

Indymac Bank, FSB v Lamattina

2008 NY Slip Op 33000(U)

October 31, 2008

Supreme Court, New York County

Docket Number: 403764/2006

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

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

PART 10.

Index Number : 403764/2006

INDYMAC BANK, FSB

vs.

LAMATTINA, JOSEPH

SEQUENCE NUMBER : 014

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 14

MOTION CAL. NO. _____

I 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 IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
NOV 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

OCT 31 2008

Dated: _____

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
INDYMAC BANK, FSB

Plaintiff,

-against-

JOSEPH LAMATTINA; LAMATTINA &
ASSOCIATES, INC; VINCENT ANCONA;
UNION AMERICA MORTGAGE, INC.;
FRANK ALFIERI; JAMES LAFORTE JR.;
TINA LAFORTE; TARA CAMINITI;
CHRISTINE ALFIERI; NICK LOMBARDI;
PRELUDE ABSTRACT CORP.; GDA
CONTRACTING, INC.; HILLIS, INC.;
GMC LENDING & MORTGAGE SERVICES
CORP.; GMC LAND SERVICES, INC.;
RICHMOND ABSTRACT CORP.;
RICHMOND ABSTRACT OF FLORIDA,
INC.; JOSEPH W. LAFORTE; MONIQUE
LAFORTE; NEW CORP CONSTRUCTION
CORP.; JAMES LAFORTE SR.; MICHAEL
O'LEARY; VICTORY STATE BANK, AND
JOHN DOES "1" THROUGH "10,"

Defendants.

-----X
VICTORY STATE BANK,

3RD Party Plaintiff,

-against-

KEY LAND SERVICES, INC. and
COMMONWEALTH LAND TITLE
INSURANCE COMPANY, INC.,

3RD Party Defendants.

DECISION/ ORDER
Index No.:403764/2006
Seq. No.: 014

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

FILED
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

T.P. Index No.:
590021/08

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

Papers	Numbered
Commonwealth n/m (3211) w/DMS affirm, exhs	1
DSD supporting affid (sep back) w/exhs	2
Victory Bank opp w/RMB affirm	3

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

The court has before it the pre-answer motion by one of the third party defendants' ("Commonwealth") to dismiss Victory State Bank's ("Victory Bank") third party complaint against it. Victory's claims against Commonwealth and Key Land are for contribution and indemnification if the plaintiff in the original action, IndyMac Bank, FSB ("IndyMac") recovers a money judgment against Victory. Victory opposes Commonwealth's motion in its entirety. The other named 3rd party defendant, Key Land Services, Inc. ("Key Land"), takes no position on the motion, and it is unclear whether it has even appeared in this action.

In connection with this motion to dismiss for failure to state a cause of action, the court will consider whether, accepting all of the plaintiffs' facts as true, they support the causes of action asserted. CPLR § 3211 (a) (7); Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). Since Commonwealth also moves based upon documentary evidence, i.e a report of title, the court will also decide whether the document the 3rd party defendant has put forth definitively disposes of plaintiff's claims. CPLR § 3211 (a) (1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st Dept 1995).

Facts Considered and Arguments Presented

IndyMac is a bank in the business of funding residential mortgages. It claims

that one or more of the defendants were engaged in a number of fraudulent, deceptive (and criminal) acts, including money laundering and conversion. According to IndyMac, it was defrauded into wiring monies for loans that were never paid to the rightful borrowers, but instead used by some of the defendants for personal benefit. In connection with these mortgages Vincent Ancona and his company Union America Mortgage, Inc. (Collectively "Ancona") were the brokers and LaMattina & Associates, Inc. ("LAI") was the settlement agent for the loans in question. LAI maintained bank accounts at Victory Bank, including the accounts into which the missing monies were originally wired. IndyMac contends that many of the fraudulent transactions and deceptive activities undertaken by the defendants were conducted through accounts that LAI maintained at Victory Bank. IndyMac contends that Victory Bank was negligent in monitoring and investigating the "signs of misappropriation" in these accounts, thereby facilitating defendants' fraudulent activities. After a prior motion to dismiss, the only remaining claims remaining against Victory Bank are for negligence and conversion. Order, Gische J., 2/13/08.

Although Victory Bank denies any liability to IndyMac, it brought a third party action, contending that if it should be found liable to IndyMac, then Commonwealth and Key Land are responsible to it under theories of contribution and indemnification. Victory Bank alleges that certain acts of Commonwealth and Key Land lulled IndyMac into making the wired transfers of money which are the basis of IndyMac's underlying causes of action.

It is alleged and supported by the un-refuted documentary evidence that Commonwealth's agent (Key Land) issued a commitment for a title insurance policy

("title report") in connection with a mortgage loan made by IndyMac to Joan, Horace and Junior Richards. ("the Richards loan"). Victory Bank contends that although Key Land initially listed on the title report an outstanding prior mortgage on the Richards' property ("Dime mortgage¹") marking it as an exception to title, at closing it marked the mortgage as "omit, paid at closing." It is alleged that although the mortgage was eventually paid off on December 27, 2006 (and recorded January 9, 2007) the mortgage was not, in fact, satisfied at the time of closing which took place on June 29, 2005. Thus the representation in the title policy, that the Dime Mortgage was paid at the time of closing, was false. Victory Bank claims that Key Land either knew or should have known that the representation that the Dime mortgage had been paid was false. Victory Bank alleges that IndyMac relied on the false representation that the Dime Mortgage had been paid at closing and as a result continued to wire monies and fund subsequent loans based upon its belief that the proceeds of the Richards loan had been properly applied, in part, to repay the Dime mortgage. It is these factual assertions which underlie Victory Bank's third party complaint for contribution and indemnification against Commonwealth and Key Land.

