Murphy v Chicago Tit. Ins. Co.

2008 NY Slip Op 30092(U)

January 8, 2008

Supreme Court, Nassau County

Docket Number: 9185-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

KENNETH MURPHY and LINDA MURPHY,

Plaintiffs,

-against-

CHICAGO TITLE INSURANCE COMPANY,

Defendant.

Motion Sequence # 001
Submitted October 10, 2007
XXX

INDEX NO: 9185/07

The following papers were read on this motion:

Notice of Motion..1
Affirmation in Opposition..2
Reply...3

Defendant, CHICAGO TITLE INSURANCE COMPANY (hereinafter referred to as "CHICAGO"), moves for an order, pursuant to CPLR §3211, dismissing the complaint in its entirety, on the ground that the Title Policy excepts the coverage under the claim as demanded by plaintiffs. Plaintiffs, KENNETH MURPHY and LINDA MURPHY oppose the motion, which is determined as follows:

Counsel for defendant relates that the MURPHYS purchased the subject property known as 3 Williams Drive, Massapequa, New York in September 1995 and, at that time, purchased a title insurance policy from CHICAGO. In December 2002, CHICAGO received a claim from the MURPHYS requesting that it provide a defense and indemnification with

respect to an adverse possession claim asserted by the MURPHYS' neighbors in an action entitled *Andrew Schildhaus & Carole Schildhaus v Kenneth Murphy and Linda Murphy,* Nassau County Index No. 1074/02. In essence, the Schildhauses alleged that they are the "real owners" owners of a parcel of land that runs between the neighbors' properties, that is part of the MURPHYS' property but which the Schildhauses adversely possessed for more than twenty (20) years. Said parcel was described as a "parcel improved with a planter, hedges and bush and which runs approximately twenty feet along the westerly edge of plaintiffs' [the Schildhauses'] parcel starting from the northwest corner of plaintiffs' parcel as well as a sprinkler system located beneath the ground of the parcel".

In February 2003, CHICAGO denied the MURPHYS' claim for a defense and indemnification on the Schildhaus law suit based upon the Title Policy's Exceptions from Coverage, Schedule B, Item 1, "Rights of tenants or persons in possession, if any" and, allegedly after review of the agent's file, confirmed its denial of the claim based upon said exception. CHICAGO noted that the Title Policy exceptions from coverage provided, inter alia, as follows:

> This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of :
>
> 1. Rights of tenants or persons in possession, if any.
> 2. Survey made by Baldwin and Cornelius Co., dated October 23, 1970, final date February 24, 1971, shows a two story building with garage under. No variations.
>   Survey inspection dated July 11, 1995 shows:
>   a) fences added along the Northerly and part of the Easterly line (not located);
>   b) hedge added along part of the Westerly line (not located);
>   c) dog pen with fencing West of dwelling.

Schedule B, Exceptions to Coverage, Exhibit "A".

[* 3]

Over the course of many months, and after much correspondence between the parties in which the MURPHYS pointed out that the listed exceptions did not reference the wooden planter box and hedges on the Easterly side of their property, CHICAGO reaffirmed its denial of coverage based upon the Title Policy's Exceptions from Coverage, Schedule B, Item 1, "Rights of tenants or persons in possession, if any". It is CHICAGO's position that the adverse possession of a portion of MURPHYS' property is not discernable from the public record and is, therefore, excluded from the policy coverage.

CHICAGO states that the Schildhaus action was settled by the parties, on April 26, 2006, and more than a year later, the MURPHYS commenced the instant action against CHICAGO. They seek to recover approximately $6,000.00 in defense costs expended in the Schildhuas action. CHICAGO asserts that the complaint must be dismissed because the Title Policy specifically excepts coverage for "Rights of tenants or persons in possession, if any", citing *Price and Monette v First American Title Company of New York,* a Supreme Court, Suffolk County case (Werner, J., 2001), which found for the Title Company under similar circumstances and held, " inasmuch as the underlying action does not involve a defect arising from the rights of a person whose interest appears in the chain of title, the possession exception is applicable even if there has been an investigation of the property by a representative of the title insurance company". CHICAGO argues that even if the survey inspection did not identify the planter box at issue, same is irrelevant because the claim of adverse possession to a portion of the MURPHY property would not appear in the chain of title, which puts it squarely within the exception relied upon by CHICAGO.

