

**Surace v Commonwealth Land Title Ins.
Co.**

2008 NY Slip Op 31796(U)

June 25, 2008

Supreme Court, Richmond County

Docket Number: 0100216/2008

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 100216/08
Motion No.:001, 002**

**STEVE SURACE, SR.,
MIDRED SURACE, and
TARGEE STREET INTERNAL MEDICINE GROUP, P.C.
RETIREMENT TRUST,**

Plaintiffs

against

**COMMONWEALTH LAND TITLE INSURANCE
COMPANY**

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of these motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	3
Replying Affidavits	4, 5
Supplemental Affirmation	6
Response to Sur-Reply	7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant moves this court for an order dismissing plaintiffs' complaint pursuant to *CPLR* §§ 3211 and 3212. Plaintiffs' cross move for an order granting summary judgment pursuant to *CPLR* §§ 3211 and 3212. Defendant's motion is denied; Plaintiffs' motion is denied.

Facts

This case arises out of a policy of mortgage insurance provided to plaintiffs by defendant. On April 5, 2005 Andrew Stewart ("Stewart") mortgaged the premises located at 1639 Utica Avenue, Brooklyn, New York ("Premises") to plaintiffs. The principal loan amount was \$360,000.00. Defendant insured plaintiffs' mortgage interest by issuing a policy bearing number G32-2034693. Subsequent to the April 5, 2005 mortgage, Stewart once again mortgaged the

Premises to Columbia Capital Company for \$200,000 on July 14, 2005. Through some sort of undisclosed failure on the part of defendant, the April 5, 2005 mortgage to plaintiffs' was not recorded until January 19, 2006. This fact is uncontested by the parties.

On November 11, 2005 plaintiffs brought a claim against the defendant. As a result of this claim defendant assigned the law firm of Farrell Fritz, P.C. to represent plaintiffs in an action in Supreme Court, Kings County to quiet title to the premises ("the Brooklyn Action"). In conjunction with the insurance policy held by plaintiffs, defendant directly paid the law firm for all legal fees incurred with the representation of plaintiffs in that action.

The Kings County Clerk entered the judgment of the Supreme Court, Kings County in the Brooklyn Action on November 27, 2007. In that decision the court awarded plaintiffs the principal sum of \$265,377.65 "together with interest thereon at the mortgage loan rate from April 5, 2005." In addition, the court declared that plaintiffs held a first priority equitable lien encumbering the Premises. Defendant brings it to the court's attention that as a result of a separate action plaintiffs' secured a judgment against Stewart on their promissory note in the sum of \$386,496.16.

Plaintiffs argue that defendant's failure to properly record the mortgage with the county clerk damaged them in the approximate amount of \$94,622.35. Plaintiffs base their argument on the fact that they purchased mortgage insurance from defendant to guarantee a first priority lien in the amount of \$360,000. However, through the alleged negligence of defendant plaintiffs no longer holder a first priority lien in the amount of \$360,000, but instead have a reduced first priority lien of \$265,377.65 plus interest from April 5, 2005.

Defendant argues that plaintiffs' action for payment is premature in that they have not foreclosed their mortgage against Stewart. Defendant contends that without a judgment of foreclosure plaintiffs cannot demonstrate damages.

Discussion

Plaintiffs bring three causes of action against defendant: 1) for breach of contract for defendant's failure to pay plaintiff “. . . the total sum of \$128,737.00 representing the subordinated lien of \$94,622.35 plus interest at the stated Mortgage Loan rate of 13% per annum in the sum of \$33,868.50 to January 4, 2008, plus per diem interest of \$33.70 thereafter;”¹ 2) for negligence for “. . . failing to timely record plaintiffs' Mortgage. . . ”²; and 3) for attorney's fees.

Defendant argues that the law prevents plaintiffs from bringing an action against it for negligence. To support its position, defendant cites the decision of the Second Department in *Logan v. Barretto*.³ Defendant asserts that the Appellate Division's holding prevents plaintiffs from maintaining a cause of action for negligence against title insurance companies. Specifically, defendant's cite a portion of the *Logan* opinion where the Second Department cites the First Department as follows:

[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 Title Ins. Co.*, 228 AD2d 635, 645 NYS2d 826, quoting, (5A Warren's Weed, New York Real Property Title Insurance, §1.03[6][4th ed.] at 15). (Internal quotations omitted).⁴

However the Second Department's decision in *Logan* does not apply in this matter. In *Logan* plaintiffs brought an action against a title insurance company for failing to disclose certain

¹ Plaintiffs' complaint at 3-4

² *Id.* at 4

³ *Logan v. Barretto*, 251 AD2d 552 [2d Dep't 1998].

