DOCKET NO: LLI-CV21-6028857-S		SUPERIOR COURT
KIM COOLBETH	:	JUDICIAL DISTRICT
VS.	:	OF LITCHFIELD
CONNECTICUT ATTORNEYS TITLE	:	AT TORRINGTON
INSURANCE COMPANY, ET AL	:	MAY 29, 2024

MEMORANDUM OF DECISION

Kim Coolbeth, Jr. ("plaintiff") has filed this action against the Connecticut Attorneys Title Insurance Company ("defendant"). Count One of the Amended Complaint seeks a declaratory ruling determining whether there is coverage under the policy per the provision which insures against no right of access to the land. The court finds that permissive access does not satisfy the policy's promise of a "right of access" when the insured has no legal right to enforce or continue access. Count Two of the Amended Complaint claims breach of contract. The court finds that the defendant breached the contract by failing to take any action to obtain a right of access or otherwise clear the title and by failing to tender the policy or otherwise settle with the defendant within a reasonable time. The court enters judgement in favor of the plaintiff as to both remaining counts of the amended complaint. The court, however, awards nominal damages because the plaintiff has failed to prove damages, specifically, the difference in value of the property with and without a right of access. The court will schedule a hearing to determine attorney's fees and costs.

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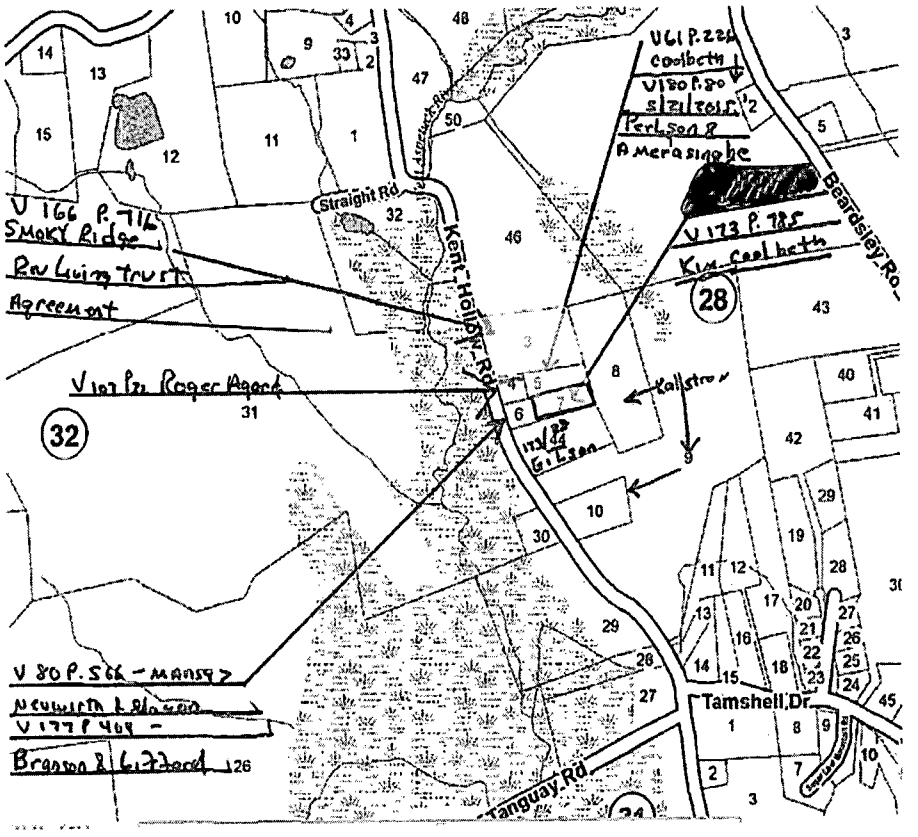
I. FACTUAL FINDINGS

A. Proceedings

The court conducted a bench trial. The only remaining parties at the time of trial were the plaintiff, Kim Coolbeth, Jr., and the defendant, Connecticut Attorneys Title Insurance Company. The amended complaint contains five counts. The first two counts are the only counts presently before the court. The plaintiff has withdrawn his claims against his neighbors alleging easement by necessity and by implication. At trial, the court heard from the plaintiff, Attorney Harvey, Attorney Swenson, and Attorney Scanlon. The court admitted multiple exhibits and the parties submitted post-trial briefs which the court has considered.

