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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MBK CELAMONTE, LLC, Plaintiff and Respondent, v. LAWYERS TITLE INSURANCE CORPORATION, Defendant and Appellant.	G041605 (Super. Ct. No. 07CC05874) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Polos, Judge. Affirmed. Request for judicial notice. Granted.

Garrett & Tully, Robert Garrett, Ryan C. Squire and Zi Chao Lin for Defendant and Appellant.

Voss, Cook & Thel, Francis T. Donohue III and Daniel S. Kippen for Plaintiff and Respondent.

* * *

INTRODUCTION

MBK Celamonte, LLC (MBK), purchased undeveloped land in Chino Hills, California, intending to build townhomes on it. MBK believed the property was not subject to a special tax under the Mello-Roos Community Facilities Act of 1982 (Gov. Code, § 53311 et seq.) (Mello-Roos), and marketed the townhomes with that as a selling point. The property, however, *was* subject to Mello-Roos; the special tax authorization had been recorded in 1988, although payment only became due when the final subdivision map for the townhomes was recorded.

MBK sued Lawyers Title Insurance Corporation (Lawyers Title), the company that had issued a title insurance policy on the property. Following a bench trial, the trial court found the special tax authorization was an "encumbrance" on MBK's title covered by the title insurance policy, and judgment was entered in favor of MBK. Lawyers Title appeals; we affirm.

The recorded special tax under Mello-Roos meets all the criteria of an encumbrance on title. Therefore, the trial court did not err.

Lawyers Title also argues the trial court improperly calculated damages because it used the wrong date to determine the diminution of the property's value due to the special tax authorization. Damages were calculated as the amount to make a lump sum pay off of the Mello-Roos special tax on every townhome in the development. Even if the trial court selected the wrong date to make this calculation, we conclude the pay off amount would not have changed using the alternate date proposed by Lawyers Title.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1987 and 1988, the Butterfield Community Facilities District No. 8 (the CFD) was established. The property involved in the present dispute is within the CFD. A boundary map was recorded in September 1987 identifying the property as part of the CFD. A notice of special tax authorization for the CFD, issued under Mello-Roos, was

recorded on January 8, 1988; in relevant part, it provides: "A special annual use tax to pay for certain regional and local public facilities, said tax to initially (1987) be in the amount of $324.00 per residential dwelling until or equivalent dwelling unit per year, subject to 2% escalation per year, effective January 1 of each year, said tax due and payable for a period of years not to exceed twenty-five (25), commencing upon the following: [¶] (1) Recordation of final subdivision map for dwelling units; or [¶] (2) Issuance of a building permit for a non-residential development (EDU). [¶] A 'dwelling unit' (DU) is defined as follows: [¶] A single family dwelling as used in the Chino Hills Financing Plan to define the density of a development area."

On January 25, 1988, the San Bernardino County Board of Supervisors passed a resolution that provided an option of allowing property owners within the CFD to permanently satisfy the special tax by making a lump sum payment based on the present value of the remaining payments owed, using a six percent discount rate.

In February 2006, MBK purchased property in Chino Hills, California, with the intent to construct on it a planned unit development consisting of 119 townhomes. In connection with MBK's purchase of the property, Lawyers Title underwrote an owner's policy of title insurance (the Policy). The Policy's insuring provisions cover loss or damage incurred by MBK due to "[a]ny defect in or lien or encumbrance on the title[.]" The Policy excludes from coverage "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of Policy[.]"

In December 2006, as it prepared to sell the townhomes constructed on the property, MBK learned that the property was in the CFD, making the townhomes subject to Mello-Roos taxes, and tendered a claim on the Policy to Lawyers Title. Lawyers Title denied MBK's claim.

In May 2007, MBK sued Lawyers Title for breach of contract—the Policy—, breach of the implied covenant of good faith and fair dealing, and declaratory relief. An amended complaint was filed in April 2008. Following a bench trial, the trial

court found in favor of MBK on the claims for breach of contract and declaratory relief, and in favor of Lawyers Title on the claim for breach of the implied covenant. The trial court issued a written statement of decision, and entered judgment awarding MBK contract damages and prejudgment interest. Lawyers Title timely appealed.

DISCUSSION

I.

THE TRIAL COURT'S STATEMENT OF DECISION

Following a bench trial, the trial court issued a lengthy statement of decision, which included the following detailed factual recitation:

"On February 28, 2006 Plaintiff purchased approximately seven acres of undeveloped land in the City of Chino Hills ('Property') with the plan to build 119 townhomes there. Plaintiff paid $18,560,130.00 for the Property. That same day, Plaintiff also obtained the Policy which was underwritten by Defendant. The Policy insured against, *inter alia*, '[a]ny defect or lien or encumbrance on the title.'

