IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

STEVENS & COOPER, LLC, Plaintiff, vs. DONALD MORELAND and MORELAND & LERMAN, PC, Defendants, CHASE MANHATTAN MORTGAGE CORPORATION, Third Party Defendant.	)	Civil Action File No. 05 VS 088745-F

BRIEF IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT

COMES NOW, Stevens & Cooper, LLC, Plaintiff in the above styled action, and files and serves this its Brief in Response to Motion for Summary Judgment and shows this Court as follows.

BACKGROUND

Charles Burditt, Esq. is an attorney licensed to practice in the State of Georgia. Mr. Burditt is an employee and member of the Stevens, Cooper & Burditt, LLC f/k/a Stevens & Cooper, LLC. On March 9, 2005, Mr. Burditt conducted a real estate closing regarding property located at 2270 Polar Rock Ave., Atlanta, GA 30315 ("Property") that had been owned at one time by Janet Williams. Janet Williams had apparently borrowed money using the Property as collateral and had granted a security deed to Advanta National Bank in the amount of $45,000.00. See copy of Security Deed dated September 10, 1998, recorded at Book 25447,

Page 313, Fulton County records, a copy of which is attached as Exhibit "A" to the Complaint ("Open Loan Deed").

Janet Williams died and her estate conveyed the Property to Roshanda Deneice Williams on or about February 28, 2005.

Roshanda Deneice Williams conveyed the Property to New Hope Realty Investments, Inc. on February 28, 2005, in a closing that occurred in the offices of Defendant Moreland & Lerman, PC ("Moreland Closing"). Defendant Donald Moreland, Esq. conducted the Moreland Closing.

On or about March 9, 2005, New Hope Realty Investments, Inc. conveyed the Property by Limited Warranty Deed to the 2270 Polar Rock Trust which then conveyed the Property by Limited Warranty Deed to Atlas Realty, Inc. also on March 9, 2005. These closings were conducted by Charles Burditt for Plaintiff Stevens & Cooper, LLC ("Stevens' Closings"). In connection with preparing for the Stevens' Closings employees of Plaintiff ordered a title examination. Mr. Burditt became aware of the Open Loan Deed and the recent Moreland Closing.

The Georgia Title Standards make it ethically incumbent upon an attorney examining title to contact an attorney that has previously examined title and passed an exception and to allow that attorney an opportunity to explain what was done to clear the exception or to in fact clear the exception. Understanding and abiding the Georgia Title Standards employees of Plaintiff contacted Defendant Donald Moreland regarding the Open Loan Deed. Defendant Donald Moreland replied to the inquiry of Plaintiff's employees by confirming that the Open Loan Deed had been paid off and that a cancellation would be filed of record within 90-120 days. See

correspondence and marked up page from Stewart Title Guaranty Company title insurance Commitment attached as Exhibit "B" to the Complaint.

In connection with the Moreland Closing, Defendants apparently attempted to confirm that that the Open Loan Deed had been paid off. Apparently what had actually happened is that the holder of the Open Loan Deed had sold it to Heath W. Williams, Esq., who in turn sold it to Emanuel Walker who hired Heath W. Williams, Esq. to conduct a foreclosure with regard to the Open Loan Deed. A foreclosure was conducted and the Property was conveyed by Deed Under Power to Neighborhood Investment Group, Inc. on or about June 10, 2005. A title insurance claim was made. Plaintiff paid and has taken assignment to claims related to the payment of the $64,000.00 title insurance claim.

ARGUMENT AND CITATION OF AUTHORITY

I. Movant's Burden on Summary Judgment

Movant faces a heavy burden on motion for summary judgment.

> "...The judgment sought [summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law..." (emphasis supplied)

O.C.G.A. § 9-11-56(c). The burden is upon the Movant to establish lack of a genuine issue of fact and entitlement to judgment as a matter of law. *Holland v. Sanfax Corp.*, 106 Ga. App. 1 (1962). Allegations in the pleadings are to be taken as true until pierced by the party moving for summary judgment and it is shown that there is no material issue of fact remaining. *Cotton States Mutual Ins. Co. v. Martin*, 110 Ga. App. 309 (1964). The party opposing a motion for

summary judgment is to be given the benefit of all doubts and favorable inferences. *Holland*, supra., *Watkins v. Nationwide Mutual Fire Ins. Co.*, 113 Ga. App. 801 (1966).

