

Commonwealth Land Tit. Ins. v Timoney

2011 NY Slip Op 31506(U)

May 24, 2011

Sup Ct, Nassau County

Docket Number: 018822-10

Judge: Timothy S. Driscoll

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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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**COMMONWEALTH LAND TITLE INSURANCE
COMPANY,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

Index No: 018822-10

Motion Seq. No: 2

- against -

Submission Date: 4/8/11

**GERARD P. TIMONEY, CARMELLA STUART,
GPT SERVICES INC. *d/b/a* TITLE GUARD
AGENCY, TITLEGUARD AGENCY LAND
SERVICES, INC. *d/b/a* TITLEGUARD, GPT/288
INC. *d/b/a* TITLEGUARD AGENCY,
TITLEGUARD LAND SERVICES, TITLE GUARD
LAND SERVICES, TITLEGUARD AGENCY LAND
SERVICES, INC., GREENHOUSE STRATEGICS
LLC, VIKING TITLE AGENCY CORP., GPT
CAPITAL INC., DEVIN'S OFFICE SERVICES INC.,
50 GRAND AVENUE CORPORATION, and 25
OSBORNE PLACE, CORP. and JOHN DOES 1-10,
CORP.,**

Defendants.

-----x

Papers Read on this Order to Show Cause:

- Notice of Motion and Affidavit in Support.....x**
- Affirmation in Opposition and Exhibits.....x**

This matter is before the court on the motion filed by Defendant Carmella Stuart ("Stuart") on January 21, 2011 and submitted on April 8, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendant Stuart Plaintiff moves for an Order, pursuant to CPLR § 3211, dismissing the Complaint against her. Plaintiff Commonwealth Land Title Insurance Company (“Plaintiff” or “Commonwealth”) opposes the motion.

B. The Parties’ History

The parties’ history is set forth in detail in a prior decision of the Court dated November 3, 2010 (“Prior Decision”) in which the Court granted, in part, Plaintiff’s application for injunctive relief. The Court incorporates the Prior Decision herein by reference.

As noted in the Prior Decision, Plaintiff is a title insurance company. The Complaint alleges that Defendant Gerard P. Timoney (“Timoney”) is the sole principal and President of TitleGuard and an officer of the other entities named as Defendants in this action, which are allegedly Titleguard’s corporate affiliates and alter egos (“Affiliated Companies”). At all relevant times, TitleGuard was a policy issuing agent of Commonwealth, authorized by Commonwealth to issue title policies underwritten by Commonwealth, subject to certain rules, procedures and limitations. Commonwealth and TitleGuard were parties to an Agency Agreement dated May 24, 2004 that Commonwealth terminated on or about August 13, 2009. Defendant Stuart is the bookkeeper and individual responsible for the financial and banking operations of TitleGuard and the Affiliated Companies. The Complaint describes the Affiliated Companies and their relationship to Timoney and Titleguard. Plaintiff alleges that Timoney and Stuart exercised complete dominion and control over TitleGuard and its Affiliated Companies, and were solely responsible for causing those entities to act. The Complaint contains twelve (12) causes of action including but not limited to requests for an accounting and injunctive relief, breach of contract and breach of fiduciary duty.

The Complaint describes this action as arising from the fraudulent and criminal scheme of TitleGuard, its Affiliated Companies, Timoney, Stuart and others to, *inter alia*, misappropriate trust funds (“Trust Funds”) placed in escrow with TitleGuard by its customers at real estate closings. The Complaint alleges that the Defendants’ conduct included 1) the misappropriation, waste and/or theft of over \$275,000 in funds deposited with TitleGuard by mortgage lenders,

buyers and sellers of real property, 2) wilful destruction and/or reckless loss of documents and files, and 3) failure to record documents, including but not limited to deeds and mortgages, thereby exposing Plaintiff to significant liability arising from claims under policies of title insurance that TitleGuard issued in Plaintiff's name.

The specific causes of action asserted against Stuart are 1) the first cause of action, asserted against all Defendants, for an accounting and injunctive relief, 2) the second cause of action, asserted against all Defendants, for conversion of trust funds, 3) the third cause of action, asserted against all Defendants, for breach of the Agency Agreement which includes Plaintiff's request that the Court pierce the corporate veil of Titleguard and hold all Defendants liable for the contractual wrongs of Titleguard, 4) the fourth cause of action, asserted against all Defendants, for breach of fiduciary duty which includes Plaintiff's request that the Court pierce the corporate veil of Titleguard and hold all Defendants liable for Titleguard's breaches of fiduciary duty, 5) the fifth cause of action, asserted against Timoney and Stuart ("Individual Defendants") for aiding and abetting breach of fiduciary duty, 6) the sixth cause of action, asserted against all Defendants for common law negligence which includes Plaintiff's request that the Court pierce the corporate veil of Titleguard and hold all Defendants liable for Titleguard's acts of negligence, 7) against all Defendants for fraud, 8) the eighth cause of action, asserted against all Defendants, for money had and received, 9) the tenth cause of action, asserted against all Defendants, for violation of Debtor and Creditor Law ("DCL") § 275, which includes Plaintiff's request that the Court pierce the corporate veil of Titleguard and hold all Defendants liable for the improper transfers alleged, 10) the eleventh cause of action, asserted against all Defendants, for a violation of § 276A, which includes Plaintiff's request that the Court pierce the corporate veil and hold all Defendants liable for the improper transfers alleged, and 11) the twelfth cause of action, asserted against all Defendants, for attorney's fees pursuant to DCL § 267-a, which includes Plaintiff's request that the Court pierce the corporate veil of Titleguard and hold all Defendants liable for the improper transfers alleged.

