SHORT FORM ORDER

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INDEX
NO.: 26227-06

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 2-20-07
SUBMITTED: 2-28-07
MOTION NO: 001-MOT D

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HENDRIKA VANDERMULEN,

Plaintiff,

-against-

FIDELITY NATIONAL TITLE INSURANCE COMPANY and FIDELITY NATIONAL FINANCIAL, INC.,

Defendants.

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IRWIN POPKIN, ESQ.
Attorney for Plaintiff
1138 William Floyd Parkway
Shirley, New York 11967

HERRICK, FEINSTEIN LLP
Attorneys for Defendants
2 Park Avenue
New York, New York 10016

Upon the following papers numbered 1 to 28 read on this motion to dismiss ; Notice of Motion and supporting papers 1-21 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 22-27; Replying Affidavits and supporting papers 28 ; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint is granted to the extend indicated below.

The plaintiff, Hendrika Vandermulen, applied for a loan to purchase a parcel of real property located at 234 South Magee Street in Southampton, New York. The property was owned by Donald MacPherson, who transferred it to his wife, Carrie MacPherson, on August 30, 2000, for no consideration. Approximately one month later, Donald MacPherson sold the property to Vandermulen for $383,000. WMC Mortgage Corp. (hereinafter "WMC") loaned Vandermulen 100% of the purchase price. Donald McPherson's mortgage on the property was satisfied with $285,000 from the proceeds of the loan Vandermulen obtained from WMC. Although a deed from Carrie and Donald MacPherson to Vandermulen was prepared, it was subsequently lost. Moreover, neither the deed nor the mortgage was ever recorded. Vandermulen's first payment to WMC was due on November 1, 2000. She made one payment on December 31, 2000, and then defaulted.

On March 28, 2001, Vandermulen transferred her interest in the property to 234 South Magee Co., a corporation purportedly owned by her. Although the property was conveyed to the corporation and the deed was recorded on April 9, 2001, 234 South Magee Co., was not incorporated until May 17, 2001.

WMC sold Vandermulen's loan to Ingomar, LP, almost immediately after the closing. By a letter dated September 25, 2001, Ingomar advised WMC that, because Vandermulen's loan did not have a recorded mortgage, WMC was required to repurchase it. The repurchase was completed on July 31, 2002.

By letters dated February 12, 2003, WMC's counsel advised the attorneys who represented Vandermulen and the MacPhersons in connection with the sale to Vandermulen that the mortgage and deed for that transaction were never recorded. WMC's counsel requested their assistance in resolving the matter, but they never responded.

On May 23, 2003, 234 South Magee Co. transferred its interest in the property to Eugene John Sheehan for $450,000. However, Eugene John Sheehan died more than one month earlier on April 6, 2003. The deed was recorded on July 16, 2003. Also on May 23, 2003, Carrie MacPherson executed a deed transferring the property to the deceased Eugene John Sheehan for no consideration. That deed was also recorded on July 16, 2003. John Eugene Sheehan, as attorney-in-fact for the deceased Eugene John Sheehan, mortgaged the property and obtained a loan in the amount of $337,500 from Homecomings Financial Network, Inc., to finance the purchase from 234 South Magee Co. That mortgage was recorded on June 27, 2003.

On September 1, 2003, John Eugene Sheehan, as attorney-in-fact for the deceased Eugene John Sheehan, transferred the property to himself for no consideration. The deed was recorded on October 24, 2003, and returned to Donald MacPherson.

By a letter dated November 17, 2003, WMC's counsel advised the MacPhersons that WMC'S mortgage and the deed transferring the property to Vandermulen were lost prior to recordation and, thus, not recorded. WMC's counsel asked the MacPhersons to execute a replacement deed, but they never did.

On June 1, 2004, John Eugene Sheehan transferred his interest in the property to 234 South Magee Co. for no consideration. The deed was recorded on November 17, 2004, and returned to Donald MacPherson.

In 2004, the defendant Fidelity National Title Insurance Company, which insured Vandermulen's and WMC's interests in the property, commenced an action in Vandermulen's name to compel the MacPhersons to execute a replacement deed. By a letter dated July 30, 2004, Vandermulen directed Fidelity's counsel to discontinue the action on the ground that she had not retained or authorized Fidelity's counsel to commence such an action or to act on her behalf. The action was subsequently discontinued.

