), *trans. denied*).[6] The *Goodwin* court explained that

> because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome is "sufficiently likely" is not enough to give rise to a duty. Instead, for purposes of determining whether an act is foreseeable in the context of duty we assess "whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it."

[6] We note that our supreme court in *Goodwin* chose to adopt *Goldsberry*'s "framework for assessing foreseeability in the duty context" and expressly disapproved of the contrary approach in *Webb v. Jarvis,* 575 N.E.2d 992 (Ind. 1991). *See Goodwin,* 62 N.E.3d at 391.

62 N.E.3d at 392. Here, Springbrook alleges that it sent a letter to the Hospital that was forwarded to S.E. Title informing it that the Hospital's purchase agreement with the Nobbe family was interfering with Springbrook's ongoing purchase agreement with the Nobbe family. Thus, the foreseeability of harm prong weighs in favor of Springbrook.

[16] "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Beckom v. Quigley*, 824 N.E.2d 420, 428 (Ind. Ct. App. 2005). Here, we find that public policy considerations weigh against finding a duty. Imposing a duty on title insurers to third parties identified in land records with whom they have no relationship would severely limit their ability to provide title services. Therefore, we conclude it would be contrary to public policy to impose such a duty.

[17] We conclude that after balancing the relationship between the parties, the foreseeability of harm; and public policy concerns, S.E. Title did not owe Springbrook a duty of care.[7] Therefore, Springbrook's negligence claim against S.E. Title must fail.

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[7] Springbrook did not bring a negligence claim against Chicago Title. However, our analysis regarding duty of care in this section applies to Chicago Title as well. Accordingly, we conclude that Chicago Title also did not owe Springbrook a duty of care.

C. Negligent Misrepresentation

[18] Springbrook next argues the trial court "erred in dismissing the Complaint's negligent misrepresentation counts[.]" Br. of Appellants at 21. Our supreme court has noted:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information for the guidance of others in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

U.S. Bank, N.A. v. Integrity Land Title Corp., 929 N.E.2d 742, 747 (Ind. 2010) (quoting Restatement (Second) of Torts § 552 (1977)) (emphasis added); *see also Passmore v. Multi-Mgmt. Servs., Inc.*, 810 N.E.2d 1022, 1025 (Ind. 2004) ("Indiana has recognized liability for the tort of negligent misrepresentation, where there is a direct relationship between the plaintiff and defendant.").

[19] Negligent misrepresentation claims, similar to negligence claims, require a showing of duty. *See Thomas v. Lewis Eng'g, Inc.*, 848 N.E.2d 758, 760 (Ind. Ct. App. 2006) ("[A] professional owes no duty to one with whom he has no contractual relationship unless the professional has actual knowledge that such third person will rely on his professional opinion.").[8] In *Integrity*, our supreme

[8] Springbrook seemingly does not allege that it ever received, reviewed, or relied on the title commitment at issue.

court addressed an action for negligent misrepresentation and held that a title company could be found liable for a lender's pecuniary losses under the tort of negligent misrepresentation even if the title company and the lender did not have a contractual relationship. 929 N.E.2d at 750. Springbrook attempts to expand *Integrity* to include all third parties by arguing that S.E. Title and Chicago Title should be held liable under the "public duty exception" of negligent misrepresentation outlined in Restatement (Second) of Torts section 552.[9]

[20] Pursuant to Restatement (Second) of Torts section 552(3):

> [t]he liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

The comment on subsection 3 states that the "usual case in which the exception arises is that of a public officer who, by his acceptance of his office, has undertaken a duty to the public to furnish information of a particular kind." Restatement (Second) of Torts § 552, Cmt. k. However, the comment continues, clarifying that the rule is not limited to public officers and "may

[9] Springbrook cites Indiana Code section 27-7-3-20 in support of its contention that S.E. Title was under a public duty by Indiana Statute to not harm the interests of a third party. *See* Br. of Appellants at 26. Indiana Code section 27-7-3-20 limits the risk title insurance companies was expose themselves to. It does not establish a public duty nor a statutory relationship between title insurance companies and unrelated third parties

apply to private individuals or corporations who are required by law to file information for the benefit of the public." *Id.*

[21] Here, neither S.E. Title nor Chicago Title is a public official, and neither is *required* by law to file information for the benefit of the public. Further, as noted in *Integrity*, "preliminary title reports are normally relied on by insureds, escrow agents, and lenders[,]" not the public at large or unrelated third parties. 929 N.E.2d at 749 (citation omitted). The facts of *Integrity* also do not support an expansion to third parties such as Springbrook. In *Integrity*, Texcorp Mortgage Banker ("Texcorp") issued a mortgage to a buyer of real property. Texcorp then contracted with Integrity Land Title Corp. ("Integrity") to prepare a title commitment. Integrity failed to note a foreclosure judgment in its commitment. U.S. Bank, N.A. ("U.S. Bank") then succeeded Texcorp's interest and filed a third-party claim against Integrity. Thus, the third-party relationship between U.S. Bank and Integrity is not like that of Springbrook and S.E. Title and Chicago Title because Springbrook does not succeed in interest a party who had a contractual relationship with S.E. Title or Chicago Title.

[22] We conclude that S.E. Title and Chicago Title did not owe Springbrook a public duty. Therefore, the trial court did not err in dismissing the negligent misrepresentation claim.

D. In Concert Liability

[23] Springbrook argues that the trial court "erred in dismissing the Complaint for Damages that sufficiently pled in concert liability claim under the Restatement

of Torts, Second, Section 876 for the Appellees' substantial assistance on behalf of the original tortfeasor in its tortious interference of a contract between the Nobbe family and Appellants." Br. of Appellants at 17 (quotations omitted).

[24] In *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006), this court adopted Restatement (Second) of Torts section 876 which states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

[25] Here, the underlying tortious activity is the Hospital's tortious interference with the Nobbe Contract between Springbrook and the Nobbe family. Springbrook contends that its claims against S.E. Title and Chicago Title fall under Section 876(b) which finds "liability for substantially assisting a tortfeasor whom one knows is committing a tort against a third party. . . [and] does not require 'joint concerted effort' nor pleading of the underlying tort." Br. of Appellants at 19-20.

[26] In *Hellums*, we stated that under Section 876(b), it must be shown that

> (1) the *defendant was acting negligently*, (2) . . . it was reasonably foreseeable that the defendant's actions would encourage

> someone else to act negligently, and (3) . . . the encouragement was a proximate cause of the plaintiff's injuries.

853 N.E.2d at 147 (emphasis added). "It is . . . essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with intent to commit a tort, or with negligence." *Id.* (citation omitted). Here we have already determined that neither S.E. Title nor Chicago Title owed Springbrook a duty of care and therefore were not negligent. Therefore, following the rule for Section 876(b) as outlined in *Hellums*, neither appellee is liable under a theory of in concert liability.

[27] We conclude the trial court did not err in dismissing Springbrook's in concert liability claims.

Conclusion

[28] We conclude that Springbrook failed to show that it was prejudiced by the trial court dismissing its complaint with prejudice. Further, the trial court did not err when granting S.E. Title's and Chicago Title's motions to dismiss. Accordingly, we affirm.

[29] Affirmed.

Pyle, J., and Weissmann, J., concur.