

**Northern Funding, LLC v Stewart Ins.
Co.**

2007 NY Slip Op 32118(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0600446/2005

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 600446/2005
NORTHERN FUNDING LLC.
vs
STEWART TITLE
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JUL 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

ALL PAGES REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: JUL 09 2007

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
NORTHERN FUNDING, LLC and
NORTHERN SOURCE, LLC,

Index No.: 600446/05
Seq. No. : 001

Plaintiffs,

-against-

Present:
Hon. Judith J. Gische
J.S.C.

STEWART INSURANCE COMPANY,

Defendant.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Pltf's motion [psj] w/BHS affirm in support, memo, exhs	1
Def's JLK affirm in opp, memo, exhs	2
Pltf's BHS reply affirm in further support, memo, exhs	3

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a contract of insurance. Plaintiff Northern Funding, LLC ("Northern Funding") now moves for partial summary judgment on the second and sixth causes of action.¹ Defendant opposes the instant motion and asks the court for summary judgment in its favor instead.²

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

¹ Only Northern Funding moves at this time since Northern Source, L.L.C. was not involved in the loan transaction that forms the subject of this motion.

² No notice of cross motion was made. Instead, Stewart asks the court to search the record. CPLR § 3212(b); Merritt Hill Vineyards v. Windy Hgts. Vineyard, 61 N.Y.2d 106 (1984).

The court's decision follows.

Background

Many facts are undisputed. On January 13, 2003, Valuehome Charlie, Inc. ("Charlie") purchased real property located at 673 Lafayette Avenue, Brooklyn, New York (the "Property"). The purchase was funded by a purchase money mortgage provided by Northern Funding. Although the mortgage instrument indicates a principal amount of \$357,500, Northern Funding represents that it advanced \$236,250 at closing and further advanced an additional \$55,000 for property improvements, all for a total mortgage of \$291,250. The mortgage was personally guaranteed by Jacques Pomeranz ("Pomeranz"), a principal of Charlie. At closing, Stewart issued a mortgagee policy of title insurance (the "Title Insurance"), bearing policy number M-8832-515856, to Northern Funding on the Property in the amount of \$236,250.

After closing on the Property, Dr. Arthur Rouse ("Rouse") commenced an action in the Supreme Court of New York, Kings County, Rouse v. Winthrop, et al., Index No. 6257/03 (the "Rouse Action"), to declare that he was the true owner of the Property. Northern Funding was named a defendant. Northern Funding notified Stewart about the action and requested both defense and indemnification in the action from Stewart on August 20, 2003 and April 13, 2004. By June 9, 2004, the law firm of Sanders, Gutman & Brodie had been retained by Stewart to represent Northern Funding in the Rouse Action.

As the Rouse Action continued, Northern Funding was being presented with strong evidence that Rouse's claim of ownership of the property was valid. On July 16, 2004, Charlie was informed by Peter Zanolin, Senior Investigative Assistant District Attorney at the King's County District Attorney's Office, that it had obtained defective and

unmarketable title to the Property. Northern Funding learned that the failure of title arose from a faulty conveyance several steps in the chain of title prior to the purported conveyance to Charlie. A woman named Maria Leyna Albertina ("Albertina") subsequently pled guilty to first degree grand larceny in connection with the earlier fraudulent conveyance of the Property.

In September 2004, Peter Aytug, Vice President of Northern Funding, and Pomeranz each submitted affidavits in connection with Northern Funding and Pomeranz' proofs of loss to Stewart. Robert Gutman Esq. ("Gutman"), of Sanders, Gutman & Brodie, thereafter negotiated a settlement in the Rouse Action. On February 16, 2006, Gutman forwarded the settlement proposal draft to Joseph Fiore Esq. ("Fiore") for Stewart's authorization. The authorization was denied by Fiore, in part, as follows:

"I have reviewed the settlement proposal draft which you forwarded to me... Stewart takes no position and gives no advice relative to the content thereof. Stewart does not consent to any process which will permit the receipt of any of the funds by the Insureds unless the Policies are released in writing by the Insureds. You refer to a shortfall payment by Stewart and a possible continuation of the claim thereafter. Stewart does not consent to that arrangement and does not authorize any of the action now being taken unless the Insureds agree that releases will be given under the Policies at this time. If the Insureds' personal counsel wishes to call me and discuss what suitable arrangement can be made in this regard [sic], I am willing to endeavor to resolve it now. Absent such an arrangement, Stewart will not participate and does not consent to the resolution set forth in the proposed stipulation. Thank you."

