Old Republic Natl. Title Ins. Co. v Santangelo & Cohen
2001 NY Slip Op 30095(U)
July 30, 2001
Supreme Court, New York County
Docket Number: 600078/00
Judge: Paula J. Omansky

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY PART 47

Justice

Old Republic Title Ins Co -v- Sardangelo etc

INDEX NO. 600078-00

MOTION DATE 5/18/01

MOTION SEQ. NO. 01

MOTION CAL. NO. 10

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with accompanying memorandum

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/30/01

PAULA J. OMANSKY J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

PAULA J. OMANSKY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

----------X

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Index No. 600078/00

Plaintiff,

DECISION AND ORDER

-against-

SANTANGELO & COHEN f/k/a SANTANGELO, SANTANGELO & COHEN, MICHAEL L. SANTANGELO, GEORGE L. SANTANGELO, JOSEPH GILLETTE, and BERNARD B. COHEN

Defendants.

---------- X

PAULA J. OMANSKY, J.:

Plaintiff Old Republic National Title Insurance Company moves, pursuant to CPLR 3212, for summary judgment in its favor on all causes of action in the complaint and moves to strike defendants' answer and affirmative defenses with prejudice based on their failure to comply with their discovery obligations pursuant to CPLR 3126.

Defendants Santangelo & Cohen f/k/a Santangelo & Cohen, Michael L. Santangelo, George, George L. Santangelo, Joseph Gillette and Bernard B. Cohen move for a protective order with respect to the documents requested in plaintiff's second notice for discovery and inspection, dated October 3, 2000. In addition, defendants move to strike scandalous and prejudicial allegations from the complaint.

FACTS

Plaintiff has commenced this action to recover monies spent due to defendants' alleged failure to perform its promise pursuant

to an undertaking at a real estate closing in which Donald and Susan Herzog, non-parties, sold real property to Gregory and Dora Binkiewicz, non-parties. The Herzogs were represented by defendants. The title search was prepared by plaintiff's agent, Southern Tier Abstract Corp. Plaintiff states that it insured the Binkiewicz' title based on defendants' letter that they would satisfy the Herzog's outstanding mortgage with EMC Mortgage Corporation ("EMC Mortgage"), a non-party. This document, dated January 28, 1998 (the "January 1998 undertaking"), and signed by defendant Joseph Gillette, an associate at defendant Santangelo, Santangelo & Cohen, provides

> I Joseph Gillette of Santangelo, Santangelo & Cohen, do hereby undertake to provide to Southern Tier Abstract Corp. within thirty days a payoff receipt for the mortgage referred to at Schedule B exception #22 in title policy NO. 862-SU-M2350. We will hold the sum of $110,000.00 in escrow to payoff said mortgage and upon paying said amount due provide proof of said payment to Southern Tier Abstract, and have a satisfaction of mortgage in recordable form forwarded to Southern Tier.

Plaintiff alleges that Mr. Gillette and his law firm failed to perform any of the terms of the January 1998 undertaking except for taking $100,000.00 into their possession. In addition, plaintiff alleges that none of the defendants obtained a payoff receipt for the mortgage. or paid any money towards the mortgage, or obtained any other proof of satisfaction of the mortgage.

Eventually, EMC Mortgage put the loan into foreclosure since the defendants failed to pay it off. As a result, plaintiff was forced to pay off the mortgage in order to protect its insureds. According to plaintiff, it obtained payoff letters noting that the

sum of $158,107.18 remained outstanding. Defendants eventually disgorged the $110,000 they had put in escrow by sending a check to the Southern Tier Abstract Corporation which in turn issued a check for $110,000 payable to EMC Mortgage. Plaintiff was forced to pay the remainder of the mortgage which totaled $48,107.18.

Defendants maintain that they did not cause the delay in obtaining the payoff statement and that the foreclosure was triggered by the fact that EMC Mortgage failed to cooperate with their repeated requests for a written statement concerning the amount of money needed to satisfy the underlying mortgage. To support their claims, defendants submitted Mr. Gillette's initial letter to EMC Mortgage. This correspondence, dated January 26, 1998 notified EMC Mortgage that the Herzogs were closing title and would need a payoff statement to transfer the property. Apparently the payoff statement did not arrive prior to closing and Mr. Gillette signed the January 1998 undertaking.

Defendants also maintain that Mr. Gillette tried to comply with the terms of the January 1998 undertaking but was prevented from doing so by EMC Mortgage's failure to send the necessary information required by defendants to issue a check in the correct amount. To support these claims, defendants submit copies of Mr. Gillette's additional letters to EMC dated February 4, 1998 and March 12, 1998, which requested a payoff statement. According to defendants, Mr. Gillette sent the $110,000 check to Southern Tier Abstract Corp on December 23, 1999. Defendants allege that Southern Tier Abstract Corp took until January 12, 2000 (20 days)

before sending the check to plaintiff's counsel. Plaintiff did not request an updated payoff letter until January 21, 2000 (another 9 days). Defendants allege that plaintiff waited until February 2, 2000 to send a letter to the mortgagee with the checks required to satisfy the mortgage.

