Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

JERRY PALOUBIS, et al.

-against-

UNITED GENERAL TITLE INSURANCE COMPANY, et al.

Index Number 16910 2006

Motion Date March 7, 2007

Motion Cal. Number 46

Motion Seq. No. 1

The following papers numbered 1 to 12 read on this motion by defendants United General Title Insurance Company (United) and Intrastate Property Corporation (Intrastate) to dismiss the complaint with prejudice, together with costs and disbursements.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	8-9
Reply Affidavits.....	10-12

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

Plaintiffs were the successful bidders at the public auction held on May 4, 2004, of the real property, known as 166-66 21st Avenue, Whitestone, New York (Block 5760, Lot 37), having bid the amount of $531,000.00. The property was an asset of a decedent's estate being administered by the Public Administrator of Queens County. In their complaint, plaintiffs allege that in connection with their purchase of the property, defendants United and Intrastate issued to them a "certificate of good title" and a title insurance policy. According to plaintiffs, defendants negligently misrepresented that the certificate of occupancy for the premises permitted residential use of the dwelling by two families, when in fact, the certificate of occupancy for the premises authorized residential use of the dwelling by one family

only. Plaintiffs allege they relied upon the misrepresentation and the certificate and policy when proceeding with their purchase and making renovations to convert the dwelling on the premises into a two-family dwelling. Plaintiffs further allege that they subsequently "discovered" that the property was not a "two-family dwelling, but a one-family dwelling," and were assessed fines for having renovated and used the premises as a two-family dwelling in violation of the zoning law. Plaintiffs assert causes of action for breach of contract, negligence and negligent misrepresentation, claiming that defendants wrongfully have refused to pay them the amount of $424,800.00, pursuant to the policy of title insurance. Plaintiffs seek to recover damages.

In lieu of serving an answer, defendants United and Intrastate move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Defendant United is the title insurance company which issued a policy of insurance through its agent, defendant Intrastate, to plaintiffs. Defendant Intrastate prepared the title insurance commitment report and ordered the "Certificate of Occupancy" search from Abstracters Information Service, Inc. (AIS). Defendant AIS is the company which made the certificate of occupancy search.

Plaintiffs oppose the motion. Defendant AIS has not appeared in relation to the motion.

In considering a motion to dismiss a complaint for failure to state a cause of action (see CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Morone v Morone, 50 NY2d 481, 484 [1980]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

With respect to the claim by plaintiffs for breach of contract, "[a] policy of title insurance protects a property owner 'against loss by reason of defective titles and encumbrances and insur[es] the correctness of searches for all instruments, liens or charges affecting the title to such property' (Insurance Law § 1113[a] [18]; see also Insurance Law § 6401[b]; Smirlock Realty Corp. v Title Guar. Co., 52 NY2d 179 [1981])." '"[T]he liability of the title insurer to its insured is essentially based on contract law [and] is governed and limited by agreements, terms,

conditions and provisions contained in the title insurance policy"' (Citibank v Commonwealth Land Tit. Ins. Co., 228 AD2d 635 [1996], quoting 5A Warren's Weed, New York Real Property, Title Insurance § 1.03[6], at 15 [4th ed])" (Logan v Barretto, 251 AD2d 552, 552-553 [1998]).

The policy of title insurance at issue affords plaintiffs coverage for loss occasioned by a defect in title, including liens or encumbrances on the title, or unmarketability of the title. Contrary to the plaintiffs' argument, that the certificate of occupancy for the property restricts its use to one-family residential use does not render the title defective or unmarketable, or constitute an encumbrance on the title. "[M]arketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property" (Voorheesville Rod & Gun Club v Thompkins Co., 82 NY2d 564, 571 [1993]). Because a certificate of occupancy and zoning laws regulate the manner in which the property can be used and does not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy (see generally Logan v Barretto, 251 AD2d at 553; Chu v Chicago Tit. Ins. Co., 89 AD2d 574 [1982]; Wolf v Commonwealth Land Title Ins. Co., 180 Misc 2d 307 [1999]).

Insofar as plaintiffs base their claims against defendants United and Intrastate upon negligence and negligent misrepresentation regarding the authorized use of the premises, they rely upon a copy of the "CERTIFICATE OF OCCUPANCY" report annexed to the title policy which states that a certificate of occupancy had been issued on February 5, 1958 for a three-story, "TWO FAMILY DWELLING" and garage for the premises known as "166-66 21 AVENUE COUNTY: QUEENS BLOCK: 05760 LOT: 00037." In addition, they allege they relied upon the copy of the certificate of occupancy provided to them.

The misrepresentation regarding the property's authorized use in the certificate of occupancy report was not made until after plaintiffs already had entered into the contract of sale. Thus, plaintiffs could not have relied upon the misrepresentation to their detriment in contracting to purchase the property (see Securities Investor Protection Corp. v BDO Seidman, 95 NY2d 702, 711 [2001]; Ford v Sivilli, 2 AD3d 773 [2003]; see generally 60A NY Jur 2d, Fraud and Deceit § 138).

To the extent plaintiffs assert they relied upon the same misrepresentation when closing the transaction, the contract of sale itself made no representation regarding the existence of a

certificate of occupancy for any dwelling. Thus, a reasonable and prudent person should have carefully read the copy of the certificate of occupancy supplied by the title company if the type of authorized use was relevant to the decision to close the transaction. If plaintiffs had done so, they would have seen that on its face, the property address listed thereon, including the block and lot numbers, failed to match the one set forth in the certificate of occupancy report, or in the offer or contract of sale.[1] Hence, they should have realized it may not have been the correct certificate of occupancy for the property they contracted to purchase. In view of the address discrepancy, and because the cover sheet to the annexed copy of the certificate of occupancy, (denominated "Municipal Department Searches and Street Report") specifically warned that any search reported was furnished "FOR INFORMATION PURPOSES ONLY," and would not be insured and that the company would not assume "any liability for the accuracy thereof," plaintiffs should have made an additional inquiry as to whether the representation in the certificate of occupancy report was, in fact, correct. Additionally, plaintiffs themselves acknowledged in the offer and in the contract of sale that they had inspected the property, and, thus, should have been aware that the physical layout of the dwelling was inconsistent with a residential use by two families. At a minimum, plaintiffs should have double-checked to confirm the accuracy of the representation in the certificate of occupancy report, prior to commencing the renovation work. As plaintiffs concede, the status of the certificate of occupancy issued for the correct premises was readily available as a matter of public record.

Under such circumstances, plaintiffs cannot be said to have justifiably relied upon the misrepresentation regarding the authorized use of the premises pursuant to the certificate of occupancy at the time they closed the transaction.

Lastly, the title insurance policy further provides:

> "EXCLUSIONS FROM COVERAGE
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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[1] The annexed copy of the certificate of occupancy provided to plaintiffs stated it was for a property with the address "160-66 21st Ave.," "Block 5755 Lot 20" (as opposed to 166-66 21st Ave., Block 5760, Lot 37).

> 1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (I) the occupancy, use, or enjoyment of the land ... or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy."

Thus, the terms of the contract sued upon specifically and unambiguously disclaim responsibility for the mistake related to the certificate of occupancy that forms the basis for this action (see Chu v Chicago Title Ins. Co., 89 AD2d at 574).

Accordingly, the motion by defendants United and Intrastate to dismiss the complaint asserted against them for failure to state a cause of action is granted.

Dated: May 4, 2007

J.S.C.