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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 05/07/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

KONDAUR CAPITAL CORPORATION, a ) No. 1 CA-CV 12-0295  
foreign corporation, )  
) DEPARTMENT C  
Plaintiff/Appellant, )  
) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules of  
FIDELITY NATIONAL TITLE ) Civil Appellate Procedure)  
INSURANCE CORPORATION, a foreign )  
corporation; OLD REPUBLIC )  
NATIONAL TITLE INSURANCE COMPANY, )  
a foreign corporation; PIONEER )  
TITLE AGENCY, INC., an Arizona )  
corporation, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Navajo County

Cause No. S0900CV201000440

The Honorable Ralph E. Hatch, Judge

**AFFIRMED**

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By Joseph E. Holland  
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Snowflake

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Attorneys for Appellee Fidelity National Title Insurance Corp.

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By Andrew Abraham and Jessica Conaway  
Attorneys for Appellee Old Republic National Title Insurance and  
Pioneer Title Agency Inc.

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**B R O W N**, Judge

¶1 Kondaaur Capital Corporation ("Kondaaur") appeals the trial court's summary judgment rulings in favor of (1) Old Republic National Title Insurance Company and Pioneer Title Agency (collectively "Old Republic") and (2) Fidelity National Title Insurance Corporation ("Fidelity"). For the following reasons, we affirm.

**BACKGROUND**

¶2 In March 2006, Mr. and Mrs. Genys purchased a four-acre parcel of unimproved land located in Heber on the north side of what eventually became Midnight Sky Road. Almost immediately, the Genys subdivided the land into four one-acre parcels, delineated as Parcels 1, 2, 3, and 4. Later that year, the Genys purchased an unimproved five-acre lot located on the south side of Midnight Sky Road and divided the property into Parcels 5A and 5B. The Genys further subdivided Parcel 5A into Parcel One and Parcel Two. As a result, the Genys owned several parcels, including one on the north side of Midnight Sky Road, delineated as "Parcel 2," and another on the south side, delineated as "Parcel Two."

¶13 In early 2007, the Genys borrowed \$303,900 from M & I Bank ("M & I") to build a vacation home on Parcel 2. They gave M & I a deed of trust that identified the encumbered property as "Parcel 2, Section 24, Township 12 North, Range 16 East, according to Book 56 of Land Surveys, Page 96, records of Navajo County, Arizona." The deed of trust listed two incorrect tax parcel numbers for the property: 207-17-107A (the number for the original four-acre parcel) and 207-17-107K (the number for Parcel Two). The correct parcel number for Parcel 2 was 207-17-107N. M & I obtained a lender's title insurance policy from Fidelity to ensure its priority lien position.

¶14 The Genys eventually defaulted on the loan and M & I commenced foreclosure proceedings. On behalf of M & I, attorney James Tanner purchased a Trustee's Sale Guarantee ("TSG") from Old Republic. The TSG made the following guarantees:

1. The title to the herein described estate or interest was vested in the vestee named, subject to the matters shown as Exceptions herein, which Exceptions are not necessarily shown in the order of their priority;
2. The names and addresses of persons who are entitled to a copy of the notice of sale pursuant to the provisions of A.R.S. Section 33-809 are shown herein; and
3. Said land is located in the county stated herein and, if designated, the newspaper or newspapers listed herein are acceptable for title insurance purposes for the

publication of the notice of sale required  
in A.R.S. Section 33-308.

The TSG further stated that the guarantees applied to "the Assured named in Part 2 of this Guarantee." That section indicated that the assureds were Tanner and M & I. The TSG defined "the Assured" as "the party or parties named as the Assured in this Guarantee, or on a supplemental writing executed by the Company." After obtaining the TSG, M & I sold a portfolio of loans to Kondaur. The sales agreement for that portfolio provided that Kondaur was purchasing "the Loans and related Loan Documents," including the deed of trust for the Genys' property.

¶15 In April 2009, purportedly now acting under the direction of Kondaur, Tanner recorded a notice of trustee's sale. The notice contained the same legal description of the property as the deed of trust, and initially listed the parcel number as 207-17-107K.<sup>1</sup> In September, Kondaur purchased the property at the trustee's sale after submitting a credit bid. Tanner then issued a trustee's deed to Kondaur with the same legal description as the deed of trust and the TSG. Kondaur eventually attempted to sell the property, but alleged it was

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<sup>1</sup> The parcel number on the recorded notice has a hand-written modification changing the number to 207-17-107N, which is the correct number for Parcel 2. The parties dispute, however, when the modification took place, who made the modification, and what significance, if any, the modification has.

not able to do so because neither Old Republic nor Fidelity would issue title insurance for the property due to confusion over which parcel Kondaur had acquired at the trustee's sale. Kondaur then submitted claims to Fidelity and Old Republic, requesting coverage for alleged problems with the title to Parcel 2.