In a letter dated January 4, 2000, defendant George L. Santangelo informed plaintiff's counsel that defendants had satisfied their obligation. According to Mr. Santangelo, the January 1998 undertaking only required defendants to hold the sum of $110,000 and to seek a payoff letter from the mortgagee. In addition, Mr. Santangelo informed plaintiff's attorney:

> [y]ou should be aware that both your client and we notified EMC before the closing, during the closing and subsequent to the closing that the property was being sold and pay-off figures were required.
>
> When EMC failed to respond, either negligently or intentionally, we notified Southern Tier Abstract Co., Inc. We do not know why EMC failed to respond to both your client's and our request for pay-off information. Nevertheless, we received no instructions from anyone until late 1999. However, we believe that EMC may have deliberately failed and refused to provide the information form which we could determine the payoff amount and obtain a satisfaction.

Mr. Santangelo also stated that defendants were unaware of any mortgage foreclosure and "object to the payment of any money to satisfy the mortgage foreclosure proceeding or interests payments subsequent to the date of closing." He also warned plaintiff that if it choose to mitigate by payment it did do at its own risk and for its own account. Moreover, Mr. Santangelo also stated that defendants would not assume any responsibility for any difference

or any other loss associated with these matters.

DISCUSSION

Defendants' January 1998 undertaking is a valid agreement. A letter or memorandum is enforceable as a contract, in this State, where the writing identifies the parties, describes the subject matter, states the essential terms and is signed by the party to be charged (160 Chambers St. Realty Corp. v Register of City of New York, 226 AD2d 606, 607 [2d Dept 1996]).

The January 1998 undertaking must be construed to achieve the apparent purpose of the litigants (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]). A promise to act may not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts anc circumstances (id. at 491-492). Here, the plain wording of the January 1998 undertaking clearly requires defendants to pay off the mortgage within 30 days and to provide proof of this payment to Southern Tier Abstract. Although the January 1998 undertaking states that defendants will put $110,000 in escrow, the agreement does not limit the amount of defendants' liability for the mortgage to the $110,000 placed in escrow or absolve defendants of their duty to perform timely in the event they are unable to obtain the required information within a certain time period. Defendants could have insisted on language in the January 1998 undertaking which limited the liability of the firm and its attorneys but failed to do so. Mr. Santangelo's belated letter of January 2000 does not modify the terms of the January 1998 undertaking.

As to the remaining objections, defendants are conclusively bound by the terms of the January 1998 undertaking unless there is a show of fraud, duress or some other wrongful act on the part of plaintiffs (State Bank of India, New York Branch v Patel, 167 AD2d 242, 243 [1st Dept 1990]). Defendants have failed to raise any issue of fact which would indicate that Mr. Gillette, an experienced attorney, entered into the January 1998 undertaking under duress or that any other party participated in a fraud or some other wrongful act. Moreover, defendants have not produced any evidence to prove that it actually mailed letters to EMC Mortgage trying to obtain the required information. Even if defendants were able to present proof of mailing, they failed to explain why they did not directly contact plaintiff to notify it of the delay or to seek its assistance in obtaining the payoff letter to avoid a foreclosure. In comparison to defendants' failed attempts, the record indicates that plaintiff had no trouble in obtaining the required information from EMC Mortgage.

Therefore, this court grants plaintiff's motion for summary judgment. However, the record does not support plaintiffs' allegation in the complaint that it is entitled to the sum of $158,107.18. Plaintiffs' admit in its reply that defendants eventually paid over the $110,000 held in their escrow account. Therefore, plaintiffs are only entitled to be reimbursed in the sum of $48,107.18. which is the difference between the amount actually owed on the foreclosure and the amount paid by defendants. Since plaintiffs do not request a particular interest rate and the

January 1998 undertaking does not specify one, interest is set at the statutory rate of 9% (Marine Mgt. Inc. v Seco Mgt., Inc., 176 AD2d 252, 253-254 [2d Dept 1991], affd 80 NY2d 886 [1992]; citing CPLR 5004).

However, this court rejects plaintiff's claims for legal fees. Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute, or court rule (Hooper Assocs., Ltd. v AGS Computers, Inc., supra, 74 NY2d, at 491). Plaintiff has not stated any statute or court rule which authorized legal fees in this situation. Furthermore, this court shall not infer defendants' intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise (id. at 492). Nothing in the January 1998 undertaking obligates defendants to pay plaintiff's litigation costs, in this action or in the foreclosure, in the event that they fail to perform timely (ibid.; cf., DiPerna American Broadcasting, 200 AD2d 267, 270, fn 3 [1st Dept 1994]).

Plaintiff has also failed to cite any authority which would entitle it to $500,000 in punitive damages under the present fact pattern. Therefore, all claims for punitive damages are denied.

Since this court has granted plaintiff's claim there is no need of further discovery and the remainder of plaintiff's motion for an order of preclusion is denied as moot. In the same way, the court need not reach defendants' remaining objections to discovery and to the wording of the pleadings. Therefore, defendants' cross

motion for a protective order and to strike certain portions of the complaint is also denied as moot.

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants on its complaint in the amount of $48,107.18., together with interest as allowed by CPLR 5004, until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly and it is further

ORDERED that those branches of plaintiff's motion for summary judgement on its claims for attorney fees and punitive damages are denied for the reasons stated herein and those claims are hereby severed and dismissed; and it is further

ORDERED that the remaining branches of plaintiff's motion which seek an order of preclusion and defendants' entire cross motion are denied as moot.

DATED: July 30, 2001

ENTER:

PAULA J. OMANSKY
J.S.C.