STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 25, 2014)

282 COUNTY ROAD, LLC,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PB 09-7447**
	:	***(Consolidated With)***
AAA SOUTHERN NEW ENGLAND,	:	
Defendant.	:	

AAA SOUTHERN NEW ENGLAND,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PB 11-4874**
	:	***(Consolidated)***
CHICAGO TITLE INSURANCE COMPANY, RICHARD N. MORNEAU, JOHN B. MURPHY, and MORNEAU & MURPHY,	:	
Defendants,	:	
	:	
v.	:	
	:	
JAMES A. MANCINI, JR. and NARRAGANSETT ENGINEERING, INC.,	:	
Third Party Defendants.	:	

AAA SOUTHERN NEW ENGLAND,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PB 11-5351**
	:	***(Consolidated)***
JAMES A. MANCINI, JR.,	:	
Defendant.	:	

DECISION

SILVERSTEIN, J. Before the Court are various motions seeking summary judgment in the above consolidated cases. The three cases stem from the sale of a certain piece of real estate located in Barrington by James A. Mancini, Jr. (Mancini, Jr.) to AAA Southern New England (AAA). After the sale, but before construction was completed on the building that AAA commissioned to be built, 282 County Road, LLC filed suit against AAA alleging that AAA was trespassing on land owned by 282 County Road, LLC. Essentially, the suit between 282 County Road, LLC and AAA amounted to a boundary dispute. Subsequently, AAA filed suit against Chicago Title Insurance Company (CTIC), Richard N. Morneau (Morneau), John B. Murphy (Murphy), Morneau & Murphy (M&M), Mancini, Jr. and Narragansett Engineering, Inc. (NEI) alleging, among other things, breaches of professional duties, breaches of covenants, and fraudulent and negligent misrepresentations. Currently pending are six motions for summary judgment: (1) 282 County Road, LLC's motion as against AAA; (2) AAA's cross-motion as against 282 County Road, LLC; (3) M&M's motion (joined by NEI) as against 282 County Road, LLC; (4) AAA's motion as against Mancini, Jr.; (5) AAA's motion as against NEI; and (6) AAA's motion as against CTIC, Morneau, Murphy, and M&M. Also pending is NEI's motion to amend its admissions.

I

Facts and Travel

A

AAA's Purchase of Lot 306

On September 25, 2008 (the Closing Date), AAA purchased from Mancini, Jr., by warranty deed, certain real property located at 280 County Road in Barrington, as described on

Assessor's Plat 23, Lot 306, Parcel 45 (Lot 306). Lot 306 is bordered by Maple Avenue to the south, County Road to the east, what is referred to either as Lot 1 or the Codega Lot to the west, and 282 County Road, also described on Assessor's Plat 23, Lot 38, Parcel 44 (Lot 38) to the north.

On the Closing Date, Mancini, Jr. executed and delivered an affidavit to AAA and CTIC. The affidavit represented that Mancini, Jr. was the only individual "in possession of all or any portion" of Lot 306 and that Mancini, Jr. was "not aware of any boundary claims of any type or nature" relating to Lot 306. See Mancini, Jr. Aff. Additionally, the warranty deed delivered by Mancini, Jr. included the following covenants: (1) Covenant of Seisin; (2) Covenant against Encumbrances; (3) Covenant of Right to Convey; (4) Covenant of Quiet Enjoyment; and (5) Covenant of Warranty.

Also on the Closing Date, CTIC issued to AAA an Owner's Policy of Title Insurance, Policy No. 72306-76537302 (the Policy), which insured AAA's title to Lot 306 in the amount of $950,000. The Policy was signed by CTIC's authorized agent, Murphy. The Policy insured AAA's title against certain risks, including that title to Lot 306 was unmarketable, defective, or subject to encumbrances not specifically excepted from coverage. Both Morneau and Murphy were authorized agents of CTIC. Even though Morneau and Murphy were CTIC's agents, M&M[1] was engaged by AAA to serve as AAA's closing attorney. Before the Closing Date, no defects, liens, or encumbrances on Lot 306 were ever disclosed to AAA by any party.

After the Closing Date, AAA demolished the then-existing building and obtained approval from the Planning Board of Review in Barrington to begin construction on a new building. AAA engaged an architectural firm to assist with the planning for construction. The

[1] Morneau and Murphy are the named partners of the firm M&M.

architectural firm engaged NEI to perform a land survey of Lot 306 on October 24, 2008. The survey completed by NEI did not contain any mention of encumbrances on Lot 306. After beginning construction, AAA received notice from 282 County Road, LLC alleging that AAA's construction encroached upon a triangular strip of land on the northerly side of Lot 306 (the Disputed Area). AAA was informed by 282 County Road, LLC that 282 County Road, LLC's predecessors in title had twice previously filed Notices of Intent to Dispute Interrupting Adverse Possession (the Notices) in the Land Evidence Records of the Town of Barrington (Barrington Land Evidence Records).

AAA, after receiving notice of 282 County Road, LLC's claim to the Disputed Area, e-mailed M&M on November 25, 2009. AAA later met with M&M to discuss the claims. The actual nature of the conversation between the parties is disputed, but, as a result, AAA concluded that the Notices did not affect the title to Lot 306. Therefore, AAA continued construction of the building and did not file a claim under the Policy with CTIC. While construction was ongoing, 282 County Road, LLC initiated suit on December 31, 2009 against AAA seeking to enjoin AAA's construction, requiring AAA to restore Lot 306 to the condition that it was in before construction, and monetary damages. The suit initially sought a preliminary injunction against AAA's continued construction, which AAA defended against. However, the parties agreed that the Court would not enter a temporary restraining order with respect to AAA's construction of the building.

AAA later learned that the Notices were discoverable in the chain of title to Lot 306 by searching the land evidence records. The predecessor in title to Lot 38 first recorded a notice in the Barrington Land Evidence Records on December 4, 1972 (the 1972 Notice) in the grantee index under the names of Lot 306's prior owners, James Mancini (Mancini, Sr.) and Anna

Mancini. A second notice was filed on June 17, 1993 in the computerized index under Mancini, Jr.'s name and under the names of Mancini, Sr. and Anna Mancini (the 1993 Notice).

On February 16, 2011, AAA submitted a claim under the Policy to CTIC. CTIC responded to AAA by denying AAA's claim and refusing to defend AAA in the lawsuit brought by 282 County Round, LLC. After receiving CTIC's first denial, AAA responded to CTIC's basis for denying coverage and again sought for CTIC to provide coverage under the Policy. CTIC once again responded to AAA and once again CTIC denied AAA's request. Finally, AAA sent a third request for coverage to CTIC, which CTIC again denied by letter dated June 9, 2011.

AAA then filed two lawsuits in connection with its response to 282 County Road, LLC's claim to the Disputed Area. The suit filed by 282 County Road, LLC and the two suits filed by AAA were consolidated by order of this Court on March 20, 2012. AAA's claims against Mancini, Jr. are for: (1) fraud; (2) negligent misrepresentation; (3) breach of warranty deed; and (4) declaratory judgment. AAA's claims against NEI are for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; and (4) negligent misrepresentation. AAA's claims against CTIC are for: (1) declaratory judgment; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) bad faith. AAA's claims against Morneau, Murphy, and M&M are for: (1) civil malpractice; and (2) declaratory judgment.

