

**National Title Ins. Agency of N.Y. Inc. v Muro Title Agency, Inc.**

2011 NY Slip Op 30628(U)

March 8, 2011

Supreme Court, Suffolk County

Docket Number: 36809-2007

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present:*** **HON. EMILY PINES**  
J. S. C.

Original Motion Dates: 5-13-2010, 7-26-2010  
& 08-17-2010  
Motion Submit Date: 01-11-2011  
Motion Sequence Nos.: 008 MG  
009 MG  
010 MOTD

NON-FINAL

X

\_\_\_\_\_  
NATIONAL TITLE INSURANCE AGENCY OF NEW YORK INC.,

Plaintiff,

-against-

MURO TITLE AGENCY, INC.,

Defendant.

X

\_\_\_\_\_  
MURO TITLE AGENCY, INC.,

Third Party Plaintiff,

-against-

HETTY ELENA BENNETT, KELVIN O. BENNETT and REALTY  
SKYLINE RESEARCH, LLC, FAIRMONT FUNDING, LTD, ANDREW  
STRAKER, ALLISON M. RAMOS, JOHN P. FOSTER, BEST FUNDING  
LLC and STEWART TITLE INSURANCE COMPANY,

Third Party Defendants.

X

**ORDERED**, that the motion (motion sequence no. 008) by third-party defendant, Stewart Title Insurance Company, for summary judgment dismissing the Amended Third-Party Complaint dated September 15, 2009, as asserted against it is granted; and it is further

**ORDERED**, that the motion (motion sequence no. 009) by third-party defendant Allison M. Ramos, to dismiss the Amended Third-Party Complaint dated September 15, 2009, as asserted against her is granted; and it is further

**ORDERED**, that the motion (motion sequence no. 010) by third-party defendants John P. Foster and Best Funding LLC, to dismiss the Amended Third-Party Complaint dated September 15, 2009, as asserted against them is granted to the extent that the first, second, third, fifth, sixth, and ninth causes of action in the Amended Third-Party Complaint dated September 15, 2009, as asserted against them are dismissed, and the motion is otherwise denied.

### **BACKGROUND**

In this action, plaintiff, National Title Insurance Company of New York, Inc. (“National Title”), alleged that it sustained damages as a result of the negligence of its agent, defendant, Muro Title Agency, Inc. (“Muro”), in performing title work in connection with a transaction involving the premises known as 312 Throop Avenue, Brooklyn, New York (the “Premises”). Additionally, National Title sought contractual indemnity from Muro pursuant to an agreement between the parties entitled, “Issuing Agency Agreement” (the “Agreement”) dated August 29, 2001. Specifically, National Title alleged that Muro erroneously concluded that third-party defendant, Hetty Elena Bennett (“H. Bennett”) was the sole owner of the premises located at 312 Throop Avenue, Brooklyn, New York (the “Premises”), and that H. Bennett could convey good and marketable title to the Premises to third-party defendant, Andrew Straker (“Straker”). National Title claimed that Muro should have been aware of certain facts which demonstrated that H. Bennett was not the sole owner of the Premises and that she could not convey good and marketable title free and clear of any competing claims of ownership. When the transaction from H. Bennett to Straker closed in 2003, Muro, as agent for National Title, issued policies of title insurance to Straker and his mortgagee, obligating National Title to insure that Straker owned the entirety of the Premises in fee simple and without any co-owners. Thereafter, Straker and/or his mortgagee discovered that H. Bennett did not have the power to convey to Straker free and clear of any competing claims and Straker and/or his mortgagee made a claim under the title insurance policies. National Title paid

\$403,206.00 to settle the claims made under the title insurance policies and seeks to recover that amount from Muro in this action.

Muro commenced a third-party action against H. Bennett, Kelvin O. Bennett, Realty-Skyline Research, LLC (“Realty-Skyline”), Fairmont Funding, Ltd. (“Fairmont”), Straker, Allison M. Ramos (“Ramos”), John P. Foster (“Foster”), Best Funding LLC (“Best Funding”) and Stewart Title Insurance Company (“Stewart”), seeking contribution or common law indemnity.

By order dated July 28, 2009, this Court (1) granted plaintiff National Title’s motion for summary judgment against Muro on its second cause of action for contractual indemnity, (2) granted Muro’s unopposed motion for a default judgment against third-party defendant Kelvin O. Bennett, (3) granted third-party defendant Ramos’ motion to dismiss the third-party complaint as asserted against her, (4) granted the motion by third-party defendants Foster and Best Funding to dismiss the third-party complaint as asserted against them, (5) scheduled a hearing on National Title’s claim for counsel fees in the main action, and (6) severed the third-party action and scheduled a preliminary conference. In the Decision and Order, this Court stated, in relevant part:

In the case at bar, a review of the Third-Party Complaint reflects that it cannot stand as against the third-party defendants Ramos, Foster and Best. Initially, the cause of action sounding in legal malpractice must fail as it is undisputed that neither Ramos nor Foster represented Muro nor did they stand in privity to either Muro or plaintiff. Thus, the Sixth Cause of Action for legal malpractice is dismissed. The First Cause of Action fails to set forth any allegations against any of these defendants and is therefore dismissed as against them. The Second and Third Cause of Action alleging misrepresentation and fraud must also be dismissed for failure to plead the specific acts of Ramos, Foster and Best that constitute the wrongdoing. Finally, the Seventh Cause of Action against Best must be dismissed for failure to state a cause of action.

