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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ROBERT G. LUCAS, as Agent for LUCAS INVESTORS GROUP, **NASSAU COUNTY**

Plaintiff,

-against- **Index No: 2064-08**
Motion Seq. No: 6
Submission Date: 8/13/09

KENSINGTON ABSTRACT LLC and FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Defendants.

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The following papers having been read on this motion: [1]

Notice of Cross Motion, Affirmation in Support and Exhibit.....x
Affirmation in Opposition and Exhibits.....x
Reply Affirmation in Support and Exhibits.....x
Letter dated July 23, 2009 and Exhibits in Further Support.....x
Letter dated August 5, 2009 and Exhibits in Further Opposition...x

This matter is before the Court for decision on the Cross Motion filed by Defendant First American Title Insurance Company of New York on October 17, 2008, which was submitted on August 13, 2009, after the Court heard oral argument from counsel. [2] For the reasons set forth below, the Court denies Defendant First American's motion in its entirety.

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[1] Some of the motion papers listed also address a separate Motion to Reargue a decision of the Court (Austin, J.), which this Court denied on July 9, 2009.

[2] This Court assumed responsibility for this motion, and this case, on May 8, 2009.

BACKGROUND

A. Relief Sought

Defendant First American Title Insurance Company of New York ("First American") moves for an Order, 1) pursuant to CPLR § 602, consolidating this action with related foreclosure actions pending in New York County; and/or 2) staying this action, pending resolution of the related foreclosure actions in New York County.

Plaintiff opposes Defendant's motion.

B. The Parties' History

First American previously moved for an Order, pursuant to CPLR § 510, to change venue of this action to New York County or, in the alternative, pursuant to CPLR §3211(a)(1) and (7), for dismissal of the complaint insofar as asserted against First American. By decision dated July 22, 2008, the Court (Austin, J.): 1) denied First American's motion to change venue of this action; 2) granted First American's motion to dismiss the second and fourth causes of action; and 3) denied First American's motion to dismiss the third cause of action which alleges that First American breached its contract with Plaintiff Robert G. Lucas as Agent for Lucas Investors by failing to list the three mortgages that predated the Plaintiff's mortgage in its title policy. In that prior decision ("Prior Decision"), Judge Austin outlined the background of this action, which this Court sets forth below.

On March 18, 2005, Plaintiff, Robert G. Lucas ("Lucas"), as agent for Lucas Investors Group, made a loan of $150,000 to Maxine Holder ("Holder"). The loan was secured by a mortgage ("Mortgage") on property located at 300 East 108th Street, New York, New York, consisting of three condominium units identified as units 1D, 1E, and 1F (the "Premises"). After the closing of the transaction, which occurred in Locust Valley, New York, Lucas delivered the mortgage executed by Holder to Defendant, Kensington Abstract LLC ("Kensington"), a title abstract company that conducts title searches and performs related services with regard to transactions involving real property. Kensington agreed to record the Mortgage in the proper office of New York County so as to make the Mortgage a valid lien on the Premises.

Kensington failed to record the Mortgage until April 30, 2007. In the two years between the closing date and the date the Mortgage was recorded, Lucas asserts that six mortgages were recorded on the Premises, totaling $2,397,750, that now take priority over his Mortgage.

Additionally, on March 18, 2005, Lucas obtained a title insurance policy with First American. The $150,000 policy insured that the Mortgage delivered to Lucas by Holder was free and clear of all prior liens and encumbrances that were not specifically listed in the policy. According to the complaint, First American's policy failed to report three prior liens existing against the Premises.

On April 2, 2007, Lucas demanded that First American pay $150,000 for breach of its title insurance policy. First American has refused to make such a payment to the Plaintiff. Subsequent to Lucas' demand, an action was commenced by Deutsche Bank National Trust Company and Freemont Investment and Loan to foreclose two prior mortgage obligations on Units 1E and 1F of the Premises. First American has since taken up defending those foreclosure actions, both of which are currently pending.

On January 28, 2008, Lucas filed this action in Nassau County, alleging four causes of action. In his first cause of action, Lucas alleges that by reason of its failure to properly record the Mortgage, Kensington was grossly negligent. As a result of said negligence, Lucas alleges that he has been damaged by the loss of its principal in the amount of $150,000, with interest at the rate of 20% per annum from November 1, 2006, together with late charges and reasonable attorneys fees. Lucas also claims he is additionally entitled to $250,000 in punitive damages as consequence of the "egregious negligence and deliberate omissions" of Kensington.