B

Back Title to Lot 306 and Lot 38

Lot 306 and Lot 38 were at one point a single, larger parcel entirely held by Emma Bradford (Bradford). On September 14, 1939, Bradford conveyed what would become known as

Lot 306 to Mancini, Sr. by a deed recorded in Book 36 at Page 436 of the Barrington Land Evidence Records. This deed described the land conveyed as follows:

> "Beginning at the southwesterly corner of the parcel herein described at a point in the northerly line of Maple Avenue, said point being the southeasterly corner of Lot No. 1 on that plat entitled "Plat of House Lots No. 2, Barrington, R.I. laid out by H.L. Cady May 1913 Charles F. Chase Engineer"; thence northerly along the easterly line of said Lot No. 1, one hundred (100) feet to a corner; thence easterly about two hundred fifteen (215) feet to a point in the westerly line of County Road, said point being one hundred (100) feet northerly from the northerly line of said Maple Avenue; thence southeasterly along the said westerly line of County Road, one hundred (100) feet to the northwesterly corner of County Road and Maple Avenue; thence westerly about two hundred sixty-four (264) feet to the place of beginning; bounded westerly by land belonging to Giuseppe Codega, northerly by other land of this grantor, easterly by said County Road and southerly by said Maple Avenue."[2]

Title to Lot 306 passed from Mancini, Sr. to Mancini, Jr. Mancini, Jr. later passed title to AAA, utilizing the same description as was used in the 1939 deed from Bradford to Mancini, Sr.

Bradford passed away in 1956. In May 1958, the Executor of Bradford's Estate sold Bradford's remaining property. On May 21, 1958, the Executor conveyed to Albert Berard (Berard) what is now known as Lot 38 by the following description:

> "Beginning at the point of intersection of the southerly line of Hamilton Avenue with the southwesterly line of County Road; then southeasterly bounding northeasterly on County Road one hundred forty seven and 19/100 (147.19) feet to a corner; thence turning an interior angle of 56°16'40'' and running westerly two hundred two and 27/10 [sic] (202.27) feet to land now or lately of Giuseppe Codega et al; thence turning an interior angle of 94°09'30'' and running northerly along a wire fence and bounding westerly on the last named land one hundred twenty two and 75/100 (122.75) feet to Hamilton Avenue; thence turning an interior angle of 85°50'30'' and running easterly bounding

[2] For ease of reference, a sketch of Lot 306 (referred to in the sketch as "280 Lot") and Lot 38 (referred to in the sketch as "282 Lot") with their relation to Maple Avenue and County Road is provided in the attached Appendix 1.

> northerly on said Hamilton Avenue one hundred twenty nine and 45/100 (129.45) feet to County Road and the point and place of beginning, the last described course forming an interior angle of 123°43'20'' with the first described course."

Later, by deed dated May 21, 1958, Berard conveyed by warranty deed the exact same described land to Angelo and Nicholas Gizzarelli (the Gizzarellis).

On May 22, 1958, the Executor of Bradford's Estate conveyed directly to the Gizzarellis what has become known as the Disputed Area by the following description:

> "All right, title and interest which Emma S. Bradford had at the time of her decease in and to that parcel of land situated on the southwesterly side of County Road in the Town of Barrington in the State of Rhode Island, bounded and described as follows:
>
> "Beginning at a point in the southwesterly line of County Road one hundred forty seven and 19/100 (147.19) feet southeasterly of the intersection of said line of County Road with the southerly line of Hamilton Avenue; thence southeasterly bounding northeasterly on said County Road to land now or lately of James Mancini; thence westerly bounding southerly on the last named land to land now or lately of Giuseppe Codega et al; thence easterly in a straight line two hundred two and 27/100 (202.27) feet to County Road at the point or place of beginning."

This description creates a pie shaped piece of land that has boundaries of County Road, Lot 306 and Lot 38.[3]

On August 13, 1980, the Gizzarellis conveyed Lot 38, including the Disputed Area, to Michael Romano (Romano). The warranty deed contained descriptions of a "Parcel I" and a "Parcel II." The description of "Parcel I" matches the description used in the May 1958 deeds from the Executor to Berard and from Berard to the Gizzarellis. The description of "Parcel II"

[3] AAA claims that it owns the Disputed Area, which would make the northerly and southerly boundary lines of Lot 306 parallel. However, if 282 County Road, LLC owns the Disputed Area, then the northerly line of Lot 306 would run from the northwesterly boundary of Lot 306 in an east-southeasterly direction to County Road, thereby making the northerly and southerly boundary lines of Lot 306 not parallel.

matches the description used in the May 1958 deed from the Executor to the Gizzarellis, except that it does not include the qualifying statement regarding "[a]ll right, title and interest which Emma S. Bradford had at the time of her decease . . . ." The rights of Romano were later transferred to 282 County Road, LLC.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in a light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Indus. Nat'l Bank v. Peloso, 121 R.I. 305, 307-08, 397 A.2d 1312, 1313 (1979). "[T]he opposing parties will not be allowed to

rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

III

Discussion

A

Title to the Disputed Area[4]

As argued by 282 County Road, LLC, it owns the Disputed Area because when the deed from Bradford to Mancini, Sr. is "read in its entirety [it is] clear and unambiguous on its face." John Mensinger (Mensinger) Aff. Mensinger concludes, in his expert opinion, that the Bradford to Mancini, Sr. deed excluded the Disputed Area because the only way the deed's one hundred foot measurement on the easterly side of the property is consistent with all other measurements is if the one hundred feet runs along County Road, as opposed to perpendicular to Maple Avenue. Also argued by 282 County Road, LLC is that if the one hundred foot measurement called for in the instruction stating, "said point being one hundred (100) feet northerly from the northerly line of said Maple Avenue" was actually to be measured perpendicular to Maple Avenue, then the other distances in the deed would also need to change. The 215 feet northerly border distance

[4] AAA and 282 County Road, LLC's cross-motions against one another seek a determination as to who holds title to the Disputed Area. Additionally, Morneau, Murphy, and M&M's motion against 282 County Road, LLC also seeks a declaration as to who owns the Disputed Area. Thus, the two motions will be considered jointly.

would be 202.27 feet, and the 100 feet distance along County Road would become 119.93 feet. To simply ignore these substantial differences is incorrect, argues 282 County Road, LLC.

Additionally, 282 County Road, LLC argues that the historical treatment of Lot 306 confirms that the Disputed Area does not belong to AAA. The following documents were submitted by 282 County Road, LLC which purport to show that the northerly property line is not parallel to the southerly property line: (1) the 1938-40 extensive survey of County Road conducted by the Rhode Island Department of Transportation; (2) a Waterman survey from 1973; (3) 1982 and 2011 Scituate surveys; and (4) aerial photographs that show the physical orientation of the prior building. These documents, argues 282 County Road, LLC, provide insight into the historical treatment of the land and that the Disputed Area was excluded from the Bradford to Mancini, Sr. deed.

AAA argues that it holds superior title to the Disputed Area because the Disputed Area was within the description of land contained in the Bradford to Mancini, Sr. deed, and thus, the Executor had no interest in the Disputed Area when the Executor attempted to convey it to the Gizzarellis. AAA asserts that the instruction "said point being one hundred (100) feet northerly from the northerly line of said Maple Avenue" contained in the Bradford to Mancini, Sr. deed creates a significant point or monument. AAA recognizes that if this point is the northeast boundary of the property, then the metes and bounds descriptions in the deed become inconsistent. However, AAA emphasizes that because monuments take precedence over metes and bounds, that the point 100 feet north of Maple Avenue is the correct northeast boundary. Further, AAA contends that because the northerly boundary line of Lot 306 both begins and ends

at a point 100 feet north of Maple Avenue, it necessarily means that the northerly boundary line must run parallel to the southerly boundary line (Maple Avenue).[5]

"It is a familiar rule that what are the boundaries of land conveyed by a deed is a question of law, where the boundaries are is a question of fact." Coop. Bldg. Bank v. Hawkins, 30 R.I. 171, 73 A. 617 (1909); see also Bitting v. Gray, 897 A.2d 25, 30 (R.I. 2006) ("The determination of what are the boundaries of land conveyed in a deed is a question of law.").[6] Additionally, "as a general rule known and fixed monuments and boundaries will control courses and distances, and metes and bounds expressed with certainty will include the land within them." Id. See also 12 Am. Jur. 2d Boundaries § 61 ("Although preference is ordinarily to be given to natural objects over artificial monuments, the latter are allowed to dominate courses and distances given in deeds in interpreting descriptions of boundaries to land. The monuments are the best evidence of the lines and corners actually made by a survey, and, when ascertained, are satisfactory and conclusive evidence of the location of the lines as originally run whether they correspond with plat and field notes of survey or not.").