II. Elements of Negligent Misrepresentation

This is a negligent misrepresentation case. Section 522 of the Restatement (Second) of Torts, entitled "Information Negligently Supplied for the Guidance of Others," pertinently provides,

> "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."

Georgia adopted the tort of negligent misrepresentation at least with the case of *Robert & Company Associates v. Rhodes-Haverty Partnership, et. al.*, 250 Ga. 680 (1983). The elements of negligent misrepresentation are "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 426 (1997); *Robert & Co. supra.*

III. Privity Not Required

"The trend in Georgia has been to relax the rule of strict contractual privity in malpractice actions, recognizing that under certain circumstances, professionals owe a duty of reasonable care to parties who are not their clients. *Driebe v. Cox*, 203 Ga. App. 8 (1992). Exceptions to the privity rule have been carved out where injury to third parties is foreseeable.

For example, in cases involving negligent misrepresentation of facts, liability extends to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly. . . . [Otherwise] there will be no liability in the absence of privity, wilfulness or physical harm or property damage." *Robert & Co., supra.*

IV. Reasonable Reliance is a Jury Question

"Our appellate courts have held in hundreds of cases that questions of negligence, diligence, contributory negligence and proximate cause are peculiarly matters for the jury and a court should not take the place of a jury in solving them except in plain and indisputable cases." See http://www.lexis.com/research/buttonTFLink?_m=5b2204b422b7872e069da89c470a53cb&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b118%20Ga.%20App.%20414%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=31&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b76%20Ga.%20App.%20588%2cat%20595%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=8&_startdoc=1&wchp=dGLbVtb-zSkAB&_md5=930aa94698b9de9f12d080e1e8221073 *McKnight v. Guffin*, 118 Ga. App. 168; *Seagraves v. Abco Mfg. Co.*, 118 Ga. App. 414. Whether or not the plaintiffs acted with justifiable reliance or should have had their own engineering study done is a jury question under the facts and circumstances of this case. *Wiederhold v. Smith*, 203 Ga. App. 877, 878 (1992). The issue of whether a purchaser has acted with the requisite due diligence is generally for the jury. *Akins v. Couch*, 271 Ga. 276, 278 (1999); see also *Conway v. Romarion*, 252 Ga. App. 528.

V. Reasonable Reliance Depends on Purpose of Communication

"The question of whether [parties] were justified in relying on [a] report depends upon the circumstances under which the report was made." *Marquis Towers, Inc. v. Highland Group*, 265 Ga. App. 343, 347 (2004). "In making a determination of whether the reliance by the third party is justifiable, we will look to the purpose for which the report or representation was made." Id. The *Marquis Towers, Inc.* case was one in which a consulting firm had provided a report to the owner of a Ramada hotel franchise and to the franchisor. The report was relied upon to the detriment of the franchisee and the court concluded that a question of fact for jury determination on the issue of reasonable reliance existed despite evidence that the consulting firm had not observed the industry standard of care and that its report contained factual inaccuracies. This is analogous to our case. Mr. Moreland's written confirmation to Plaintiff that the Open Loan Deed was paid off and would be cancelled of record was factually incorrect. Mr. Moreland may not have observed the standard of care in the practice of law regarding residential real estate closings, but under the authority of the *Marquis Towers, Inc.* case, that does not affect the fact that reasonable reliance is an issue for the jury in our case.

The key to the making reliance on the consultant's report in the *Marquis Towers, Inc.* case a jury question is that the report was provided in connection with the business of the consultant and was produced by the consultant with the expectation that it would be relied upon. In our case it is undisputed that the reports of Mr. Moreland regarding the Open Loan Deed were made in the course of his business. It is also undisputed that Mr. Moreland makes such reports in his practice, calls upon other attorneys to make such reports, and reasonably expects reliance upon such reports when making or receiving them.