In January 2005, Fidelity commenced another action naming WMC as the plaintiff against Vandermulen, 234 South Magee Co., the MacPhersons, and the Sheehans to foreclose WMC's mortgage, for an equitable lien on the property, and to recover damages for fraud. All of the defendants except the deceased Eugene John Sheehan moved to dismiss the complaint, and WMC cross moved for leave to amend the complaint. By an order dated May 29, 2007, this court denied the motion to dismiss and granted the cross motion solely to the extent of adding

Homecomings Financial Network as a party defendant and permitting the plaintiff to clarify the factual allegations in the complaint. The court, on its own motion, dismissed the complaint insofar as it was asserted against the deceased Eugene John Sheehan.

In 2006, Vandermulen commenced this action against Fidelity National Title Insurance Company and its parent, Fidelity National Financial, Inc. (hereinafter "Fidelity"). The complaint contains five causes of action: breach of contract, negligence, violation of General Business Law § 349, fraud, and malpractice. The defendants move to dismiss the complaint pursusant to CPLR 3211(a)(1) and (7).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez,** 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see,* **Goshen v Mut. Life Ins. Co.,** 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see,* **Leon v Martinez**, *supra*; **Guggenheimer v Ginzburg**, *supra*; **Rovello v Orofino Realty Co.**, *supra*). Applying these principals to the case at bar, the court finds that the plaintiff has set forth sufficient factual allegations to survive dismissal of her breach-of-contract claim only insofar as it alleges that the defendants failed to record the deed and mortgage in question.

The plaintiff contends that Fidelity breached its obligations to her under the title insurance policy that she purchased by commencing an action in her name to compel the MacPhersons to execute a replacement deed. However, the documentary evidence conclusively establishes that such an action was permitted under the terms of the title insurance policy that Fidelity provided to the plaintiff. The policy provides, in pertinent part, as follows:

> [Fidelity] shall have the right, at its own costs, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured.
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> In all cases where this policy permits or requires [Fidelity] to prosecute or provide for the defense of any action or proceeding, the insured shall secure to [Fidelity] the right to so prosecute or provide defense in the action or proceeding * * * and permit [Fidelity] to use, at its option, the name of the insured for this purpose.

The plaintiff also contends that Fidelity breached its obligations to her under the title insurance policy that she purchased by commencing an action against her. The plaintiff contends that the WMC action was contrary to the Fidelity's obligation to protect and defend her title to the property. However, the documentary evidence conclusively establishes that Fidelity's obligations to the plaintiff terminated prior to the commencement of the WMC action. The policy provides, in pertinent part, as follows:

> Whenever requested by [Fidelity], the insured, at [Fidelity's] expense, shall give [Fidelity] all reasonable aid (I) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding * * * and (ii) in any other lawful act which in the opinion of [Fidelity] may be necessary or desirable to establish the title to the estate or interest as insured. If [Fidelity] is prejudiced by the failure of the insured to provide the required cooperation, [Fidelity's] obligations to the insured under the policy shall terminate.

The action to compel the MacPhersons to execute a replacement deed was discontinued after plaintiff refused to cooperate with Fidelity's prosecution thereof. Accordingly, the court finds that, since Fidelity's obligation to the plaintiff had terminated, Fidelity was free to commence the WMC action against her.

As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from or in addition to the breach of contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. Merely charging a breach of a "duty of due care," employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim (*see*, **Clark-Fitzpatrick, Inc., v Long Is. R.R. Co.,** 70 NY2d 382, 389-390). The court finds that the plaintiff's negligence, fraud, and malpractice claims do not allege the breach of a duty extraneous to, or distinct from, the contract between the parties (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, supra at 119). Moreover, the plaintiff's fraud claims are not pled with the requisite particularity (*see*, CPLR 3016[6]; **Mountain Lion Baseball v Gaiman**, 263 AD2d 636, 638). Accordingly, the second, fourth, and fifth causes of action are dismissed.