The deed from Bradford to Mancini, Sr. contains three undisputed corner boundary markers. The first corner boundary marker is the southwest corner of Lot 306 described in the

[5] Morneau, Murphy, and M&M similarly argue that the deed from Bradford to Mancini, Sr. has the northerly boundary line running parallel to the southerly boundary line, and thus, they argue that AAA holds superior title to the Disputed Area. Additionally, NEI joined Morneau, Murphy, and M&M's motion.

[6] Here, the question is for the Court to determine what the boundaries are as conveyed by the deed, and thus where the boundaries are. See Coop. Bldg. Bank, 30 R.I. 171, 73 A. 617 ("When the calls of the description are definite and unequivocal the construction by the court amounts to a location of the boundaries."). It cannot be disputed that the descriptions in the deed are sufficiently definite such that the intention of the parties is not called into question. Id.

deed as the beginning point.[7] The next undisputed corner is the northwest corner, which runs 100 feet northerly along the Codega Lot line from the beginning point. This northwest corner also happens to share a point with Lot 38. The final undisputed corner, irrespective of any inconsistent metes and bounds descriptions, is the southeast corner of Lot 306, which is described in the deed as the "northwesterly corner of County Road and Maple Avenue." Therefore, the only remaining boundary for the Court to ascertain is the northeast corner of Lot 306.

The deed from Bradford to Mancini, Sr. identifies the northeast corner of the property as "a point in the westerly line of County Road, said **point** being one hundred (100) feet northerly from the northerly line of said Maple Avenue[.]" (emphasis added). This corner point must utilize Maple Avenue to determine its existence. In fact, the deed gave a similar instruction to get to the northwest corner of the property by running 100 feet northerly from a point in the northerly line of Maple Avenue. Because County Road is angled along the property line at a northwest to southeast direction, there can only ever be a single point in the westerly line of County Road that is 100 feet northerly from the northerly line of Maple Avenue. Therefore, this point is a definite point in the westerly line of County Road, and thus is considered a monument. See Scott v. Hansen, 18 Utah 2d 303, 422 P.2d 525 (1966) (monument must be "definitely identified and located"). This northeast corner when connected with the northwest corner creates a parallel line to Maple Avenue, which makes sense considering the deed had described both corners as being 100 feet northerly of the northerly line of Maple Avenue. Additionally, because the description of the northeast corner creates a fixed and identifiable point, that corner point

[7] "[A] point in the northerly line of Maple Avenue, said point being the southeasterly corner of Lot No. 1 on that plat entitled 'Plat of House Lots No. 2, Barrington, R.I. laid out by H.L. Cady May 1913 Charles F. Chase Engineer.'" See Deed from Bradford to Mancini, Sr.

takes precedence over inconsistent metes and bounds descriptions. See Di Maio v. Ranaldi, 49 R.I. 204, 204, 142 A. 145, 146 (1928)

The argument by 282 County Road, LLC that the metes and bounds descriptions are sufficiently definite is mistaken. Notably, 282 County Road, LLC would have the Court find that the deed instruction describing the point as "in the westerly line of County Road, said point being one hundred (100) feet northerly from the northerly line of said Maple Avenue," really meant a point that is 100 feet when running along County Road. However, this argument simply ignores the next instruction in the deed, which is, "thence southeasterly along the said westerly line of County Road, one hundred (100) feet to the northwesterly corner of County Road and Maple Avenue[.]" If the Court were to adopt 282 County Road, LLC's interpretation, then the entire instruction describing a point that is 100 feet northerly of the northerly line of Maple Avenue would become entirely superfluous. See Brown, Robillard and Wilson, Evidence and Procedures for Boundary Location, Evidence-General, § 6-6 (3d. ed. 1994) ("Each deed should be construed as a whole; all parts are read in light of the other parts; nothing stands alone and nothing is rejected unless it is impossible to give that part a meaning."). Here, by finding that the northerly line creates a parallel line to Maple Avenue, the only inconsistency created is with the numerical values contained in the metes and bounds descriptions. See Di Maio, 49 R.I. at 204, 142 A. at 146 (changing metes and bounds descriptions to conform to monument descriptions).

Having determined the four corner boundary markers, it is evident that the Disputed Area was conveyed originally from Bradford to Mancini, Sr. The attempted conveyance from the Executor to the Gizzarellis was ineffective because, at the time of the conveyance, Bradford, through the Executor, had no right, title, or interest to the Disputed Area. Thus, through transfers from Mancini, Sr. to Mancini, Jr. to AAA, the Disputed Area belongs to AAA. Accordingly,

AAA could not have committed a trespass onto 282 County Road, LLC's land because the building was entirely on Lot 306. The motion of 282 County Road, LLC is denied, AAA's motion is granted, as well as the motion by Morneau, Murphy, and M&M, which was joined by NEI.

B

AAA Claims Against Mancini

1

Fraud and Negligent Misrepresentation

AAA argues that Mancini, Jr. withheld information that Mancini, Jr. was personally aware of a longstanding dispute between the owners of Lot 306 and Lot 38. AAA asserts that Mancini, Jr. committed both fraud and negligent misrepresentation by attesting in his affidavit that he was unaware of any "boundary claims of any type or nature relating to the subject property." Rather, AAA contends that Mancini, Jr. was either actually aware of or should have had constructive knowledge regarding the boundary dispute. AAA claims that the very existence of the Notices in the Barrington Land Evidence Records created constructive knowledge on the part of Mancini, Jr. Yet, AAA argues that even if Mancini, Jr. did not have constructive knowledge of the Notices, he had actual knowledge. AAA cites to the affidavit of a Bristol County Deputy Sheriff attached to the 1993 Notice, which states that the Deputy Sheriff personally hand-served Mancini, Jr. and read the contents of the 1993 Notice to Mancini, Jr. Furthermore, AAA identifies letters between Mancini, Jr.'s attorney and Romano that discuss the boundary dispute and which Mancini, Jr. is carbon copied. In one of the letters, Mancini, Jr.'s attorney writes "James Mancini has referred to me your notice dated June 14, 1993[.]" See Letter from William F. Hague, Jr. to Dr. Michael Romano dated July 1, 1993. AAA claims that

Mancini, Jr. committed both fraud and negligent misrepresentation based on the overwhelming evidence that Mancini, Jr. was at least constructively aware of the dispute, if not actually aware of it, but yet he still represented that he was "not aware of any boundary claims of any type or nature relating to the subject property."