In his second cause of action, Lucas asserts that Kensington was duly authorized to act on First American's behalf and, therefore, First American is jointly and severally liable for all acts and omissions performed by Kensington while it was acting as its agent. Thus, Plaintiff alleges that First American is liable for compensatory damages of $150,000 with 20% per annum interest accruing from November 1, 2006, plus punitive damages of $250,000.

In the third cause of action, Lucas alleges breach of contract by First American for failing to identify and disclose the three prior liens that predated the Mortgage in its title policy. Plaintiff states that if he were aware of such prior liens and encumbrances, he would not have made the loan to Holder. Upon this cause of action, Lucas seeks $150,000 plus interest accruing from April 2, 2007.

Lastly, Lucas alleges bad faith. According to the complaint, First American is tendering a frivolous defense that is without merit with respect to the Deutsche Bank and Fremont

foreclosures in order to delay payment to the Plaintiff under the policy. Upon the fourth cause of action, Lucas seeks punitive damages in the sum of $250,000.

C. Plaintiff's Prior Motion for a Change of Venue

In denying First American's motion for a change of venue, Judge Austin wrote as follows in the Prior Decision:

> First American first argues pursuant to CPLR 510(3), claiming that the allegations primarily involve witnesses and events that occurred in New York County, and that its witnesses would be inconvenienced by being forced to appear in Nassau County. However, First American has not offered any information establishing how its witnesses would be any more inconvenienced testifying in Nassau County than they would in New York County. In J & A Interiors, Inc. v. Roth, 239 N.Y.L.J. 102, p. 27 col. 3 (Sup. Ct. Nassau. Co. 5/28/08), this Court found that the commute from New York County to Nassau County was not so lengthy as to substantially inconvenience the witnesses, and that "mere inconvenience to witnesses which the defendants may call at trial is not grounds for a change of venue."
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> Moreover, First American has failed to meet the basic requirements for a change of venue motion under CPLR 510(3). See, O'Brien v. Vassar Brothers Hosp., 207 A.D.2d 169, 172-173 (2nd Dept. 1995), which established the standard for changing venue on the basis of a forum *non conveniens.* The defendant must submit (1) a detailed justification for the change; (2) the identity and availability of the proposed witnesses; (3) the nature and materiality of their anticipated testimony; and (4) the manner in which they would be inconvenienced by the initial venue. See also, Cilmi v. Greenburg, Trager, Troplity & Herbat, 273 A.D.2d 266 (2nd Dept. 2000). First American has failed to provide the Court with adequate justification for the change, or sufficient proof of specific circumstances or conflicts that would prevent witnesses in this case from appearing in Nassau County. Significantly, the identity of the purported "material witnesses," the nature of their anticipated testimony and the manner in which they would be inconvenienced by maintaining venue in Nassau County is either omitted or discussed in conclusory terms.
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> First American urges the Court to disregard the requirements as laid out in *O'Brien*, and exercise its discretion in granting the motion, as the courts did in Santiago v. Walsh-Atkinson Co., Inc, 202 A.D.2d 307 (1st Dept. 1995); and Mar v. MHZ Realty Corp., 205 A.D.2d 667 (2nd Dept. 1994). Even if the Court was to overlook the defects in First American's motion, the fact remains that the cause of action still essentially arose in Nassau County. That is where the parties entered into their contractual agreement. Additionally, First American conducts business, and maintains business offices in Nassau County. Therefore, the "ends of justice" will not, in this case, be promoted if the action were moved New York County.

Judge Austin also rejected First American's argument that New York County is the proper venue because the instant action is an action affecting real property in New York County.

In rejecting that argument, Judge Austin wrote:

> An action affecting title to, or possession, use or enjoyment of, real property should be brought in the county where the property is located. CPLR 507. Section 183 of the Civil Practice Act ("CPA"), the predecessor of CPLR 507, specified the types of actions that fall within the purview of the statute, including: (1) ejectment; (2) partition; (3) dower; (4) mortgage foreclosure; (5) to determine a claim to real property; (6) waste; (7) nuisance; (8) to compel a conveyance; and (9) every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling, or otherwise affecting an estate, right, type, lien, or other interest in real property. Alexander, *Practice Commentaries,* p.109 (McKinney's 2006). CPLR 507 includes all of the actions that were listed in Section 183. N.Y.Sen. Fin. Comm. *et al*, Fifth Prelim. Rep., Legis. Doc. No. 15, p.76 (1961).
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> First American contends that Lucas seeks to procure a judgment affecting a lien and, thus, it is the type of action incorporated by the ninth subdivision of CPA § 183. First American further asserts that Lucas is "first and fore-most" seeking re-payment of the loan he made to Holder and that whether that mortgage is satisfied clearly affects the right, title, and use and enjoyment of the property. This Court disagrees.
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> While Lucas is seeking repayment of the loan, that is not the gravaman of his complaint. Lucas is seeking monetary damages resulting from the alleged negligence, breach of contract and bad faith of the Defendants. Generally, where money damages are sought for a breach of contract involving realty, title is not affected. McNamara Realty, Inc. v. Hutchinson 283 N.Y.S.2d 422, 424 (Sup. Ct. Albany Co. 1967); *3-5 New York Civil Practice:* CPLR P 507.03. Where, as here, the claims "involve" title to property, but do not "affect" title, CPLR 507 does not apply. See, Nassau Hotel Co. v. Barnett, 164 A.D. 203, 205 (1st Dept. 1914). Because title is not affected, the action is deemed transitory. Therefore, venue is properly based on residence rather than on the location of the realty.