"In August 2006 Plaintiff recorded a final subdivision map for the Property. In December 2006, when Plaintiff was almost ready to release the first phase of townhomes for sale, Plaintiff first learned that the Property was subject to a public financing requirement: the CFD. Joy Moore, an MBK representative, received a Disclosure Report that contained evidence of the CFD in June of 2006 but did not open it until December 2006. Further, without the actual knowledge of MBK, their attorneys at Palmieri, Tyler knew of the CFD in June 2006. The CFD had been created by way of a 1987 Boundary Map (Trial Exhibit 1) and a 1988 Notice of Special Tax Authorization ('Notice') (Trial Exhibit 2) created by the County of San Bernardino. Since 1988 the CFD imposed the following restriction on the use of the Property:

> "A special annual use tax to pay for certain regional and local public facilities, said tax to initially (1987) be in the amount of $324.00 per

> residential dwelling unit or equivalent dwelling unit per year, subject to 2% escalation per year, effective January 1 of each year, said tax due and payable for a period of years not to exceed twenty-five (25) commencing upon the following: (1) Recordation of final subdivision map for dwelling units; or (2) Issuance of a building permit for a non-residential development (EDU).
> (Trial Exhibit 2)

"Thus, a change in use of the Property by recording a final subdivision map or obtaining a building permit for the Property would make the Property subject to the CFD tax which was established in amount and duration in 1988. The presence of the CFD meant that purchasers of the townhomes built by Plaintiff would have to pay an escalating CFD cost, starting at approximately $42.00 per month.

"On January 25, 1988 the County of San Bernardino adopted Resolution 88-27 (Trial Exhibit 104) which allowed property owners to pay off the CFD taxes and included a table that set out the specific pay off amount per unit based on the year and number of years of CFD payments to run for that property. The document provides that in 2006, with 25 years left on the CFD, it would cost $7,303.00 per unit to pay off the CFD.

"In February 2006, when Plaintiff purchased the Property, most of the amenities to be paid for through the CFD had already been constructed. No new CFD-related construction had occurred since Plaintiff's purchase of the Property, and no such construction is currently planned.

"On December 18, 2006 Plaintiff tendered a claim to Defendant for protection from the CFD pursuant to the Policy. (Trial Exhibit 14) On April 10, 2007 Defendant rejected Plaintiff's claim, stating 'it does not appear that the Notice constituted a lien against the subject real property as of the Date of Policy.' (Trial Exhibit 28) Evidence showed that the CFD is being charged on property tax bills for townhomes at the Property."

The trial court then made the following findings:

"The insuring provision of the Policy, relevant to this analysis, provides that Defendant 'insures, as of Date of Policy . . . , against loss or damage . . . , sustained or incurred by the insured by reason of: . . . [a]ny defect in or lien or encumbrance on the title.' (Trial Exhibit 11)

"Defendant acknowledged in its response to an interrogatory asking what 'encumbrance' meant as used in the Policy, that '[a]n encumbrance is any right of a third person in real property that diminishes the value of the insured's title, but does not prevent the passing of the insured interest. . . .'

"This definition, acknowledged by Defendant, is similar to the definition of encumbrance given in the case of *1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, where the court found a Conditional Use Permit [CUP] was an encumbrance for title insurance purposes. The Court held:

> "Here, the occupancy requirements in the CUP, which was to run with the land to bind any successors, amounted to a restriction on the owner's ability to convey the property within the meaning of [Government Code] section 27281.5. (See fn. 4.)[.] Because the CUP diminished the bundle of rights that could be conveyed by the owner, it constituted an encumbrance on title 'limiting the right of the owner of [the] land to freely use it in any lawful way.'
>
> "[Footnote no. 4 reads:]
> "The term encumbrance is defined as any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee. (*Fraser* [*v. Bentel* (1911)] 161 Cal. [390,] 394; accord *Evans v. Faught* (1965) 231 Cal.App.2d 698, 706.) Although Civil Code section 1114 provides the term encumbrance 'includes taxes, assessments, and all liens upon real property' (italics added), the word 'includes' is one of enlargement rather than limitation (*Fraser, supra*, [161 Cal.] at p. 394; *Evans, supra*, [231 Cal.App.2d] at p. 706). Therefore, the language of Civil Code [section] 1114 does not limit encumbrances to those specifically mentioned therein. (*Evans, supra*, [231 Cal.App.2d] at p. 706.) [(*1119 Delaware v. Continental Land Title Co.*[, *supra*,] 16 Cal.App.4th [at pp.] 999-1000, fn. 4.)]

