Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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CLAUDE RAMEAU and GLADYS RAMEAU,

Plaintiffs,

Index No.: 24133/07
Motion Date: 3/04/09
Motion Cal. No.: 22
Motion Seq. No.: 2

-against-

CARMINE RUSSO, BRYAN MAY, and MICHAEL JAGMOHAN,

Defendants.

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MICHAEL JAGMOHAN,

Third-Party Plaintiff,

Index No.: 350022/08

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Third-Party Defendant.

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The following papers numbered 1 to 19 read on this motion by third party defendant First American Title Insurance Company of New York, for an order: (a) pursuant to CPLR § 3212, granting summary judgment against defendant/third-party plaintiff Michael Jagmohan and in favor of third-party defendant First American Title dismissing the third-party complaint; and (b) awarding costs and disbursements; and on this cross motion by defendant/third-party plaintiff Michael Jagmohan for an order: a) pursuant to CPLR §3212, granting summary judgment against third-party defendant First American Title and in favor of defendant/third-party plaintiff Michael Jagmohan for a declaration in indemnification and defense; and (b) awarding defendant/third-party plaintiff Michael Jagmohan all reasonable costs, expenses and attorney fees relating to the prosecution and defense of both actions.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 9
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action sounding in fraud and negligence commenced by plaintiffs Claude Rameau and Gladys Rameau ("plaintiffs") against defendants Carmine Russo ("Russo") and Brian May ("May"), and defendant/third-party plaintiff Michael Jagmohan ("Jagmohan"), arising from the transfer of the real property located at 299-55 Whitehall Terrace, Queens Village, New York. Plaintiff Gladys Rameau, the fee owner of the property as of October 29, 1982, conveyed the property to her son, plaintiff Claude Rameau, on October 8, 2004, to be held in trust for her, as she continued to reside at the property. In 2005, plaintiff Claude Rameau sought to refinance the property through defendant Russo, a mortgage broker, who, due to plaintiff Claude Rameau's poor credit rating, suggested that defendant May be brought in as a third party to secure the financing on plaintiffs' behalf, and hold the property in trust for plaintiffs. Defendant May, instead, sold the property to defendant Jagmohan, who obtained title insurance from third-party defendant First American Title Insurance Company of New York ("First American"). Following the commencement of this action, defendant Jagmohan, claiming that he was a bona fide purchaser of the property, commenced a third-party action against First American upon its refusal to defend and indemnify him in the main action. First American now moves for summary judgment dismissing the third- party complaint and an award of costs and disbursements; defendant Jagmohan cross moves for summary judgment in his favor and a declaration that First American must defend and indemnify him, as well as an award for all reasonable costs, expenses and attorney fees relating to the prosecution and defense of both actions.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Lui v. Park Ridge at Terryville Ass'n, Inc, 196 A.D.2d 579 (2nd Dept.1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957); Conde v. City of New York, 24 A.D.3d 595 (2nd Dept. 2005); .D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1st Dept. 1985). Generally, the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1983); Zuckerman v. City of New York, 49

N.Y.2d 557, 562 (1980). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." Rotuba Extruders v. Ceppos, supra, 46 N.Y.2d at 231; Coughlin v. Bartnick, 293 A.D.2d 509 (2nd Dept. 2002). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

At issue is whether First American, which issued the title insurance to defendant Jagmohan, has a duty to defend and indemnify him pursuant to the insurance policy. "'[A]n insurer's duty to defend its insured arises whenever the allegations in a complaint states a cause of action that gives rise to the reasonable possibility of recovery under the policy' (citations omitted)'" [Francis v. D & W Saratoga, Inc., 49 A.D.3d 597 (2nd Dept. 2008)]; thus, if a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. See, BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007). In short, the duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer ... [and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions." Seaboard Surety Company v. The Gillette Company, 64 N.Y.2d 304, 310 (1984). As stated in BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007):

> 'The merits of the complaint are irrelevant and, [a]n insured's right to be accorded legal representation is a contractual right and consideration upon which [a person's] premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured' (id. [internal quotation marks and citation omitted]). An 'insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract' (Servidone Constr. Corp. v. Security Ins. Co. of Hartford, 64 N.Y.2d 419, 423-424, 488 N.Y.S.2d 139, 477 N.E.2d 441 [1985]).

In sum, the duty to defend is broader than the duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured. Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137 (2006); General Motors Acceptance Corp. v. Nationwide Ins. Co., 4 N.Y.3d 451 (2005); Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61, 65-66 (1991); Franklin Development Co., Inc. v. Atlantic Mut. Ins., __ A.D.3d__, __ N.Y.S.2d __, 2009 WL 791497 (2nd Dept. 2009); Global Const. Co., LLC v. Essex Ins. Co., 52 A.D.3d 655, 655-656 (2nd Dept. 2008); BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007); City of New York v. Evanston Ins. Co., 39 A.D.3d 153 (2nd Dept. 2007).

