

Polanco v Federal Deposit Ins. Co.

2009 NY Slip Op 31582(U)

July 13, 2009

Supreme Court, Queens County

Docket Number: 20081/07

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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RAFAEL G. POLANCO and DIANA L.
CARDONA,

Index No: 20081/07
Motion Date: 5/6/09
Motion Cal. Nos: 26
Motion Seq. No: 7

Plaintiffs,

-against-

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of INDYMAC BANK FSB, NATIONAL
SETTLEMENT AGENCY INC., STEVEN M. LEFF,
RACHEL M. LEFF, RICHARD A. LEFF, FIDELITY
NATIONAL TITLE INSURANCE COMPANY,
HORIZON LAND SERVICES, LLC, JOSEPH SCOTT
FINANCIAL, COUNTRYWIDE HOME LOANS, INC.,
Defendants.

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The following papers numbered 1 to 9 read on the motion by defendant Federal Deposit Insurance Corporation, as Receiver of IndyMac Bank FSB, for an order, pursuant to CPLR § 2221, granting leave to reargue that portion of the cross-motion resulting in the determination of summary judgment in favor of defendant Fidelity National Title Insurance Company, by decision and order dated February 5, 2009.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum.....	1 - 5
Answering Affidavits-Exhibits.....	6 - 7
Reply Memorandum.....	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for damages sustained by plaintiffs Rafael G. Polanco and Diana L. Cardona (“plaintiffs”), arising from a real estate transaction in which they applied to defendant Joseph Scott Financial (“JSF”), a mortgage broker, to refinance the existing primary mortgage upon property located at 25-06 23rd Avenue, Astoria, New York, held by defendant Countrywide Home Loans, Inc. (“Countrywide”) in the amount of \$537,971.00. The loan application was approved by defendant Federal Deposit Insurance Corporation, as Receiver of IndyMac Bank FSB (“IndyMac”), for

\$679,250.00, consisting of a first mortgage in the amount of \$572,000.00 and a second mortgage in the amount of \$107,250.00, and a title search of the property was conducted by defendant Horizon Land Services, LLC (“Horizon”), as agent for defendant Fidelity National Title Insurance Company (“Fidelity”), a licensed title insurance company. Defendant National Settlement Agency Inc. (“National”) was selected by JFS from a pool of IndyMac’s authorized closing agents to serve as the settlement agent for the instant refinancing transaction on behalf of IndyMac.

Plaintiffs commenced this action against defendants for various claims resulting from their failure to pay-off the primary mortgage held by Countrywide in the amount of \$537,971.00. As a result, IndyMac asserted cross claims against both Fidelity and JSF for breach of contract, a claim for negligence against JSF and a claim alleging bad faith against Fidelity. Thereafter, Fidelity and JSF moved for summary judgment dismissing the cross claims of Indymac asserted against them, and IndyMac cross-moved for an order granting it summary judgment on its cross claims against Fidelity and JSF. By decision and order of this Court dated February 5, 2009, the motions of Fidelity and JSF were granted, the cross-motion by defendant IndyMac was denied, and IndyMac’s cross claims asserted as to those defendants were dismissed.

In the factual recitation of the order, denoted “Relevant Facts,” this Court stated the following:

On or about March 13, 2007, the date of the loan closing, plaintiffs executed a first and second loan agreement with IndyMac in the total amount of \$679,250.00; National issued a check payable to Countrywide in the amount of \$537,971.00, to pay off the primary mortgage and Horizon, on behalf of Fidelity, issued title insurance policies to IndyMac. Thereafter, IndyMac wired the proceeds to the escrow account of National; however, the check tendered by National to Countrywide was not honored due to insufficient funds, and Countrywide never received the \$537,971.00 designated for the repayment of the primary mortgage.

In dismissing the cross claim for breach of contract asserted by IndyMac against Fidelity, this Court stated, in relevant part, the following:

“[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). "It is well settled that '[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).

Here, notwithstanding IndyMac's contentions to the contrary, Fidelity did not breach its obligation under the subject title insurance policy. The record is clear that this action arises from the misappropriation of the funds designated to satisfy the Countrywide mortgage that were wired by IndyMac to National, the settlement company approved by IndyMac to appear on its behalf at the instant closing. Indeed, in the affidavit of Steven Leff, the principal of National, he admits that he failed to carry out his fiduciary duty, and stated that he secreted the funds and converted them to his own use. Thus, to the extent that Indymac alleges that Fidelity breached its contract by allowing the Countrywide mortgage to exist as a senior lien, this claim is simply unfounded. As a preliminary matter, it is well settled that "title insurance insures against loss regarding title to the land, not the underlying debt (citations omitted)." Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512, 514 (2nd Dept. 2000). "Moreover, where as here, the underlying debt has not been satisfied, the mortgage it was meant to secure must fail (citation omitted)." Id. at 514.

