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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

FOREST PARK COOPERATIVE, INC., Section 2

Plaintiff,

- against -

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Defendant.

Index Number 29912 2010

Motion Date March 8, 2011

Motion Cal. Number 8

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendant Commonwealth Land Title Insurance Company for an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7), and in the alternative for an order granting summary judgment dismissing the complaint, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits(A-B).....	1-4
Opposing Affirmation-Exhibit(A).....	5-7
Reply Affirmation -Exhibits(A-B).....	8-10

Upon the foregoing papers this motion is determined as follows:

Plaintiff Forest Park Cooperative Inc., Section 2, alleges in its complaint that, on May 7, 2008, it obtained a first mortgage with National Cooperative Bank. Plaintiff also obtained a Loan Policy of Title Insurance from Liberty Title Agency, LLC (Liberty), which was issued by defendant Commonwealth Land Title Insurance Company. Plaintiff alleges that as part of the title requirements, sums were held in escrow by Liberty for taxes, water charges,

and an outstanding Environmental Control Board (ECB) violation. Plaintiff alleges that the sums held in escrow for the taxes and water charges were ultimately released, but that the $30,000.00 held in escrow pending the resolution of the ECB violation, was never released. It is alleged that the plaintiff corrected the ECB violation and sought to obtain the release of the escrowed funds from Liberty. However, by that time, a principal of Liberty had been indicted and Liberty had gone out of business. The plaintiff alleges that it requested that defendant return the $30,000.00 held in escrow, and that defendant has denied any coverage for said funds, on the grounds that the escrow services provided by Liberty were incidental to the title insurance transaction and, therefore, fell outside the scope of defendant's agency relationship with Liberty.

The plaintiff, in its first cause of action, asserts that a justiciable controversy exists, and seeks a declaration to the effect that defendant, in conferring actual authority on Liberty to issue title policies, also conferred implied authority to hold monies in escrow; that Liberty, in placing in escrow $30,000.00 with respect to the ECB violation, was acting as defendant's agent, and was acting within the scope of the agency relationship between Liberty and defendant; that plaintiff's claim for the return of the $30,000.00 held in escrow is a covered claim under the Loan Policy of Title Insurance and escrow agreement entered into in furtherance thereto; and that defendant is liable to plaintiff for the $30,000.00 that was deposited into escrow.

The second cause of action alleges that a justiciable controversy exists, and seeks a declaration to the effect that defendant, in conferring actual authority upon Liberty to issue title policies, also conferred apparent authority to hold monies in escrow; that Liberty, in placing in escrow the plaintiff's $30,000.00 for the ECB violation, was acting as defendant's agent and was acting within the agency relationship between Liberty and defendant; that plaintiff's claim for the return of the $30,000.00 held in escrow is a covered claim under the Loan Policy of Title Insurance and escrow agreement entered into in furtherance thereto; and that defendant is liable to plaintiff for the $30,000.00 that was deposited into escrow.

The third cause of action for breach of contract alleges that Liberty breached its contractual obligations with respect to the $30,000.00 held in escrow when it failed to return said funds when it went out of business; that defendant was the disclosed principal and that Liberty acted as its agent in placing the $30,000.00 in escrow; that, as a result of this agency relationship, defendant is liable for Liberty's breach of its contractual obligations with the plaintiff, and seeks a money judgment in the sum of $30,000.00.

The fourth cause of action alleges that Liberty wrongfully misappropriated and converted plaintiff's $30,000.00 that was held in escrow. It is alleged that, due to the agency

relationship between Liberty and defendant, defendant is liable for Liberty's misappropriation and conversion of said funds, and seeks a money judgment in the sum of $30,000.00.

The fifth cause of action seeks an award of attorney's fees pursuant to the terms of the escrow agreement and the title insurance policy.

Defendant now seeks to dismiss the complaint and asserts that plaintiff has not alleged facts sufficient to show that Liberty acted as its agent with respect to the escrow agreement. Defendant also relies upon its agency agreement with Liberty, and asserts that said agreement expressly limited the agent's authority, and specifically did not authorize Liberty to act as defendant's agent for escrow transactions. Defendant further asserts that plaintiff's claims of apparent authority are legally deficient, as plaintiff does not allege that defendant did anything to lead the plaintiff to reasonably believe that Liberty was its agent with respect to the escrow agreement between Liberty and the plaintiff. Defendant also asserts that it cannot be liable for a tort committed by its agent which was personally motivated, including the defalcation of the escrow funds. Finally, it is asserted that the claims for attorney's fees must be dismissed, as plaintiff has failed to allege any facts which would permit such an award.

