

Jorif v Stewart Tit. Ins.

2009 NY Slip Op 30776(U)

March 31, 2009

Supreme Court, Nassau County

Docket Number: 20302/06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

DOUGLAS JORIF,

Plaintiff,

-against-

STEWART TITLE INSURANCE,

Defendant.

Motion Sequence #1
Submitted December 15, 2009
XXX

INDEX NO: 20302/06

The following papers were read on this motion:

Notice of Motion.....1
 STEWART's Memorandum of Law in Support.....2
 Affirmation in Opposition.....3
 Memorandum of Law of Plaintiff "Motion for Summary Judgment".....4
 Reply Affirmation.....5

Requested Relief

Counsel for defendant, STEWART TITLE INSURANCE (hereinafter referred to as "STEWART"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint, with prejudice, on the ground that plaintiff fails to state a claim, as a matter of law. Counsel for plaintiff, DOUGLAS JORIF, opposes the motion and, though no cross-motion is interposed, seeks summary judgment against STEWART and an award of punitive damages. The motion is determined as follows:

Background

In this litigation, plaintiff seeks to recover the sum of \$15,000.00 in compensatory damages and the sum of \$15,000.00 for punitive damages, plus interest from April 1, 2003, a sum provided by plaintiff at the closing of the sale of his home, in about July 1998, as security for the satisfaction of an open mortgage disclosed in the title report issued by CMS Abstract Inc. (hereinafter referred to as "CMS"), between plaintiff and one, Earl B. Broglin. In essence, plaintiff contends that, when the outstanding mortgage was satisfied, he sought return of his \$15,000.00 from CMS, as escrow agent, only to find that CMS was defunct and that the security funds in their possession were looted. Therefore, plaintiff sought the return of his money from STEWART, on the theory that CMS was acting as the agent for a disclosed principal, STEWART, the title insurer.

Specifically, on July 22, 1998, at the closing of residential real estate, a Title Insurance Policy was sought by the purchaser of the JORIF residence from the defendant, STEWART. Upon examination of title by STEWART's abstract agent, CMS, an old mortgage in the sum of \$10,000.00 was disclosed, making title uninsurable without satisfaction of said mortgage. Accordingly, a "Deposit Agreement", dated July 22, 1998, was entered into, wherein the Seller, JORIF, deposited the sum of \$15,000.00 with CMS, which acknowledged receipt of said sum, and agreed:

To hold the said sum as security for the production by Depositor to Depositary on or before 1/22/99 of the following: To provide satisfaction of the mortgage in recordable form held by Earl B. Broglin, deceased, dated 5/5/86, recorded 5/21/86 at Liber 11522 pg 362. The Depositary agree to refund the deposit upon performance satisfactory to it of the Depositor's obligations.

Said Deposit Agreement, under the masthead "STEWART TLE (sic) INSURANCE COMPANY", assured STEWART that it was protected from loss by at least one third more

than the face amount of the outstanding mortgage, and the mortgage was omitted as an exception from the Title Policy.

At the closing, both CMS and STEWART were represented by one closer, who collected from JORIF the money to pay off the first mortgage, the \$15,000,00 to be held in escrow, the transfer taxes, recording fees and other pick-up fees to satisfy the first mortgage. At that time, various documents were requested to be executed by the Sellers, or their attorney, that specifically disclosed that CMS was acting as the agent of STEWART at the closing, among them being a mortgage payoff letter disclosing that the STEWART TITLE INSURANCE COMPANY was accepting funds as escrow agent, but would not be liable for any deficiency as to the first mortgage, and another being a representation by Sellers to CMS and STEWART that the deed was regular and the grantor was alive as of the date of transfer. Also presented to the Seller was the above noted "Deposit Agreement" under STEWART's masthead, with CMS as the depository.

