

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18286
G/prt

_____AD3d_____

Argued - January 28, 2008

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
RUTH C. BALKIN, JJ.

2007-00145

DECISION &

ORDER

2008-01839

Paul L. Francis, plaintiff, v D&W Saratoga, Inc.,
defendant-respondent, Washington Title, appellant;
Amrit Puran, intervenor-respondent.

(Index No. 19192/05)

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y. (Jacob E. Amir of counsel), for appellant.

Jeanette G. Stewart, New York, N.Y., for defendant-respondent.

Kleinman, Saltzman & Bolnick, P.C., New City, N.Y. (Laurence D. Kleinman of counsel), for intervenor-respondent.

In an action pursuant to RPAPL article 15, inter alia, for a judgment declaring that a deed conveying certain real property is void, the defendant Washington Title appeals from an order of the Supreme Court, Kings County (Schneier, J.), dated November 13, 2006, which denied its motion for summary judgment dismissing the cross claims of the defendant D&W Saratoga, Inc., asserted against it and granted the cross motion of the defendant D&W Saratoga, Inc., in effect, for summary judgment on so much of its second cross claim as was, in effect, for a declaration that Washington Title is obligated to defend it in this action and for reimbursement of attorney's fees, costs, and expenses incurred in defending the action. The appeal brings up for review an order of the same court dated May 11, 2007, which, upon reargument, adhered to the original determination (*see* CPLR 5517[b]).

March 11, 2008

Page 1.

FRANCIS v D&W SARATOGA, INC.

ORDERED that the appeal from the order dated November 13, 2006, is dismissed, as that order was superseded by the order dated May 11, 2007, made upon reargument; and it is further,

ORDERED that the order dated May 11, 2007, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The appellant failed to make a prima facie showing that a claim made by the defendant D&W Saratoga, Inc. (hereinafter D&W), under a title insurance policy it issued to D&W was not covered under the policy. Accordingly, the Supreme Court properly denied the appellant's motion for summary judgment dismissing D&W's cross claims against it and, upon reargument, properly adhered to that determination.

The Supreme Court also properly determined that the appellant is obligated to defend D&W in the instant action under the terms of the title insurance policy. "[A]n insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65; see *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137). "However, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45). The appellant failed to make that showing. Its contention that coverage for D&W's claim is precluded under the policy because the basis for the claim, the conveyance of the subject property pursuant to a purportedly fraudulent deed, was not known to the appellant or was not part of the public record as of the effective date of the policy, is unavailing. "[A] title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from said coverage" (*Citibank v Commonwealth Land Tit. Ins. Co.*, 228 AD2d 635, 637; see *U.S. Bank Natl. Assn. TR U/A DTD 12/01/98 v Stewart Tit. Ins. Co.*, 37 AD3d 822, 824). Here, the policy contains no specific exclusion from coverage in the event the deed conveying the property to D&W was fraudulent.

The appellant's remaining contentions are without merit.

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court