B. Purchase of the Insured Property

On August 6, 2012, the plaintiff purchased in the Town of Kent, Connecticut an undeveloped 1.914-acre lot (hereinafter Lot 7 or The Tennis Court Lot) from the Smoky Ridge Revocable Living Trust for the sum of $200,000. The plaintiff's parents were the trustees for the trust. The plaintiff's parents owned three distinct parcels of land that made up the family compound. The following exhibit is helpful in visualizing the property at issue.



In 2012, the plaintiff's parents owned or controlled lot numbers 3, 5, and 7 in the map displayed above. Lot 3 consists of a vacant eight-acre lot that abuts Kent Hollow Road. Lot 5 does not have any direct road frontage and is an interior lot south of Lot 3. Lot 5 contained the family home and is referred to as the Homestead Lot. The Homestead Lot accesses the public road through a fifty-foot easement south of Lot 3 and north of Lot 4. The Tennis Court Lot is directly south of the Homestead Lot and is also an interior lot. The Tennis Court Lot does not abut the public road. At the time of the purchase, the plaintiff's attorney showed him a map which provided access from the Tennis Court lot to Kent Hollow Road via a twenty-foot right of way through Lot 6. Unfortunately, that map had not been recorded during the previous land transfers and that right of way did not exist when the plaintiff purchased the property.

C. Title History of the Insured Property

Testimony from the plaintiff's expert, Attorney Harvey, and the defendant's title report establish the following title history. Lot 6 and Lot 7 were previously one lot. In 1982, the owners of the lot sought a variance from the Town of Kent Zoning Board of Appeals to permit division of the 2.914-acre parcel into a front lot of one acre with a house and outbuildings (Lot 6) and a rear lot of 1.194 acres (Lot 7). The application approved by the Town included a map showing that Lot 7 would have access to the public road via a twenty-foot right of way over Lot 6. After receiving approval to split the lot, the prior owners of the combined lot sold the newly partitioned Lot 7 to the plaintiff's father. The referenced map showing the twenty-foot right of way was never recorded. In 2009, the plaintiff's father quitclaimed Lot 7 to the Smoky Ridge Revocable Living Trust, and in 2012 the Trust sold Lot 7 to the plaintiff.

Lots 3, 5, and 7 functioned as the plaintiff's family compound. Lot 5 contained the family home, and Lot 7 contained a tennis court at what was essentially an extension of the back yard of the family home. The plaintiff grew up on this property. He could always access his home through the easement that connected the Homestead Lot to Kent Hollow Road. The family could drive from Kent Hollow Road through the easement to the Homestead Lot, and from the Homestead Lot the family could walk along a path from the family home to the tennis court.

In 2015, the plaintiff's parents sold the Homestead Lot. At this point, the plaintiff could no longer access the Tennis Court Lot by driving up his parents' driveway and walking around their house to the property he purchased.

D. Denial of Coverage

The plaintiff is in construction and builds and renovates homes. He testified that when he bought the property from his parents' trust, his intention was to build a speculation home on the property that he would later sell. In 2016, he began the permit process to build on the Tennis Court Lot. When he had the property surveyed to begin building, he found out that the property did not have any access to the public road. Since 1982, the family attorney that conducted the multiple real estate transactions for the family had never recorded the map showing the twenty-foot right of way.

When the plaintiff purchased the Tennis Court Lot, he also purchased title insurance from the defendant through the family attorney. The title insurance policy contains covered risk number four which indemnifies the insured if, as of the date of the policy, there was "[n]o right of access to and from the Land." The plaintiff filed a notice of claim under this provision alleging that he did not have a right of access to the Tennis Court Lot.