In opposition to the motion, counsel for the MURPHYS contends that there is coverage under the policy because CHICAGO sent a representative to perform an onsite inspection of the property and failed to except the planter from coverage. Counsel argues that it would be manifestly unjust if title insurers were granted the ability to perform inspections, exclude items based on the inspections, and then later be permitted to exclude items that they failed to identify in the inspections. Plaintiffs claim that, although a fence on the Easterly side of the property immediately abutting the planter and bushes was excepted from coverage, the inspector must have thought that the planter was on the neighbors side of the fence because he did not identify the structure for exception and CHICAGO later only relied upon the "persons in possession" exception. Moreover, counsel argues that issues of fact preclude the granting of summary judgment and that discovery should go forward to review the underwriting file to determine if the subject planter was addressed when the policy was issued. Additionally, counsel for plaintiffs contends that the ambiguous language of the Title Policy must be construed against CHICAGO. It is plaintiffs' position that the"Rights of tenants or persons in possession, if any" clause speaks to claims that may arise from tenants or other persons in actual possession, who may have rights flowing from the acts of prior owners. Counsel asserts that if CHICAGO intended this exclusion to include adverse possession claims, it should have clearly stated so in its contract., citing *Seaboard Surety Co. v Gilette Co.*, 64 NY2d 304, 486 NYS2d 873, 476 NE2d 272 (C.A. 1984), which holds that an insurer must establish that its exclusion is stated in clear and unmistakable language and is not subject to any other reasonable interpretation.

After a careful reading of the submissions herein, the Court is satisfied that the area improved by the planter box and row of bushes was within the MURPHYS' parcel of property, and that same was acknowledged by CHICAGO in its letter from counsel, John Dietz, dated July 15, 2003. As such, there is no question of fact before the Court but only the question, as a matter of law, of whether CHICAGO should have afforded coverage to the MURPHYS when their neighbors asserted a claim of ownership by adverse possession of the area improved by the planter box and row of buses.

"Because it is not common practice for title insurance examiners to physically inspect the premises prior to the issuance of title insurance policies, most policies except the right of persons in possession: *Fekishazy v Thomson,* 204 AD2d 959, 612 NYS2d 276 (3rd Dept. 1994).

> ...[T]he possession exclusion stems from the practical problems associated with title examination. The title company does not want to be held responsible for some unknown person who might be able to make a claim founded on either possession alone (i.e., adverse possession) or an instrument which would not cross the examiner's path if the public records were examined–for example, an unrecorded deed. Thus any risk attendant to not examining the physical property itself is passed to the insured by way of the exception. The records, however, remain the insurer's concern, for their careful review is the essence of the title examiners task.

Herbil v Commonwealth Land Title Insurance Co., 183 AD2d 219, 590 NYS2d 512 (2nd Dept. 1992).

In the case at bar, there was an inspection of the property. Nonetheless, said inspection, or even a new survey, could not have revealed the potential claim of the Schildhauses for adverse possession. It is the judgment of the Court that the plain language of the contract, that the Title Policy does not insure for the rights of "persons in possession", is applicable to the circumstances herein

> . . . [I]nasmuch as the underlying action does not involve a defect arising from the rights of a person whose interest appears in the chain of title, the possession exclusion is applicable even if there has been an investigation of the property by a representative of the title insurance company.

Price v Monette, supra.

The Court finds that it is irrelevant whether the survey inspection identified the planter box at issue, since its inclusion or exclusion from the survey inspection would not have identified the neighbors claim which was not discoverable by a search of the public records. A survey inspection does not identify ownership and, no matter how precise the survey or survey inspection, it would not have disclosed the claim of ownership by adverse possession. In this Court's view, the "rights of tenants or person in possession" exception is not limited to possessory interests "flowing from acts of prior owners" but includes claims under adverse possession. *See*, *Herbil v Commonwealth Land Title Insurance Co. supra*. Based on the foregoing, it is hereby

ORDERED, that CHICAGO's motion for an order dismissing the complaint is granted. Based upon the documentary evidence submitted herein, the Title Policy excepts coverage for "tenants or persons in possession, if any" and the underlying claim for which the MURPHYS seek coverage is one for adverse possession; and it is further

ORDERED, that it is declared that the MURPHYS are barred from recovering against CHICAGO for breach of the title insurance policy.

The Court has considered the plaintiffs other contentions and find them to be without merit.

All further requested relief not specifically granted is denied.

This constitutes the decision and judgment of the Court.

Dated: January 8, 2008

WILLIAM R. LaMARCA, J.S.C.

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