Mancini, Jr. responds by arguing that AAA mistreats his affidavit. First, Mancini, Jr. asserts that both AAA and he were represented by counsel during the closing and the Notices were not discovered by either party prior to the closing, even though title searches were completed. Accordingly, Mancini, Jr. claims that he executed the affidavit to the best of his knowledge. In fact, the affidavit contains the following language: "[n]ow, therefore, the seller(s) on oath depose(s) and say(s), to the best of the seller's knowledge as follows . . . ." Mancini, Jr. argues that this limiting language creates a question of fact as to whether Mancini, Jr. made a false representation because the affidavit was made to the best of his knowledge, including with reliance upon the title reports produced by counsel and the title company. Additionally, Mancini, Jr. asserts that AAA did not act in reliance upon the affidavit. In support of this assertion, Mancini, Jr. quotes from AAA's President and CEO Mark Shaw's (Shaw) Supplemental Affidavit dated October 17, 2012, which states that:

> "As part of the legal counsel provided to AAA, Morneau & Murphy performed a title search on Lot 306 and informed AAA that the search did not reveal anything of record with respect to the title to Lot 306 and that the title was clear. Relying on that representation that the title was clear, AAA closed on the purchase of Lot 306 on September 25, 2008." Shaw Supplemental Aff. ¶ 4.

In order to establish a claim for fraud, "'the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon' and that the plaintiff justifiably relied thereon.'" Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996) (quoting Cliftex

Clothing Co. v. DiSanto, 88 R.I. 338, 344, 148 A.2d 273, 275 (1959)). The elements of a negligent misrepresentation claim are as follows:

> "(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he [or she] ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation." Cruz v. DaimlerChrysler Motors Corp., 66 A.3d 446, 453 (R.I. 2013); Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007); Mallette v. Children's Friend & Service, 661 A.2d 67, 69 (R.I. 1995).

Here, it is apparent that Mancini, Jr. made a false misrepresentation of material fact. Mancini, Jr. swore that he was not aware of any boundary claims, however, the affidavit attached to the 1993 Notice states that Mancini, Jr. was personally served with the 1993 Notice after having the contents read to him. Additionally, the correspondence between Mancini, Jr.'s attorney and Romano implicates that Mancini, Jr. actually forwarded the 1993 Notice to his attorney to handle the situation. Furthermore, Mancini, Jr. was carbon copied on the correspondence regarding the boundary dispute. Finally, the affidavit of Mancini, Jr. states that: "AAA . . . is about to purchase the Subject Property from [Mancini, Jr.], and is willing to proceed with the transaction based in part upon the following representations from [Mancini, Jr.]." Clearly, from this statement, Mancini, Jr. admits that his representations were part of the reason why AAA was willing to enter into the transaction to buy Lot 306. See Travers, 682. A.2d at 474.

Mancini, Jr.'s argument that he does not recall receiving the Notices, and therefore, a question of fact exists is without merit. In order to create an issue about a material fact, there must be a dispute regarding "competent and reasonably definite evidence[.]" Roche v. John

Hancock Mut. Life Ins. Co., 81 F.3d 249, 253 (1st Cir. 1996). Here, Mancini, Jr.'s admission that he "has no recollection of receiving" the 1993 Notice is insufficient to create an issue of fact regarding whether Mancini, Jr. actually received the 1993 Notice. See Craig v. Colonial Penn Ins. Co., 335 F. Supp. 2d 296, 305 (D. Conn. 2004) ("[A] witness's non-denial does not create a genuine issue of material fact when the witness has testified to a lack of memory and no affirmative evidence has been introduced."); see also Weaver v. Am. Power Conversion Corp., 863 A.2d 193, 200 (R.I. 2004) ("[N]aked and conclusory assertions in an affidavit are inadequate to establish the existence of a genuine issue of material fact .").

Additionally, the prefatory language utilized in the Mancini, Jr. Affidavit that the representations were made to the best of his knowledge does not negate the claims of fraud and negligent misrepresentations. The qualifying language utilized does not change or diminish the fact that Mancini, Jr. had actual knowledge of at least the 1993 Notice. See PHL Variable Ins. Co. v. P. Bowie 2008 Irrevocable Trust ex rel. Baldi, 718 F.3d 1, 12 (1st Cir. 2013) (finding that statements made to one's "best knowledge and belief" were fraudulent). Our Supreme Court in East Providence Credit Union v. Harpootian, 108 R.I. 219, 222, 273 A.2d 852, 853 (1971) found that an applicant fraudulently misrepresented their indebtedness even when the application signed contained the qualifying language that it was "to the best of [applicant's] knowledge and belief." Mancini Jr.'s failure to inform AAA of the 1993 Notice was an omission that induced AAA to proceed with the purchase of Lot 306. See id. 108 R.I. at 224, 273 A.2d at 855 ("[D]efendant's failure to make known all of his indebtedness was an omission designed to induce plaintiff to make the loans in question.").

Finally, even if AAA did rely on their own closing and title attorney's representations, that does not absolve Mancini, Jr. of wrongdoing. AAA has alleged wrongdoing by multiple

parties and claims damages resulting therefrom. It is a basic tenet of Rhode Island joint tortfeasor law that multiple parties may be liable for the same injury. See Merrill v. Trenn, 706 A.2d 1305, 1314-15 (R.I. 1998); see also G.L. 1956 §§ 10-6-1, et seq. Accordingly, AAA's summary judgment is granted as to its counts of fraud and negligent misrepresentation.

2

Warranty Deed Claims

AAA argues that Mancini, Jr. breached the covenants in the warranty deed by representing that Mancini, Jr. had clear title to Lot 306. AAA asserts that the Notices constituted an encumbrance on the property and that Mancini, Jr. therefore did not have clear title at the time of conveyance. Mancini, Jr. counters that the determination of the underlying ownership dispute has quieted title in the property, and therefore, he did in fact comply with all the warranties.

Our Supreme Court has held:

> "[a] seller who conveys real property with warranty covenants, warrants to the grantee inter alia, that he or she is lawfully seised in fee simple of the granted premises; that the devised property is free of all encumbrances; that the grantee shall at all times after the delivery of the deed peaceably and quietly have and enjoy the deeded premises; and that the seller shall defend against any claim against the premises. The covenants of quiet enjoyment and warranty of title are prospective in nature and come into play after the delivery of the deed." Bitting, 897 A.2d at 35 (internal quotations omitted).

"The covenant of seizin may be defined to be an assurance that the grantor has the very estate in quantity and quality which he purports to convey." Burton v. Price, 141 So. 728, 729 (Fla. 1932). Additionally, the covenant of authority to sell is similar to the covenant of seisin. See Holmes Dev., LLC v. Cook, 48 P.3d 895, 905 (Utah 2002) (holding that "the covenants of seisin and the right to convey are synonymous, and the analysis of whether a grantor breached one of these covenants is the same for either covenant."). Here, as determined supra, Mancini,

Jr. was lawfully in possession of the Disputed Area and lawfully conveyed his interest to AAA. Mancini, Jr. was able to transfer the very estate in both quantity and quality that he purported to convey to AAA. Therefore, Mancini, Jr. was not in breach of the covenants of seisin or authority to sell.

Next, AAA relies upon Magnusen v. Stedman, No. 91-0495, 1997 WL 839870, at *5 (R.I. Super. Jan. 8, 1997) for the proposition that "[t]he covenant [against encumbrances] provides a purchaser with protection from the diminution of the value of property purchased, due to preexisting rights or interests of other parties." AAA asserts that the Notices diminished the value of Lot 306 and were encumbrances upon the land at the time of the conveyance. However, a full reading of Magnusen reveals that the court found that the encumbrance in that case was not in dispute "[b]ecause defendants offered no evidence contradicting Grant's expert testimony that defendants' house is on plaintiffs' land." Id. This Court finds more persuasive the reasoning of the Bitting Court when it found that encumbrances existed. There, our Supreme Court found that an encumbrance existed not because plaintiff did not own a part of the property they believed they owned, but because defendants failed to disclose a potential impediment to a known right of way being conveyed. Bitting, 897 A.2d at 35. AAA's claimed encumbrance was 282 County Road, LLC's Notices, which, as determined supra, were held to be invalid. Therefore, no encumbrances to Mancini, Jr.'s title existed at the time of conveyance. See Boulware v. Mayfield, 317 So. 2d 470, 472 (Fla. Dist. Ct. App. 1975) ("The nexus of appellants' complaint is that the common law covenant against encumbrances warrants to the purchaser a record title even though such record encumbrance is invalid and unenforceable. Although this is apparently a question of first impression in this jurisdiction, we conclude that the answer is a positive NO."); 20 Am. Jur. 2d Covenants, Etc. § 89 (2014) ("In any event, the covenant is not broken unless the

alleged outstanding lien, encumbrance, or title is valid, legal, and subsisting. An invalid claim may constitute a cloud upon record title, but only a lawful or valid claim will constitute a violation of a covenant against encumbrances.").