VI. The Title Standards Make Clear the Purpose of Defendant's Representations

The Georgia Title Standards provide at Standard 1.2 as follows:

"When an attorney discovers a situation which the attorney believes renders a title defective and he/she has notice that the same title has been examined by another attorney who has passed the defect, it is recommended that the attorney communicate with the previous examiner, explain the mater objected to, and afford an opportunity for discussion, explanation, and correction. The attorney contacted should cooperate fully and promptly in investigating his/her records and taking whatever steps are necessary to explain and or correct the title defect complained of. ... It is ethically incumbent upon the attorney raising the objection, prior to discussing the objection with the client, to locate the prior attorney, to discuss same with that attorney in order to afford that attorney an opportunity to explain what steps, if any, had been taken to clear the objection and to offer the prior attorney the opportunity to clear the objection. ..." (emphasis supplied)

Part of the job of a real estate closing attorney is to clear objections or exceptions to conveying clear title to the property. Clearing such objections or exceptions proceeds via a number of different approaches. At times the seller is contacted to verify the correctness of an encumbrance. At other times a lender or claimant is contacted to verify an encumbrance or to obtain a cancellation of an encumbering instrument of record. A closing attorney and his staff must use judgment about how to proceed given the facts and circumstances.

The Title Standards made it "ethically incumbent" upon Plaintiff to inquire of an attorney that had passed judgment on the title to the Property only a few days before Plaintiff was to do a closing. Mr. Moreland had passed the title to the Property only days before Plaintiff was to conduct a closing on the Property. One of the purposes of this prominently placed provision of the Title Standards is to minimize any undue alarm on the part of a seller that believes he has good title to convey and usually does possess such title. The purpose is to an extent to protect

the attorney that has recently passed upon a title. The purpose is in significant part set forth in the Title Standard itself in that it is made clear that the inquiry of the subsequent attorney is meant to afford the prior closing attorney an opportunity to correct or explain what had been done to correct an objection to title. Clearly the Title Standards do not use words like "ethically incumbent" lightly. Clearly it is intended that communications made pursuant to this Title Standard are intended to be relied upon.

It is not just ethically required to make inquiries of prior closing counsel regarding passed upon exceptions, but it just makes plain good business sense. It is almost always the case that when a title examination shows an exception and a prior closing has been conducted over that exception that the open item has in fact been released, cancelled, discharged, paid or dealt with in some other fashion. It is quite common to make the types of inquiries required by Title Standard 1.2.

It is frequently the case in Plaintiff's closing practice that they make a Title Standard 1.2 inquiry and are required to rely on the investigation and representations of the attorney. This is true because they represent a number of real estate investors and lenders that loan money to real estate investors. It is in the nature of real estate investing to have purchased a property and be selling it in a relatively short period of time. In this context it is frequently the case that a prior closing in another attorney's office has taken place just days or weeks before the closing that is to take place in Plaintiff's office. Due to the time it takes the office of the Clerk in many of the metro Atlanta area counties to record and index deeds and other instruments it is common for documents to be out for recording and not yet returned from the Clerk and indexed when Plaintiff makes a Title Standard 1.2 inquiry. Any attorney practicing in the real estate area for

more than a month or two understands this and understands the importance of the information that they will provide and that the information will be relied upon.

It is not uncommon in a real estate practice for an attorney to rely on a fax, letter, e-mail, or other written communication from an attorney having conducted a prior closing in the context of a Title Standard 1.2 inquiry. However, a "marked up" title commitment is a title policy and is considered to be the "Gold Standard" against which to measure a representation by prior counsel that a particular exception has been cleared. A title commitment is a contract issued by a real estate closing attorney as an agent for a title insurance company to a lender or a buyer specifying the conditions pursuant to which a title insurance policy will be issued. A "marked up" title commitment is a document prepared by a closing attorney that contains a list of exceptions from a title examination report and notations about how those exceptions have been resolved. The title commitment is said to be "marked up" due to the handwritten notations about how various exceptions have been resolved. The "marked up" title commitment is sometimes provided to a buyer or a lender. When an attorney provides a "marked up" title commitment in response to a Title Standard 1.2 inquiry he is making a representation that he issued title insurance in connection with his closing and that the noted exceptions have been resolved in the manner specified in the "marked up" commitment.

In connection with the closing on the Property Plaintiff received not only a fax from Defendants indicating that the Open Loan Deed had been paid off but also a "marked up" title commitment indicating the Open Loan Deed had been paid off and a release would be filed of record within 90-120 days. This time frame was obviously well outside the time for the closing to be conducted in Plaintiff's office regarding the Property so they had no choice but to rely on the representations of Defendants in passing judgment on title to the Property.

Clearly the fax and the "marked up" title policy that Defendants provided to Plaintiff were intended by Defendants to be relied upon.