Northern Funding, nonetheless, went forward with the settlement agreement. Pursuant to the parties' settlement, on February 23, 2006, Justice David I. Schmidt entered an order decreeing all of the intermediate deeds in the chain of title from the fraudulent

conveyance of the Property, including Charlie's deed, to be void and directing the Kings County Register of Deeds to cancel those deeds of record. On March 26, 2006, a Referee's sale of the Property was conducted where Rouse was listed as grantor and thus title holder to the Property. On March 28, 2006, Rouse paid Northern Funding \$136,504.88 in full settlement of the Rouse Action. Northern Funding represents that the settlement money constitutes recoupment of advances for real estate taxes and improvements, together with some accrued interest.

Northern Funding further represents that through December 31, 2006, the mortgage loan had an outstanding balance of \$249,318.94, including interest which accrued at the note rate of fifteen percent per annum. Stewart has refused to pay any amount on Northern Funding's claim based on defective title.

Arguments of the Parties

Northern Funding claims that such denial constitutes a breach of the Title Insurance policy (second cause of action) and that it is entitled to indemnification for its losses from Stewart under the Title Insurance policy (sixth cause of action). It seeks judgment in its favor for the loan amount, less a certain portion of the settlement proceeds, plus pre-judgment interest at the note rate of fifteen percent per annum.

Stewart claims that Northern Funding materially breached the policy by entering into an unauthorized settlement where the Title Insurance policy explicitly states Stewart "shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without prior written consent of the Company." Stewart also argues that Northern Funding's settlement in the Rouse Action is prohibited under the policy which states, in pertinent part:

"[T]he Company will not pay loss or damage, costs or attorneys fees ... by reason of:

Defects, liens, encumbrances, adverse claims or other matters: (a) Created, suffered, assumed or *agreed to* by the insured..." (emphasis added).

Stewart additionally argues that the settlement in the Rouse Action prevented a final adjudication, which is required to trigger Stewart's obligation to indemnify Northern Funding under Section 4 of the policy which states:

"Whenever the Company shall hereunder ... interpose a defense ... the Company may pursue any litigation to final determination by a Court ... and expressly reserves the right to appeal from any adverse judgment or order..

...

In the event of litigation ... the Company shall have no liability for loss or damage until there is a final determination by a court of competent jurisdiction and disposition of all appeals therefrom, adverse to ... the lien of the insured mortgage."

Stewart alternatively contends that because Northern Funding failed to pursue the Pomeranz guaranty, it failed to mitigate its damages. Stewart similarly, argues that Northern Funding has yet to suffer an actual monetary loss until it attempts to collect on the Pomeranz guaranty.

Stewart finally argues that, even if Northern Funding were entitled to indemnification from Stewart, such recovery should be offset by the Rouse Action settlement and Northern Funding's loss should be limited to the policy limit or appraised value of the Property less such settlement proceeds. In January 2003, when title closed, an appraisal was done on the Property, which valued the property at \$200,000.

In reply, Northern Funding claims that there was no valid defense to title in the

Rouse Action, so that Stewart's failure to authorize settlement was "bad faith conduct" designed to "deprive Northern Funding of that for which it bargained." Northern Funding further argues that it was not required to procure a final court determination unless the title company raised a legitimate dispute as to the validity of the title. Northern Funding also contends that, in any event, the January 27, 2006 order of the Hon. David I. Schmidt in the Rouse Action, which incorporated a stipulation of settlement, constituted a "final determination" sufficient to satisfy the policy requirements.

Northern Funding also rejects the arguments regarding the Pomeranz guaranty. It claims Stewart's position is incorrect and would render Section 12 of the policy ineffectual. Section 12 of the policy provides for Stewart's subrogation rights and Northern Funding asserts that it is ready to assign its rights in the Pomeranz guaranty to Stewart. On the issue of damages, Northern Funding claims that the 2003 appraisal is unsworn, of no probative value and should be disregarded. Alternatively, Northern Funding argues that even if there was any admissible evidence of value of the Property, such evidence would be irrelevant because Stewart's liability would still be in the full policy amount of \$236,250.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the

proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

At its core a title insurance policy is a contract in which the insurer protects the insured for losses that may occur because the title conveyed as part of a real estate transaction is defective. L. Smirlock Realty Corp. v. Title Guarantee Co., 52 N.Y.2d 179 (1981). A mortgage title insurance policy is a contract of indemnity, wherein the insured must demonstrate an actual loss before the insured can recover under the policy. Citibank, N.A. v. Chicago Title Ins. Co., 214 A.D.2d 212 (1st Dept. 1995) *app. dismissed* 87 N.Y.2d 896 (1995).