Muro thereafter served an Amended Third-Party Complaint dated September 15, 2009, alleging, among other things, that prior to October 30, 2003, non-party Imogene Bennett McKenzie (“McKenzie”), owned the Premises; that McKenzie was the mother of H. Bennett and Kelvin O. Bennett; that McKenzie died on March 25,

1988; that Kelvin O. Bennett was appointed Administrator of McKenzie's estate; that Kelvin O. Bennett, as Administrator, transferred the Premises to H. Bennett by executing an Administrator's Deed; that the transfer from the McKenzie estate to H. Bennett violated the court order appointing Kelvin O. Bennett as Administrator; and that Kelvin O. Bennett transferred the Premises with knowledge that he was not authorized to do so. Further, it is alleged that third-party defendants Ramos and Foster represented the parties in the drafting and execution of the contract for the subsequent sale of the Premises by H. Bennett to Straker. Additionally, Muro alleges that prior to October 30, 2003, it entered into an agreement with Realty-Skyline pursuant to which Realty-Skyline was to conduct a search of the title for the Premises in order to determine whether H. Bennett could convey good title to Straker. Realty-Skyline allegedly conducted a search and represented to Muro that Bennett could convey good title. It is also alleged that Fairmont and Best were mortgage funding companies that provided funding to Straker for the purchase of the Premises. Muro alleges that Stewart Title improperly cleared prior titles to the Premises.

The Amended Third-Party Complaint by Muro dated September 15, 2009, contains 12 causes of action, each seeking contribution or common law indemnity. The first cause of action is asserted against all the original third-party defendants and alleges negligence and/or breach of contract. The second cause of action is asserted against all original third-party defendants and alleges negligent misrepresentations. The third cause of action is asserted against all original third-party defendants, except Stewart Title, and alleges fraud. The fourth cause of action is asserted solely against Ramos and alleges fraud and misrepresentation by Ramos in connection with the transaction. The fifth cause of action is asserted solely against Foster and alleges negligence, misrepresentation and fraud by Foster in connection with the transaction. The sixth cause of action is asserted solely against Best Funding and alleges fraud. The seventh cause of action is asserted against H. Bennett and alleges unjust enrichment. The eighth cause of action is asserted against Realty-Skyline and alleges breach of its agreement with Muro. The ninth cause of action is asserted against Ramos and Foster and alleges legal malpractice. The tenth cause of action is asserted against Fairmont and Best Funding and alleges fraud. The eleventh cause of action is asserted against Straker and alleges fraud. Finally, the twelfth cause of action is

asserted against Stewart Title and alleges fraudulent misrepresentations in connection with a title search performed on the Premises prior to 2003.

### MOTIONS

Third-party defendant Stewart Title now moves for summary judgment (motion sequence # 008) dismissing the Amended Third-Party Complaint as asserted against it and submits copies of the pleadings, the Court's order dated July 28, 2009, an affirmation from Muro's counsel dated March 31, 2009, submitted in opposition to National Title's prior motion for summary judgment, a computer printout from the New York Department of State Division of Corporations, and an affidavit from Richard J. King ("King"), Vice President and Chief Claims Counsel of Stewart Title. Stewart Title contends that King's affidavit establishes that Muro never had any business relationship with Stewart Title, that Stewart Title never issued a title insurance policy relating to the Premises to any party to this action, and that Stewart Title never examined title to the Premises for Muro or National Title, nor did it agree to indemnify Muro or National Title concerning title to the Premises. King states that Stewart Title has no record of ever issuing a fee policy relating to the Premises. King explained that on or about March 29, 2000, more than three years before Muro issued the policies to Straker, Advance Abstract Corp., a limited policy-issuing agent of Stewart Title, issued a lender's title insurance policy, insuring only a mortgage against the Premises held by Alliance Funding, and that the proceeds from that mortgage apparently paid off a mortgage given by H. Bennett to Delta Funding Corp. dated November 13, 1987. King states that a satisfaction of the Alliance mortgage was recorded on March 29, 2001, terminating any liability Stewart Title may have had to the holder of the Alliance mortgage.