"Based on the broad meaning of the term 'encumbrance' provided by case law and statu[t]e, and partially based on the definition acknowledged by Defendant, the Court finds that the CFD (meaning the Notice of Special Tax Authorization, the Map and Resolution providing a pay off figure for the CFD taxes and their legal and practical effects) constituted an encumbrance on title that was insured under the Policy, and that this encumbrance existed since 1987 and 1988 and continued to exist on the date that the Policy was issued and title transferred to Plaintiff. The encumbrance was 'on title' because the CFD ran with the Property and thus was a cloud on the title that would be transferred.

"The Court does not need to reach the issue of whether the CFD is also a lien or defect because of the finding that the CFD is an encumbrance. [¶] . . . [¶]

"The Policy (Trial Exhibit 11) provides (at paragraph 7(a)):

> "The liability of the Company under this policy shall not exceed . . . the difference between the value of the Insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

"Here, when the Property was sold to Plaintiff, both the buyer (Plaintiff) and the seller were under the belief that no CFD existed and the purchase price was based on the belief that no CFD existed. In comparing the Property's value with and without the burden of the CFD, the Property and the amenities in the surrounding area that were apparently built with CFD funds remain the same with or without the CFD imposition on the Property. Thus, the only effect the CFD has on the value is the actual costs to the owner(s) imposed by the CFD, much like what would be the effect of a mechanic's lien on the value of Property.

"In 2006, which is the year that the subdivision map was recorded, and the year in which Plaintiff tendered the claim to Defendant, the pay-off amount for the CFD per unit was $7,303.00 pursuant to the 1988 County Resolution[.] (Trial Exhibit 104)

The CFD thus encumbered the Property and its 119 units in the amount of $869,057.00 as of the date of the Policy, February 28, 2006.

"Because this amount was certain and readily ascertainable, Plaintiff is also entitled to recover legal interest at 10 percent per annum in the amount of $238.10 per day from December 18, 2006 pursuant to Civil Code sections 3287 and 3289. This interest amount is arrived at by taking 10 percent of $869,057.00, and dividing that figure by 365 to arrive at a daily interest figure."

II.

WAS MBK'S CLAIM COVERED UNDER THE TITLE INSURANCE POLICY?

"'Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued.' [Citations.] There is no coverage for physical conditions of property that merely affect land value. [Citations.] Under Insurance Code section 12340.1, title insurance means 'insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of: [¶] (a) Liens or encumbrances on, or defects in the title to said property; [¶] (b) Invalidity or unenforceability of any liens or encumbrances thereon; or [¶] (c) Incorrectness of searches relating to the title to real or personal property.' [¶] The insuring clauses of an insurance policy define and limit coverage. [Citations.]" (*Elysian Investment Group v. Stewart Title Guaranty Co.* (2002) 105 Cal.App.4th 315, 320.)

"Coverage is determined in the first instance by reference to the insuring clauses. [Citation.]" (*1119 Delaware v. Continental Land Title Co., supra*, 16 Cal.App.4th at p. 1003.) "Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation. [Citations.]" (*TIG Ins. Co. of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749, 755.) "[I]nsurance coverage is

‘“‘interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer.’”’ [Citation.]” (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

The Policy provides coverage for “loss or damage . . . sustained or incurred by the insured by reason of . . . [a]ny defect in or lien or encumbrance on the title[.]” The Policy excludes from coverage “[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of Policy[.]”

As noted earlier, the special Mello-Roos tax recorded in January 1988 was an encumbrance on MBK’s property existing before the effective date of the Policy in February 2006, and therefore covered by the Policy. Case law has defined an encumbrance as “any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee.” (*1119 Delaware v. Continental Land Title Co., supra*, 16 Cal.App.4th at pp. 999-1000, fn. 4; see also *Fraser v. Bentel, supra*, 161 Cal. at p. 394; *Evans v. Faught, supra*, 231 Cal.App.2d at p. 706.) In this case, Lawyers Title submitted interrogatory responses in which it agreed that the term encumbrance, as used in the Policy, meant “‘any right of a third person in real property that diminishes the value of the insured’s title, but does not prevent the passing of the insured interest.’” The special tax was a right of the State of California to collect taxes on the property due upon “[r]ecordation of [a] final subdivision map for dwelling units”—an act which would not prevent MBK from transferring the property, but would diminish the value of the property on transfer.

