

Cane v First Am. Title Ins. Co. of N.Y.

2015 NY Slip Op 30812(U)

May 7, 2015

Supreme Court, Suffolk County

Docket Number: 30273/2012

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 MICHAEL P. CANE,

Plaintiff,

-against-

FIRST AMERICAN TITLE INSURANCE
 COMPANY OF NEW YORK and WATER
 MILL ABSTRACT CORP.,

Defendants.

ORIG. RETURN DATE: JANUARY 17, 2013
 FINAL SUBMISSION DATE: APRIL 18, 2013
 MTN. SEQ. #: 001
 MOTION: MG

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Upon the following papers numbered 1 to 10 read on this motion _____
 FOR DISMISSAL

Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation in Support 5; Affirmation in Opposition and supporting papers 6, 7; Memorandum of Law in Opposition 8; Reply Affirmation 9; Reply Memorandum of Law in Support 10; it is,

ORDERED that this motion by defendant FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK ("First American") for an Order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing plaintiff's complaint, is

hereby **GRANTED** for the reasons set forth hereinafter. The Court has received an affirmation in support of and joining this application from defendant WATER MILL ABSTRACT CORP. ("Water Mill"), as well as an affirmation in opposition from plaintiff MICHAEL P. CANE.

This action, commenced on October 1, 2012, arises out of plaintiff's purchase on August 26, 2008 of a parcel of undeveloped real property commonly known as 139 Buckskill Road, East Hampton, New York ("Property"). In his complaint, plaintiff alleges that Water Mill was engaged to search title, issue a title report and to close title. Closing of the purchase of the Property was completed on August 26, 2008, and First American issued a policy of title insurance of even date to plaintiff insuring a fee simple interest in the Property with coverage in the amount of \$1,559,000.00. The title insurance policy was countersigned by Stephen F. McMahon on behalf of Water Mill. The Property shares a common driveway easement with neighboring properties for ingress and egress to Buckskill Road, and for the installation of utilities. However, the title insurance policy contained a "Schedule B" entitled "Exceptions From Coverage," which recites that "this policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of ... 5. Driveway Easement recorded in Liber 11658 cp 455." Moreover, by its express terms, the policy coverage continued in force as of the date of the policy in favor of the insured, but only so long as the insured retained an estate or interest in the Property.

Following closing, plaintiff was advised by his counsel that the recorded declaration which granted the easement contained an error that deprived his Property of the easement. Plaintiff gave First American formal written notice of this problem on or about June 23, 2009, indicating that: (1) title was defective because plaintiff "has no legal access and legal method to provide electricity and water because of the defect on the Common Driveway Declaration" and (2) Suffolk County Water Authority is refusing to recognize the validity of the Common Driveway Declaration which document also provides for the installation of utilities." First American alleges that without prejudice to its rights under the policy of title insurance, it undertook to rectify the problem. Plaintiff contends that he received correspondence from First American on or about September 29, 2009, which indicated that "there are two instruments that need to be recorded in order for Mr. Cane to proceed with the development of his [P]roperty; a Waterline Easement and a Correction to Common Driveway Easement." Notwithstanding the fact that plaintiff executed all documents given to him by First American to

correct the title defects, plaintiff alleges that the corrective documents were never recorded. After plaintiff waited a "reasonable time" for defendants to cure the title defects, he sold the Property on or about December 17, 2009, to the owner of the contiguous lots "at a substantial loss." Plaintiff did not obtain First American's prior written consent before transferring the Property, which, First American argues, violates the terms of the insurance policy and terminates coverage thereunder.

Plaintiff asserts two causes of action herein against the defendants. In the first cause of action, plaintiff alleges breach of contract of the title insurance policy issued to him by First American. The second cause of action sounds in negligence for defendants' failure to properly read, search, and examine the title to the Property to "find the obvious title defects." As a result of the foregoing, plaintiff seeks damages herein in an amount no less than \$1,357,745.00.

First American has filed the instant motion to dismiss, arguing that as a matter of law, both causes of action must be dismissed as against First American. In sum, First American alleges that plaintiff's first cause of action for breach of contract must be dismissed because: (1) his coverage under the policy terminated when he sold the Property; (2) the sale of the Property without First American's consent violated conditions of the policy that was issued to him; and (3) his claim was excepted from the coverage of the policy. Further, First American contends that plaintiff's second cause of action must be dismissed as: (1) it is barred by the applicable statute of limitations; and (2) any claim that plaintiff (as the insured) has against First American (as the insurer) is limited to claims under the policy of insurance.

As noted, Water Mill joins in First American's motion to dismiss, arguing that at all times relevant, Water Mill was First American's disclosed agent acting within the scope of the agency. Therefore, Water Mill similarly seeks dismissal of the complaint as asserted against it.