¶16 Unable to achieve an acceptable resolution, Kondaur filed a complaint for breach of contract, negligence, and bad faith. Kondaur later amended the complaint, adding claims for quiet title and declaratory judgment. As the basis of its complaint, Kondaur alleged that following the trustee's sale, it was unable to sell the property because Fidelity had refused to provide an owner's title insurance policy.<sup>2</sup> Kondaur also asserted that based on Old Republic and Fidelity's bad faith denials of coverage under the TSG and lender's title policy, Kondaur had to expend significant resources to independently verify which parcel it had actually acquired at the trustee's sale. Based on the alleged wrongdoing, Kondaur sought compensatory and punitive damages.

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<sup>2</sup> The record contains only vague references relating to this alleged refusal to provide an owner's title insurance policy. As to Old Republic, the only evidence in the record suggesting that it ever refused to issue a new insurance policy is a statement made by Kondaur's counsel at oral argument on the motions for summary judgment. As to Fidelity, the only evidence is an unsigned affidavit provided by Kondaur.

¶17 Old Republic moved for summary judgment, arguing that because Kondaur was not an assured under the TSG, any claims against it failed as a matter of law. Old Republic further asserted that even if Kondaur could be construed as an assured under the TSG, Kondaur had failed to allege any conduct that breached the policy's terms. Fidelity also sought summary judgment, asserting that because Kondaur failed to pursue a deficiency judgment against it pursuant to Arizona Revised Statutes ("A.R.S") section 33-814 (2013),<sup>3</sup> the trustee's sale fully satisfied the debt secured by the deed of trust and Kondaur was thus precluded from pursuing its claims.

¶18 After briefing and oral argument, the trial court granted Old Republic's motion, finding that because Old Republic had never agreed to add Kondaur as an assured under the TSG, no valid assignment had ever taken place and Kondaur could not pursue claims for breach of contract or bad faith. The court also rejected Kondaur's claim that refusal to provide a new title insurance policy created a cloud on Kondaur's title, reasoning that Old Republic did not file any document with the county recorder's office that clouded the title to Parcel 2. The court further concluded that Old Republic had no legal obligation to sell Kondaur a new owner's title insurance policy.

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<sup>3</sup> Absent material revisions after the relevant date, we cite a statute's current version.

The court also granted Fidelity's motion, concluding that because the trustee's sale satisfied the debt secured by the deed of trust, Kondaur was precluded from bringing its claims against Fidelity. Additionally, the court awarded Old Republic and Fidelity attorneys' fees pursuant to A.R.S. § 12-341.01 (2013). Kondaur timely appealed and we have jurisdiction under A.R.S. § 12-2101 (2013).

#### DISCUSSION

¶19 "We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Ochser v. Funk*, 228 Ariz. 365, 369, ¶ 11, 266 P.3d 1061, 1065 (2011). Summary judgment is appropriate only if "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Because Kondaur's appeal challenges two motions for summary judgment, we consider each motion separately.<sup>4</sup>

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<sup>4</sup> Kondaur's complaint also includes claims for negligence, quiet title, and declaratory judgment. The trial court resolved each of those claims in favor of the defendants. Kondaur has not argued on appeal, however, that any genuine issue of material fact exists as to those claims. Accordingly, we do not consider any such argument. See ARCAP 13(a)(6) (requiring that an appellant's brief include an "argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); see

**A. Claims Against Old Republic**

¶10 Kondaur asserts that the trial court erred in granting Old Republic's motion because Kondaur was a valid assignee of the TSG and its attendant protections. Thus, Kondaur argues Old Republic owed it a duty to (1) verify the description of the property and (2) indemnify Kondaur for losses incurred in ascertaining which property it had acquired at the trustee's sale.<sup>5</sup>

¶11 Under the express terms of the TSG, Old Republic made three guarantees: (1) that title to Parcel 2 was vested in the Genys; (2) that the names and addresses of those entitled to receive notice were set forth in the TSG; and (3) that the land was located in Navajo County and that the newspapers listed were sufficient for notification. Kondaur's complaint alleged Old Republic breached the terms of the TSG because it "specifically cover[ed] the accuracy of the legal description on the

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*also Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (refusing to address issue on the merits where party "cites no relevant supporting authority and does not develop" argument on appeal).