The defendant denied the plaintiff's claim, and the denial letter stated that the "Insured Property enjoyed legal access to Kent Hollow Road (satisfying coverage) primarily by way of the benefit of a license or permission over the Homestead Lot & Fifty Foot [right of way] and secondarily by access over the [undeveloped] Eight Acre Lot [Lot 3]." The defendant further found that legal access for the Insured Property terminated in 2015 when the plaintiff's father sold the Homestead Lot to a third party and that was a post-policy event for which coverage is excluded under the policy.

There is no written or legally enforceable license or permission. The defendant denied coverage because the plaintiff had permissive pedestrian access to the Tennis Court Lot. He could always drive up his parents' driveway and walk around their home to

access the Tennis Court Lot up and until they sold the Homestead Lot to a third party in 2015. The plaintiff had no expectation that his parents would ever deny him access to his childhood home. In fact, the plaintiff testified that he never discussed the issue of access with his parents. The defendant interpreted this permissive pedestrian access based on the familial relationship as satisfying the right of access to the insured land covered by the policy.

II. DISCUSSION

A. Declaratory Ruling

The plaintiff now asks this court to determine whether the defendant breached the policy when it decided that the plaintiff's "right of access" was satisfied even though it was restricted to, and dependent upon, undocumented, implied pedestrian access only.

The parties have provided briefing, and the court has conducted its own research and has not found a Connecticut case that interprets the meaning of "right of access" in a title insurance policy. The language at issue in this case is standard in most title insurance policies and other jurisdictions have interpreted the meaning of the language. In reviewing the policy language, the court is mindful that it should "look at the policy as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." *Stewart* v. *Old Republic Nat'l Title Ins. Co*, 218 Conn. App. 226, 239, 291 A.3d 1051 (2023). The determinative question for the court is the intent of the parties as gleaned from the contract. Id. If "the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning." Id. In deciding whether a provision is ambiguous, the "court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity."

Id. Any ambiguity in a contract must come from the language used in the contract and not from one party's subjective perception of the language. Id. A provision is ambiguous if it is reasonably susceptible to more than one reading, and any ambiguity is construed in favor of the insured. Id.

The policy insures against loss caused from "[n]o right of access to and from the Land." The plaintiff is asking the court to consider his reasonable expectations and to find that the language means a legally enforceable vehicular right of access to the public road. The defendant is asking the court to find that right of access includes permissive pedestrian access. The defendant argues that the plaintiff "was not a trespasser on his own family's properties; he had permission and/or license to travel over the family's properties."

The terms "right" and "access" are not defined in the policy. The court has reviewed the language and does not find that it is ambiguous. A right, in the context of a title insurance policy, means a legally enforceable right. *Magna Enterprises, Inc.* v. *Fid. Nat'l Title Ins. Co.*, 104 Cal. App. 4th 122, 125–26, 127 Cal. Rptr. 2d 681 (2002).[1] Black's Law Dictionary defines "right" as "[t]he interest, claim, or ownership that one has in tangible or intangible property." *Right*, Black's Law Dictionary (10th ed. 2014) (def'n 5). The plain meaning of the term "right" in the context of a title insurance contract is a legally enforceable interest, claim, or ownership that one has in the property. That right can come in many legal forms. It may come through an easement, easement by

[1] "It is axiomatic that rights are legal in nature, at least when used in insurance contracts. It is not necessary to add the word 'legal' to make it so." Id.

necessity, year-to-year license for a fee, or by federal or state law.[2] The insurance policy does not insure access in the legal form that the insured desires; what it does cover is that there is a legal form of access.