⁴ Affirmation of Defendant at 10.

Sanitary Code violations issued by the county in its title report. In reversing the trial court's denial of summary judgment, the Second Department, held that while the Sanitary Code violations were missing from the title report, their absence did not amount to a breach of the title company's contractual obligation. The court analyzed this fact pattern based on the language of the title company's policy language. The contract executed between the parties in that action insured plaintiffs against ". . . loss occasioned by a defect in title, or unmarketability of the title."⁵ The court found that the liens stemming from the Sanitary Code violations did not amount to an "encumbrance on the title," or render the title unmarketable. Contrary to the opinion advanced by defendant, the Second Department determined that a negligence action may be brought against a title insurer in certain factual situations.

In addition, to these Appellate Division decisions, defendant cites the Court of Appeals decision in *L. Smirlock Realty Corporation v. Title Guarantee Company*⁶ for the principle that, ". . . a title insurance company cannot be sued in negligence by an insured because all claims in negligence merge into and become extinguished by the title insurance policy itself."⁷ After an examination of the decision cited by defendant, this court determined that defendant is referencing a statement by Court of Appeals in a footnote that states: ". . . any claim of negligence in the title search merged into the subsequently issued title policy pursuant to the express terms of the certificate of title."⁸

This court cannot adopt the interpretation of these cases expounded by defendant, that plaintiffs are prevented from maintaining a cause of action for negligence based on the evidence before this court. The success of the causes of action brought by plaintiffs turn on whether plaintiffs suffered actual damages as a result of defendant failing to timely record plaintiffs'

⁵ *Logan*, 251 AD2d at 553.

⁶ *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 52 NY2d 179, [1981].

⁷ Affirmation of Borchert at 9.

⁸ *L. Smirlock Realty Corp.*, 52 NY2d at 185.

mortgage. It is uncontested that plaintiff contracted with defendant, to provide mortgage insurance in the amount of \$360,000.00. It is further uncontested that as a result of actions taken by defendant it no longer held a mortgage of first priority in the amount of \$360,000.00. The Supreme Court, Kings County reduced plaintiffs' first priority lien from its original amount to \$265,377.65 plus interest from April 5, 2005. Defendant acknowledges that the court's decision in the Kings County action, reduced plaintiffs' lien on the Premise. Defendant fully acknowledged that plaintiffs' position changed to its detriment as a result of its failure to properly record plaintiffs' mortgage. In its reply affirmation, defendant's attorney states "[t]he equitable subrogation judgment that Surace also shows that Surace does have a first priority lien *for the bulk of its loan.*"⁹ (emphasis added)

In spite of the clear economic loss between the actual mortgage held by plaintiffs and the equitable subrogation judgment issued in the Brooklyn Action, defendant maintains that a finding of damages would be premature without plaintiffs having first foreclosed on its \$360,000.00 mortgage.

The Court of Appeals reviewed the concept of indemnity as it relates to title insurance in *Empire Development Company v. Title Guarantee and Trust Company* in 1918.¹⁰ In that case the Court of Appeals stated:

It has been said often that every policy of insurance is a contract of indemnity. The accuracy of this statement is a question of definition. . . if the word 'indemnity' is given a broader sense; if it means that whatever the language of the contract the insured may recover only the precise amount of the pecuniary damage caused to him by the contingency against which he seeks protection, then it is not now and never has been an inflexible rule . . . When it is said that [insurances] are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the

⁹ Reply Affirmation of Borchert at 4.

