SANDBERG PHOENIX

PROFESSIONAL LIABILITY BLOG

On the Hook Without a Word: Title Agent May Create Attorney-Client Relationship Between Lender and Attorney Retained by Title Agent

AUTHOR: MEGHAN E. LEWIS, NICHOLAS P. VAN DEVEN

Summary: A Florida appellate court recently held a title agent's consultation with an attorney to prepare a note and mortgage may have created an attorney-client relationship between a lender and the attorney, despite no direct communications between the lender and attorney. Additionally, the creation of such relationship may have triggered a duty by the attorney to review documents prepared by the title agent outside the attorney's agreed scope of work.

JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc., 2018 WL 3301673, -- So.3d -- (Fla. Dist. Ct. App. July 5, 2018)

A Florida appellate court recently held a title agent's consultation with an attorney to prepare a note and mortgage may have created an attorney-client relationship between the lender and the attorney, despite no direct communications between the lender and attorney. Additionally, the creation of such a relationship may have triggered a duty by the attorney to review documents prepared by the title agent outside the attorney's agreed scope of work.

In *JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc.*, 2018 WL 3301673, -- So.3d -- (Fla. Dist. Ct. App. July 5, 2018), the Florida Court of Appeals, Fourth District, reversed summary judgment in favor of an attorney and his firm (collectively "Burgess") on a legal malpractice claim brought by a lender, JBJ Investment of South Florida ("JBJ") in connection with the attorney's preparation of a note and mortgage containing incorrect legal descriptions of properties intended to secure the loan. After a default by the borrower, JBJ discovered the legal description of the collateral to the loan omitted a valuable property which was material to JBJ's decision to make the loan in the first place, resulting in a legal malpractice suit.

Burgess sought summary judgment on the basis he had no attorney-client relationship with JBJ. JBJ's title agent, Ingrid Goenaga, (a non-attorney) had hired Burgess to prepare the note and mortgage. Goenaga – and not Burgess– prepared "Exhibit A" to the mortgage with the incorrect legal description of the collateral. It was undisputed JBJ had never met or communicated with Burgess. However, JBJ claimed it "indirectly" hired Burgess, and that Goenaga communicated with Burgess on JBJ's behalf sufficient to create an attorney-client relationship, an essential element to a legal malpractice claim.

Under Florida law, "actual consultation with a lawyer" is a prerequisite to forming an attorney-client relationship. *Id*. at * 4 (citing *Jackson v. BellSouth Telecomms*., 372 F.3d 1250, 1281 n.29 (11th Cir. 2004)). The *JBJ Investment* court held the consultation requirement "can be met when an agent of the client consults with an attorney on the client's behalf." *I*d. The Florida Court of Appeals reversed the trial court's summary judgment in favor of Burgess because there was sufficient evidence of the requisite consultation when Goenaga, as JBJ's title agent, hired Burgess and assigned him the task of preparing the note and mortgage. The evidence included "(1) JBJ wanted an attorney to prepare the loan documents and review them for accuracy; (2) JBJ's title agent, Ms. Goenaga, contacted Mr. Burgess on JBJ's behalf and hired him to prepare the note and mortgage; (3) Mr. Burgess prepared the note and mortgage; and (4) Mr. Burgess accepted a fee for his legal services." *Id*. at *5.

Additionally, the *JBJ Investment* court concluded Goenaga's testimony precluded summary judgment on the issue of whether Burgess had a duty to review the legal descriptions of the properties. Though Goenaga never asked Burgess to prepare the legal descriptions of the properties to be encumbered by the mortgage nor provided Burgess a list of the subject properties to be included in "Exhibit A" to the mortgage, the court held a reasonable jury could find that, once Burgess undertook to prepare the mortgage, he "agreed by implication to ensure that the mortgage encumbered the correct real estate." *Id*. (emphasis added). Moreover, "Burgess arguably had the ultimate responsibility to review that work product for accuracy where he was retained to prepare the mortgage and he charged a separate fee for this service." *Id*.

The *JBJ Investment* opinion offers a warning to title agents who may unknowingly create an attorney-client relationship on behalf of the lender involved in the underlying transaction. Likewise, real estate attorneys, particularly those offering services procured through title agents, may face increased professional liability exposure when the attorney fails to clarify the scope of his or her representation in writing or fails to ensure the accuracy of a non-attorney's work.

As a comparison, in *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. banc 1992), the Missouri Supreme Court has recognized numerous restrictions on escrow companies related to the unauthorized practice of law that may reduce the type of potential exposure described in *JBJ Investment*. For example, attorneys who are engaged by an escrow agent or closing/settlement service company may not provide legal services to the company's customers, and any forms used by them (non-lawyers) must be drafted or approved by legal counsel. Id. 849. Additionally, escrow companies are prohibited from preparing or completing nonstandard or specialized documents, or any other document that requires the exercise of judgment or discretion, and cannot draft legal documents or select the form of documents to be used. *Id*. The Missouri Supreme Court's express restrictions clarifying the scope of authorized and unauthorized practice of law in the real estate arena may translate into reduced professional liability exposure to attorneys. The *JBJ Investment's* opinion should, nonetheless, be treated as a cautionary tale to encourage implementation of best practices to prevent errors and minimize risk. Though untested, lawyers in Missouri and other jurisdictions may attempt to rely on the recent Florida opinion to give rise to implied duties and enlarge the scope of parties who should be named in their real estate disputes.