The duty to defend is not triggered, however, when, "'as a matter of law ... there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy' (citations omitted) or when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion (citations omitted)." Franklin Development Co., Inc. v. Atlantic Mut. Ins., __ A.D.3d__, __ N.Y.S.2d __, 2009 WL 791497 (2nd Dept. 2009); Global Const. Co., LLC v. Essex Ins. Co., 52 A.D.3d 655, 655-656 (2nd Dept. 2008); Francis v. D & W Saratoga, Inc., 49 A.D.3d 597 (2nd Dept. 2008); City of New York v. Evanston Ins. Co., 39 A.D.3d 153 (2nd Dept. 2007). Upon such a showing, an insurer can be relieved of its duty to defend.

Here, First American, referencing the "Risk" section of the title insurance policy, argues that the allegations set forth in the complaint filed in the underlying action fall within the exclusions of that section, which provides that the policy holder "is not insured against loss, costs, attorney's fees and expenses resulting from:

4. Risks
   a. that are created, allowed, or agreed to by You, whether or not they appear in the Public Records;
   b. that are known to You at the Policy Date, but not to Us, unless thy appear in the Public Records at the Policy Date;
   c. that result in no loss to You; or
   d. that first occur after the Policy Date– this does not limit the coverage described in Covered Risk 7, 8.d, 21, 22, 23 or 24.4."

However, "[t]o be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint in the underlying action cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision (citations omitted). If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action (citation omitted)." Physicians' Reciprocal Insurers v. Loeb, 291 A.D.2d 541 (2nd Dept. 2002). First American did not meet its burden.

Plaintiffs allege in the complaint that defendants May and Jagmohan met with plaintiffs at the property, where they were informed by defendant May that he "intended to transfer the subject premises to [defendant Jagmohan] to be held in trust for the plaintiffs," and further allege that they "advised [defendant] Jagmohan of the fact that the subject premises held in trust by [defendant] Bryan May for the benefit of [] plaintiff[s] and that any agreement between [defendants] Jagmohan and May relative to the subject premises is subject to the beneficial interest of [] plaintiffs." The

fourth cause of action set forth in the complaint contains three specific allegations with respect to defendant Jagmohan:

> 31. Defendant JAGMOHAN knew or ought to know that [defendant] BRYAN MAY held title in the subject premises in trust and on behalf of the plaintiff[s].
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> 32. Defendant JAGMOHAN, with intent to defraud the plaintiffs, connived with Defendant BRYAN MAY to steal the equity in the subject premises contrary to Section 265 of the Home Equity Theft Prevention Act, by taking title to the subject premises from [defendant] BRYAN MAY on May 4th, 2007.
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> 33. Defendant JAGMOHAN connived with Defendant MAY, and stole the equity in the subject premises to the detriment of the Plaintiffs.

In disclaiming coverage, First American based its denial upon its conclusory determination that defendant Jagmohan "was actively involved in the fraudulent scheme perpetrated on the Plaintiffs by Defendants mortgage broker Carmine Russo and alleged investor [defendant] Bryan May to deprive the Plaintiffs of their title to the home under the guise of assisting the Plaintiffs in escaping foreclosure." The letter of disclaimer further concluded:

> By colluding with Defendant Bryan May to defraud the Plaintiffs, the Insured 'assumed' or 'agreed' to the consequences of his acts; that is, the Insured agreed to acquire the premises subject to the beneficial ownership of the Plaintiffs. Furthermore, the Insured failed to disclose to the Company that title was encumbered by such beneficial ownership, and the Company was not in a position to discover such encumbrance by a diligent search of the land records.

First American's denial was based upon its conclusive resolution of the very issues placed before the court to determine. "When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage (citations omitted). The merits of the complaint are irrelevant and, '[a]n insured's right to be accorded legal representation is a contractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured' (citations omitted)." Town of Massena v. Healthcare Underwriters Mutual Ins., 98 N.Y.2d 435, 443-444 (2002

Moreover, "'a title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from said coverage' (citations omitted)." Francis v. D & W Saratoga, Inc., 49 A.D.3d 597 (2nd Dept. 2008). See, also, U.S. Bank