<sup>5</sup> Kondaur also argues that if the trial court determined that Kondaur lacked standing to pursue its claims, the court should have joined M & I as an indispensable party under Arizona Rules of Civil Procedure 19(a). Because Kondaur did not make this argument to the trial court, however, it has been waived on appeal and we do not address it. See *Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7, 130 P.3d 1000, 1002 (App. 2006) ("As a general rule, a party cannot argue on appeal legal issues and arguments that have not been specifically presented to the trial court.").



documents.” In making that argument, however, Kondaur does not suggest what portions of the TSG, if any, contain incorrect information. Indeed, Kondaur acknowledged to the trial court that the legal description of property in the TSG is correct in that it describes Parcel 2, the property which is the subject of the deed of trust. And Kondaur does not suggest that by purchasing the property at the trustee’s sale it received anything other than the property listed in the TSG. Nor has Kondaur presented any evidence that Old Republic failed to comply with the three guarantees listed in the TSG. Moreover, Kondaur does not provide any authority supporting the underlying basis for its claims against Old Republic—that a title company’s mere refusal to issue an owner’s title insurance policy supports a cause of action by a property owner.

¶12 Accordingly, because Kondaur has not shown any breach of the TSG, any claim against Old Republic for breach of contract fails. Similarly, because Kondaur had no valid claim under the TSG, Kondaur’s claim for bad faith fails because Old Republic had a reasonable basis to deny coverage. See *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 170, ¶ 48, 171 P.3d 610, 621 (App. 2007) (holding that “[t]o show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for denying

the claim." (citation omitted)). Therefore, the trial court did not err in granting summary judgment for Old Republic.

**B. Claims Against Fidelity**

¶13 Kondaur argues the trial court erred in granting summary judgment in favor of Fidelity based on the court's mischaracterization of Kondaur's claims as based on a deficiency judgment. Specifically, Kondaur argues the court's reliance on A.R.S. § 33-814(D) was misplaced because Kondaur's claims are grounded on theories of negligence, breach of contract, and bad faith, not a deficiency judgment.

¶14 The relevance, if any, of the deficiency statutes to Kondaur's claims is not clear; in any event, we conclude that Kondaur's claims against Fidelity cannot succeed as a matter of law for other reasons. See *Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) (noting that "[w]e will affirm the trial court's ruling if it is correct for any reason").

¶15 Kondaur alleged that Fidelity breached the lender's policy of insurance by failing to verify the legal description of the property contained in the lender's title policy. Kondaur has not identified, however, any portion of the insurance contract that Fidelity breached. Instead, Kondaur vaguely asserts that Fidelity had a responsibility to independently verify the legal description of the property. We find no such obligation manifested in the terms of the contract. The policy

covers a wide range of liability including defects, liens, encumbrances, unmarketability, and lack of access. The policy does not, however, impose an obligation on Fidelity to, of its own accord, verify a parcel number that is listed on the deed of trust, which is not part of the legal description of the property.

¶16 Furthermore, Kondaur has not pointed to any evidence establishing there is a defect or cloud on the title of Parcel 2. Rather, Kondaur's only complaint appears to be based on Fidelity's alleged refusal to provide a title insurance policy after the trustee's sale was completed. Even assuming that allegation is true, nothing in the lender's title policy obligated Fidelity to enter into a contract to provide title insurance to a new owner after the trustee's sale. Thus, because Kondaur failed to demonstrate any breach by Fidelity, its claim fails. See *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (noting that "in an action based on breach of contract, the plaintiff has the burden of proving the existence of a contract, *breach of the contract*, and resulting damages.") (emphasis added).

¶17 Kondaur also challenges the trial court's grant of summary judgment on its claim against Fidelity for bad faith. Kondaur asserts that Fidelity's refusal to indemnify under the lender's policy was "untenable" and therefore amounts to bad

faith. We disagree. Kondaur has not demonstrated the existence of a title defect as to Parcel 2 that would trigger Fidelity's obligation to provide title insurance coverage. Because Kondaur did not assert a valid claim under the lender's policy, it was reasonable for Fidelity to deny coverage. See *Regal Homes, Inc.*, 217 Ariz. at 170, ¶ 48, 171 P.3d at 621. As a matter of law, Kondaur has not established the viability of its bad faith claim against Fidelity.

**CONCLUSION**

¶18 For the foregoing reasons, we affirm the judgment of the trial court. In the exercise of our discretion, we award reasonable attorneys' fees incurred on appeal to Old Republic and Fidelity pursuant to A.R.S. § 12-341.01(A), subject to compliance with ARCAP 21(a). We also award Old Republic and Fidelity their taxable costs on appeal, subject to compliance with ARCAP 21(a).

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
SAMUEL A. THUMMA, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge