

180 Misc.2d 307, 690 N.Y.S.2d 880, 1999 N.Y. Slip Op. 99238
(Cite as: **180 Misc.2d 307, 690 N.Y.S.2d 880**)

C

Supreme Court, Appellate Term, New York.
First Department.
Joel WOLF et al., Respondents,
v.


COMMONWEALTH LAND TITLE INSURANCE
COMPANY, Appellant.

April 6, 1999.

Insureds sued their title insurer for breach of contract to recover the cost of removing a deck/extension that purportedly violated the certificate of occupancy and/or zoning regulations and resulted in a prospective purchaser's cancellation of a contract of sale. The Civil Court, New York County, [Kibbie F. Payne](#), J., denied both sides' summary judgment motions, and the insurer appealed. The Supreme Court, Appellate Term, held that the policy's exclusion of zoning-related and similar losses barred coverage.

Reversed; insurer's motion granted.

West Headnotes

[1] Insurance 217  **1863**

[217](#) Insurance

[217XIII](#) Contracts and Policies

[217XIII\(G\)](#) Rules of Construction

[217k1863](#) k. Questions of law or fact. [Most Cited Cases](#)

Issue relating to the appropriate construction of an insurance policy and whether coverage is afforded under facts which are not in dispute is strictly a legal one; and in the absence of an ambiguity giving rise to mixed questions of law and fact, it is the court's obligation to determine the rights or obligations of parties under insurance contracts based on the specific language of the policies.

[2] Insurance 217  **2625**

[217](#) Insurance

[217XXI](#) Coverage—Title Insurance

[217k2615](#) Title Defects

[217k2625](#) k. Zoning or other land use restrictions. [Most Cited Cases](#)

Title policy's exclusion of zoning-related and similar losses barred coverage for the insureds' cost of removing a deck/extension that purportedly violated the certificate of occupancy and/or zoning regulations and resulted in a prospective purchaser's cancellation of a contract of sale, particularly since the insureds never entered into a special agreement with the insurer to ascertain that the structure at issue conformed with the certificate of occupancy.

[3] Vendor and Purchaser 400  **130(8)**

[400](#) Vendor and Purchaser

[400IV](#) Performance of Contract

[400IV\(A\)](#) Title and Estate of Vendor

[400k130](#) Marketable Title

[400k130\(8\)](#) k. Incumbrances and charges. [Most Cited Cases](#)

Violation of a zoning regulation is not an encumbrance on the title and does not render title unmarketable.

[4] Vendor and Purchaser 400  **130(.5)**

[400](#) Vendor and Purchaser

[400IV](#) Performance of Contract

[400IV\(A\)](#) Title and Estate of Vendor

[400k130](#) Marketable Title

[400k130\(.5\)](#) k. In general. [Most Cited Cases](#)

Marketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property.

****880 *307** Butler, Fitzgerald & Potter, New York City ([David K. Fiveson](#) of counsel), for appellant.

180 Misc.2d 307, 690 N.Y.S.2d 880, 1999 N.Y. Slip Op. 99238
(Cite as: **180 Misc.2d 307, 690 N.Y.S.2d 880**)

[Elliot M. Rudick](#), New York City, for respondents.

PRESENT: STANLEY PARNES, P.J., [WILLIAM P. McCOOE](#), WILLIAM J. DAVIS, Justices.

PER CURIAM.

Order entered June 3, 1998 (Kibbie F. Payne, J.), insofar as appealed from, reversed, *308 with \$10 costs, and defendant's motion for summary judgment dismissing the complaint is granted.

Plaintiffs-sellers commenced this breach of contract action to recover the cost of removing an illegal deck/extension to their premises under a title insurance policy issued by defendant. The deck/extension purportedly violated the certificate of occupancy and/or zoning regulation which resulted in a prospective buyer's cancellation of a contract of sale for the premises. Plaintiffs claim that defendant title company failed to disclose the existence of such violations in the title report. Civil Court denied both plaintiffs' and defendant's motions for summary judgment, finding triable issues as to whether plaintiffs' claims fell within a governmental regulation policy exclusion. Defendant title company appeals.

****881 [1]** The issue presented by the parties in this case is "strictly a legal one, relating to the appropriate construction of an insurance policy and whether coverage is afforded under facts which are not in dispute" (*Stainless, Inc. v. Employers Fire Ins. Co.*, 69 A.D.2d 27, 32, 418 N.Y.S.2d 76, affd. 49 N.Y.2d 924, 428 N.Y.S.2d 675, 406 N.E.2d 490). In the absence of an ambiguity giving rise to mixed questions of law and fact, it is the court's obligation to determine the rights or obligations of parties under insurance contracts based on the specific language of the policies (*see, State of New York v. Home Indem. Co.*, 66 N.Y.2d 669, 671, 495 N.Y.S.2d 969, 486 N.E.2d 827).

[2] The policy here at issue unambiguously excluded from its coverage terms any loss from:

"[a]ny laws, regulations or ordinances (including, but not limited to zoning, building, and environmental protection) as to the use, occupancy, subdivision or improvement of the premises, adopted or imposed by any governmental body, or the effect of any non-compliance with, or any violation thereof".

[3][4] The violation of a zoning regulation is not an encumbrance on the title and does not render title unmarketable. "[M]arketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property" (*Voorheesville Rod & Gun Club v. E.W. Tompkins Co.*, 82 N.Y.2d 564, 571, 606 N.Y.S.2d 132, 626 N.E.2d 917). Since zoning laws regulate the manner in which the property can be used and do not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy (see generally, *Logan v. Barretto*, 251 A.D.2d 552, 675 N.Y.S.2d 102; *Chu v. Chicago Tit. Ins. Co.*, 89 A.D.2d 574, 452 N.Y.S.2d 229; 14 Warren's Weed, New York Real Property, Title Insurance § 4.04[3] [a] *309 [4th ed.] at 77-78). We further note that plaintiffs did not allege that they ever entered into a special agreement with defendant to ascertain that the structure in issue was in conformity with the certificate of occupancy. Accordingly, defendant's motion for summary judgment dismissing the complaint should have been granted.

N.Y.Sup., 1999.

Wolf v. Commonwealth Land Title Ins. Co.
180 Misc.2d 307, 690 N.Y.S.2d 880, 1999 N.Y. Slip Op. 99238

END OF DOCUMENT