Plaintiff, in opposition, asserts that the agreement between defendant and Liberty does not conclusively establish that Liberty's authority was limited only to the issuance of title insurance policies on behalf of the insurer, and that said agreement does not conclusively establish the extent of Liberty's actual or implied authority to hold money in escrow. Plaintiff further asserts that the complaint adequately alleges that Liberty entered into the escrow agreement as an agent on behalf of defendant. Plaintiff also asserts that defendant's request for summary judgment is premature, as issue has not been joined.

Defendant, in its reply, asserts that the plaintiff's arguments regarding implied authority is contrary to law, and to the plain terms of the agency agreement. It is further asserted that Liberty's misappropriation of escrowed funds was clearly outside the scope of its agency agreement with defendant, and, therefore, plaintiff's claims must be dismissed.

It is well settled that " '[i]n considering a motion to dismiss for failure to state a cause of action (*see,* CPLR 3211[a][7]), the pleadings must be liberally construed (*see,* CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2003]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see*

Morone v Morone, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affirmed* 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

When a defendant moves, pursuant to CPLR 3211(a)(1), to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" *(Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]; *see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347, *supra*; *see,* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20).

In support of the within motion to dismiss the complaint, defendant has submitted a copy of its agency agreement with Liberty, dated January 7, 2001 (incorrectly referred to as an underwriting agreement by plaintiff). Said agreement expressly provided that Liberty's authority is "limited to the issuance of title insurance commitments, policies and endorsements and the collection of Premiums as set forth herein. Without limitation, AGENT is not authorized and shall not purport to:

> a) Incur any obligation or liability on behalf of PRINCIPAL other than as expressly set forth in this Agreement;...
>
> d) Engage in any business in the name of PRINCIPAL except as specifically authorized herein;...

> f) Receive in the name of PRINCIPAL any funds, including escrow and settlement funds;...
>
> i) Issue any commitment, policy or endorsement which insures against or over any matter by reason of an escrow deposit, indemnity agreement, letter of credit, or bond."

The agreement sets forth the agent's obligations, including "the collection of the gross amount of all fees and charges for title insurance in respect to Policies issued by AGENT (hereinafter termed 'PREMIUMS')" and required the agent to:

> "c) Keep all funds, received by AGENT from any source in connection with transactions in which title insurance policies of PRINCIPAL are to be issued in a federally insured financial institution, in an account separate from AGENT'S individual accounts and designated as an 'escrow' or 'settlement funds' account, and disburse such funds only for the purposes for which the same were entrusted. AGENT acknowledges that all such funds constitute trust funds and AGENT agrees that all such funds and accounts shall be maintained and documented in accordance with the requirements and guidelines established by PRINCIPAL."
>
> "l) Cooperate fully with PRINCIPAL in the performance of quality assurance reviews, audits and other examinations of AGENT'S activities. Agent states that it is not currently engaging in, and has no present intent to engage in, escrow and settlement services. If agent, at its sole discretion, decides in the future to engage in escrow and settlement services, the following sentence shall be operative: Although AGENT concedes that AGENT'S escrow business is beyond the scope of the agency relationship created by this Agreement, AGENT agrees to permit PRINCIPAL to audit and examine all financial and business records relating to any escrow business conducted by AGENT at any reasonable time or times due to Principal's legitimate concerns about Closing Protection Letter liability and title insurance policy liability created by AGENT'S closing services. PRINCIPAL'S audit and examination rights survive termination of this Agreement."

The agency agreement further provides that the agent shall not, without the prior written consent of the principal:

> "f) Issue any commitment, policy or endorsement which insures against or over any matter by reason of an escrow deposit, indemnity agreement, letter of credit, or bond".

It is well settled that an agent's authority may be actual or apparent. Actual authority exists when an agent has the power "to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestation to him." (*Minskoff v American Exp. Travel Related Servs. Co.*, 98 F3d 703, 708 [1996] [quoting Restatement (Second) of Agency § 7 comment a [1958]). Actual authority may be express or implied. The distinction between express and implied actual authority turns on the nature of the representation by which the principal delegates authority to that agent. Express authority is "authority distinctly, plainly expressed, orally or in writing." (Black's Law Dictionary 521 [5th ed. 1979]), while implied authority exists "when verbal or other acts by a principal reasonably give the appearance of authority to the agent." (*99 Commercial St., Inc. v Goldberg*, 811 F Supp 900, 906 [1993]). In addition, "[i]mplied authority" has also been defined as "a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers." Generally, with regard to implied authority, "an agent employed to do an act is deemed authorized to do it in the manner in which business entrusted to him is usually done." (*Songbird Jet Ltd., Inc. v Amax, Inc.*, 581 F Supp 912, 919 [1984]).