Finally, typically in order to recover for breaches of quiet enjoyment and warranty to defend, an actual eviction must take place, such that title to the property is disturbed. See Nunes v. Meadowbrook Dev. Co., 24 A.3d 539, 543 (R.I. 2011). Despite this, AAA argues for this Court to adopt the view that these covenants may still be breached when "the wrongful act of the covenantor thrusts the covenantee into litigation with a third person." Outcalt v. Wardlaw, 750 N.E.2d 859, 864 (Ind. App. 2001). While Mancini, Jr. made false representations in his affidavit, he did not breach any of the warranties associated with the warranty deed. Any "thrusting" that Mancini, Jr. did was a result of the affidavit that he swore to, not the warranty deed that he conveyed to AAA. Therefore, this Court declines to find that Mancini, Jr. breached the covenants associated with the warranty deed. Accordingly, this Court denies AAA's motion for summary judgment relating to breach of the warranty deed as against Mancini, Jr.

C

AAA Claims Against NEI

1

NEI's Request to Amend Admissions

Before considering the claims AAA asserted against NEI, the Court must first address the issue of whether NEI's admissions may be amended. In response to AAA's request for admissions, NEI admitted that "NEI discovered the Notices before AAA began construction of a building on Lot 306[,]" and that "NEI did not inform AAA that it had discovered the Notices until after AAA began construction of a building on Lot 306." NEI Admissions ¶¶ 6, 7. NEI

attempts to revise these admissions due to a misunderstanding by NEI at the time of the original response. NEI asserts that it first became aware of the Notices in late November 2009 when Shaw contacted NEI about the Notices, not before certifying the survey and not before construction had begun.

Pursuant to Super. R. Civ. P. 36(b):

> "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . . . [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the party's action or defense on the merits."

Our Supreme Court has stated, that "[a]n admission may be withdrawn (1) if the admitting litigant has acted diligently; (2) if adherence to the admission might cause a suppression of the truth; and (3) if the withdrawal can be made without prejudice to the party who made the request." Gen. Elec. Co. v. Paul Forsell & Son, Inc., 121 R.I. 19, 23, 394 A.2d 1101, 1103 (1978); see also In re McBurney Law Servs., Inc., 798 A.2d 877, 883 (R.I. 2002).

Here, NEI acted diligently, and adherence to the original admission would cause a suppression of the truth. Once NEI learned of the discrepancy regarding the admissions, NEI attempted to file the amended admissions. NEI did not delay in attempting to correct the mistaken admissions. In fact, the original responses were served on May 31, 2013, and the amended responses were served less than six months later on November 11, 2013. NEI immediately attempted to rectify the situation upon first learning of the discrepancy while preparing its opposition to AAA's summary judgment motion. Additionally, it is apparent that if the original admissions were to stand, truth could be subserved. Whether or not NEI discovered the Notices before completing the survey is central to the consideration of the issues presented

below. NEI contends that the original admissions were based upon a misunderstanding by a principal at NEI. If the admissions are allowed to stand, then NEI will be deemed to have discovered the Notices prior to completing the survey, whereas NEI claims they did not discover the Notices until much later, when AAA informed NEI about their existence.

Central to the determination of whether the amendment should be allowed is whether AAA will be prejudiced by the amendment. As Super. R. Civ. P. 36(b) makes clear, the party who obtained the admission must show how it will be prejudiced. See id. ("[T]he party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the party's action or defense on the merits."). Here, AAA argues that it relied upon the admissions in filing its motion for summary judgment against NEI. AAA cites to Cardi Corp. v. State, 524 A.2d 1092 (R.I. 1987), where a request to withdraw admissions was denied and the court granted summary judgment based on the admissions. In Cardi, the Court found that the party that had obtained the admissions would be prejudiced because the Court determined that the "admissions in question were probably more consistent with the truth than otherwise" and to force the obtaining party to have "to produce evidence at a trial to establish the truth of what [the withdrawing party] knows is true." Id. at 1096.

This Court is not persuaded that AAA will be prejudiced by allowing the amendment to the admissions. AAA's bald assertion that it relied upon the admissions when preparing its summary judgment motion is completely undercut by AAA's later argument in the alternative with regard to the new set of facts under the amended admissions. Clearly, AAA was able to adequately adapt to maintain its action against NEI. Furthermore, with a trial date not yet set, AAA still has ample time to make any further adjustments necessary because of the amended admissions. Therefore, NEI's request to amend its admissions is granted.

2

Negligence

AAA argues that NEI was negligent in its performance of completing the land survey. AAA asserts that NEI owed a duty commensurate with the Procedural and Technical Standards for the Practice of Land Surveying in the State of Rhode Island and Providence Plantations (Effective April 1, 1994) (the Surveying Standards). AAA claims that NEI did not comply with the Surveying Standards when it completed the survey on February 2, 2009. Specifically, AAA relies on the Affidavit of Louis Federici (Federici) to establish the duty of care owed under the Surveying Standards. According to Federici, the Surveying Standards required NEI to (1) affirmatively discuss the Notices with AAA to address any potential concerns; (2) identify the Notices on the face of the survey; and (3) search the Barrington Land Evidence Records for documents affecting the survey. See Federici Aff. at ¶¶ 23-37. AAA concludes that the breach of this duty caused damages suffered by AAA, and therefore, NEI was negligent in its performance of the survey.

NEI responds first by arguing that the Federici Affidavit attempts to introduce standards into the Surveying Standards that do not exist. NEI states that the Surveying Standards speak for themselves, and when considered without the Federici Affidavit, questions of fact exist as to whether NEI complied with the Surveying Standards. NEI also claims that AAA already asserted that M&M was the proximate cause of the damages sustained by AAA. NEI cites the Affidavit of Shaw which stated that had M&M discovered the Notices, then AAA might not have purchased Lot 306.

"The existence and extent of a duty of care are questions of law[.]" Mignone v. Fieldcrest Mills, 556 A.2d 35, 37 (R.I. 1989). However, when the duty owed is not "obvious or

discernible by an ordinary lay person" then an expert must be used to establish such a duty. MacTavish v. R.I. Hosp., 795 A.2d 1119, 1121 (R.I. 2002). Here, both parties agree that the controlling standards are those contained in the Surveying Standards.[8] The Federici Affidavit attempts to clarify the Surveying Standards in order to make them more easily comprehended. The Surveying Standards set forth the requirements necessary for a surveyor when undertaking a survey. However, in MacTavish, the plaintiff did not submit an expert affidavit disputing the standard of care alleged to be owed. The Court does not pass judgment at this time as to whether the standard of care owed is articulated merely by reference to the Surveying Standards or the Surveying Standards supplemented by the Federici Affidavit.