Further, notwithstanding plaintiffs assertion regarding the inapplicability of provision 3(a), most fatal to IndyMac's breach of contract claim is the exclusionary provision contained in the instant policies in which Fidelity expressly excludes coverage for any loss which was "created, suffered, assumed or agreed to" by IndyMac. Although there is much ado in the record about whether National was IndyMac's legal or settlement agent, and which entity selected National to serve as the settlement agent on this transaction, these issues are of no moment as it is undisputed that National was the approved settlement agent of IndyMac which represented its interest at the subject closing, and IndyMac funded National's escrow account

on the misguided belief that National would carry out its obligation to satisfy the Countrywide mortgage. In complete contravention of its obligation to perform certain duties on IndyMac's behalf at the closing, National admittedly defrauded IndyMac. Thus, where, as here, "a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed." Greenpoint Mortg. Funding, Inc. v. Stewart Title Ins. Co., 49 A.D.3d 687, 691 (2nd Dept. 2008); see, Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512 (2nd Dept. 2000). Thus, the actions of National are properly imputed to IndyMac as the record is clear, despite the feigned issue of agency raised herein, that IndyMac designated National as its settlement agent by directing the funds earmarked for the Countrywide mortgage to an escrow account maintained by National, and authorizing it to perform specific duties on behalf of IndyMac at the closings. Therefore, this cross claim must be dismissed as against Fidelity.

Further, in dismissing the second cross claim asserted by IndyMac against Fidelity for bad faith denial of coverage, this Court held:

"Allegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading." Royal Indem. Co. v. Salomon Smith Barney, Inc., 308 A.D.2d 349, 350 (1st Dept. 2003); Bettan v. Geico General Ins. Co., 296 A.D.2d 469, 745 N.Y.S.2d 545 (2nd Dept. 2002); Moreover, "there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance contract (citations omitted)." Zawahir v. Berkshire Life Ins. Co., 22 A.D.3d 841 (2nd Dept. 2005); see, Paterra v. Nationwide Mut. Fire Ins. Co., 38 A.D.3d 511 (2nd Dept. 2007); Johnson v. Allstate Ins. Co., 33 A.D.3d 665 (2nd Dept. 2006). Consequently, this cross claim likewise must be dismissed as against Fidelity.

It is upon the foregoing that IndyMac now moves for an order, pursuant to CPLR § 2221, granting leave to reargue that portion of the decision and order dated February 5, 2009, resulting in the determination of summary judgment in favor of Fidelity.

A motion for leave to reargue, pursuant to CPLR Rule § 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." A motion to reargue allows a party to establish that the court "overlooked or

misapprehended the relevant facts” or “misapplied any controlling principle of law,” in determining the prior motion. Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). The purpose of a motion for leave to reargue “[] is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” Foley v. Roche, 68 A.D.2d 558, 567 (2nd Dept. 1979). It is also not an opportunity for an unsuccessful party to present arguments not originally presented. Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 (2nd Dept. 2006); Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005). Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). It is within the court’s discretion to grant leave to reargue when it appears that the court may have “overlooked certain facts and misapplied the law in its initial order.” Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005); CPLR 2221.

Here, despite IndyMac’s contention to the contrary, it has not made a proper demonstration that there are matters of fact or law overlooked or misapprehended by this Court in determining the prior motion, which would warrant the granting of the instant motion for leave to reargue. In support of the aforementioned motion, IndyMac contends that this Court misapprehended the facts of this case by incorrectly stating in its factual recitation that “the check tendered by National to Countrywide was not honored due to insufficient funds,” claiming, inter alia, that “there is no evidence that Countrywide received the payoff check. [] Nor is there evidence that Countrywide presented any check for payment, let alone that any such check was dishonored.” In opposition to the present motion, Fidelity asserts that it proffered in its original moving papers that the “National check presented to Countrywide ‘bounced,’” however, IndyMac, in its underlying opposition papers stated that “Countrywide never attempted to deposit the check.”

Notwithstanding, this allegedly misapprehended fact was immaterial to this Court’s ultimate findings, as it is clear that the salient issues considered by this Court were not framed by whether the pay-off check was received by Countrywide and dishonored, but that the funds wired by IndyMac to National were never provided to Countrywide to satisfy the mortgage due to the admitted defalcation of Steven Leff, National’s principal. Indeed, this Court, in its underlying decision and order, stated that “the record is clear that this action arises from the misappropriation of the funds designated to satisfy the Countrywide mortgage that were wired by IndyMac to National, the settlement company approved by IndyMac to appear on its behalf at the instant closing.” Further, in finding that the breach of contract cross claim could not lie, this Court stated that title insurance insures against loss concerning title and issues running with the land, not the underlying debt. See, Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512, 514 (2nd Dept. 2000). Further, this Court found that the actions of National, the designated settlement agent, were properly imputed to IndyMac, as “a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed.” Greenpoint Mortg. Funding, Inc. v. Stewart Title Ins. Co., 49 A.D.3d 687, 691 (2nd Dept. 2008). Lastly, this Court found that the second cross claim for bad faith denial of coverage was duplicative of the breach of contract cross claim, and was likewise dismissed.

In short, there is no basis, despite IndyMac's attempt to create a viable ground, which would compel this Court to consider the motion for reargument, as IndyMac has failed to demonstrate that this Court overlooked or misapprehended germane facts or law, in granting Fidelity's underlying motion for summary judgment dismissing IndyMac's cross claims for breach and bad faith denial of coverage. Further, as the other allegations set forth in the motion were proffered on the underlying motion and rejected by this Court, they too fail to provide a basis for this Court's consideration of the motion. As reargument does not provide a party an opportunity to advance arguments different from those tendered on the original application, it likewise does not provide a party the second opportunity to re-litigate its unsuccessful claims. Consequently, this Court finds that reargument is unwarranted and the motion for leave to reargue this Court's February 5, 2009 decision and order, is denied.

Dated: July 13, 2009

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J.S.C.