

Tower Ins. Co. of N.Y. v Valentin

2010 NY Slip Op 32855(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 114008/09

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Index Number : 114008/2009
TOWER INSURANCE COMPANY
VS.
VALENTIN, ALEJANDRO
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 114008/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in*
accordance with the annexed decision.

FILED
OCT 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/8/10

CSK
CYNTHIA S. KERN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 114008/09

-against-

DECISION/ORDER

ALEJANDRO VALENTIN, THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and ABDUL KALAM AZAD,

Defendants.

-----X
ALEJANDRO VALENTIN,

Third-party Plaintiff,

Index No. 590255/10

-against-

DECISION/ORDER

WELLS FARGO HOME MORTGAGE and ROBERTO JIMENEZ,

Third-party Defendant

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

FILED
OCT 14 2010
NEW YORK COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

-----X
Plaintiff commenced the instant action seeking a declaratory judgment declaring that it

has no duty to defend or indemnify the defendants in an underlying action and granting plaintiff costs and attorneys' fees. Third-party plaintiff Alejandro Valentin then brought a third-party action against third-party defendants Wells Fargo Home Mortgage ("Wells Fargo") and Roberto Jimenez, seeking damages he alleges he sustained for breach of an agreement whereby Wells Fargo agreed to obtain and/or modify the insurance policy or policies at issue in the main action. Wells Fargo now moves to dismiss the third-party complaint on the grounds that no such agreement or contract existed. For the reasons set forth below, Wells Fargo's motion is granted.

Valentin owns premises located at 25-01 83rd Street, East Elmhurst, New York (the "First Premises"). The First Premises were originally his primary residence but he subsequently bought another home and moved to premises located at 3146 93rd Street, East Elmhurst, New York (the "Second Premises"). On or about May 30, 2006, Valentin utilized the services of Wells Fargo to refinance a mortgage loan for the First Premises. Valentin alleges that at the same time, Wells Fargo procured a liability insurance policy for the First Premises, an allegation that Wells Fargo denied. This policy required Valentin to reside at the First Premises and was apparently renewed annually. On or about March 29, 2007, Valentin utilized the services of Wells Fargo to obtain a mortgage loan for the Second Premises. At the same time, Valentin asserts, Wells Fargo procured "owner occupied" liability insurance for the Second Premises. Valentin further claims that he informed Roberto Jimenez, his insurance broker whom he alleges was an employee of Wells Fargo (which Wells Fargo also disputes), that he would no longer reside at the First Premises and was moving to the Second Premises and that he needed a liability policy for the First Premises that did not require him to reside there. No one ever procured such a policy for the First Premises. On May 3, 2008, Abdul Kazam Azad allegedly tripped and fell in front of the

First Premises and subsequently commenced a legal action against Valentin (the "Azad Action"). At the time, Valentin did not reside at the First Premises. The "owner occupied" insurance policy was in effect for the First Premises. Because Valentin did not meet the requirement that he reside there, Tower disclaimed coverage and instituted a declaratory judgment action seeking a declaration that it has no duty to provide coverage in the Azad Action.

Wells Fargo's motion to dismiss is granted. Valentin fails to plead the elements of a claim for breach of contract. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound." *Kowalchuk v Stroup*, 61 A.D.3d 118, 121 (1st Dept 2009). Valentin fails to allege all but the first. Although his instructions to Jimenez to obtain the proper insurance policy for the First Premises because he was moving might constitute an offer, he never alleges that Jimenez or anyone at Wells Fargo actually accepted the offer. There is no allegation that anyone at Wells Fargo agreed to obtain the requested insurance policy. Thus, there is no evidence that Wells Fargo intended to be bound. Moreover, Valentin does not allege that there was any consideration. Although he states that he paid Wells Fargo various fees, those were in connection with obtaining the mortgage on the Second Premises, not in connection with modifying the insurance policy for the First Premises. Valentin does not state that he paid Wells Fargo to perform this particular task as opposed to fees associated with obtaining the mortgage.

Even if Valentin's complaint was liberally construed to state a cause of action for negligent performance of services rather than breach of contract, the documentary evidence he himself submits belie his claim. Although he alleges that Wells Fargo obtained an insurance

policy for the First Premises in connection with the refinancing of the mortgage on that property, that property was not refinanced until May 2006. However, the only insurance policy for the First Premises that Valentin submits has a term beginning three months earlier, on February 28, 2006. Moreover, Wells Fargo is not mentioned anywhere on that policy. Rather, the name of the agent listed on that policy is Northeast Agencies, not Wells Fargo. There is thus no evidence that Wells Fargo even had a role in obtaining the relevant insurance policy.

Accordingly, Wells Fargo's motion is granted and the third-party complaint is dismissed as against it. This constitutes the decision and order of the court.

Dated: 10/8/10

Enter: CSK
J.S.C.
CYNTHIA S. KERN
J.S.C.

FILED
OCT 14 2010
NEW YORK
COUNTY CLERK'S OFFICE