Regardless of whether the Court adopts the standards as articulated by the Surveying Standards or by the Federici Affidavit, questions of fact exist as to whether NEI breached the duty it owed. See Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009) ("Only when a party properly overcomes the duty hurdle in a negligence action is he or she entitled to a factual determination on each of the remaining elements: breach, causation, and damages."). Here, because NEI admitted that they did not find the Notices until after completing the survey, AAA argues that they breached their duty to properly search the Barrington Land Evidence Records. However, NEI submitted the affidavit of Kamal Hingorany (Hingorany), which sets forth the steps that NEI undertook in completing the survey. See Hingorany Aff., Oct. 18, 2013. Additionally, after going through the procedure utilized in preparing the survey, Hingorany swears that in his "professional opinion the NEI Survey was prepared in accordance with [the Surveying Standards.]" Id. at ¶ 12.

[8] To the extent that NEI argues that they only owed a duty to Ekman & Arp, AAA's architectural firm, this Court finds AAA was in the "actually foreseen and limited classes of persons" that NEI should have anticipated would have relied upon the survey. See Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968)

Furthermore, while the issue of proximate cause is typically also a question of fact, there can be no dispute that if NEI did breach a duty owed to AAA, then NEI was a proximate cause of the injuries sustained by AAA. A breach of a duty is the proximate cause of an injury "if the harm would not have occurred *but for* the [breach] *and that the harm was a natural and probable consequence* of the [breach]." DiPetrillo v. Dow Chem. Co., 729 A.2d 677, 692 (R.I. 1999) (internal quotations omitted) (emphasis in original). NEI's argument that AAA already admitted M&M was the cause of AAA's injury is of no import. There may be multiple proximate causes of a single injury. See Martinelli v. Hopkins, 787 A.2d 1158, 1170 (R.I. 2001) ("It should be noted that the plaintiff was not required to prove that the town's negligence was the proximate cause for his injuries and damages, but only that it was a proximate cause which, standing alone, or in combination with any other defendant's negligence, contributed to the plaintiff's injuries."). NEI, if it breached its duty of care, was a proximate cause of AAA's damages. See Pierce v. Providence Ret. Bd., 15 A.3d 957, 966 (R.I. 2011) ("We reiterate that proximate cause need not be the sole and only cause. It need not be the last or latter cause. It's a proximate cause if it concurs and unites with some other cause which, acting at the same time, produces the injury of which complaint is made.") (internal quotations omitted).

Because questions of fact exist regarding whether NEI breached the duty of care owed to AAA,[9] summary judgment is denied with respect to AAA's negligence claim against NEI.

3

Breach of Covenant of Good Faith and Fair Dealing

AAA relies on NEI's supposed noncompliance with the Surveying Standards as evidence that NEI failed to use its best efforts in preparing the survey. AAA argues that when a party fails

[9] Whether that duty of care owed is merely defined by the Surveying Standards or the Surveying Standards are interpreted by Federici is immaterial to this Court's determination.

to use best efforts, then their action amounts to a breach of the covenant of good faith and fair dealing. See 1800 Smith St. Assocs., LP v. Gencarelli, 888 A.2d 46, 56-57 (R.I. 2005).

NEI responds by arguing that whether NEI failed to use best efforts is necessarily a question of fact. NEI submits the affidavit of Hingorany, which states that, in his belief, NEI completed the survey in good faith. See Hingorany Aff. ¶ 3, Nov. 11, 2013.

The Court notes that whether conduct violates the duty of good faith and fair dealing is generally a question reserved for the finder of fact. See Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 72 F.3d 190, 199 (1st Cir. 1995) (citing E. Allan Farnsworth, Contracts § 7.17 (2d ed. 1990). Here, NEI has submitted affidavit evidence that the survey was completed in good faith. Accordingly, the Court denies AAA's motion with respect to the breach of the covenant of good faith and fair dealing.

4

Breach of Contract

AAA argues that NEI breached its contract by failing to disclose the Notices. Specifically, AAA asserts that the contract required NEI to prepare a survey that included a "legal description that conforms to the record title boundaries." See Request for Proposal – Land Survey, at 5. AAA claims that NEI's failure to prepare a survey that included the Notices was a breach of NEI's contractual duties.

NEI argues that AAA's claim for breach of contract is a repeat of AAA's negligence claim. NEI asserts that under both the negligence claim and the breach of contract claim, the single issue is whether NEI had a duty to disclose the Notices to AAA in the survey. Thus, NEI claims that the question is whether NEI complied with the applicable Surveying Standards.

Separate counts for breach of contract and tort can be maintained when there are "separate and distinct" breaches of duties. See Ciccone v. Pitassi, No. PB 97-4180, 2004 WL 2075120, at *7 (R.I. Super. Aug. 13, 2004). Here, NEI did not disclose the Notices on the survey because NEI had not discovered them. Therefore, the breach that AAA claims—that NEI had to provide a legal description that conforms to the record title boundaries—occurred because of NEI's failure to discover the Notices. Whether this amounts to a breach of the contract necessarily requires measuring NEI's actions against the Surveying Standards. Therefore, AAA's breach of contract claim is merely a "tort claim[] cloaked in contractual language . . . [and] not [a] breach of contract claim[.]" Weiner v. Clinton, 942 A.2d 469, 473 (Conn. App. 2008). Therefore, AAA's motion with respect to breach of contract is denied.

5

Negligent Misrepresentation

AAA argues that NEI made a negligent misrepresentation when it represented on the survey that there were no disputes regarding title. AAA asserts that while NEI claims that NEI did not know about the Notices at the time of completing the survey, NEI should have known because the Notices were discoverable through a search of the Barrington Land Evidence Records.

NEI responds by arguing that it did not make any representations regarding any potential boundary disputes. NEI states that it did make the determination that the boundary dispute was illusory, but that determination was an opinion of fact, not actionable as a negligent misrepresentation. Finally, NEI claims that the underlying issue, like the breach of contract claim, is whether NEI was negligent in performing the survey.

As stated previously, the elements of negligent misrepresentation claim are as follows:

> "(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he [or she] ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation." Cruz, 66 A.3d at 453; Manchester, 926 A.2d at 1012; Mallette, 661 A.2d at 69.

Here, it is evident that NEI is correct when they suggest that at the heart of this issue is whether NEI was obligated to find the Notices and disclose them on the survey. The second element of a negligent misrepresentation claim states that a representor is liable for a misrepresentation "under circumstances in which he [or she] ought to have known of its falsity[.]" Id. Whether or not NEI should have known about the Notices—the alleged misrepresentation—necessarily turns on whether NEI breached its duty under the Surveying Standards. If NEI was negligent in performing the survey and should have known of the Notices, then NEI would have committed a negligent misrepresentation by not including the Notices on the survey. However, because questions of fact exist regarding whether NEI should have known of the Notices, summary judgment must be denied on this count. See Palmisciano, 603 A.2d at 320.

D

AAA Claims Against CTIC

1

Declaratory Judgment and Breach of Contract

AAA argues that CTIC breached its obligations under the Policy in two ways: (1) CTIC was obligated to tender a defense on behalf of AAA against 282 County Road, LLC's lawsuit, and (2) CTIC's decision to deny coverage under the Policy was itself a breach of the Policy. AAA asserts that the Policy provides coverage against numerous risks, including unmarketable

title and any defect, lien or encumbrance on title. AAA stresses that 282 County Road, LLC claimed ownership of the Disputed Area, and accordingly, CTIC had a duty to defend AAA against these claims because the legal description of the deed for which the Policy was issued included the description of the Disputed Area. AAA also contends that the Notices rendered the title to Lot 306 unmarketable, an additional condition as to which CTIC would have to defend AAA.