In its complaint, IndyMac has not asserted any direct claim against Commonwealth or Key Land in this action. The Richards loan is not part of the underlying complaint brought by IndyMac against any of the defendants. The IndyMac complaint concerns loans made in July and August 2005, which was after the Richard's loan already closed.

Commonwealth argues that as a matter of law, Victory Bank's claims must be

¹The Dime mortgage was later assigned to Bank of America.

dismissed because the title report was not prepared for the benefit of IndyMac, but rather for the benefit of the title insurance company, here Commonwealth. In addition it argues that as a matter of law the representations made in any title report do not survive the delivery of the policy or otherwise give rise to a cause of action in negligence or misrepresentation. Thus, Commonwealth argues that because IndyMac cannot assert a direct claim against it, Victory Bank has no claim for contribution or indemnification. Commonwealth further argues that contribution does not apply, where as here the only loss is economic resulting from breach of contract. It argues that there is no contractual indemnification because there is no such contract and no common law indemnification because Victory Bank has not discharged any duty owed by Commonwealth to IndyMac.

Victory Bank acknowledges that while an insurer of title cannot be sued for negligence or breach of contract in connection with a title report, it distinguishes the instant action as being one for actual fraud. It further states that under its claims for contribution, it is not seeking economic loss for breach of contract, but rather contribution for the actions asserted against it for negligence and conversion, both of which sound in tort. Victory Bank acknowledges that there is no contract that supports contractual indemnification. Its common law indemnification claim is based upon principles of unjust enrichment.

Discussion

Victory Bank Bank's causes of action for contribution and indemnification are derived from a claim that Commonwealth's alleged actions otherwise give rise to a direct claim for damages by IndyMac. Thus, Victory Bank alleges that the false

representations made in the title report issued in connection with the Richard's loan gives rise to a claim for damages by IndyMac against Commonwealth. Because this court holds that the facts as alleged do not state a direct cause of action by IndyMac against Commonwealth and/or Key Land, the derivative causes of action for contribution and indemnification likewise fail.

It is well recognized that a title report, which lists defects in title, is separate from the title insurance policy that may ultimately be issued. Citibank N.A. v. Chicago Title Ins. Co., 214 AD2d 212 (1st Dept 1995); L. Smirlock Realty Corp. v. Title Guarantee Co., 52 NY2d 179 (1981). The title report is made for the benefit of the title company, so that it can either have such impediments to title cleared before policy is actually issued or make them an exception to coverage. Citibank N.A. v. Chicago Title Ins. Co., supra at 219. Thus, it has been held that any report of title merges with and does not survive any subsequently issued policy of insurance. Citibank N.A. v. Chicago Title Ins. Co., supra at 219.

At bar the title report was made for the benefit of Commonwealth. Commonwealth thereafter issued a title policy. By marking the Dime mortgage paid, when it had not in fact been paid, Commonwealth was obligated under the policy to pay for any defect in title occasioned by the outstanding Dime mortgage.² IndyMac, however, has no direct claims arising from the defective and false title report, which was merged into the subsequently issued policy of title insurance. This result is consistent with the Appellate Division, first department case of Citibank N.A. v. Title Ins. Co.,

²Since the Dime mortgage was in fact satisfied shortly after closing the Richards loan, it does not appear that any claim was filed under the Commonwealth policy.

where the court held that, as a matter of law, a bank could not maintain an action against a title insurer based upon a negligent title search after a policy had been issued. Victory Bank tries to factually distinguish the facts of this case from Citibank N.A. v. Chicago Title Ins. Co., arguing that the claims it alleges IndyMac can pursue against Commonwealth are for fraud and not negligence. Although the Citibank case involved claims of negligence, the Court's reasoning included and would apply equally to misrepresentations in the title report, whether deliberate or not. That is because once the policy is issued, it is the title company itself that becomes responsible for mistakes or misrepresentations in the title report. It is the nature of the title insurance contract.

The claim for contribution fails because there is no underlying claim for tort by IndyMac against Commonwealth.³ The claim for indemnification fails for additional reasons as well. Victory Bank has conceded that there is no claim for contractual indemnification. Common law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. Baron v. Grant, 48 AD3d 608 (2nd Dept 2008). IndyMac's negligence claims against Victory Bank are for other transactions having nothing to do with the Richards' loan.

Since the third party complaint against Commonwealth fails to state the causes of action on which relief can be granted, the motion to dismiss must be granted. The 3rd party action is hereby dismissed. Although Key Land has not taken a position on

³The collateral dispute about whether the contribution claim sounds in tort or breach of contract is not reached by the court.

Commonwealth's motion, it is only sued herein as Commonwealth's agent. An agent is not liable to a third party for nonfeasance of duties that were delegated to it by its principal, but only its "affirmative acts of negligence or other wrongs." Greco v. Levy, 257 A.D. 209, 211 (1st Dept 1939) *affd* 282 N.Y. 575 (1939). Therefore, the 3rd party complaint is dismissed as to Key Land as well. The clerk shall enter judgment in favor of the 3rd party defendants against the 3rd party plaintiff dismissing the 3rd party complaint.

Conclusion

It is hereby

ORDERED that Commonwealth's motion for the preanswer dismissal of this action is granted for the reasons stated in the court's decision and order; and it is further

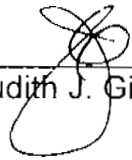
ORDERED that the clerk shall enter judgment in favor of Key Land Services, Inc. and Commonwealth Land Title Insurance Company, Inc. (3rd party defendants) against Victory Bank (3rd party plaintiff) dismissing the 3rd party complaint; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 31, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK