[*1]

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

PRESENT: WALTER B. TOLUB PART

Index Number : 601608/2004

OLD REPUBLIC

vs.

AMERICAN PIONEER

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 10.3.08

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 is decided in accordance with the accompanying memorandum opinion

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/23/09

WALTER B. TOLUB J.S.C.

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

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: IAS PART 15

----------x

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,

Plaintiff,

Index No. 601608/04
Mtn Seq. 001

-against-

AMERICAN PIONEER TITLE INSURANCE COMPANY,

Defendant.

----------x

WALTER B. TOLUB, J.:

In this action between two real estate title insurance companies, plaintiff seeks indemnification for expenses incurred in representing its insured in litigation which arose out of the purchase of premises from the defendant's insured. The action is before the court in connection with the parties' motion and cross-motion for summary judgment, motion sequence #001.

In previous related proceedings, Justice Sherry Klein Heitler addressed the competing claims to the premises known as 145 West 132nd Street, New York, New York (the property). *See Pope, as Executrix of the Estate of Maud Atkins, and Smith v Saget, et al.*, Index No. 119884/02 (Sup Ct, NY County 1/5/2005) (the Pope Action). In the Pope Action, Justice Heitler found that the deed transferring title from 96-year-old Maud Atkins to Alex Saget (Saget) was void, that the ultimate purchasers of the property Eliazer Elias (Elias) and Alew Property Management (Alew), did not hold valid title to the property, and that Sun Trust Mortgage, Inc. (Sun Trust) had lost its mortgage security.

These parties were advised to look to their own title insurance for reimbursement. Summary judgment in favor of these parties was denied, as questions of fact remained as to whether Elias, Alew and or Sun Trust knew or should have known that the deed from Maud Atkins to defendant Saget was a forgery.

Thereafter, plaintiff paid out the entire mortgage title policy to one of its insureds, Sun Trust, in the amount of $465,200.

In the present action, plaintiff Old Republic National Title Insurance Company (Old Republic) has sued defendant American Pioneer Title Insurance Company (American Pioneer) for breach of contract, indemnity, contribution, and fraud. Old Republic alleges that it had insured Elias and Sun Trust in connection with the purchase and mortgaging of the subject premises based on an indemnification agreement it obtained from American Pioneer. Elias had contracted to purchase the property from Mercury Homes Rehab LLC (Mercury Homes), who had, in turn, taken title from Saget. At the closing of title between Elias and Mercury Homes in 2002, Old Republic raised an exception to Mercury Homes's title based on the absence of proof that Maud Atkins was still living when the deed transferring title to Saget was delivered. Old Republic's abstract company, Junction Abstrac, contacted American Pioneer's abstract company, Equity Settlement Services, Inc., on August 7, 2002, the day of the Mercury Homes/Elias

closing, and requested a letter of indemnification from American Pioneer regarding this exception in order for the sale to close. With a verbal promise that American Pioneer would issue such a letter, the sale between Mercury Homes and Elias closed on August 7, 2002. On August 8, 2002, American Pioneer issued a letter of indemnification to Old Republic. That letter of indemnity stated that in consideration of Old Republic's agreeing to issue a policy of title insurance without exception to the objection, or with affirmative coverage to said exception, American Pioneer agreed to

> indemnify and hold [Old Republic] harmless from all loss, cost or damages which it may sustain by so doing as set forth herein.

Additional language stated that the letter of indemnity was limited, as follows:

> to the terms and conditions of the policy issued by American Pioneer Title Insurance Company. A prerequisite to any recovery under this indemnity is conditioned upon your company's liability under its policy issued in this transaction. As a condition precedent to this indemnification, American Pioneer Title Insurance Company must receive written notice of any claim covered hereby within a reasonable time and reserves the right to engage counsel of its choice in defense of said claim.

In its answer, defendant asserted six affirmative defenses: failure to state a cause of action, plaintiff's damages were

caused by its own actions, or by the actions of third parties, no duty owed to plaintiff, waiver, laches and estoppel, and the lack of any damage to plaintiff.