CTIC responds by arguing that CTIC did not have a duty to defend against the 282 County Road, LLC suit because the Complaint in that case alleges trespass and nuisance, and the Policy does not provide coverage for either of these claims. CTIC also asserts that the Notices are not within the chain of title for the property, and thus, they do not make title to Lot 306 unmarketable. Additionally, CTIC claims that exclusions exempt CTIC from providing coverage to AAA. These exclusions are that: (1) AAA created the encroachment alleged in 282 County Road, LLC's Complaint; (2) the encroachment alleged in 282 County Road, LLC's Complaint would have been disclosed by an accurate survey; and (3) AAA failed to timely notify CTIC of the dispute under the terms of the Policy.

AAA responds to the claimed exclusions in turn. First, AAA argues that when it commenced construction of the building, it had no knowledge of any kind regarding the dispute, and that knowledge of the dispute is an essential element to this exclusion from coverage. Next, AAA argues that the dispute created by the Notices is not the type of dispute triggered by the survey exception. Specifically, AAA states that "[a]n accurate survey would **not** have revealed the Notices."[10] Lastly, AAA claims that the only reason for a delay in filing its claim with CTIC

[10] Interestingly, AAA seems to make the exact opposite argument with regard to NEI.

was because AAA relied on the advice of CTIC's agents, M&M. Furthermore, AAA argues that CTIC suffered no prejudice by the delay in reporting the claim.

The obligation of an insurer to defend its insured is to be determined by the allegations in the complaint filed against the insured. See Thomas v. Am. Universal Ins. Co., 80 R.I. 129, 133-34, 93 A.2d 309, 312 (1952). Our Supreme Court has found that when "the complaint discloses a statement of facts bringing the case potentially within the risk coverage of the policy the insurer will be duty-bound to defend irrespective of whether the plaintiffs in the tort action can or will ultimately prevail." Flori v. Allstate Ins. Co., 120 R.I 511, 513, 388 A.2d 25, 26 (1978). In fact, Rhode Island resolves any doubt in favor of the insured party. See Emp'rs' Fire Ins. Co. v. Beals, 103 R.I. 623, 632, 240 A.2d 397, 403 (1968) ("[A]ny doubts as to the adequacy of the pleadings to encompass an occurrence within the coverage of the policy are resolved against the insurer and in favor of its insured.").

Here, even without resolving any doubts in favor of AAA, the Complaint filed by 282 County Road, LLC clearly implicates the Policy. The Complaint by 282 County Road, LLC alleges that the AAA building encroaches and trespasses on Lot 38. Furthermore, the Complaint asks the Court to determine and set the boundary line between the parties, thus alleging that 282 County Road, LLC owns part of or all of the Disputed Area. Thus, because 282 County Road, LLC claimed ownership of the Disputed Area, clearly creating a potential defect on title, CTIC had a duty to defend AAA against 282 County Road, LLC's claims, "irrespective of whether the plaintiffs in the tort action can or will ultimately prevail." Flori, 120 R.I. at 513, 388 A.2d at 26.

Therefore, CTIC was obligated to provide coverage to AAA, unless one of the claimed exclusions is applicable.[11]

Exclusions for "[d]efects, liens, [or] encumbrances . . . created, suffered, assumed, or agreed to by the insured claimant . . . has been construed to insulate the insurer from liability where the loss incurred by the insured resulted from the insured's own intentional, illegal, or inequitable conduct." Mattson v. St. Paul Title Co. of the S., 641 S.W.2d 16, 18 (Ark. 1982). Here, the injury allegedly incurred by AAA was not a result of AAA's "own intentional, illegal, or inequitable conduct." See id. Rather, AAA relied upon the Policy, warranty deed, and other sources of information in constructing the building on Lot 306. In fact, the alleged defect on the title of Lot 306 was created more than forty years ago, when the 1972 Notice was filed in the Barrington Land Evidence Records. Thus, this claimed exclusion is not applicable.

Schedule B of the Policy excepts from coverage "[e]ncroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey and inspection of the premises." Despite AAA's assertion that the title defects were "of record" and within the chain of title, there exists a question of fact as to whether an accurate survey would have revealed the defect. CTIC's expert contends that the Notices do not describe the land located within the metes and bounds of the property, and thus, they are not part of the property's chain of title. Due to the conflicting affidavits, there exists an issue of fact as to whether an accurate survey would have disclosed the dispute.

[11] AAA also asserts that CTIC was obligated to provide coverage because of CTIC's failure to originally find and disclose the Notices. However, this creates a question as to whether CTIC had a duty to discover the Notices and if CTIC breached this duty. Both sides have submitted countering affidavits as to this point, thus creating a question of fact as to whether CTIC would have owed a duty to defend simply for not discovering and disclosing the Notices before issuing the Policy.

Finally, the Policy provides that AAA shall provide "prompt" notice to CTIC of any claims and "[i]f [CTIC] is prejudiced by the failure of [AAA] to provide prompt notice, [CTIC's] liability to [AAA] under the [P]olicy shall be reduced to the extent of the prejudice." See Policy, Conditions § 3. Here, 282 County Road, LLC filed its Complaint on December 31, 2009. AAA did not inform CTIC until February 2011. Clearly, this lengthy delay in providing CTIC notice would not be considered prompt. However, AAA alleges that their delay in providing notice is excused because it relied upon information from CTIC's agents, M&M, in not providing notice immediately. Even assuming that AAA was correct in relying on the advice of M&M in deciding not to provide immediate notice to CTIC, there still exists a question of fact as to whether CTIC was prejudiced by the delay. AAA asserts that all actions it took were reasonable and necessary. See Shaw Aff. Yet, CTIC alleges that it was prejudiced because (1) it lost the ability to assess the conditions of the property before AAA began construction; (2) of the accrual of attorney fees; (3) of AAA's failure to mitigate damages; and (4) it lost the ability to dictate the course of resolving the conflict. See Jeffrey Hansen Aff. ¶ 11, Jan. 3, 2013. Due to the dispute regarding whether prejudice exists, summary judgment is inappropriate. See Raso v. Wall, 884 A.2d 391, 396 (R.I. 2005) ("Whether or not there has been unreasonable delay and whether prejudice to the adverse party has been established are both questions of fact, and a determination must be made in light of the circumstances of the particular case.").

2

Breach of Covenant of Good Faith and Fair Dealing and Bad Faith

AAA argues that CTIC's refusal on three separate occasions to provide coverage to AAA constitutes a breach of the implied covenant of good faith and fair dealing, as well as a violation of G.L. 1956 § 9-1-33. AAA asserts that there is a complete "absence of a reasonable basis for

the insurer's denial of benefits, and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." See Skaling v. Aetna Ins. Co., 799 A.2d 997, 1002-03 (R.I. 2002) (internal quotations omitted).

CTIC responds that they investigated the claim of AAA and made a determination that no coverage was due under the Policy. CTIC asserts that, at best, it is "fairly debatable" whether coverage is due and accordingly "no liability in tort [may] arise." See id. at 1007. CTIC claims that, at the very least, it is a question of fact as to whether CTIC acted in bad faith in denying coverage.

CTIC is correct that it is a question of fact whether or not they denied coverage in bad faith in violation of § 9-1-33. Section 9-1-33 provides that "the question of whether or not an insurer has acted in bad faith in refusing to settle a claim shall be a question to be determined by the trier of fact." Similarly, whether conduct violates the duty of good faith and fair dealing is generally a question reserved for the finder of fact. See Knapp Shoes, 72 F.3d at 199. Accordingly, summary judgment is inappropriate when the parties differ about whether coverage was denied in bad faith.

E

AAA Claims Against Morneau, Murphy, and M&M[12]

AAA argues that M&M violated the professional duties they owed to AAA in three ways: (1) M&M did not perform as a reasonable and prudent title examiner and failed to discover the Notices before the Closing Date; (2) M&M did not meet the standard of care owed by an attorney when providing legal advice regarding 282 County Road, LLC's lawsuit; and (3) M&M subordinated AAA's interests to those of CTIC when M&M provided AAA legal advice.