In opposition hereto, plaintiff alleges, among other things, that plaintiff purchased the Property with the intention of building a home for his family; title to the Property was defective because of the defective Common Driveway Declaration, and as such, plaintiff had no legal right of access to the Property; and plaintiff was unable to use or build on the Property due to the defective Common Driveway Declaration and the lack of a utility easement. Plaintiff argues that insurance policies are to be strictly construed against the

insurer, and that exceptions from policy coverage must be specific and clear and subject to no other reasonable interpretation. Plaintiff claims that First American has failed to meet its burden herein to prove that the exception in the policy applies to defeat coverage. Further, plaintiff contends that he did not waive his claims under the policy by selling the Property in December of 2009, as his loss arose while he was still fee owner of the Property and he sold the Property to mitigate his damages. With respect to the statute of limitations argument concerning the negligence claim, plaintiff alleges that the claim arose when plaintiff sold the Property on or about December 17, 2009 and suffered damages, thereby making the negligence cause of action timely.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence “must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies (see *Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]; *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403 [2007]; *6D Farm Corp. v Carr*, 63 AD3d 903 [2009]; *Savarese v Shatz*, 273 AD2d 219 [2000]).

Furthermore, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995];

Detmer v Acampora, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). However, the Court notes that in opposition to the instant application, plaintiff has merely submitted an attorney's affirmation.

Here, the Court finds that the documentary evidence submitted, to wit: the title insurance policy and the Certificate of Title, resolve all factual issues as a matter of law, and conclusively dispose of plaintiff's claims for breach of contract and negligence against both defendants. As noted hereinabove, the insurance policy contains a "Schedule B" entitled "Exceptions From Coverage," which recites that "this policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of . . . 5. *Driveway Easement recorded in Liber 11658 cp 455*" (emphasis supplied). Therefore, the policy itself excepted from coverage the very easement that plaintiff now bases his action upon. A policy of title insurance protects a property owner against loss by reason of defective titles and encumbrances and insures the correctness of searches for all instruments, liens or charges affecting the title to such property. The liability of the title insurer to its insured is based on contract law and is governed and limited by agreements, terms, conditions and provisions contained in the title insurance policy. Insurers have no obligations to their insureds with respect to items specifically and expressly excepted from coverage (see Insurance Law § 1113 [a] [18]; *Property Hackers, LLC v Stewart Tit. Ins. Co.*, 96 AD3d 818 [2012]; *St. Luke's Pentecostal Church, Inc. v Stewart Tit. Ins. Co.*, 37 AD3d 702 [2007]; *Scaglione v Commonwealth Land Title Ins. Co.*, 303 AD2d 671 [2003]; *Logan v Barretto*, 251 AD2d 552 [1998]).

Furthermore, by its express terms, the policy coverage continued in force as of the date of the policy in favor of the insured, but only so long as the insured retained an estate or interest in the Property. As discussed, plaintiff conveyed the Property on or about December 17, 2009, by bargain and sale deed, without First American's prior written consent. Consequently, plaintiff impaired First American's right to comply with its obligations vis-à-vis plaintiff to pursue appropriate action to remedy any defect in title, and terminated coverage under the policy (see *Aetna Cas. & Sur. Co. v Longo Prod.*, 247 AD2d 497 [1998]; *Washington Temple Church of God in Christ, Inc. v Global Properties and Associates, Inc.*, 37 Misc 3d 1211[A] [Sup Ct, Kings County 2012]; *Soldiers', Sailors', Marines' and Airmen's Club, Inc. v Carlton Regency Corp.*, 30 Misc 3d 352 [Sup Ct, NY County 2010]).

Regarding plaintiff's second cause of action for negligence against First American, it is well-settled that:

a cause of action for negligence in searching title does not lie in an action on the policy. The contract of insurance is distinct and separate from the contract of searching. Under a contract for searching titles, there may be liability in negligence. Under a contract of insurance, no question of negligence in searching can arise. In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. The doctrine of skill or negligence has no application to a contract of title insurance

(*Citibank, N. A. v Chicago Title Ins. Co.*, 214 AD2d 212, 216 [1995]; see *Trenton Potteries Co. v Title Guar. & Trust Co.*, 176 NY 65 [1903]; *Charney v Commonwealth Land Tit. Ins. Co.*, 215 AD2d 152 [1995]; *Maggio v Abstract Tit. & Mtge. Corp.*, 277 AD 940 [1950]). Thus, the cause of action for negligence against First American cannot be maintained herein.

With respect to plaintiff's causes of action as against Water Mill, it is also well-settled that if a negligence claim is based upon a certificate of title, and the certificate merges with a subsequently issued insurance policy, "any action for damages arising out of the search – whether sounding in tort or contract – is foreclosed" (*Citibank*, 214 AD2d at 217, quoting *Smirlock Realty Corp v Tit. Guar. Co.*, 70 AD2d 455, 465 [1979]; see *Wells Fargo Bank v Conestoga Tit. Ins. Co.*, 41 Misc 3d 1240[A] [Sup Ct, Kings County 2013]; *Timac Realty v G&E Tremont, LLC*, 2013 NY Slip Op 31047[U] [Sup Ct, NY County]; *Valcon Am. Corp. v CTI Abstract of Westchester*, 28 Misc 3d 1228[A] [Sup Ct, Orange County 2010]). In the instant action, the Certificate of Title contains a provision that states, "[t]his Agreement to insure shall terminate . . . (2) upon the issuance of title insurance in accordance herewith." As such, the Court finds that plaintiff is foreclosed from asserting a claim for damages against Water Mill with respect to the title search it performed.

In view of the foregoing, upon favorably viewing the facts alleged, and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582

[2005]), the Court finds that plaintiff has failed to plead causes of action for breach of contract or negligence against both First American and Water Mill.

Accordingly, this motion to dismiss is **GRANTED**, and plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: May 7, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION NON-FINAL DISPOSITION