

<b>Harris v H&amp;Z Abstract</b>
2009 NY Slip Op 31304(U)
June 8, 2009
Supreme Court, Suffolk County
Docket Number: 24216-2008
Judge: Melvyn Tanenbaum
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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #001 002 CASE DISP  
R/D: 11/18/08  
S/D: 03/30/09

PAUL S. HARRIS,  
  
Plaintiff,

PLTF'S/PET'S ATTY:  
AHERN & AHERN  
One Main Street  
Kings Park, NY 11754

-against-

H&Z ABSTRACT and COMMONWEALTH LAND  
TITLE INSURANCE COMPANY,  
  
Defendants.

DEFT'S/RESP'S ATTY:  
LAMB & BARNOSKY,LLP  
534 Broadhollow Road, Suite 210  
Melville, NY 11747

Upon the following papers numbered 1 to 22 read on this motion for an order pursuant to CPLR Sections 3211 & 3212 Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross Motion and supporting papers 9-20 Answering Affidavits and supporting papers      Replying Affidavits and supporting papers 21-22 Other      ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendants H&Z ABSTRACT ("H&Z") and COMMONWEALTH LAND TITLE INSURANCE COMPANY ("COMMONWEALTH") for an order pursuant to CPLR Section 3211(a)(1)&(7) dismissing plaintiff's complaint and the cross motion by plaintiff PAUL HARRIS ("HARRIS") for an order pursuant to CPLR Section 3212 granting summary judgment declaring that defendants are obligated to provide a legal defense and to indemnify its insured, "HARRIS", in an action pending in the United States District Court, Eastern District of New York entitled: John Lehman & Janice Lehman, Individually and as Parents of Christian Lehman, Matthew Lehman and Marissa Lehman vs. John Rutigliano, Paul Harris, Corey J. Covert, Esq., Countrywide Financial, Countrywide Home Loans, Inc et. al, Case No. CV 07 3640 are determined as follows:

Plaintiff "HARRIS's" complaint seeks a declaratory judgment declaring that defendants/insurers are obligated to indemnify and to provide a legal defense pursuant to the terms of a policy of title insurance issued by defendant "COMMONWEALTH" dated August 31, 2006. On that date title to premises located at 21 Sylvan Place, Wading River, NY was transferred from John Lehman and Janice Lehman to plaintiff "HARRIS". Defendant "COMMONWEALTH" issued an owner's policy in favor of "HARRIS" in the amount of \$445,000.00. Defendant "H&Z" conducted the underlying title search.

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In August, 2007 the "LEHMANS" commenced a Federal Court action claiming that "HARRIS", in concert with others, engaged in a fraudulent scheme to obtain title to their home. The Federal complaint seeks money damages and a judgment declaring that the "LEHMANS" are the rightful owners of the residence. Plaintiff "HARRIS" claims that defendants are obligated to provide a defense and to indemnify him in the Federal Court action under the terms of the "COMMONWEALTH" title policy. Defendants claim that plaintiff's complaint must be dismissed since the policy does not provide insurance for the fraud claims set forth in the Federal complaint.

In support of defendants motion, "COMMONWEALTH" and "H& Z" submit two affirmations of counsel and claim that no legal basis exists upon which to compel the insurer to provide a defense or indemnify plaintiff under the terms of the title policy. Defendants argue that there is no title defect alleged as of the date of the policy and that the fraud allegations set forth in the Federal complaint are specifically excluded under the policy. Defendants claim that the policy excludes coverage for adverse claims "created by... the insured claimant". It is defendants position that the "LEHMANS's" claims in the Federal complaint allege that "HARRIS" actively participated in a fraudulent scheme to obtain title to their home and that such claims, even if proved to be true, do not provide a basis to extend coverage under the terms of the title policy. Defendant "COMMONWEALTH" also claims that plaintiff's indemnification claims are premature since there has been no actual loss resulting from a covered title defect. Defendant "H&Z" asserts that although it conducted a title search, "H&Z" did not issue insurance and therefore has no obligation to "HARRIS".

In opposition and in support of the cross motion, plaintiff submits an attorney's affidavit and claims that the title insurer has a duty to defend its insured since the allegations contained in the Federal complaint makes a claim concerning "HARRIS's" ownership of the premises. Plaintiff asserts that even though the "LEHMANS" claims may be frivolous, the insurer has a duty to defend on its insured's behalf, since the claims seek to affect the insured's right to retain title. Plaintiff contends that under these circumstances partial summary judgment must be granted in favor of "HARRIS" declaring that the title insurer is obligated to defend and to pay counsel fees, costs and expenses with respect to the Federal Court action.

To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claims ( SIDDIQUI v. NATIONWIDE, 255 AD2d 30, 687 NYS2d 457 (3<sup>rd</sup> Dept., 1999); FERNANDEZ v. CIGNA, 188 AD2d 700, 590 NYS2d 925 (3<sup>rd</sup> Dept., 1992)).

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails

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to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2<sup>nd</sup> Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2<sup>nd</sup> Dept., 1984)).