Stewart Title argues that the first cause of action asserting a negligence/breach of contract claim and the second cause of action asserting a negligent misrepresentation claim must be dismissed because there was no privity between Stewart Title and Muro and because Stewart Title owed no duty to Muro or National Title. Stewart Title also argues that Muro does not have a valid claim for contribution because National Title's claims against Muro are for purely economic damages. With regard to the twelfth cause of action asserting a claim for fraudulent misrepresentation, Stewart Title argues that Muro fails to state a cause of action or

allege any purported fraud by Stewart Title with particularity, as required by CPLR 3016(b). Additionally, Stewart Title contends that it never made any representation to Muro regarding the Premises and, therefore, Muro could not have justifiably relied upon any prior examination of title that Muro assumed had been performed by or on behalf of Stewart Title.

In opposition to Stewart Title's motion, Muro submits an attorney's affirmation and argues only that the motion is premature as document discovery and depositions have not taken place.

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept. 1996]). As noted by the Appellate Division, Second Department in *Spatola v. Gelco Corp.* (5 AD3d 469, 470 [2d Dept 2004]):

Pursuant to CPLR 3212(f), the court has discretion to deny a motion for summary judgment, or to order a continuance to permit affidavits to be obtained or disclosure to be had, if facts essential to justify opposition to the motion may exist but cannot then be stated. For the court to delay action on the motion, there must be a likelihood of discovery leading to such evidence. The mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient (citations omitted).

Here, with regard to the first cause of action sounding in negligence/breach of contract, the second cause of action alleging negligent misrepresentation, and the twelfth cause of action alleging fraud, Stewart Title, through the affidavit of its Vice President and Chief Claims Counsel, has made a prima facie showing of entitlement to summary judgment by demonstrating that it never had any contractual or other

business relationship with Muro, that it never issued a title insurance policy relating to the Premises to any party in this action, and that it never examined title to the Premises for Muro or National Title, nor did it agree to indemnify Muro or National Title. “[A] title company hired by one party is not, absent evidence of fraud, collusion, or other special circumstances, subject to suit for negligent performance by one other than the party who contracted for its services” (*Calamari v. Grace*, 98 AD2d 74, 83 [2d Dept 1983]). In opposition to Stewart Title’s motion, Muro has failed to produce any evidence to contradict the assertions set forth in King’s affidavit or of fraud, collusion, or other special circumstances involving Stewart Title. Additionally, Muro has failed to demonstrate a likelihood that additional discovery would lead to such evidence. Therefore, Stewart Title’s motion for summary judgment dismissing the Amended Third-Party Complaint dated September 15, 2009, as asserted against it is granted.

Third-party defendant Ramos moves to dismiss (motion sequence # 009) the Amended Third-Party Complaint dated September 15, 2009, as asserted against her pursuant to CPLR 3211(a)(1) and (7). Ramos submits an attorney’s affirmation, copies of the Amended Third-Party Complaint dated March 10, 2009, the Amended Third-Party Complaint dated September 15, 2009, as well as a copy of the Court’s order dated July 28, 2009. Ramos points out that the first, second, and third causes of action in the Amended Third-Party Complaint dated September 15, 2009, are identical to the first, second, and third causes of action in the Amended Third-Party Complaint dated March 10, 2009, which were all dismissed as asserted against Ramos by this Court’s prior order dated July 28, 2009. Additionally, Ramos points out that the ninth cause of action in the Amended Third-Party Complaint dated September 15, 2009, alleging legal malpractice is identical to the sixth cause of action in the Amended Third-Party Complaint dated March 10, 2009, which was also dismissed by this Court’s order dated July 28, 2009. With regard to the newly alleged fourth cause of action alleging fraud, Ramos argues that it fails to state a cause of action because there are no allegations of (1) a confidential or fiduciary relationship between Ramos and Muro, (2) that Ramos made any representation(s) to Muro, (3) that Ramos had any role in the preparation of the title report, and (4) that Muro relied to its detriment on any representation(s) by Ramos.

In opposition to Ramos' motion, Muro submits an attorney's affirmation and argues "that the prior dismissal of the causes of action is specific only to the first third-party complaint, not the amended third-party complaint" (Affirmation of Neil J. Palmieri, Esq. dated August 6, 2010, at ¶ 8). Muro also argues that the specific allegations of misrepresentations and fraud against Ramos have been pled with particularity in the fourth cause of action, which alleges that Ramos failed to disclose the existence of prior mortgages on the Premises, as well as a second mortgage between Straker and Bennett, which allowed Bennett to remain in the Premises and induced Muro to clear title without raising any objections.

