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

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
THIRD EQUITIES CORP.,	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No: 010254-10**
	Motion Seq. Nos. 1 and 2
	Submission Date: 10/18/10
COMMONWEALTH LAND TITLE INSURANCE COMPANY,	
Defendant.	
----------x	

The following papers having been read on these motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affidavit in Support/Opposition,
Affirmation in Opposition/Support and Exhibits.....x
Reply Memorandum of Law in Further Support.....x
Reply Affirmation and Exhibit.....x

This matter is before the Court for decision on 1) the motion filed by Defendant Commonwealth Land Title Insurance Company ("Commonwealth" or "Defendant") on August 6, 2010, and 2) the cross motion filed by Plaintiff Third Equities Corp. ("Third Equities" or "Plaintiff") on September 22, 2010, both of which were submitted on October 18, 2010. For the reasons set forth below, the Court 1) grants Defendant's motion; and 2) denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Defendant moves, pursuant to CPLR §§ 3211 and 3212(e) and (g), for an Order 1) dismissing Plaintiff's claims for bad faith conduct in connection with its insurance claim; and 2) dismissing Plaintiff's claims for damages in excess of the difference between a) the value of

Plaintiff's title to property ("Property") located at 206 Pennsylvania Avenue, Brooklyn, New York as insured, and b) the value of the Property subject to the risk against which Plaintiff's insurance policy with Commonwealth ("Policy") insured the Plaintiff.

Plaintiff opposes Defendants' motion and cross moves, pursuant to CPLR § 3212, for summary judgment in favor of Plaintiff on the issue of liability.

B. The Parties' History

The Complaint (Ex. A to Rosenberg Aff. in Supp.) alleges as follows:

Prior to December 10, 2008, Plaintiff entered into a contract to purchase the Property from seller Robert Cowan ("Seller"). Plaintiff retained the services of Defendant, through its agent ("Agent") NY Liberty Abstract Services Corp., to investigate and search the title to the Property so that Plaintiff could obtain clear and marketable title to the Property ("Title Search"). Plaintiff paid Defendant the sum of $1,400 for the Title Search. Defendant agreed to insure Plaintiff against loss or damage up to $300,000 that Plaintiff might sustain as a result of defects or unmarketability of the Title.

Defendant issued a title insurance policy ("Policy") to the Plaintiff (Ex. B to Rosenberg Aff. in Supp.). With respect to the First Cause of Action, Plaintiff alleges that Defendant, and/or its Agent's, examination of the title to the Property was "careless, negligent and unskillful in that they failed to discover and detect forgeries in the chain of title..." (Compl. at ¶ 6). This alleged negligence resulted in Seller receiving, and conveying to Plaintiff, fraudulent title to the Property. As a result, Plaintiff's title to the Property has no value. Upon discovering the defect following the closing on the Property on December 10, 2008 ("Closing"), Plaintiff notified Defendant and requested that Defendant compensate Plaintiff for the damage he sustained, either by securing good and encumbered title to the Property, or paying to Defendant the amount of the Policy. Defendant refused to compensate Plaintiff. [1] In the First Cause of Action, Plaintiff alleges that he has been damaged in the sum of $300,000, plus reasonable attorney's fees.

With respect to the Second Cause of Action, Plaintiff alleges that, due to Defendant's alleged delay and failure in compensating Plaintiff, the condition of the Property has deteriorated. As a result of its deterioration, the City of New York ("City") has filed and recorded an unsafe building violation against the Property, and filed a notice of pendency against

[1] Plaintiff also alleges that Defendant failed to compensate Plaintiff, "[n]otwithstanding the said policy of title insurance issued to the plaintiff by the defendant" (Compl. at ¶ 12). Thus, it is not entirely clear whether the First Cause of Action sounds in negligence or breach of contract.

the Property, thereby reducing the value of the Property and further encumbering Plaintiff's title to the Property. Plaintiff also alleges, upon information and belief, that the City intends to demolish the Property, which will further reduce its value. Plaintiff alleges that "all of foregoing was caused by the bad faith of the defendant in not affording the plaintiff the benefits of the title insurance policy to which it was entitled in a prompt and efficient manner..." (Compl. at ¶ 21). Plaintiff seeks damages in the sum of $500,000.

In his Affidavit in Support/Opposition, David Dilmanian ("Dilmanian"), President of Plaintiff corporation, affirms as follows:

Plaintiff is in the business of buying properties, renovating them and reselling them at a profit. In these transactions, Plaintiff contracts with a title insurance company, usually through an agent, to investigate the legitimacy of the title at issue. The title insurance company charges the buyer a premium for this service. At times, a title insurance company offers the buyer "market value insurance" for which it receives a higher premium (Dilmanian Aff. at ¶ 3(d)); in these cases, the title is insured for an amount that is higher than the sales price.

