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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

KOSSUTH 3 INC.,

INDEX NO.: 13378/08

Plaintiff,

MOTION DATE:11-12-08
SUBMIT DATE:1-14-09
SEQ. NUMBER - 001

-against-

STEWART TITLE INSURANCE COMPANY,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 10-14-08.....1
Affirmation in Opposition, dated 1-6-09.....2
Affirmation in Reply, dated 1-13-09.....3

Plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied.

Plaintiff purchased premises known as 17 Kossuth Place, Brooklyn, New York (the Premises) and took title by deed dated April 3, 2006. Plaintiff alleges that defendant issued a title insurance policy to it insuring that plaintiff owned the Premises free of liens but that when plaintiff conveyed the Premises to another by deed dated approximately one year later, the purchaser claimed that the City of New York (the City) had asserted a lien on the

Premises for demolition work. Plaintiff has attached a single page paper from the City Department of Housing Preservation and Development (DHP) that it claims is evidence of a lien dated May 5, 2005 but has not presented any support to demonstrate that this single page document constitutes a lien or any other evidence to establish that the proper requisites to create a lien were performed by the City.

Defendant asserts that no lien has ever been created because the City did not follow its own procedures to perfect. Defendant's attorneys have submitted affirmations intended to demonstrate that they recently (apparently in preparation for this motion) conducted searches of City records and were unable to locate any proof of a lien for the work performed.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant

establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d

519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Because plaintiff has failed to make a *prima facie* showing of entitlement to relief, the motion is denied. Although the complaint is predicated on a policy of title insurance, there is no policy attached to either the complaint or the motion papers. Consequently this motion

omitted a document necessary to its determination. *Wells Fargo Home Mortgage Inc. v. Mercer*, 35 AD3d 728 (2d Dept. 2006). A document which appears to be a title search is attached by plaintiff, but this document is by its own terms, an agreement to issue defendant's standard form of title insurance policy subject certain conditions and on certain terms.

The City Administrative Code contains procedures governing unsafe buildings and prescribes procedures for the removal or repair of structures by the owners thereof, the docketing of notice thereof, service of notice upon certain persons of interest, the issuance of an order, the conduct of a survey and the instituting of a proceeding in the Supreme Court. Demolition may not take place absent an order from the Supreme Court and it is only after the cost of demolition has been proven to the court that a judgment may be entered against the unsafe premises. An alternative expedited procedure exists for the temporary safeguarding of structures in imminent danger. See New York City Charter Code, Amendments and Rules New York City Administrative Code (the Code) Title 26, Ch1, Subch. 3. Art. 8 §26-235 *et seq*. Code Title 27 Ch.2, Subch. 5 Art. 8, §27-2144, requires that all expenses incurred by the City constitute a lien when certain conditions have been met, including a definitive amount, a filing in the department of buildings and a filing in the building department. It is a condition precedent to the enforcement of a lien against a subsequent good faith purchaser that the entry be made in the building department records but once made, entry is notice to all parties.

It has been held that filing with the City Collector is required to enforce a lien against a subsequent purchaser, that a lien is not created until filing with the City Collector and priority over subsequent purchasers is not attained until filed with HPD. *Rosenbaum v. City of New York*, 96 NY2d 468, 473 (2001); *Brooklyn LLC, v. City of New York*, 16 Misc. 3d 681 (Sup. Ct. Kings County 2007); *Cf Matter of Williams v. City of New York*, 46 AD3d 909 (2d Dept. 2007).

Moreover, inasmuch as plaintiff is asserting that the City has a valid lien on the Premises, plaintiff is required as part of its *prima facie* showing of entitlement to summary judgment to show that the City followed its own statutes and ordinances in connection with the creation and filing of the lien. While it is true that the title search attached to the motion papers contains certain indecipherable handwritings there is no policy as required thereby.

Plaintiff has not provided a policy of title insurance and has not demonstrated that a lien did in fact exist and if so, that the defendants policy provided coverage in favor of plaintiff. *See Aubuchon Realty Company, Inc., v. Fidelity National Title Insurance Company*, 295 AD2d 725 (3rd Dept. 2002); *Citibank, N.A., v. Chicago Title Insurance Company*, 214 AD2d 212 (1st Dept. 1995); *Zev Cohen, LLC v. Fidelity National Title Insurance Company*, 15 Misc 3d 798, 805 (Sup. St. Kings County 2007).

Merely attaching a one page bill from the City requesting payment for demolition performed in 1997, without more, does not establish that the City did in fact properly create and give notice to the public of a lien.

In sum, in order for plaintiff to recover on its policy of title insurance, plaintiff must

demonstrate that the City had a valid and properly noticed or filed lien against the Premises for the amounts claimed and that defendant insured plaintiff that such a lien did not exist at the time of issuance of its policy of title insurance.

Because plaintiff has not made a prima facie showing of entitlement to relief, it is not necessary for the Court to make a determination of whether defendant has raised sufficient issues of fact so as to require a denial of this motion on such grounds. *Spahn v. Wohlmacher*, 52 AD3d 815 (2d Dept. 2008).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 21, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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