D. Pending New York County Foreclosure Actions

First American affirms that there are two pending, related foreclosure actions ("Foreclosure Actions") in New York County titled 1) *Deutsche Bank National Trust Co. v. Holder et al.*, New York County Index Number 1063601/07, and 2) *Fremont Investment & Loan v. Holder et al.*, New York County Index Number 106800/07. First American affirms that the Foreclosure Actions were commenced prior to the action *sub judice*. The two mortgages that are the subject of the Foreclosure Actions were recorded prior to Lucas' mortgage.

Lucas submits, in its letter to the Court dated August 5, 2009, that there are now four separate related actions that were filed in New York County, including the Foreclosure Actions, and First American has only moved to consolidate the matter *sub judice* with two of those

matters. One of the other two actions is a case titled *Ehrenhalt v. Kinder et al.* , New York County Index Number 106347-09, in which Lucas is a named defendant. That action was filed on May 7, 2009 and involves claims based, *inter alia*, on fraud, breach of contract and promissory estoppel. Lucas submits that this matter is in a preliminary stage.

E. The Parties' Positions

First American affirms that, in the Foreclosure Actions, First American is providing a defense to Lucas' fourth priority interest. Thus, First American submits, Lucas' loss of priority as a result of Kensington's failure to record Lucas' mortgage in a timely manner is directly at issue in the Foreclosure Actions. First American argues that, if the Court in the Foreclosure Actions determines that Lucas has a lower priority interest than fourth, Lucas' loss can be determined by the extent to which the party with the fourth priority interest recovers funds.

First American submits further that, because Plaintiff has only an anticipatory breach of an indemnity contract claim remaining against First American and Plaintiff refuses to foreclose, which would establish its loss, the Court should either consolidate this matter with the Foreclosure Actions or, alternatively, stay this action pending resolution of those Foreclosure Actions.

Lucas opposes First American's application. First, Lucas notes that this is First American's second effort to remove this action to New York County, the first being its motion for a change of venue, which Justice Austin denied.

Lucas also submits that First American, as movant, has failed to prove a commonality of issues of law or fact that would warrant the consolidation it seeks. With respect to certain property that is the subject of the Foreclosure Actions, specifically Units #s 1E and 1F, Lucas submits that these actions will likely proceed to the entry of a judgment of foreclosure and sale by submission of papers only, and the subsequent issuance and confirmation of a Referee's report. In the matter *sub judice*, by contrast, Plaintiff has the right to a jury trial on his cause of action for breach of contract. Lucas also argues that the foreclosure proceedings will have no bearing on First American's liability to the Plaintiff, but rather will bear solely on First American's right of subrogation in the event that First American is required to pay Lucas under his policy.

Lucas also submits that the Court should reject First American's argument that Lucas'

damages cannot be determined or ascertained until the resolution of the Foreclosure Actions. On the contrary, Lucas argues, Lucas' damages are clearly defined by the terms of the applicable title insurance policy.

Finally, Lucas submits that it will be prejudiced by delays involving the Foreclosure Actions in which First American has not yet appeared, but may appear in the future, pursuant to the terms of its title insurance policy. Lucas also contends that it will incur extensive additional costs and expenses, if the Court grants the requested consolidation, by its involvement in the complex Foreclosure Actions. Moreover, it is anticipated that there may be an additional motion in New York County to consolidate all four foreclosure matters, which would result in additional delay to Lucas if this matter were consolidated with the Foreclosure Actions.

DECISION OF THE COURT

CPLR 602(a) permits consolidation "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial or any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Gutman v. Klein*, 26 A.D.3d 464 (2d Dept. 2006). A motion to consolidation rests in the sound discretion of the trial court. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d 527 (2d Dept. 1999).

The party seeking consolidation must establish the existence of common questions of law or fact. *Beerman v. Morhaim*, 17 A.D.3d 302 (2d Dept. 2005). Once the movant has established the existence of common questions of law or fact, the party opposing consolidation must demonstrate that it will suffer prejudice to a substantial right if consolidation is granted. *Mattia v. Food Emporium, Inc.*, *supra*. Absent that showing, consolidation should be granted if the movant meets its burden. *Id.* *See also*, *Viafax Corp. v. Citicorp Leasing, Inc.*, *supra*; and *Mas-Edwards v. Ultimate Services, Inc.*, 45 A.D.3d 540 (2nd Dept. 2007).

Preliminarily, the Court notes that First American raised similar arguments in the motion that was the subject of the Prior Decision, and Judge Austin rejected those arguments. In

First American's motion to dismiss the third cause of action, Justice Austin rejected First American's claim that Lucas has not established that it has suffered an actual loss, and therefore may not recover from First American at this time:

> First American argues that Lucas' only avenue of recovery under the policy is by establishing an actual loss arising from a loss of priority interest. Because Lucas has failed to institute foreclosure proceedings (thereby asserting its right to priority over the other mortgages), First American contends that Lucas has not shown that it has incurred any actual loss.
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> Lucas argues that it would be futile to initiate foreclosure proceedings for the purposes of ascertaining its damages in property which is known to have no equity in excess of the mortgages which currently exist with priority to its Mortgage. Moreover, Lucas asserts that plaintiff may maintain a claim for anticipatory indemnification, relying on Crupi v. Newell & Talarico Title Agency, *supra* at 7, which states that "a party who has not yet sustained actual loss may still assert an anticipatory claim for indemnification." While First American correctly points out that the court in *Crupi* was referring to a negligence action, anticipatory claims for contractual indemnification have been sustained by courts in the past, even where no damages have been suffered. See, Pennsylvania v. General Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 470 n.2 (1986) ("Of course, a party who has not yet been cast in damages or sustained actual loss may assert an anticipatory claim for common-law or contractual indemnification."); and McDermott v. New York, 50 N.Y.2d 211, 218 n.4 (1980).
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> First American further argues that because two of the pre-existing mortgages (Aleppo Pine and JP Morgan) have since been satisfied, and the third mortgage (MERS) is currently being defended by First American on Plaintiff's behalf, even if Lucas was to foreclose in the future, it would not be able to establish any actual loss of priority to those liens.
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> Lucas counters that the two satisfied mortgages were actually refinanced, and that the new mortgages also have priority as a result of the failure to timely record its Mortgage. Additionally, Plaintiff has submitted a copy of the New York endorsement loan policy, which was attached to the title insurance policy. In part, clause 3(d) provides that "if the recording date of the instruments creating the insured interest is later than the policy date such policy shall also cover intervening liens or encumbrances."
>
> Therefore, even if Lucas does not suffer an actual loss from the three pre-existing mortgages, Plaintiff might still have a contractual claim for damages as a result of the six intervening encumbrances that were recorded between the closing date and the recording of the Mortgage, which totaled $2,397,750. Therefore, the motion to dismiss this cause of action must be denied.

The Court is persuaded that, for many of the same reasons that Justice Austin denied First American's motion for a change of venue, consolidation of the action *sub judice* with the Foreclosure Actions is inappropriate. Preliminarily, the Court adopts Justice Austin's reasoning in rejecting First American's argument that Lucas has not established that it has suffered an actual loss, and therefore may not recover from First American at this time.

The Court also concludes that consolidation is inappropriate because 1) Lucas may demand a jury trial in the Nassau County case, whereas the Foreclosure Actions may realistically be decided upon the motion papers and other submissions; 2) two of the related pending matters in New York County have not yet been consolidated with the Foreclosure Actions, and a potential consolidation of those matters may result in additional delay to Lucas; and 3) the Nassau County action may proceed, even if the Foreclosure Actions are still pending, as the Foreclosure Actions bear more on First American's right to subrogation than the merits of Lucas' action.

In light of the above, the Court also denies First American's application for a stay. Accordingly, it is,

ORDERED, that First American's motion to consolidate this action with related foreclosure actions pending in New York County, and/or to stay this action, pending resolution of those related foreclosure actions, is **denied.**

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court on October 28, 2009 at 9:30 a.m. for a Certification Conference.

ENTER

DATED: Mineola, NY
October 15, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.