Lawyers Title argues the special tax under Mello-Roos was not a lien or encumbrance on, or a defect in the title existing before the effective date of the Policy. Lawyers Title argues that because the Mello-Roos special tax did not become due and owing until the subdivision map was recorded, it was not an encumbrance on the title when the Policy issued.

Lawyers Title relies on *Jaques v. Tomb* (1918) 179 Cal. 444, for the proposition that an assessment that has not been levied as of the date a property is sold is not an encumbrance on title. We conclude *Jaques* does not support Lawyers Title's argument. In that case, Tomb sold a piece of property to Jaques; the grant deed contained a covenant against encumbrances. (*Id.* at p. 444.) After the sale was completed, the reclamation district in which the property was located levied an assessment against the property. (*Ibid.*) The Supreme Court affirmed the trial court's order sustaining a demurrer to Jaques's claim for breach of the covenant against encumbrances: "Since the assessment did not exist at the time when defendant conveyed the land to D. E. Jaques, but was levied subsequent to said date, and, indeed, after he had conveyed the property to his grantee, we are unable to perceive how a cause of action could be founded thereon, any more than would a subsequent annual assessment, upon which to base a levy for fiscal taxes, give rise to a cause of action." (*Id.* at pp. 444-445.) Here, by contrast, the special tax authorization existed as of the date the Policy issued, although it had not yet become "due and payable."

Lawyers Title also relies heavily on a leading title insurance treatise addressing special assessments, not special taxes, in arguing there was no encumbrance on title when the Policy issued. Our reading of the treatise, however, convinces us that the trial court correctly determined the special tax was an encumbrance covered by the Policy. The treatise reads in relevant part as follows: "By far the greatest number of cases construing this clause of the title insurance policy involve tax liens and special assessments for public works. Insureds have made claims against their title insurers when the property they purchased or took as security for a loan thereafter was assessed or subjected to a lien for the cost of a public improvement that had been completed or authorized by governing authorities prior to the issuance of the title insurance policy. Title insurers, however, have defended against such claims on the basis of policy clauses which exclude from coverage defects, liens, and encumbrances not in existence on the

date of the policy. [¶] The difficulty with special assessments from a title insurance perspective is that they may be authorized or even assessed against real property long before any record will appear in county land records, the only public records the title insurer is obligated to search. A special assessment for a public work begins with its authorization by local governing authorities. The public record of that authorization—e.g., minutes of a city council meeting, local ordinance, or county board resolution—is not generally filed in county real property records. Once the assessment for payment is actually levied against individual parcels of property, notice still is only given to each property owner. Generally, only when the assessment remains unpaid and the governing body files a lien against the property for the amount owed does a record appear in the public real property records searched by title examiners. Since the title insurance policy expressly limits coverage to liens existing on the policy date, insurers will not pay a claim if the assessment was merely authorized by a governing board or by an ordinance at that time. Only if the property was levied against and a lien filed prior to the policy date will the insured have a claim for the amount of the special assessment." (Palomar, Title Insurance Law (2009) § 5.5, fns. omitted.)

A tax imposed pursuant to Mello-Roos is a special tax, not a special assessment. (Gov. Code, § 53325.3; *Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 656.) The treatise's analysis of coverage under title insurance policies for special assessments is therefore inapplicable. No authority cited by Lawyers Title, or uncovered in our independent research, holds that a claim may be made on a title policy only if a lien based on a special tax rather than a special assessment has been filed before the policy date. Unlike the public record of a special assessment (which the treatise quoted above states is often not recorded), the

notice of the special tax authorization in this case was recorded, and therefore within the public records Lawyers Title was required to search.[1]

Lawyers Title argues throughout its appellate briefs that the special tax was not a lien. Whether Lawyers Title is correct in this regard is irrelevant. The Policy covers loss or damage resulting from not only liens on title, but also *encumbrances* on title. The evidence supporting the trial court's finding that the special tax was an encumbrance on title is substantial.