CPLR §3212(b) states that the motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1<sup>st</sup> Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2<sup>nd</sup> Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2<sup>nd</sup> Dept., 1981)).

Insurance contracts are liberally construed in favor of the insured and the court must consider the plain language of the contract as it would be understood by an average or ordinary citizen (Miller v. Continental Insurance Company, 40 NY2d 675, 389 NYS2d 565(1976)). The insurer bears the burden of proving that the loss falls within the exclusion and that there is no reasonable interpretation of the exclusion that supports the claim of the insured (Seaboard Sur. Co. v. Gillette Co., 64 NY2d 304, 486 NYS2d 873(1984)).

A title insurance policy is a contract in which the insurer agrees to indemnify the insured against loss by reason of encumbrances on property or defects in title (L. Smirlock Realty Corp. v. Title Guarantee Company, 52 NY2d 179, 437 NYS2d 57 (1981)). A title insurer’s obligation to indemnify against title defects 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 (Citibank v. Chicago Title Insurance Co., 214 AD2d 212, 632 NYS2d 779 (1<sup>st</sup> Dept., 1995)). Moreover the duty of an insurer to defend is broader than its duty to pay and is defined solely by the allegations on the face of the complaint (Allstate Insurance Company v. Mugasello, 79 NY2d 160, 581 NYS2d 142 (1992); Seaboard Surety Co. v. Gillette Co., 64 NY2d 304, 486 NYS2d 873 (1984)). An insurer can be relieved of its duty to defend if it can establish as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision (see Villa Charlotte Bronte v. Commercial Union Insurance, 64 NY2d 846, 848, 487 NYS2d 314 (1985); Spoor-Lasher v. Aetna, 39 NY2d 875, 386 NYS2d 221 (1976)).

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Plaintiff's declaratory judgment action seeks to compel the defendant/title insurer "COMMONWEALTH" to provide a defense and indemnification in an action commenced in Federal Court by the individuals who sold their home to "HARRIS". Accepting the facts as alleged in the "LEHMANS" complaint as true, no basis exists upon which the title insurer is obligated to indemnify or to provide a defense for plaintiff in the Federal Court action.

The Federal complaint alleges that the "LEHMANS" attended the August 31, 2006 closing to refinance their mortgage but were informed by the lender's representatives that they did not qualify for refinancing but were eligible to participate in a "special program" in which the homeowners would transfer title temporarily to an individual ("HARRIS") who would become the "LEHMANS" landlord for up to two years. The complaint states that "HARRIS" "knew or should have known that this was a fraudulent and voidable transaction" and that "HARRIS" "completed his purchase of the premises.... despite actual and/or constructive notice of the fraud.." and that "all defendants (including "HARRIS") were aware of, approved, caused, condoned and/or ratified the complained of conduct.... and .... facilitated the unconscionable fraud and conversion.."

Assuming the claims alleged in the Federal complaint are true, there is no basis to compel the title insurer to provide a defense or to indemnify the plaintiff "HARRIS" in the underlying action. The "LEHMANS" federal claims raise no issue concerning any loss by "reason of encumbrances on property or defects in title" (L. Smirlock Realty Corp. v. Title Guarantee Co., supra.) but instead allege that "HARRIS", in concert with others, conspired to defraud the sellers to obtain ownership of their dwelling. Defendant "COMMONWEALTH's" title insurance policy insures a loss occasioned by a defect in title: not a loss occasioned by tortious or criminal conduct. There is no evidence submitted to show that on the date of closing the "LEHMANS" were not the legal owners of the property or to show that the deed from the "LEHMANS" to "HARRIS" was invalid and did not convey their interest in the property. There is therefore no factual issue concerning any defect in title which would trigger the title insurers' policy obligations. Absent such proof "COMMONWEALTH" owes no duty under the policy to defend "HARRIS".

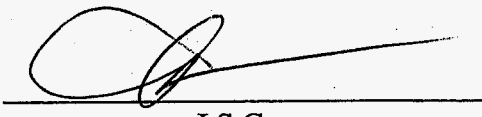
Moreover even were the Court to accept that "COMMONWEALTH's" policy somehow included coverage for its insured under these circumstances, there is no view of the facts alleged in the underlying Federal complaint upon which the policy exclusion (Paragraph 3(a)), which provides that coverage is not provided for "defects and adverse claims..... created by (reason of) the insured claimant", would not apply. Defendant "COMMONWEALTH's" motion for an order dismissing plaintiff's complaint must therefore be granted. Defendant "H&Z's" motion must also be granted since the evidence reveals that "H&Z" conducted a title search but did not issue a title policy and therefore had no duty to insure the plaintiff. Accordingly it is

**ORDERED** that plaintiff's motion for an order pursuant to CPLR Section 3212 is denied, and it is further

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**ORDERED** that defendants motion for an order pursuant to CPLR Section 3211(a)(1)&(7) is granted. The complaint against defendants "COMMONWEALTH" and "H&Z" is hereby dismissed.

Dated: June 8, 2009



J.S.C.

**MELVYN TANENBAUM**