The term "access" is also unambiguous and commonly defined as "a right, opportunity, or ability to enter, approach, pass to and from, or communicate with." *Access*, Black's Law Dictionary (10th ed. 2014). Most jurisdictions that have interpreted a right of access have held that such access does not mean reasonable and practicable access. *Chicago Title Ins. Co.* v. *Jen*, 249 Md. App. 246, 261-64, 245 A.3d 150 (2021). These jurisdictions have found a right of access even when there is a lack of vehicular access because the route is rough or nearly impassable, when differences in elevation made physical access difficult or impractical, and even when the platted street is inundated during hightide making it impassable.[3] In these cases the insured has a legal

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[2]Title insurance policies insuring a legal right of access "do not insure access by any particular physical route." Joyce Palomar, 1 Title Ins. Law § 5:8 (2023 ed) (collecting cases); *United Bank* v. *Chicago Title Ins. Co.*, 168 F.3d 37, 39 (1st Cir. 1999) (The "policy nowhere provides any assurance of deeded access. All that is protected is a "right of access," which could be secured in a variety of ways. No doubt deeded access—e.g., a perpetual easement granted in a deed by the owner of the intervening property—would be more valuable than, say, an easement by necessity under state law or a year-to-year license for a fee. . . Read according to its terms, the policy does not cover a lawsuit whose gravamen is the promise of something different from and more valuable than a generic right of access"); *Fidelity National Title Ins. Co.* v. *Woody Creek Ventures, LLC*, 830 F.3d 1209, 1213 (10th Cir. 2016) (30-year revocable license obtained by the insurance company found to satisfy right of access); *James* v. *Chicago Title Ins. Co.*, 377 Mont. 264, 339 P.3d 420, 422–24 (2014) (concluding insureds had no claim against title company for lack of right of access when they received no surveyed and platted right of way, only an undefined nonexclusive-access easement based on recorded declaration of easements).

[3] *Gates* v. *Chicago Title Ins. Co.*, 813 S.W.2d 10, 12 (Mo. Ct. App. 1991) (Rough and nearly impassable route met the definition of right of access); *Magna Enterprises, Inc.* v. *Fidelity National Title Co.*, 104 Cal. App. 4th 122, 127 Cal. Rptr. 2d 681 (2002) ("The location of a building and fence and differences in elevation may have rendered physical access difficult or impractical, but that is not the test"); *Krause* v. *Title & Trust Co. of*

right of access, but it is the physical characteristics of the property that make vehicular access impracticable. While there is a clear national trend holding that access does not mean reasonable access, there are a couple of jurisdictions that have held otherwise. See *Marriott Fin. Servs., Inc.* v. *Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975)[4]; *First American Title Ins. Co.* v. *GS Indus., LLC*, United States District Court, D. Hawaii, Docket No. 21-CV-00078-DKW-KJM, 2021 WL 5985124 (December 16, 2021)[5]. Those

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Fla., 390 So.2d 805, 806 (Fla. Dist. Ct. App. 1980) (The difficulty in traversing the road did not give rise to any claim that there was a lack of right of access); *43 Park Owners Grp., LLC* v. *Commonwealth Land Title Ins. Co.*, 121 A.D.3d 937, 938–39, 995 N.Y.S.2d 148 (2014) (holding that a retaining wall preventing vehicular access does not prevent a "lack of right of access to and from the land" because the title policy "refers to the absence of a legal right of access and does not cover claims concerning lack of an existing means of physical access"); *Title & Trust Co. of Fla.* v. *Barrows*, 381 So.2d 1088, 1089–90 (Fla. Dist. Ct. App. 1979) (holding that purchasers still had a legal right of access despite the fact that the platted street connecting their property to the public road was inundated with high tide because the title policy did not insure against "physical infirmities of the platted street"); *Mafetone* v. *Forest Manor Homes, Inc.*, 34 A.D.2d 566, 567, 310 N.Y.S.2d 17 (1970) (holding that failing to notify an owner of land of the difference between the grade of land and the abutting street is not covered under a title insurance policy because standard title policies insure "matters affecting [t]itle to property and do not concern themselves with physical conditions of the abutting property"); *Hocking* v. *Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625, 626, 629–30 (1951) (holding that title and the physical condition of the property and adjacent streets are not the same for purposes of title insurance in finding that the purchaser's claim was not covered by her title insurance policy).