Plaintiff purchased the Property for $80,000 on December 10, 2008. Defendant, through its Agent, offered Plaintiff insurance in the sum of $300,000 and Plaintiff accepted that offer for which it paid a higher premium of $1,400. Following the Closing, the City Register refused to record the deed to the Property on the grounds that the City had been "advised by the District Attorney's office that these are fraudulent transactions and it would be inappropriate to record the deeds" (Ex. B to Dilmanian Aff.).

Plaintiff subsequently filed a claim ("Claim") with Defendant. Dilmanian affirms that, prior to instituting this action, Plaintiff forwarded to Defendant all documents it requested and provides a copy of a letter dated May 13, 2009 to Defendant (Ex. F to Dilmanian Aff.) enclosing copies of numerous documents related to the Property. By letter dated July 7, 2009 (Ex. D to Dilmanian Aff.), Defendant advised Dilmanian that it had completed its investigation of the Claim and was prepared to provide a coverage determination. Defendant also outlined the relevant facts and advised Dilmanian that "[Defendant] accepts this claim as covered under your title policy, pursuant to and in accordance with the terms and conditions of the Policy, and [Defendant] will investigate the charge and keep you informed as to how we will remedy or resolve."

By letter to Defendant dated October 2, 2009 (Ex. G to Dilmanian Aff.), Plaintiff's counsel, "[a]s a follow-up to our recent conversations," provided Defendant with a list of

expenses that Plaintiff incurred following the Closing, but also noted that the figures provided did not include any "lost profits." By letter to Defendant dated February 17, 2010 (Ex. J to Dilmanian Aff.), Plaintiff's counsel made reference to a letter from Defendant dated February 11, 2010, outlined the history of the Claim, including the correspondence between the parties, and advised Defendant that Plaintiff would commence legal action if the matter were not resolved satisfactorily. Defendant advised Plaintiff's counsel, by letter dated February 23, 2010 (Ex. C to Dilmanian Aff.), that Defendant's investigation "has determined that [Plaintiff] has suffered a failure of title with regard to [the Property]." In the letter, Defendant also advised Plaintiff's counsel, *inter alia*, that 1) Defendant was working to remedy the defect consistent with the terms of the Policy; and 2) Defendant was also seeking to mitigate Plaintiff's losses by obtaining contributions from other parties that may have created the defect, including but not limited to the Seller. Defendant also made reference to the February 17, 2010 letter from Plaintiff's counsel, and disputed certain assertions in that letter.

C. The Parties' Positions

Condition 8 of the Policy, titled "Determination and Extent of Liability," provides as follows at subparagraph (a):

> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.
>
> (a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of
> (i) the Amount of Insurance; or
> (ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

Defendant submits that Plaintiff's claims for damages exceeding the fair value of the Property should be dismissed because the Policy limits Plaintiff's recovery to the lesser of a) the Policy limit of $300,000, and b) the difference between the value of the insured property as insured and its value subject to the risk against which it was insured. Where, as here, Plaintiff alleges a total failure of title due to the Forgery, it cannot recover more than the fair market value of the insured property at the time when the title defect was discovered. Where that fair market value is less than the total policy limit, Plaintiff may only recover the market value and not the policy limit. Plaintiff is not entitled to compensation for additional consequential damages it alleges to have incurred as a result of Commonwealth's alleged failure to pay the Claim.

Defendant contends, further, that the Second Cause of Action, alleging Defendant's bad faith in handling the Claim, must be dismissed because New York does not recognize a cause of action for bad faith handling, or denial, of an insurance claim. In addition, because Plaintiff does not own the Property, he necessarily cannot suffer damages as a result of something that affects that Property.

Plaintiff contends, first, that the "bare affirmation of counsel" (Decker Aff. at ¶ 5) lacks probative value and warrants denial of Defendant's motion. Plaintiff also argues that the fact that Defendant's motion does not contain an affidavit from a person with personal knowledge of whether Defendant has acted in bad faith requires denial of Defendant's motion.

Plaintiff also submits, *inter alia*, that 1) the motion papers demonstrate the existence of a valid cause of action in negligence against Defendant in light of Defendant's admission "that its action caused a failure of title" (Decker Aff. at ¶ 8); 2) the only remaining issue is damages, and as Plaintiff and Defendant have obtained conflicting appraisals for the Property, for $225,000 and $115,000 respectively, there are factual issues precluding judgment for Defendant; and 3) recent case law, specifically *Bi-Economy Market Inc. v. Harleysville Insurance Co. of New York*, 10 N.Y.3d 187 (2008), *rearg. den.*, 10 N.Y.3d 890 (2008), supports a claim for damages for bad-faith handling of an insurance claim if the damages were foreseeable at the time the contract was made.

