

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 13
Justice

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ELLIOT FRENKEL, et al.		Number <u>19463</u>	2006
- against -		Motion	
		Date <u>August 15,</u>	2007
COMMONWEALTH LAND TITLE INSURANCE		Motion	
COMPANY		Cal. Number <u>13</u>	
	x	Motion Seq. No. <u>2</u>	

The following papers numbered 1 to 11 read on this motion by third-party defendants Shoshanna Walker, Sarena Walker Mayer s/h/a Serena Walker Mayer, Tamra J. Walker i/s/h/a Tamara J. Walker and the Estate of Rita M. Walker for summary judgment in their favor and dismissing the third-party complaint asserted against them and to impose sanctions, including attorneys' fees, as against third-party plaintiff Commonwealth Land Title Insurance Company (Commonwealth) and its counsel, pursuant 22 NYCRR 130-1.1 et seq.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-9
Reply Affidavits.....	10-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action alleging breach of a contract of title insurance, and seeking to recover compensatory and punitive damages, and an award of attorneys' fees. Plaintiffs allege that they purchased the real property known as 691 Empire Avenue, Far Rockaway, New York, (Section 63, Block 15547, Lot 30) from Shoshanna Walker, Sarena Walker Mayer, Tamra J. Walker and the Estate of Rita M. Walker, pursuant to a contract of sale dated September 27, 2004. At the time of their purchase, plaintiffs allegedly obtained a title insurance policy from Commonwealth in the amount of \$900,000.00. Plaintiffs allege that following closing of title and the issuance of the title policy, they submitted plans to the City of New York for the purpose of subdividing the premises into two separate tax lots, with each tax

lot containing approximately 6,418 square feet, and with one of the lots to include an existing house, and the other lot to be improved with a newly constructed, one-family dwelling. The plans allegedly were rejected because of a discrepancy in the proposed subdivided lot sizes vis-a-vis the lot size of the total parcel. Plaintiffs allegedly learned that a portion of the premises, which had been described in the contract of sale, deed and title insurance policy (totaling approximately 1,846 square feet), in fact, had been previously condemned by the City of New York, and that title in such condemned portion had vested in the City of New York in 1975.

Plaintiffs allege that because the title search failed to reveal that a portion of the property had been condemned, they were left with fee title only to a portion of the total premises described in the title policy. Plaintiffs further allege they were unable to subdivide the parcel as intended, and instead were forced to subdivide it into two smaller residential lots. Plaintiffs also allege that they filed a notice of claim with Commonwealth under the title policy, asserting they suffered a compensable loss under the title insurance policy. According to plaintiffs, defendant Commonwealth refuses to compensate them for the value of their loss.

Defendant Commonwealth served an amended answer, denying the material allegations of the complaint, and asserting various affirmative defenses. It also served a third-party complaint as against third-party defendants alleging causes of action based upon fraud, indemnification and contribution, and breach of a deed covenant. Third-party plaintiff Commonwealth claims that its insureds were fraudulently induced to purchase the subject property from third-party defendants, because third-party defendants misrepresented the boundary lines of the property and failed to disclose that a portion of the described property had been previously expropriated by the City of New York. As a consequence, third-party plaintiff Commonwealth alleges that its insureds received partially failed title. Third-party defendants served an answer to the third-party complaint denying the material allegations therein and asserting numerous affirmative defenses.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

To the extent third-party defendants seek summary judgment in their favor, they did not assert a counterclaim or other claim for affirmative relief as against third-party plaintiff Commonwealth. That branch of the motion by third-party defendants seeking summary

judgment in their favor with respect to any claim is denied as moot.

With respect to that branch of the motion for summary judgment dismissing the third-party complaint, third-party defendants argue that the negligent actions and omissions of third-party plaintiff Commonwealth, through its agent, Unlimited Abstract, were the proximate cause of any injuries suffered by plaintiffs, and that third-party defendants are entitled to rely upon the deed which made title to plaintiffs subject to "any state of facts an accurate survey may show."

Third-party plaintiff Commonwealth opposes the branch of the motion for summary judgment dismissing the third-party complaint, asserting that it is premature, because no discovery has been conducted in the action. Third-party plaintiff Commonwealth contends that third-party defendants were compensated for the taking in 1984, and that discovery is necessary on the issue of whether third-party defendants knew, or should have known, when they executed the contract of sale and deed, that they no longer owned the property to the degree it was described in the metes and bounds description contained therein. In addition, third-party plaintiff Commonwealth asserts that it owed no duty to third-party defendants, and therefore, any negligence committed by its agent in preparing the title search does not serve to nullify the material misrepresentations made by third-party defendants. Third-party plaintiff Commonwealth further asserts that it was also entitled to rely upon the representation made by third-party defendants in the affidavit given by them to induce it to insure title.