Finally, the plaintiff alleges that Fidelity violated General Municpal Law § 349 by engaging in the unauthorized practice of law in violation of Judiciary Law § 495(1). General Municipal Law § 349(a) declares as unlawful, deceptive acts and practices in the conduct of any business, trade or commerce, or in the furnishing of any service in this state (*see*, **Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank**, 85 NY2d 20, 24). Judiciary Law § 495(1) prohibits the practice of law by corporations and voluntary associations. The plaintiff contends that Fidelity engaged in the practice of law by commencing and prosecuting an action in her name against the MacPhersons and another action in WMC's name against her and others. The

plaintiff contends that, by using in-house counsel employed by Fidelity to represent her and WMC in those actions, Fidelity violated the prohibition against the practice of law by corporations.

While the unauthorized practice of law has been held to constitute a deceptive act within the meaning of General Municipal Law § 349, **Sussman v Grado** (192 Misc 2d 628), upon which the plaintiff relies, is distinguishable. That case did not involve a violation of Judiciary Law § 495(1), but the unauthorized practice of law by a paralegal. In any event, the court finds that Fidelity did not engage in the unauthorized practice of law. Judiciary Law § 495(1) does not apply to any corporation or voluntary association lawfully engaged in a business authorized by statute (*see*, Judiciary Law § 495[4]), nor does it prohibit a corporation or voluntary association from employing attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party (*see*, Judiciary Law § 495[5]).

An insurance company has a direct financial interest in the claim presented against the policyholder and in any suit in which the name of the company may not appear as a party, but which the company is obligated to defend in the name of the policyholder (*see,* NY St Bar Assn Unlawful Practice of Law Op 12 [1970], *citing* Reports of American Bar Association, Volume 64, 278-279 [1939]). Thus, an insurance counsel represents both the carrier and the insured (*see,* NY St Bar Assn Unlawful Practice of Law Op 12 [1970], *citing* **Ratner v Lehigh Valley Railroad Co.**, 26 Misc 2d 981; **Matter of Preferred Accident Ins. Co. v Roesch**, 273 App Div 993; **Shafer v Utica Mutual Ins. Co.**, 248 App Div 279). Moreover, an insurance carrier furnishing legal assistance to its insured is lawfully engaged in a business authorized by statute (*see,* NY St Bar Assn Unlawful Practice of Law Op 12 [1970]). When an insurance company furnishes an attorney in accordance with the terms of the policy, it makes no difference that the attorney furnished is "house counsel" (*see,* NY St Bar Assn Unlawful Practice of Law Op 12 [1970], *citing* **Joplin v Denver-Chicago Trucking Co.**, 329 F2d 396). A corporation may use outside counsel or staff counsel for appearances (*see,* **Toren v Anderson, Kill & Olick,** 185 Misc 2d 23, 26). Thus, an insurance carrier is not engaged in the unlawful practice of law when it furnishes its salaried and duly admitted attorneys to defend its insureds against claims made against them and arising within the terms of their insurance contracts. This is an exception to the general rule (*see*, NY St Bar Assn Unlawful Practice of Law Op 12 [1970]).

The plaintiff contends that, although insurance carriers may use in-house counsel to defend lawsuits against their insureds, they are engaged in the unauthorized practice of law when, as here, they use in-house counsel to commence an action in the name of their insureds. The plaintiff, however, does not cite to any authority in support thereof, nor has the court found any. Moreover, the plaintiff has not provided the court with any reason why the exception to the general rule enunciated above should not apply to the facts of this case. The court finds that when an insurance company furnishes an attorney in accordance with the terms of the policy, it makes no difference whether the insurance company is defending an action against its insured or prosecuting an action on behalf of or in the name of its insured. In either case, the insurance company stands in the shoes of the insured and directs the prosecution or defense of the litigation in order to protect its own interests. The insurance policy in this case clearly authorized the plaintiff to prosecute or defend any action which, in its opinion, was necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. Under these

circumstances, the court finds that Fidelity's actions were not deceptive acts within the meaning of General Business Law § 349. Accordingly, the third cause of action is dismissed.

HON. ELIZABETH HAZLITT EMERSON

DATED: October 9, 2007

J. S.C.