In reply, Defendant 1) disputes Plaintiff's claim that Defendant was required to submit an affidavit to support its motion and asserts that the motion papers demonstrate Defendant's right to dismissal of the Complaint; 2) submits that Plaintiff cannot maintain a claim for bad faith handling of its Claim where, as here, a) the Policy "unambiguously sets forth the measure of indemnification that Commonwealth is to pay the plaintiff, which measure does not include consequential business loss" (Reply Memorandum at p.2); and b) Plaintiff has not alleged facts, outside the context of the Policy, reflecting any agreement by Defendant to indemnify Plaintiff for business losses, or any awareness by Defendant of the likelihood of such losses; and 3) argues that Defendant's acknowledgment that the title to the Property was defective does not establish that Defendant breached the Policy, and Plaintiff has not established that Defendant breached the Policy in any way.

Defendant also argues that the *Bi-Economy* case cited by Plaintiff is inapposite to the matter at bar because 1) *Bi-Economy* involved a policy that included business interruption insurance which, by its nature, is designed to ensure that the insured has the financial support to

sustain its business in the event of a catastrophe; and 2) Plaintiff has not pleaded facts demonstrating that the parties contemplated coverage for business interruptions or other consequential damages.

Defendants also contend that Plaintiff has created the term "market value insurance" in an effort to fit its situation within the holding of *Bi-Economy*; in fact, no special "market value" insurance is necessary to obtain the coverage in the Policy, and the measure of damages set forth in the Policy is Defendant's usual measure of indemnification which is inconsistent with the demands in the Complaint. Defendant also disputes Plaintiff's claim that Defendant has acknowledged that it was negligent or breached the Policy; Defendant contends that it has fulfilled its obligations under the Policy and will pay Plaintiff the sums to which it is entitled.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Partial Summary Judgment

CPLR § 3212(e) provides, in pertinent part, that summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct 1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2) that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

CPLR § 3212(g), titled "Limitation of issues of fact for trial" provides that:

> If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

Pursuant to CPLR § 3212, a court may limit issues of fact for trial, or limit the measure of damages. *See, e.g., Empire Financial Services, Inc. v. Bellantoni*, 53 A.D. 3d 1095 (4th Dept. 2008) (affirmed trial court's order granting portion of defendant's motion for summary judgment limiting amount of damages that could be recovered by plaintiff); *Whitmore v. Niagara Mohawk Power Corp.*, 13 A.D.3d 1109 (4th Dept. 2004) (affirmed trial court's order granting defendant's motion for partial summary judgment dismissing claim for particular damages).

C. Applicable Legal Principles

The general rule is that damages for a breach of covenant against encumbrances or a breach of a warranty of title are measured by subtracting the value of the property after the defect is discovered from its value before the defect existed. *Veterans of Foreign Wars of the U.S. v. Josanth Realty Corp.*, 67 N.Y.2d 1029, 1031 (1986), citing *Smirlock Realty Corp. v. Title Guar. Co.*, 97 A.D.2d 208, 222 (2d Dept. 1983), *aff'd as mod.*, 63 N.Y.2d 955 (1984).

New York does not recognize an independent claim for bad faith denial of insurance coverage whether based in tort or in contract. *Edwards v. Great Northern Ins. Co.*, 2006 U.S. Dist. LEXIS 50683, at * 21 (E.D. N.Y. 2006), quoting *Continental Info. Sys. Corp. v. Federal Ins. Co.*, 2003 U.S. Dist. LEXIS 682, 2003 WL 145561, at *3 (S.D.N.Y. Jan. 17, 2003), and citing *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308 (1995) and *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603 (1995). Parties to an express contract are bound by an implied duty of good faith; the breach of that duty, however, is merely a breach of the underlying contract. *Edwards, supra*, at * 22, quoting *Fasolino Foods Co.* v. *Banca Nazionale Del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992).

D. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss the Second Cause of Action based on 1) the general rule that New York does not recognize an independent claim for bad faith denial of insurance coverage, and 2) the Court's conclusion that the *Bi-Economy* case cited by Plaintiff does not warrant the recovery of consequential damages in the matter at bar because a) the record does not support the inference that consequential damages were reasonably contemplated by the parties; and b) the provisions in the Policy provide the formula for damages under the circumstances at issue.

In light of the foregoing, the Court 1) grants Defendant's motion to dismiss the Second Cause of Action; 2) denies Plaintiff's motion for summary judgment on liability as to the First Cause of Action, in light of the disputed issues regarding whether Defendant improperly failed to discovery the Forgery or compensate Plaintiff pursuant to the Policy; and 3) limits Plaintiff's damages on the First Cause of Action, in the event that Defendant's liability is established, to the difference between the value of Plaintiff's title to the Property as insured, and the value of the Property subject to the risk insured against which the Policy insured the Plaintiff.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on January 27, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 7, 2010

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