By the terms of the contract of sale, plaintiffs agreed to take the property in question "subject to [a]ny state of facts shown on the ... survey of Carmen-Dunne, Inc. dated January 23, 1959 and any subsequent state of facts, provided same do not render title unmarketable" (see generally McCarter v Crawford, 245 NY 43 [1927]; Eisenthal v Wittlock, 198 AD2d 395, 396 [1993]). Plaintiffs did not obtain a new survey, notwithstanding the fact the prior survey was 45 years old, and instead, relied upon the title report prepared by Unlimited Abstract, as agent for third-party plaintiff Commonwealth, which included a separately prepared "Schedule A." Schedule A was a metes and bounds description, which was identical to the one that appeared in the last deed of record for the property. The description of the property's boundaries, however, was erroneous, insofar as it did not taken into account the taking by the City of New York in 1975. The same erroneous description then also was included by third-party defendants in the proposed deed.

The precise "subject to" language, used by the contracting parties in the contract of sale, was not carried over into the

proposed deed by third-party defendants. The proposed deed, instead, provided that third-party defendants covenanted to convey "[all] that certain plot, piece or parcel of land, with the buildings and improvements thereon..., bounded and described as set forth in the annexed '**SCHEDULE A-DESCRIPTION**' (emphasis in the original), but that title was to be "subject to any state of facts an accurate survey may show." Although plaintiffs were forwarded a copy of the proposed deed containing the modified "subject to" language, in advance of the closing, they voiced no objection to it. This failure to object was notwithstanding that the title report itself included a copy of the 1959 survey and a street report indicating with respect to a "PROPOSED WIDENING 10' ON THE EAST AND WEST SIDES," that "**TITLE VESTED 06/11/1975**" (emphasis added). In addition, an examination of the copy of the tax map, which was also annexed to the title report, includes boundary measurements of the property at odds with the 1959 survey. Notably, the survey inspection report annexed to the title report states that the survey inspection held on October 18, 2004, showed "[n]o physical changes." Such statement is obviously wrong, for the condemnation proceeding involved an actual street widening, which should have been readily observable.

Furthermore, the records of the New York City Registers Office show that an "Acquisition Map" was filed against the entire lot on May 29, 1975, and that a court order was filed against the same lot on August 17, 1984. The order was a final decree was issued in the condemnation proceeding entitled Matter of City of New York, (Supreme Court, Queens County, Index No. 6334/1974). Thus, the facts allegedly misrepresented by third-party defendants, that is, the boundaries of the premises, were not within the peculiar knowledge of third-party defendants and could have been ascertained by third-party plaintiff Commonwealth or its agent by the means available to them, including through a search of the Automated City Register Information System (ACRIS) website of the Office of the City Register, New York City Department of Finance.

In addition, to the extent third-party plaintiff Commonwealth argues it had a right to rely upon third-party defendants' representation regarding title, made in the affidavit of title, third-party defendants stated they "[knew] of no reason any other person might claim any right, title or interest in or to any portion of the premises." The premises, however, are described in the affidavit simply as being known as "691 EMPIRE AVE., FAR ROCKAWAY, New York." Third-party plaintiff Commonwealth did not reference the Schedule A description when preparing the affidavit.

To the extent third-party plaintiff Commonwealth argues discovery is necessary, third-party defendants are entitled to rely upon the "subject to" language found in their deed (see 3 Warren's Weed, New York Real Property § 32.77 [2007]). As a consequence,

the knowledge or awareness of third-party defendants with respect to the condemnation proceedings is irrelevant. Thus, third-party plaintiff Commonwealth has failed to identify any relevant fact which could be gleaned through discovery that would have a bearing on its claims based upon fraud or breach of a deed covenant (CPLR 3212[f]; see Campbell v City of New York, 220 AD2d 476 [1995]).

Third-party plaintiff Commonwealth also has failed to allege a basis for its claims of indemnification and contribution. It makes no allegation that it has a contractual relationship with third-party defendants which provides for contractual indemnification or contribution. Nor has third-party plaintiff Commonwealth shown that third-party defendants can be liable to third-party plaintiff Commonwealth for common-law indemnification or contribution based upon a theory of vicarious liability or joint liability.

Under such circumstances, third-party defendants have established their prima facie entitlement to summary judgment dismissing the third-party complaint (see generally Alvarez v Prospect Hosp., 68 NY2d 320, supra; Zuckerman v City of New York, 49 NY2d 557, supra). Third-party plaintiff Commonwealth has failed to raise a triable issue of fact as to whether an accurate survey would not have shown the street widening, or whether third-party defendants owed it any contractual duty to provide it with indemnification or contribution (see generally Zuckerman v City of New York, 49 NY2d at 562).

That branch of the motion by third-party defendants for summary judgment dismissing the third-party complaint is granted.

That branch of the motion by third-party defendants to impose sanctions, including attorneys' fees, as against third-party plaintiff Commonwealth is denied (22 NYCRR 130-1.1 et seq.).

Dated: January 2, 2008

J.S.C.