Plaintiff's first and second causes of action for declaratory judgment do not state a justiciable controversy with respect to the agency agreement between Liberty and defendant. Plaintiff's claim that defendant is responsible for the agent's diversion of escrow funds belonging to plaintiff, based upon a theory of implied authority, is contradicted by the language of the agency agreement relied upon by plaintiff. Said agreement, by its terms, expressly limited Liberty's authority to acting as its agent for the purpose of issuing title insurance and collecting premiums and did not expand it in any way so as to permit Liberty to act as an escrow agent on behalf of defendant. Rather, said agreement expressly prohibited Liberty from acting as an escrow agent on behalf of defendant. Furthermore, Liberty at the time it entered into the agency contract, expressly agreed that it was not engaging in escrow and settlement services, and agreed that if it chose to later engage in such services, "at its sole discretion", it would permit the insurer to inspect its books and records. The agency agreement, thus, conclusively establishes that defendant did not authorize Liberty to act as its agent for the purposes of escrow services.

It is noted that plaintiff does not come forth with any factual allegations regarding the subject transaction, or any part thereof, that would otherwise call into question whether defendant authorized Liberty to act as the former's escrow agent with respect to obtaining title insurance, despite the fact that Liberty was certainly in a position to present same.

Plaintiff's allegations do not state a claim for declaratory judgment with respect to the agency agreement based upon a theory of apparent authority. It is well settled that "[e]ssential to the creation of apparent authority are *words or conduct of the principal*, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [emphasis added] [1984]; *Std. Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]; *Greene v Hellman*, 51 NY2d 197, 204 [1980]; *Ford v Unity Hosp.*, 32 NY2d 464, 472-473 [1973]; *see also Imburgio v Toby*, __ AD3d __, 2011 NY Slip Op 2468, 2011 N.Y. App. Div. LEXIS 2400 [2011]). In such circumstances, the third party's reasonable reliance upon the appearance of authority binds the principal (*Hallock v State of New York, supra*, 64 NY2d, at 231; *Ernst Iron Works v Duralith Corp.*, 270 NY 165, 170[1936]). Here, plaintiff does not allege any words or conduct on the part of defendant that could have caused it to believe that its function involved more than the issuance of the title insurance policy, such as might warrant holding the insurer responsible for the misappropriated escrow funds under the doctrine of apparent authority (*see HSA Residential Mtge. Servs. of Tex., Inc. v Stewart Tit. Guar. Co.*, 7 AD3d 426, 427 [2004], appeal denied, 3 NY3d 607 [2004]).

Plaintiff's allegations do not state claim for declaratory judgment with respect to the terms of the title insurance policy. "[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 *(Brucha Mortg. Bankers Corp. v Nations Title Ins. of New York, Inc.*, 275 AD2d 337, 337-338 [2000] [citations omitted]). "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 NY2d 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 AD2d 337, 337-338, [2000]). Plaintiff does not allege that it sustained a loss based upon a defect in title and, therefore, has failed to state a claim for declaratory judgment based upon the title insurance policy.

Plaintiff's third and fourth causes of action to recover damages based upon Liberty's breach of its contractual obligations with the plaintiff, and Liberty's alleged misappropriation and conversion of the funds held in escrow, are also predicated upon defendant's agency

relationship with Liberty. However, as the documentary evidence conclusively establishes that the scope of Liberty's agency was limited to providing title insurance and did not extend to placing funds in escrow on defendant's behalf, plaintiff may not maintain these causes of action.

Plaintiff's fifth cause of action seeks to recover attorney's fees incurred in the prosecution of this action, pursuant to the terms of the escrow agreement and the title insurance policy. Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, [2010]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491,[1989]). Plaintiff does not allege that defendant was a party to the escrow agreement and has failed to allege a valid claim based upon the agency agreement between defendant and Liberty. Plaintiff also failed to allege valid claim under the title insurance policy. Therefore, the claim for attorney's fees must be dismissed.

In view of the foregoing, defendant's motion to dismiss the complain pursuant to CPLR 3211(a)(1) and (7) is granted. That branch of the motion which seeks, in the alternative, summary judgment dismissing the complaint is denied, as moot.

Dated: May 19, 2011

J.S.C.