[12] For ease of reference, Morneau, Murphy, and M&M will simply be referred to as M&M.

M&M denies all breaches of professional duty that AAA alleges against them. Besides denying breaching the standard of care owed, M&M attempts to create issues of fact that would preclude the entry of summary judgment. First, M&M disputes that it violated the standard of care owed when acting as closing attorney for AAA. Next, M&M claims that it was not AAA's attorney for purposes of the information that M&M provided AAA regarding 282 County Road, LLC's claims. Further, M&M asserts that AAA's failure to mitigate damages alone creates a question of fact as to whether the damages incurred by AAA could have been mitigated.

To succeed in a claim for professional malpractice, a plaintiff must demonstrate "by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff." Cronan v. Iwon, 972 A.2d 172, 173 (R.I. 2009) (internal quotations omitted). According to AAA, "a competent title examiner must . . . search[] all the indices, both grantee and grantor, for all matters of record which would impact the status of title[.]" Ronald Markoff Aff. ¶ 19. M&M states that it complied with the standard as set out in the Markoff Affidavit. M&M asserts that the 1993 Notice was noted, but that M&M determined that the 1993 Notice was not relevant to the property being searched because of the references to the southwest corner of County Road and Hamilton Avenue. With respect to the 1972 Notice, M&M asserts that it was beyond the chain of title, and thus, they did not have a duty to search outside the chain of title. In support of their position, M&M submits the Affidavit of Timothy Chapman (Chapman), who opines that M&M did not breach its duty of care in performing the title search. See Chapman Aff. ¶¶ 7-8. Due to the opposing affidavits, the question of whether M&M "exercised sufficient legal care is one of fact for the jury to decide" and, therefore, inappropriate for summary judgment. See Glidden v. Terranova, 427 N.E.2d 1169, 1170 (Mass. App. Ct. 1981).

"[T]he relationship of attorney and client arises by reason of agreement between the parties." State v. Cline, 122 R.I. 297, 309, 405 A.2d 1192, 1199 (1979). "The existence of such a relationship, however, need not be proven by express agreement; rather, the conduct of the parties also may establish an attorney-client relationship by implication." DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 766 (R.I. 2000). Additionally, "the existence of an attorney-client relationship is a question of fact." Id.

Here, AAA argues that they were seeking legal advice from M&M when meeting with M&M regarding the claims asserted by 282 County Road, LLC. However, M&M asserts that the meeting, which took place over a year following the Closing Date, was not for the purpose of providing legal advice, but rather just to provide AAA with information. M&M supports this point by pointing out that AAA was represented by both General Counsel and outside counsel during the time of this meeting. Clearly, there is a difference of opinion regarding the nature of the relationship between the parties at this meeting, creating a question of fact. Thus, summary judgment is inappropriate.[13]

Similarly, the same issue arises as to whether an attorney-client relationship existed when M&M purportedly subordinated the interests of AAA to CTIC. While it is true that "[t]he client who seeks the advice and assistance of an attorney is entitled to place dependence without question upon that attorney's loyalty[]", there still must exist an attorney client relationship. See Pilling v. Benson, 34 R.I. 519, 84 A. 1005, 1006 (1912). Thus, the resolution of this issue is not ripe at this stage of the litigation. Additionally, M&M argues that any advice that it gave to AAA was in the exercise of its professional judgment and M&M stands by that advice. See 7

[13] The Court need not deal with the issue of whether AAA mischaracterized the information allegedly provided by M&M, as the Court has determined that there is a question of fact with regard to whether an attorney-client relationship even existed during this meeting.

Am. Jur. 2d Attorneys at Law § 221 (2014) (As long as "an attorney acts in good faith and in an honest belief that his or her acts and advice are well founded and in the best interests of the client . . . an informed judgment on the part of counsel, even if subsequently proved erroneous, is not negligence."). Thus, because M&M has set forth evidence creating a question of fact, the Court denies AAA's motion.[14]

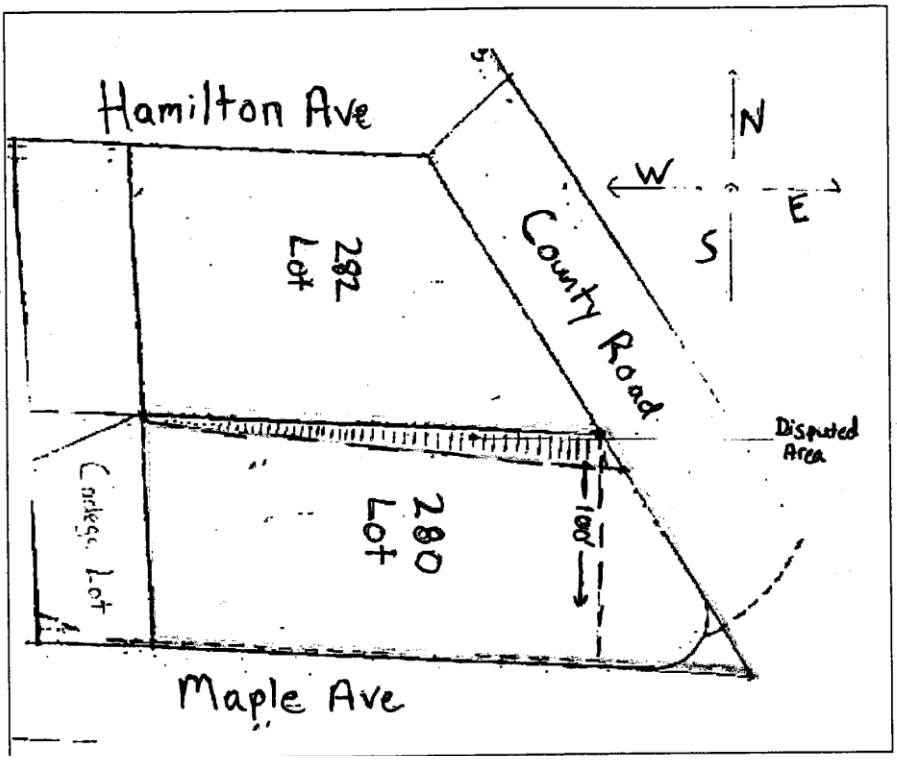
IV

Conclusion

Based on the foregoing analysis: (1) AAA's motion as against 282 County Road, LLC is granted; (2) 282 County Road, LLC's motion as against AAA is denied; (3) Morneau, Muphy, and M&M's motion, joined by NEI, against 282 County Road, LLC is granted; (4) AAA's motion as against Mancini, Jr. is granted in part and denied in part; (5) NEI's motion to amend its admissions is granted; (6) AAA's motion as against NEI is denied; (7) AAA's motion against CTIC is denied; and (8) AAA's motion against M&M is denied. Counsel for AAA may submit an order consistent herewith which shall be settled after due notice to counsel of record.

[14] Because the Court finds separate issues of fact, it does not address M&M's argument that AAA's failure to mitigate damages creates a question of fact.

APPENDIX 1


Hamilton Ave
N
W
E
S
282 Lot
County Road
Disputed Area
280 Lot
Corkers Lot
100'
Maple Ave

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**282 County Road, LLC v. AAA Southern New England** ***Consolidated With*** **AAA Southern New England v. Chicago Title Insurance Company, et al. v. Mancini, Jr., et al.** ***Consolidated With*** **AAA Southern New England v. Mancini, Jr.**
CASE NOS:	**PB 09-7447; PB 11-4874; PB 11-5351**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 25, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**See attached.**
For Defendant:	**See attached.**

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