¹⁰ *Empire Development Company v. Title Guarantee and Trust Company*, 255 NY 53, [1918].

thing insured. The amount of this interest and the amount to be paid in case of loss may be fixed by arbitrary agreement, even before the loss.¹¹

It is clearly evident that while insurance contracts are ones of indemnity as a matter of public policy, the Court of Appeals, holds that the ‘indemnity’ is given broad consideration. After determining the meaning of ‘indemnity’ in the context of insurance contracts, the Court of Appeals turned its attention to the definition of the words “loss or damage” in the context of a title insurance policy. The court stated:

The policy itself defines what shall constitute a loss. . . As is said in *Foehrenbach v. German-American Title & Trust Company* (217 Penn. St. 331) the word ‘loss’ is a relative term. Failure to keep what a man has or thinks he has is a loss. What the word means is to be measured by the standard accepted between the parties.¹²

The contract of insurance executed between the parties to this action defines loss in the following terms:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, COMMON WEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of . . .

5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage. . . ¹³ (emphasis original)

¹¹ *Id.* at 58.

¹² *Id.* At 59

¹³ Plaintiffs’ exhibit D.

In the present matter plaintiffs insured a lien with defendant in the amount of \$360,000.00. As a result of the actions by the defendant, the plaintiffs are left with a lien that leaves approximately \$94,622.35 as unenforceable as a first position lien. Additionally, the plaintiffs contracted with defendant to insure that their mortgage would enjoy first priority status against the subject property. Defendants actions caused plaintiffs to be left with two liens, one enjoying first priority at a significant shortfall and a second lien holding an unknown priority.

Based on the language of the contract executed by the parties to this action, this court determines that the decrease in value between the \$360,000.00 insured by plaintiffs to be a first priority lien and the \$265,377.65 plus interest from April 5, 2005 awarded in the Kings Country action is a loss as a matter of law.

While, based on the evidence currently before this court in these motions, it is likely that plaintiffs did indeed suffer a loss due to the action of the defendant, the full extent of which is unknown. The Appellate Division, First Department summarized the New York law with respect to awarding damages based on breaches of a title policy in *Citibank v. Chicago Title Insurance Company*.¹⁴ In that decision the court stated:

It is a well-settled principle that the title insurer's obligation to indemnify is defined by the policy itself and limited to the loss in value of the title as a result of title defects against which the policy insures. As the Court of Appeals stated in *Smirlock* . . . 'a policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title.' 'Such a policy entitles the insured to indemnity only to the extent that its security is impaired and to the extent of the resulting loss which it sustains.'¹⁵ (internal citations omitted)

Here it is clear that plaintiffs did indeed suffer a loss, however the extent of which is

¹⁴ *Citibank v. Chicago Title Ins. Co.*, 214 AD2d 212, [1st Dep't 1995].

¹⁵ *Id.* at 221.

undetermined. Defendant argues that it is unknown to what extent, if any, plaintiffs are damaged without a judgment of foreclosure and subsequent sale. This court agrees. While plaintiffs provided this court with various out of state opinions that hold the insured's loss should be measured as the amount security that is impaired by the existence of a prior lien; this court does not find these cases to be persuasive.

Conclusion

Based on the evidence included as exhibits to these motions it is the finding of the court that this action proceed to trial before a trier of fact. The plaintiffs adequately demonstrated that meritorious causes of action exist against defendant and they deserve their day in court. However, absent any New York state case law in support of their position, this court cannot find that they are entitled to summary judgment. The court reserves its decision concerning the payment of attorneys fees for this motion until a final determination of this matter.

Accordingly, it is hereby:

ORDERED, that defendant's motion for summary judgment is denied in its entirety; it is further

ORDERED, that plaintiffs' motion for summary judgment is denied in its entirety; it is further

ORDERED, that defendant shall pay to plaintiffs' attorney Howard File, the sum of \$94,622.35 to be held in escrow pending the completion of this matter; it is further

ORDERED, that plaintiffs' are to commence a foreclosure action against Andrew Stewart based on their mortgage on 1639 Utica Avenue, Brooklyn, New York, by August 29, 2008, with fees and costs to be attributed to defendants at the final determination of this action; it is further

ORDERED, that this action shall be held in abeyance pending the determination of the foreclosure action; and it is further

ORDERED, that the parties shall report to DCM Part 3 at 9:30 A.M. on Wednesday, October 22, 2008.

ENTER,

DATED: June 25, 2008

Joseph J. Maltese
Justice of the Supreme Court