VII. Moreland has Admitted Reasonable Reliance

We do not have to look just to the Affidavit of Charles Burditt or to the Title Standards to confirm that there is evidence that Mr. Burditt and his firm, Plaintiff, reasonably relied on the response Mr. Moreland provided to Mr. Burditt's Title Standard 1.2 inquiry. We can look to the testimony and admissions of Mr. Moreland himself.

Mr. Moreland was asked if the Title Standards apply to lawyers conducting real estate closings in the State of Georgia and he responded affirmatively as follows,

Q. (By Mr. Porter) Do you agree that the Georgia Title Standards for attorneys are the

standards by which Georgia lawyers, lawyers practicing under Georgia law, are the standards that they should apply to rendering a title opinion?

A. Yes.

Deposition of Donald Moreland, p. 11. Mr. Moreland was asked if he would expect an attorney making a Title Standard 1.2 inquiry to rely on the information he provided and he answered affirmatively as follows,

Q. Suffice it to say, when you get an inquiry from an attorney that is in compliance with Title Standard 1.2, you understand that that attorney is making the inquiry and will rely on the communication that you make to the attorney; correct?

MR. PAUL: Read that back.
(The record was read by the reporter.)
MR. PAUL: You can answer.

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THE WITNESS: Whatever information I have at my disposal, I understand that he is inquiring and could rely on my explanation of the situation according to the information I have at the time.

Deposition of Donald Moreland, p. 176-177. Mr. Moreland was also asked if he would expect an attorney making a Title Standard 1.2 inquiry, in a situation in which a deed or instrument he was to record or had recorded would fall in the "gap", to rely on the information he provided and he answered affirmatively as follows,

Q. Okay. If it's so recent that documents that would reflect a correcting of the title defect would fall in the gap and not show up of record, do you, when you're making this kind of an inquiry, expect to rely on the information you're provided by the attorney to whom the inquiry is made?
MR. PAUL: My objection to the form of the question is it does not state rely on what, that

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is, the information said in the Title Standards, which is what the records say, or the fact of the information itself.

So when you answer that question, answer it in relation to the Title Standards.

THE WITNESS: Can you repeat the question, please?

(The record was read by the reporter.)

THE WITNESS: If it's a situation where there just wasn't enough time for the documents to be recorded and of record, yes.

Deposition of Donald Moreland, p. 176-177. Finally Mr. Moreland was asked if the Title Standard 1.2 inquiry were the type of inquiry involving the "gap" as discussed in the previous question and he answered affirmatively as follows,

Q. (By Mr. Reed) Would this be such a situation where --

A. Yes.

Deposition of Donald Moreland, p. 177. For Mr. Moreland and his firm to now contend in their Motion and Brief that Plaintiff did not reasonably rely on the information Mr. Moreland provided after having admitted during sworn deposition testimony that in this exact situation he would expect Plaintiff to have relied on the information he provided is frivolous.

VIII. The Representation by Defendants Was False

The Defendants' Motion Summary Judgment Against Plaintiff's Stevens & Cooper, LLC and Fidelity National Title Insurance Co. ("Motion"), and the supporting brief and other pleadings including the Affidavit of Donald D. Moreland ("Moreland Affidavit") contain a characterization that is to the effect that Mr. Moreland only provided information he had obtained from Third Party Defendant Chase Manhattan Mortgage Corporation ("Chase") and that he made it clear that all he was doing was passing along information that he had obtained

from Chase and that he therefore bears no responsibility for the correctness of that information. The Affidavit of Charles Burditt makes clear that there is significant difference of recollection regarding this point of fact. Mr. Burditt clearly states in his affidavit that those characterizations are false. Mr. Burditt testifies in his affidavit that Mr. Moreland did not make it clear or even hint at or suggest that he was merely passing along information from another and disclaiming responsibility for its correctness. On the contrary his fax of March 9, 2005, said in pertinent part "S/D [Security Deed] in favor of Advanta Bank (25447/313) $45,000.00 is paid off. They are to have it cancelled and send us confirmation but have not done so yet. Takes 90-120 days." See Exhibit "B" to the Complaint which is Exhibit "C" to Defendants' Notice of Filing of Appendix to Defendants' Statement of Uncontested Material Facts... ("Appendix"). There was nothing about any telephone communication that Mr. Burditt had with Mr. Moreland that qualified this written communication.