Old Republic moves for summary judgment, claiming that defendant has no defense to this action, and that the affirmative defenses raised by defendant are merely pro forma, without any substance.

American Pioneer has cross-moved for summary judgment, claiming that it never agreed to indemnify Old Republic for the Sun Trust mortgage transaction, that the amount of title insurance which Old Republic issued was never revealed to American Pioneer when the indemnity letter was sought, that American Pioneer had no knowledge that Old Republic had issued title insurance for $590,000, more than three times the amount that American Pioneer had issued for the same property three weeks earlier, that American Pioneer never issued a "straight letter" of indemnity, that American Pioneer limited its obligation to indemnify Old Republic to the terms and conditions of the policy it had issued, and that its liability to Old Republic is limited to the amount of the policy it issued in the transaction it had insured, to $190,000.

Both sides concede that an indemnity agreement was reached before the August 7, 2002 transaction between Mercury Homes and Elias closed. However, what they fail to agree on is the amount

that American Pioneer agreed to indemnify Old Republic for, and the character of the coverage, whether for fee title insurance only, or for fee and mortgage insurance.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Old Republic has offered affidavits from James Pedowitz, Esq. (Pedowitz) to establish, through evidence of custom and usage in the industry, that American Pioneer's "straight" letter of indemnity was unconditional and unlimited as to amount.

American Pioneer offers the affidavit of one of its title underwriters to support its claim that it had no knowledge of any mortgage title insurance being involved in the subsequent sale to Elias, and that it only agreed to indemnify up to the amount of the policy it had issued to its insured several weeks earlier. This witness points to the language in the subsequently issued letter of indemnity, which states that the indemnity is subject to the terms and conditions of the policy which American Pioneer issued to its insured.

The parties do not dispute that they entered into an indemnity agreement on August 7, 2002; however, the parties'

intentions regarding the material terms of the agreement remain in dispute. Although the parties seek a summary decision by the court, the existence of material questions of fact precludes summary judgment for either side. Pedowitz addresses the inadequacy of each of American Pioneer's affirmative defenses, concluding that the defenses are "without substance," and that defendant has not indicated any "clear" or "specific" defense against Old Republic's claims. Pedowitz also addresses issues he anticipates that American Pioneer will raise, such as the fact that it was American Pioneer's intent to exclude coverage for plaintiff's mortgagee from the indemnity agreement.

However qualified Pedowitz may be on issues related to title insurance, the sufficiency of defendant's affirmative defenses is a matter uniquely within the "exclusive prerogative of the court to render a ruling on a legal issue [and] the attempt by a [party] to arrogate to himself a judicial function under the guise of expert testimony will be rejected." *Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 (1st Dept 2001). Pedowitz's opinion on the sufficiency of defendant's pleading is thus of no weight.

With respect to the issue of American Pioneer's intent to exclude coverage for plaintiff's mortgagee, Pedowitz opines that the phrase "policy of insurance" is not limited, either expressly or implicitly, to either the fee or mortgage interests, and that

the indemnity agreement therefore covered both of these coverages by Old Republic.

Pedowitz also opines that the "amount of insurance," separately listed in a Schedule A to the policy, is entirely different from the "terms and conditions" of the defendant's policy, based on the industry's rate manual and the absence of a space on industry- accepted forms for the amount of insurance.

Pedowitz's opinion may be accurate, as far as it goes, but it still does not resolve the factual issue of the parties' intent regarding the type and extent of the indemnity agreement's coverage, when the oral indemnity agreement was reached on the day of the closing. The affidavit of American Pioneer's title underwriter raises more factual issues, without resolving any.

Thus, the motions for summary judgment must be denied.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied.

Counsel for the parties are directed to appear for a Pre-Trial Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York, at 11:00 a.m. on March 13, 2009.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/23/09

HON. WALTER B. TOLUB, J.S.C.