[4] In dicta, the court noted that because the property was in a commercial area, it was "beyond reasonable limits to hold that" the insurer and insured "understood that the insurance as to access could be satisfied by pedestrian access." Id. at 565. Indeed, the court noted that the "insured must have contemplated insurance protection against lack of vehicular access." Id. The court further noted that "when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is [r]easonable access under the circumstances." Id. This decision has been continuously criticized by other jurisdictions that have considered the issue of a lack of right of access. *See, Chicago Title Ins. Co.* v. *Jen*, 249 Md. App. 246, 263-64, 245 A.3d 150, 160-61 (2021).

[5] "[T]he Policy cannot be limited to insuring pedestrian access, as *First American* asserts, because insuring pedestrian access in Honolulu's urban sprawl would be virtually meaningless. In this environment, it is difficult to conceive of how property would not have pedestrian access and where insurance would therefore be of any value. If insuring

courts have found ambiguity in the term right of access and have noted that it is unreasonable to find that the insurer and insured understood that the insurance as to access could be satisfied by pedestrian access. They have required vehicular access.

The language of the policy obligates the insurance company to provide legal access, even if it is not practicable physical access. Our state law requires title insurers to conduct a reasonable search and examination of the title. [6] This examination may reveal if there is legal access to the property, but the examination does not reveal if the property is physically traversable. This court agrees with most jurisdictions that have considered this issue and holds that a lack of right of access provision in the title insurance policy insures only against a lack of legal access and that does not equate to reasonable access.

In this case, the court must look at the access that existed when the plaintiff purchased the title insurance policy. At that time, the plaintiff did not have any written agreement, permit, or easement permitting him legal access from the public road to the Tennis Court Lot.[7] The Tennis Court Lot is an interior lot that lost its access to the public

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'access' is to have any meaning in this context, in other words, it must be insuring access beyond that of the pedestrian variety." Id. at *5-6.

[6] "No title insurance policy may be written unless and until the title insurer or its title agent has caused to be conducted a reasonable search and examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices...." General Statutes § 38a-407.

[7] The Court has reviewed cases denying the argument that the defendant put forth here, namely, that permissive access equates to a right of access. *Guenther* v. *Old Republic National Title Insurance Company*, United States District Court, D. Idaho, 2014 WL 5810984, *2 (November 7, 2014) (Court found in favor of insured when insurance company argued that because insured had always been able to physically access the property, he had a "right of access" to and from the property and, thus, there was no coverage under the policy. The court agreed with the insured who argued that, although he may never have been physically prevented from accessing the property, he nonetheless had no legal right of access to the property and could have been prevented access at any time); See also *Cynergy, LLC* v. *First American Title Ins. Co.*, 706 F.3d 1321, 1324 (11th Cir. 2013) (The District Court "rejected First American's argument that the scope of the

road in 1982. The plaintiff's parents may have had access to the public road from the Tennis Court Lot based on their ownership or control of Lot 3 and the Homestead Lot, but that legal right of access did not transfer to the plaintiff when he purchased the Tennis Court Lot in 2012. The defendant erred in denying the claim based on a finding that there was a legal right of access based on the familial relationship and it erred in finding that

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policy is limited to situations in which the claimant also lacks permissive access. Applying the established principle under Georgia law that ambiguity in insurance contracts should be resolved in favor of coverage, the court construed the phrase "lack of a right of access to and from the land" to mean the lack of legally enforceable access rights, even where, as here, the property owner has never lacked permissive access to the land. The court further found that the Retreat property did not have a legally enforceable right of access.") The defendant has not cited, nor has this court found, any case that has held that an unwritten and unacknowledged permissive right of access, as found in this case, is sufficient to satisfy the insured right of access. In all the cases this court has reviewed, the insured had a legally enforceable right. It may not have been in the form the insured wanted, but the insured had an enforceable right. See *James* v. *Chicago Title Ins. Co.*, 337 Mont. 264, 2014 MT 325, 267 (2014), where the plaintiff not only had another right of access, but also an easement; *Riordan* v. *Lawyers Title Ins. Corp.*, 393 F. Supp. 2d 1100, 1104 (D.N.M. 2005), where the plaintiff had former public roads to access the property; *Havastad* v. *Fidelity Nat'l Title Ins. Co.*, 58 Cal. App. 4th 654 (1st Dist. 1997), where the plaintiff had access to the property via an easement; *Talley* v. *Baker*, 207 A.D. 2d 967, 617 N.Y.S.2d 80 (1994), where the plaintiff had access to the property via prescriptive easement; *Wolf* v. *Department of Highways*, 220 A.2d 868, 871 (Pa. 1966), where the plaintiff had access to his property via public roadway; *Gates* v. *Chicago Title Ins. Co.*, 813 S.W. 2d 10 (Mo. App. 1991), where the plaintiff had a right of access via a platted road (the court in this case did not make a determination on whether or not a dangerous and nearly impassable road qualified as a right of access because the plaintiff did not make this argument in support of his position); *Magna Enterprises, Inc.* v. *Fidelity Nat'l Title Ins. Co.*, 104 Cal. App.4th 122 (2002), where the plaintiff had difficult access in an easement for ingress, egress, and drainage, along with ownership of the abutting property; *Fidelity Nat'l Title Ins. Co.* v. *Woody Creek Ventures, LLC*, 830 F.3d 1209, 1214 (10th Cir. 2016), where the plaintiff had legal access in the form of a revocable right of way grant from the Bureau of Land Management; *Coles* v. *Lawyers Title Ins. Corp.*, Court of Appeals of Ohio, Sixth District, 2006 WL 2640266, at ¶ 14 (September 15, 2006), where the plaintiff had access to the property via public roads; and *United Bank* v. *Chicago Title Ins. Co.*, 168 F.3d 37 (1st Cir. 1999), where the plaintiff was found to have access to the property via waterway and the case was remanded to determine whether this right of access was effective, and if absence of another right of access diminished the property's value.

the access to the Tennis Court Lot terminated in 2015 when the Homestead Lot was sold. The Tennis Court Lot, on its own, lost its legal access to the public road in 1982.

The court finds that permissive access does not satisfy the policy's promise of a "right of access" when the insured has no legal right to enforce or continue access. The plaintiff lacks a right of access and that is a covered risk under the policy. The court finds in favor of the plaintiff as to the First Count.

B. Breach of Contract Claim

The plaintiff's second count against the defendant is breach of contract. The essential elements of a breach of contract are the formation of an agreement, the performance by one party, breach by the other party, and the incurrence of damages. *Keller* v. *Beckenstein*, 117 Conn. App. 550, 558, 979 A.2d 1055 (2009). A title insurance policy is a contract of indemnity. *RNC Cap., LLC.* v. *Chicago Title Ins. Co.*, 196 Conn. App. 518, 523, 230 A.3d 740, 744 (2020). As an indemnity contract, the insurer agrees to reimburse the insured for loss or damage sustained because of the title problems, if coverage for the damages incurred is not excluded from the policy. Id.

It is undisputed that the plaintiff purchased the title insurance policy. What is at issue here is whether the defendant breached the policy and whether the plaintiff has incurred damages. The burden of proof rests on the plaintiff to prove that there was a breach of contract and that he has suffered damages.

1. Breach of the Policy

The plaintiff testified that he electronically filed his notice of claim for lack of a right of access to the Land on December 14, 2016. The defendant denied the plaintiff's claim by a letter dated January 12, 2018. The plaintiff complied with paragraph three of

the policy by giving the defendant notice of his claim. When the plaintiff notified the defendant of the lack of a right of access, the defendant had a few options under the policy. Under paragraph 5b of the policy, the defendant had the right "at its own costs, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the insured." In addition, under paragraph seven of the policy, the defendant had the options to either pay the amount of the insurance policy to the insured, to settle with the insured, or pay the loss or damage provided for under the policy. The defendant did not exercise either option but instead chose a third option, which is always available to it, which was to deny the claim and attempt to show that the alleged title defect did not exist. An insurer who chooses not to provide its insured with coverage and who is subsequently found to have breached its duty to do so must bear the consequences of its decision. *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 153, 681 A.2d 293, 298 (1996).

As discussed above, this court finds that the plaintiff lacked a right of access to the land when he purchased Lot 7 in 2012. No right of access to and from the land is a covered risk under the policy. The insurer is obligated to pay or otherwise cure title when the insured suffers a loss covered by the policy. Since this is a contract of indemnity, the insurer is not immediately in breach of the policy simply because title is defective on the day the policy was issued. A title insurer does not guarantee the state of the title.[8] "The

[8] "[A] policy of title insurance does not represent an agreement or assurance that a contingency insured against will not occur, but, generally, promises to pay damages, if any, caused by any defects to title that the title company should have discovered but did not ...." *Lee* v. *Duncan*, 88 Conn. App. 319, 325, 870 A.2d 1, 6 (2005)

importance of the contract not being one of guaranty is primarily that the insurer's liability to pay monetary compensation under the policy does not arise immediately upon the existence of a covered defect being proved." *Thurlow* v. *Ticor Title Ins. Co.*, Superior Court of Connecticut, judicial district of Windham, Docket No. CV085002923S, 2009 WL 2358307, at *3 (July 7, 2009, *Riley, J.*); *see also*, *RCN Cap. LLC* v. *Chicago Title Ins. Co.*, 196 Conn. App. 518, 524 (2020). A title insurance policy is breached only after notice of an alleged defect in title is tendered to the insurer and the insurer fails to cure the defect or obtain title within a reasonable time thereafter. *Stewart Title Guar. Co.* v. *West*, 110 Md. App. 114, 129, 676 A.2d 953, 961 (1996) *citing First Fed. Sav. & Loan Ass'n of Fargo, N.D.* v. *Transamerica Title Ins. Co.*, 19 F.3d 528, 531 (10th Cir. 1994).

The plaintiff filed his notice of claim on December 14, 2016. He did not file this action until August 5, 2021. Over seven years have passed since the plaintiff filed his notice of claim. The court finds that the plaintiff breached the policy by failing to take any action to obtain a right of access or otherwise clear the title and by failing to tender the policy or otherwise settle with the defendant within a reasonable time.

2. Damages

The plaintiff now has the burden of establishing that he sustained a loss because of the title defect and the amount of that loss or damage. See *Naples* v. *Keystone Building & Dev. Corp.*, 295 Conn. 214, 224, 990 A.2d 326 (2010). As damages, the plaintiff requests money damages in the amount of $201,000[9] (the amount of the policy) plus attorney's fees and costs. The measure of loss for the lack of a right of access is the

[9] There is an unexplained discrepancy in the amount of the policy issued at $201,000 and the amount paid for the property, $200,000.

difference in value of the property with and without that right. See *First American Title Ins. Co.* v. *273 Water St., LLC*, 157 Conn. App. 23, 42-43, 117 A.3d 857, 870 (2015); J. Bushnell Nielsen, Title and Escrow Claims Guide § 3.2.3.1.5 (2024). To award damages the court must determine the value of the property, both before and after the injury occurred. Id.

a. Diminution in Value of Property

The plaintiff has presented no evidence as to the diminution in the value of the Tennis Court Lot based on no right of access. The plaintiff's expert, Attorney Harvey, testified that he had not been asked or disclosed to offer any opinions regarding damages. He did not review any appraisals of the Tennis Court Lot with or without a right of access.

Plaintiff testified that a corporation, owned by his wife, has purchased a 47-acre lot that adjoins the Tennis Court Lot. He testified that to access the Tennis Court Lot through the 47-acre lot he would have to build a 200-foot driveway. He testified that it would cost $25,000 to clear the land for a driveway, and an additional $220,000 for a driveway to be built. That, however, is not the appropriate measure of damages. The policy insures against the lack of a legal right to access the insured property, it did not insure that the plaintiff would have a specific form of access. The cost of building a driveway is not contemplated in the title policy. The appropriate remedy is the defendant curing the title defect or paying plaintiff for his loss, which is the diminution in value of the property caused by the title defect.

Common sense dictates that a property with a legal right of access is worth more than a property that does not have such a right. "[T]he plaintiff bears the burden of proving the extent of the damages suffered in a breach of contract action." *Bruno v.*

Whipple, 186 Conn. App. 299, 308, 199 A.3d 604 (2018), cert. denied, 331 Conn. 911, 203 A.3d 1245 (2019). "Although the plaintiff need not provide such proof with [m]athematical exactitude . . . the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 65, 717 A.2d 77 (1998). The court has no basis to measure any diminution in value. Nominal damages are thus recoverable where, as here, there is a breach of contract, yet damages have not been proven. *Wasko v. Manella*, 87 Conn. App. 390, 400 n.8, 865 A.2d 1223 (2005). The court awards the plaintiff $1 in nominal damages for the diminution in value caused by the title defect.

b. Attorney's Fees and Costs

The plaintiff seeks attorney's fees and costs. Connecticut follows the American Rule, which states that "attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception...." *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582-83, 923 A.2d 697 (2007). Attorney's fees are thus not allowable unless there is a statute, agreement, or rule to the contrary. Id. In this case, there is no statute or provision in the insurance policy that would allow recovery of attorney's fees. General Statutes § 52-257 permits certain costs to the prevailing party but it does not include attorney's fees. The policy provides a duty of defense, but there is no duty to prosecute *per se*. Under paragraph 5b, the defendant has the right to prosecute an action, but that is different than the duty to defend. The court does not find that the defendant owes attorney's fees to the plaintiff under the terms of the policy. The court has also not found that the defendant has acted in bad faith and thus cannot award attorney's fees under the bad faith exception.

The court, however, has found that the defendant breached its contractual obligations, and that the plaintiff was forced to bring this action against his neighbors to clear his title. There is substantial authority "that attorney's fees incurred in other litigation against a third party, which are awarded as an element of compensatory damages, do not fall within the contemplation of the American Rule." *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 97 n.31, 952 A.2d 1, 21 (2008). The elements of this third-party litigation exception have been set out as follows: "(1) the plaintiff became involved in litigation either because of a breach of contract by the defendant, or because of the defendant's tortious conduct, that is, that the party sought to be charged with the fees was guilty of a wrongful or negligent act or breach of agreement; (2) the litigation was with a third party, not with the defendant from whom the fees are sought to be recovered; and (3) the attorney's fees were incurred in that third-party litigation." *Masonic Temple Ass'n of Crawfordsville* v. *Indiana Farmers Mut. Ins. Co.*, 837 N.E. 2d 1032, 1038-39 (Ind. Ct. App. 2005). There is also no requirement that the litigation with the third party be in a separate action. Id. at 1040. The test is not that the costs are incurred in a separate action, but rather that they were incurred in an action against a third party. Id. This rule conserves judicial resources in not requiring multiple actions.

The plaintiff brought Counts Three to Five of the Amended Complaint against his neighbors attempting to establish easements by necessity or implication. The defendant had the option to initiate this action on behalf of the plaintiff but failed to do so. That breach put the plaintiff's interests in the property in doubt. He filed this action when defendant failed to and sought to establish a right of access through easements against his

neighbors. The plaintiff is entitled to attorney's fees and costs to the extent attributable to this action against his neighbors.

The plaintiff has filed an affidavit of attorney's fees and costs. The Defendant is to file any objection to the claimed attorney's fees and costs by June 14, 2024. The court will then schedule a hearing to determine attorney's fees and costs.

III. CONCLUSION

The court enters judgment in favor of the plaintiff as to Counts One and Two of the Amended Complaint and awards damages in the amount of $1. The court will schedule a hearing to determine attorney's fees and costs.

Walter Menjivar

Menjivar, J.