Third-party defendants Foster and Best Funding move to dismiss (motion sequence # 010) the Amended Third-Party Complaint dated September 15, 2009, as asserted against them. Foster, an attorney, submits an affirmation in support of the motion, as well as copies of the Amended Third-Party Complaint dated September 15, 2009, this Court's order dated July 28, 2009, Foster and Best Funding's answer to the Amended Third-Party Complaint, Ramos' motion papers, and Foster's affirmation in support of Ramos' motion. Foster and Best Funding adopt Ramos' argument in support of dismissal of the first, second, third and ninth causes of action in the Amended Third-Party Complaint dated September 15, 2009, as duplicative of the first, second, third, and sixth causes of action in the Amended Third-Party Complaint dated March 10, 2009. With regard to the fifth, sixth and tenth causes of action, Foster and Best Funding contend that they fail to comply with the pleading requirements of CPLR 3016(b) and must be dismissed because (1) Muro had no privity with either Foster or Best Funding, neither of whom was obligated to Muro in any way, (2) Muro fails to specify in detail any misrepresentations made to Muro by Foster or Best Funding that were intended to defraud Muro, and (3) Muro fails to allege in detail how Muro relied on any alleged misrepresentations to its detriment.

In opposition to the motion by Foster and Best Funding, Muro submits an attorney's affirmation and argues that the specific allegations of misrepresentations and fraud by Foster and Best Funding have been pled with sufficient particularity.

The burden is on the party alleging fraud to plead the circumstances constituting the fraud or misrepresentation upon which the cause of action is based in sufficient detail to give adequate notice of the transaction (CPLR 3016[b]; *Sargiss v. Magarelli*, 12 NY3d 527 [2009]). This burden may be met where the allegations are sufficient to permit a reasonable inference of the alleged fraudulent conduct (*Sargiss v. Magarelli*, supra at 531). The party alleging fraud must allege a misrepresentation or material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*see, Ross v. Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]). Where a cause of action alleging fraud is predicated on acts of concealment, the plaintiff must allege, among other things, that the defendant had a duty to disclose the disputed information (*Spencer v. Green*, 42 AD3d 521, 522 [2d Dept 2007]).

With regard to the first, second, third, and ninth causes of action in the Amended Third-Party Complaint dated September 15, 2009, Ramos' motion to dismiss those causes of action as asserted against her is granted. Additionally, the motion by Foster and Best Funding to dismiss the first, second, third and ninth causes of action as asserted against them is also granted. The first, second, third and ninth causes of action in the Amended Third-Party Complaint dated September 15, 2009, are duplicative of the first, second, third and sixth causes of action in the Amended Third-Party Complaint dated March 10, 2009, all of which were dismissed by this Court's prior order dated July 28, 2009. For the same reasons stated in this Court's order dated July 28, 2009, said causes of action are again dismissed.

With regard to the fourth cause of action asserted against Ramos, the fifth cause of action asserted against Foster, and the sixth cause of action asserted against Best Funding in the Amended Third-Party Complaint dated September 15, 2009, the Court finds that the allegations contained therein are insufficient to state causes of action. First, Muro fails to plead facts sufficient to permit a reasonable inference that there existed a confidential or fiduciary relationship between it and Ramos or Foster or Best Funding, such that Ramos or Foster or Best Funding had a duty to disclose the disputed information (*see, Spencer v. Green*, supra at 522). Muro's allegation that Ramos and Foster were "duty bound" to disclose the disputed information is

conclusory and wholly unsupported by any facts. Moreover, the fourth, fifth and sixth causes of action do not allege any misrepresentation or material omission made for the purpose of inducing Muro to rely upon it. Inasmuch as the motions seek dismissal pursuant to CPLR 3211, Muro's contention that the motions are premature because it has not had an opportunity to conduct discovery is without merit.


However, the Court finds that the tenth cause of action asserted against Best Funding satisfies the pleading requirements of CPLR 3016(b). The tenth cause of action is not predicated upon acts of concealment but rather upon affirmative misrepresentations allegedly made by Best Funding to Muro regarding the purchase of the Premises by Straker. Therefore, it is Muro's burden to plead the circumstances constituting the fraud or misrepresentation upon which the cause of action is based in sufficient detail to give adequate notice of the transaction to Best Funding (CPLR 3016[b]; *Sargiss v. Magarelli*, supra). The allegations in the tenth cause of action in the Amended Third-Party Complaint dated September 15, 2009, are sufficient to permit a reasonable inference of the alleged fraudulent conduct by Best Funding.

The following causes of action set forth in the Amended Third-Party Complaint dated September 15, 2009, remain pending in the third-party action: first, second, third causes of action as asserted against H. Bennett, Realty-Skyline, Fairmont, and Straker; seventh cause of action; eighth cause of action; tenth cause of action; and eleventh cause of action.

No more substantive motions are to be made without the prior permission of the Court.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: Riverhead, New York  
March 8, 2011

  
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EMILY PINES  
J. S. C.

[ ] FINAL  
[ X ] NON-FINAL

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