The aforementioned characterizations of the Motion and Moreland Affidavit are also contradicted by the "marked up" title commitment provide by Mr. Moreland which said with regard to the Open Loan Deed, "Assigned to Chase; Paid off 4-15-04; Request for release sent 2/28/05. 90-120 day turn around." Again there was nothing about any telephone communication with Mr. Moreland that qualified this written communication. For that matter Mr. Moreland did not indicate from whom his information was obtained and he certainly never attempted to qualify the information he provided by indicating that he was passing along the information of another and disclaiming responsibility for its accuracy. As has been shown Plaintiff's evidence that Defendants made unqualified assertions that the Open Loan Deed was paid off and to be released. Plaintiff's evidence is strong on this point and includes the testimony of Mr. Burditt as well as the written communications of Defendants. For Defendants to claim

there is not a jury issue on this point is silly at best, perhaps even a misrepresentation to the Court.

IX. Assignments Do Not Affect Reasonable Reliance.

There is a second characterization that comes from Defendants' Motion, supporting pleadings, and the Moreland Affidavit to the effect that Mr. Burditt or people in his office knew about assignments of the Open Loan Deed to Heath Williams and then to Emanuel Walker and that Mr. Moreland did not know about these assignments and that therefore it was incumbent upon Mr. Burditt or Plaintiff to investigate further given my knowledge of the assignments. In the Moreland Affidavit at paragraph 7, Mr. Moreland testifies that, "I told Burditt that I had certified marketable title and closed a prior sale based on the statement of a representative of Third-Party Defendant Chase Manhattan Corporation ("Third Party Defendant Chase"), who said that the note underlying the Security Deed had been paid off and that the Security Deed would be cancelled. Further, I told Burditt that, when I requested a cancellation notice, the Chase representative said that a formal cancellation notice could be issued in 90 to 120 days if I would mail Chase a written request." Mr. Burditt clearly sets forth in his affidavit that these statements in the Moreland Affidavit are false. Mr. Moreland never told Mr. Burditt the information came from a person at Chase. If he had that would have been a red flag because Mr. Burditt knew about the assignments. Mr. Moreland never told Mr. Burditt that a "Chase representative" indicated the Open Loan Deed would be cancelled within 90-120 days.

At the time Plaintiff made its Title Standard 1.2 inquiry of Mr. Moreland Mr. Burditt did not know that Mr. Moreland's title examiner had missed the assignments and that Mr. Moreland was unaware of the assignments when he conducted the closing regarding the Property in his office. The Title Standard 1.2 inquiry regarding the Open Loan Deed addressed the Open Loan

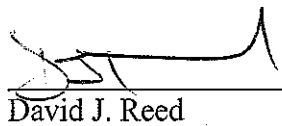
Deed which was a Security Deed from Janet W. Williams to Advanta National Bank. In a real estate closing practice practitioners refer to a deed by the original parties not the assignees. That is how they referred to the Open Loan Deed in their communications with Mr. Moreland. It is common for real estate loans to be sold. It is common for there to be an assignment or several assignments of record regarding a security deed. In providing a response to the Title Standard 1.2 inquiry it was incumbent upon Mr. Moreland to know the assignment status of the Open Loan Deed. It was incumbent upon Mr. Moreland to know who was the owner of the Open Loan Deed. It was incumbent upon Mr. Moreland to know to whom an inquiry about the payment status of the Open Loan Deed needed to be directed. These are the kinds of problems with which closing attorneys deal in a real estate closing practice on a daily basis. Mr. Burditt did not know Mr. Moreland was unaware of the assignments, it was his responsibility to know about the assignments, and Mr. Burditt believed he knew about the assignments when his firm made its inquiry. Mr. Moreland did not orally or in writing tell Mr. Burditt or anyone in his firm from whom he had obtained the information that the Open Loan Deed was paid off and would be satisfied of record. Without that information Mr. Burditt had no reason to suspect the information Mr. Moreland provided was false. Without that information Mr. Burditt had no duty to perform any further investigation regarding the truthfulness of Mr. Moreland's representations.

CONCLUSION

It has been shown that there is a substantial dispute of fact requiring a trial by jury of Plaintiff's claims. Plaintiff respectfully requests that this Court deny the Motion and grant such other and further relief as it deems just.

This 19 day of February, 2007.

Law Offices of David J. Reed



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served counsel for all concerned parties with a copy of the within and foregoing pleading by depositing a copy of same in the United States Mail in a properly addressed envelope with sufficient postage affixed thereto to ensure delivery and addressed to:

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This 19 day of February, 2007.

David J. Reed

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