At oral argument on appeal, Lawyers Title relied on *Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, for the proposition that the Mello-Roos special tax is not a defect or encumbrance on title. We do not find that case apposite. In *Hocking*, a subdivision map for property in Palm Springs had been approved by the City Council,

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[1] The distinction between a special tax and a special assessment was summarized by our Supreme Court as follows: "We explained the nature of a special assessment in *Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-143 . . . (*Knox*), a pre-Proposition 218 case. A special assessment is a '"'"compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . ."' [Citation.]" [Citation.] In this regard, a special assessment is "levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement." [Citation.] "The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public. [Citation.]" [Citation.] . . . [¶] 'A tax, on the other hand, is very different. Unlike a special assessment, a tax can be levied "'without reference to peculiar benefits to particular individuals or property.'" [Citations.] Indeed, "[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." [Citations.] . . . [¶] 'Therefore, while a special assessment may, like a special tax, be viewed in a sense as having been levied for a specific purpose, a critical distinction between the two public financing mechanisms is that a special assessment must confer a special benefit upon the property assessed beyond that conferred generally.' [Citation.]" (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 441-442.)

and accepted and recorded by the County Recorder, despite the fact streets for the subdivision had not been graded and paved. (*Id.* at pp. 646-647.) The plaintiff purchased two unimproved lots in the subdivision (*id.* at p. 645), but the city refused to issue building permits until the street grading and paving were completed (*id.* at p. 647). The plaintiff contended her title was defective because the value of the unimproved lots was diminished. (*Ibid.*) The Supreme Court disagreed, concluding that although the market value of the plaintiff's property had been adversely affected, the marketability of title to the property had not: "She appears to possess fee simple title to the property for whatever it may be worth; if she has been damaged by false representations in respect to the condition and value of the land her remedy would seem to be against others than the insurers of the title she acquired. It follows that plaintiff has failed to state a cause of action under the title policy." (*Id.* at p. 652.) The Mello-Roos special tax is not a physical condition of the property, which the *Hocking* court concluded was not covered by a title insurance policy, but rather as explained *ante*, it is an encumbrance on title because it is a right in the State of California to collect taxes on the property, which diminishes the value of MBK's title to the property.

Lawyers Title argues that "the Legislature's use of the specific terms 'taxes' and 'liens' [in Civil Code section 1114] necessarily excludes matters that have not reached that status." We must reject that argument. "The term encumbrance is defined as any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee. [Citations.] Although Civil Code section 1114 provides the term encumbrance 'includes taxes, assessments, and all liens upon real property' (italics added), the word '"includes"' is one of enlargement rather than limitation [citations]. Therefore the language of Civil Code section 1114 does not limit encumbrances to those specifically mentioned therein. [Citation.]" (*1119 Delaware v. Continental Land Title Co.*, *supra*, 16 Cal.App.4th at p. 999, fn. 4.)

III.

DID THE TRIAL COURT ERR IN ITS CALCULATION OF DAMAGES?

The trial court calculated damages by determining the amount required to pay off the Mello-Roos special tax per unit, and multiplying that amount by the total number of units.[2] Lawyers Title quotes from *Overholtzer v. Northern Counties Ins. Co.* (1953) 116 Cal.App.2d 113, 130, for the proposition that damages are properly calculated as the "diminution in the value of the property caused by the defect in title *as of the date of the discovery of the defect* . . . ." Lawyers Title then argues that the trial court selected the wrong date for determining when the defect in title was discovered. The trial court found the defect in title was discovered in December 2006, when MBK finally read the Disclosure Report provided to it in June 2006.

We need not determine whether the trial court was correct in its analysis of the discovery date, or whether MBK had actual notice or merely constructive notice of the title defect through its agents. The Mello-Roos per unit pay off amount was the same for the entirety of calendar year 2006, so whether the trial court calculated the damages as of the date of purchase of the Property (February 2006), the date when the Disclosure Report was sent to MBK (June 2006), or the date when MBK actually read the Disclosure Report (December 2006), the per unit pay off amount was the same.

IV.

REQUEST FOR JUDICIAL NOTICE

Lawyers Title filed a request that we take judicial notice of the recorded grant deed transferring the Property to MBK. MBK did not oppose the request. A recorded deed is an official act of the executive branch, of which this court may take judicial notice. (Evid. Code, §§ 452, subd. (c), 459, subd. (a); *Evans v. California Trailer*

[2] $7,303 (to pay off the Mello-Roos per unit) x 119 units = $869,057.

Court, Inc. (1994) 28 Cal.App.4th 540, 549; *Cal-American Income Property Fund II v. County of Los Angeles* (1989) 208 Cal.App.3d 109, 112, fn. 2.) We grant the request to take judicial notice of the existence of the recorded grant deed, but not of any factual matters stated therein. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064.)

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.