On the instant motion, counsel for STEWART argues that the complaint must be dismissed because a) plaintiff lacks privity with STEWART and cannot maintain a claim against STEWART, b) that STEWART is not liable for the intentional tort or criminal conduct of a limited agent, c) that plaintiff's claims, if any, are time barred; and d) that punitive damages are not a separate cause of action under New York Law. Counsel for STEWART states that a claim for CMS' theft or conversion of the plaintiff's funds is governed by a three (3) year statute of limitations, and plaintiff's demand to CMS that it turn over the \$15,000.00 deposited sum to STEWART was made on March 9, 2001 and the action herein was not commenced until November 30, 2006, some five (5) years later. Counsel claims that even a contract action is barred because more than six (6) years had

elapsed since CMS ceased operations in 2000.

The Law

“Agency is a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and consent by the other to act (Restatement, Agency 2d, ¶ 1)”. *L. Smirlock Realty Corp. v Title Guarantee Company*, 70 AD2d 455, 421 NYS2d 232 (2nd Dept, 1979), *see also*, *Hatton v Quad Realty Corp. et al*, 100 AD2d 609, 473 NYS2d 827 (2nd Dept. 1984), *leave to appeal denied*, 63 NY2d 608, 1984 NY LEXIS 5434 (C.A. 1984); *Empire Communications Consultants, Inc. v Pay TV of Greater New York*, 126 AD2d 598, 510 NYS2d 893 (2nd Dept. 1987). “An agency relationship can arise out of actual authority but also apparent authority. ‘Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into the transaction . . . Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable’”. *Empire Communications Consultants, Inc. v Pay TV of Greater New York, supra*; *see also*, *Hollock v New York*, 64 NY2d 224, 485 NYS2d 510, 474 NE2d 1178 (C.A. 1994). The evidence presented herein establishes that CMS had both actual and apparent authority to act on behalf of STEWART, and that it is reasonable that plaintiff relied on STEWART for his return of the escrow deposit, put in place for the protection of STEWART, once the mortgage was satisfied. In that regard, it is the law of New York that the conversion of funds by an agent for a disclosed principal does not relieve the principal of any contractual liability under such agency relationship. *Cf., Hatton v Quad Realty Corp. et al, supra; cf., Parlato v Equitable Life Assurance Society*

of the United States, 299 AD2d 108, 749 NYS2d 216 (1st Dept. 2002).

Conclusion

After a careful reading of the submissions herein, it is clear to the Court that STEWART was represented by CMS at the closing, that STEWART provided CMS with forms and invested it with discretion and with actual and apparent authority to act on its behalf to accept escrow and security deposits, a fact that is confirmed in STEWART's own Underwriting Agreement with CMS, which requires the transfer of escrows to STEWART upon the termination of the Agency's Agreements. (Underwriting agreement ¶25). In the Court's view, the escrow sum, deposited to protect STEWART from any liability on the outstanding Broglin mortgage, must be returned by STEWART to plaintiff, who has satisfied his obligation under the Deposit Agreement. It is undisputed that CMS has become defunct and that the \$15,000.00 deposit has disappeared. The Court rejects STEWART's denial of the agency relationship with CMS for the purpose of returning the security deposit and finds that STEWART is not entitled to judgment as a matter of law, but that plaintiff is. Based on the foregoing, it is hereby

ORDERED, that STEWART's motion for summary judgment declaring that the depositor has no privity with STEWART and dismissing the complaint is denied; and it is further

ORDERED, that STEWART's motion for summary judgment on the basis that the statute of limitations has run is denied. The Court finds that the instant litigation is governed by a six (6) year contract statute of limitations. Whether the period began to run from February 14, 2003, when plaintiff was able to obtain satisfaction of the outstanding mortgage, or from April 2, 2003, when plaintiff demanded the return of the escrow funds

from STEWART under the "Deposit Agreement" and said request was ignored, the Court finds that commencement of the action on November 30, 2006, is timely; and it is further

ORDERED, that, pursuant to CPLR §3212(b), it is the judgment of the Court that no issues of fact exist requiring a trial of this matter, and that plaintiff is entitled to summary judgment from the defendant in the sum of \$15,000.00, plus interest from April 2, 2003; and it is further

ORDERED, that plaintiff's demand for punitive damages and sanctions is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court. Submit judgment with notice of settlement.

Dated: March 31, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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COUNTY CLERK'S OFFICE**