Northern Funding has proven its *prima facie* case that the title Stewart insured was defective and that, as a result, it suffered a monetary loss. The court rejects Stewart's arguments that the loss is not insured because Northern Funding failed to get either its approval for the Rouse Action settlement or a judicial determination of the claims therein. It is undisputed that Stewart's approval for settlement was sought, but Stewart rejected any

settlement unless Northern Funding waived its rights to pursue claims under the title insurance policy.

There were no viable defenses to Rouse's claim of title. Northern Funding provides the court with the mountain of evidence developed in the Rouse Action proving that Rouse had superior title to the property and that the chain of title preceeding that given to Charlie had been obtained fraudulently. Stewart's legal position here, carried to its logical conclusion, would have required Northern Funding to pursue a frivolous defense in the Rouse Action in order to avoid forfeiture of its rights under the title insurance policy it paid for. This aberrant result is not supportable. A different result might be in order if Stewart could establish a viable defense that could have been asserted by Northern Funding on the issue of title in the Rouse action. That is not the case.

Stewart contends that the mere fact that Rouse paid Northern Funding over \$136,000 in that action demonstrates that there was a valid defense. Stewart does not establish what that defense may be. In any event, the record shows that monies under the mortgage were specifically advanced for improvements, which is not a defense to a superior claim of title.

In this regard, Stewart's refusal to authorize the settlement imports issues of bad faith where it placed its own interest in the Rouse Action above that of its insured. See: Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427 (1972); St. Paul Fire & Mar. Ins. Co. V. United States Fid. & Guar. Co., 43 N.Y.2d 977 (1978).

Moreover, the same line of reasoning follows with respect to whether there was a judicial determination of adverse title as required under the policy. Clearly the decree establishing title by Hon. David I. Schmidt was a judicial determination. While the

determination was not the result of a contested hearing, but rather the product of a stipulation, under the facts of this case it would still trigger liability under the title policy. An order of the court, even if made as a result of a stipulation, is still an order. Further, as this record reveals, since there were no colorable defenses to title for the court to even adjudicate, the determination is sufficient to trigger Stewart's responsibility under the contract.

Stewart's fourth affirmative defense, that Northern Funding has not exhausted all remedies to the policy, is equally unavailing. There is no requirement that Northern Funding first look to the Guarantor before making a claim under the policy. To the contrary, the policy contemplates that Stewart can pursue the Guarantor pursuant to its rights of subrogation. Under Section 12 of the policy, the parties agreed that in the event Stewart settles or pays a claim under the policy, "all right of subrogation shall vest in [Stewart] unaffected by any act of the insured claimant."

The court concludes that Northern Funding is entitled to summary judgment on the issue of liability. The parties further dispute how damages should be calculated.

Section 7 of the policy sets forth the formula for the determination and extent of liability. It provides:

"(a) The liability of the Company under this policy shall not exceed the least of :

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations; at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy."

Under the above formulas, the amount Northern Funding may recover is capped at \$236,250, the policy amount. However, recovery may be less than the policy amount and should reflect the actual economic loss. The court is unable to determine damages due on this record that are consistent with the policy formulas. The determination of damages must await trial.

In this regard, Stewart claims that the "title" interest is worth only \$200,000 which represents the appraised value of the property at the time of sale. This is less than the purchase price, which at arms length, is best evidence of value. People ex rel. Four Park Ave. Corp. v. Lilly, 265 A.D. 68 (1st Dept. 1942). No affidavit of the appraiser is included. While the appraisals, if properly introduced at trial, may be some evidence of value, it is certainly not conclusive on this motion.

The parties further dispute how the settlement proceeds should be applied. It is unclear what those proceeds are comprised of and whether they are items covered under the policy or something else. Northern Funding admits they reflect monies extended awarded by it under the belief Charlie had good title. There is insufficient information on this record for the court to reach any conclusion on how such settlement proceeds should be applied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Northern Funding's motion for summary judgment is granted only to

the extent that liability under the second and sixth causes of action is determined in favor of plaintiff, and it is further

ORDERED that Northern Funding's motion for summary judgment is otherwise denied on the issue of damages, and it is further


ORDERED that this matter is hereby scheduled for a status conference for **September 10, 2007 at 9:30 a.m.** in Part 10, 80 Centre Street.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 9, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUL 16 2007
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