Nat. Ass'n TR U/A DTD 12/01/98 v. Stewart, 37 A.D.3d 822 (2nd Dept. 2007)["defendant is liable for matters affecting title unless the particular defect is specifically excepted from coverage, even if the matter affecting title consists of a hidden defect."]. And, where, as here, the underlying action is based upon the rights of a person whose interest appeared in the chain of title, and who was not specifically excepted from coverage under the terms of the policy, the policy of title insurance obligates the insurer to defend the defendant and pay its attorney's fees, costs, and expenses in the underlying action. LLJBJ Partnership v. Commonwealth Land Title Ins. Co., 29 A.D.3d 957, 958 (2nd Dept. 2006); Sisco v. Nations Title Ins. of New York, Inc., 278 A.D.2d 479 (2nd Dept. 2000). Here, the title report issued by First American makes reference to and sets forth an exception with respect to a foreclosure action involving plaintiff Claude Rameau, stating: "This exception is being investigated with the prior title company. Every effort was made to clear this exception; however, this company must be contacted prior to closing to obtain the status of this exception." Plaintiff Claude Rameau, who clearly was, and known by First American to be, in the chain of title, was not specifically excepted from coverage.

First American wholly failed to establish, as a matter of law, that the allegations of the complaint in the underlying action did not suggest a reasonable possibility of coverage, that there was no possible factual or legal basis upon which it might eventually be held to be obligated to indemnify defendant Jagmohan, or that the only interpretation of the allegations against the insured was that the factual predicate for the claim fell wholly within a policy exclusion. In fact, in opposition, defendant Jagmohan, referencing the language of the policy that it insures the insured "against actual loss, including any costs, attorney's fees and expenses" resulting from covered risks, argues that the allegations fall within the "Covered Risks" section of the insurance policy, defined, inter alia, as:

1. Someone else owns an interest in Your Title.

2. Someone else claims to have rights affecting Your Title arising out of leases, contracts, or options.

3. Someone else claims to have rights affecting Your title arising out of forgery or impersonation.

He further points to paragraph "4" of the Rider to the Contract of Sale, which was provided to First American, that explicitly states that "[t]he purchaser agrees to take title subject to the existing tenancy of Claude Rameau, who currently pays a monthly rent in the amount of $1,100.00, on a month to month basis and with no lease agreement." Aside from signaling again plaintiff Claude Rameau as perhaps someone in the chain of title, any effect of paragraph "4"arguably is vitiated by Schedule B to the title insurance police that specifically excepts "loss or damage. . .which arise by reason of: 1. Rights of tenants or persons in possession, if any." In any event, here, as was stated by the Court of Appeals in Town of Massena v. Healthcare Underwriters Mut. Ins., 98 N.Y.2d 435, 443-444:

> If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend (see Technicon Elecs. Corp. v. American Home Assur. Co., 74 N.Y.2d 66, 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048 [1989]; Ruder & Finn v. Seaboard Sur. Co., 52 N.Y.2d 663, 669-670, 439 N.Y.S.2d 858, 422 N.E.2d 518 [1981]). "If any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action" (Frontier Insulation Contrs. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175 [1997]). Indeed, "[t]he duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer * * * [and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 310, 486 N.Y.S.2d 873, 476 N.E.2d 272 [1984] [citations omitted]).

Notwithstanding First American's finding to the contrary, the allegations of the complaint are potentially within the language of the insurance policy, and it thus has a duty to defend its insured, defendant Jagmohan.

With respect to the duty to indemnify, it is recognized that "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 (citation omitted)." Brucha Mortg. Bankers Corp. v. Nations Title Ins. of New York, Inc., 275 A.D.2d 337, 337-338 (2nd Dept. 2000). "By definition, title insurance involves 'insuring the owners of real property [] against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property.' [A] policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured' (citations omitted)." L. Smirlock Realty Corp. v. Title Guarantee Co., 52 N.Y.2d 179, 187-188 (1981). "'A 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' (citation omitted). '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' (citations omitted)." Brucha Mortg. Bankers Corp. v. Nations Title Ins. of New York, Inc., 275 A.D.2d 337, 337-338 (2nd Dept. 2000). As there is an issue of fact as to whether the allegations in the complaint fall within the covered risks or exclusions of the insurance policy, neither party has demonstrated entitlement to summary judgment on the issue of indemnification.

Accordingly, third- party defendant First American's motion to dismiss is denied in its entirety. The cross motion by defendant/third party plaintiff Michael Jagmohan is granted solely to the extent that this Court declares that third-party defendant First American has a duty to defend defendant/third-party plaintiff Jagmohan. In view of the foregoing, there are questions of fact which

preclude the granting of summary judgment with respect to both the insurance carrier's duty to defend and its duty to indemnify (see, Servidone Constr. Corp. v. Security Ins. Co. of Hartford, 64 N.Y.2d 419, 488 N.Y.S.2d 139, 477 N.E.2d 441). Sisco v. Nations Title Ins. of New York, Inc., 278 A.D.2d 479 (2nd Dept. 2000).

Dated: April 27, 2009

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J.S.C.