The Prior Decision discusses relevant events, including 1) Plaintiff's notification of TitleGuard that it was terminating the Agency Agreement and Plaintiff's subsequent retrieval of files from Titleguard, 2) Plaintiff's discovery, as a result of an audit conducted by another

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underwriter, the plaintiff in a related action (“Related Action”) pending before the Court titled *Stewart Title Insurance v. Timoney et al.*, Nassau County Index Number 011742-10, that documents relating to ten of the thirty two files had, in fact, not been recorded,¹ 3) Plaintiff’s determination that the cumulative amount of the mortgages and Consolidation, Extension and Modification Agreements (“CEMAs”) that TitleGuard failed to record is approximately \$3.4 million, and the cumulative amount of the deeds that TitleGuard failed to report is approximately \$8.8 million, for an approximate total of \$12.2 million in unrecorded instruments, 4) Plaintiff’s discovery of deficiencies in all of TitleGuard’s recording, premium and escrow accounts, and a lack of funds available in any of those accounts (“Accounts”) to cover the recording of the Documents, 5) Timoney’s admission that the money from these Accounts was gone and that he was experiencing severe financial problems, and 6) Timoney’s failure to provide Commonwealth with relevant files and records, notwithstanding his promise to do so.

In support of her motion to dismiss, Stuart affirms that, during the relevant time periods, she was merely an employee of Titleguard, and was never a corporate officer, accountant, bookkeeper or authorized against of any underwriter, including Plaintiff. She avers, further, that she never acted in any such capacity and never served in any official capacity of the corporations owned by Timoney. In addition, it was Timoney, the sole owner of Titleguard, who entered into the Underwriter Agreements with Plaintiff.

In opposition, counsel for Plaintiff (“Counsel”) disputes Stuart’s denials as to her involvement in the wrongdoing alleged, and submits that Stuart’s sworn statements “appear to be carefully-crafted to limit her ‘denials’ to issues of ‘corporate formalities,’ and do not even address the crux of the allegations in the Complaint that she actually participated in the misappropriation of trust funds and received benefits therefrom” (Davis Aff. in Opp. at ¶ 4).

Plaintiff relies on, and refers to, affidavits and documents submitted in connection with the Prior Motion, including 1) documentation establishing that Stuart had check writing authority on Titleguard’s bank accounts, and exercised that authority in disbursing checks related to the closings that are the subject of this action, and 2) the Affidavit of Sarah Lambert outlining numerous payments made by Stuart to the Affiliated Companies, including Timoney’s real estate

¹ The allegations in the Related Action are similar to those in the matter *sub judice*.

holding companies, and by Timoney and Stuart to bank accounts controlled by Timoney.

Plaintiff also provides additional documentation demonstrating Stuart's involvement, specifically 1) a Commonwealth form titled "High Liability/Underwriting Approval" (Ex. 2 to Davis Aff. in Opp.) reflecting Stuart's request, on behalf of Titleguard, for underwriting approval in excess of \$3 million, submitted in connection with a file that is at issue in this litigation, regarding which Defendants allegedly failed to pay \$98,700 in transfer taxes that were deposited in trust with Titleguard for that purpose, and failed to record the deed, 2) checks from a Titleguard account at Signature Bank (*id.* at Ex. 3) used for Commonwealth's insureds, signed by Stuart, that were used to make disbursements in connection with transactions involved in this litigation, regarding which Defendants failed to record deeds, mortgages and related instruments, and diverted funds intended for recording fees and transfer taxes, and 3) a check (*id.* at Ex. 4) from a separate Titleguard account in which Stuart's name, along with Timoney's name, is printed on the check, and regarding which Stuart was an authorized signator.

C. The Parties' Positions

Defendant Stuart seeks dismissal of the Complaint against her based on her assertions that, during the relevant time periods, she was merely an employee of Titleguard, and never served in any official capacity of the corporations owned by Timoney. She notes, further, that it was Timoney, the sole owner of Titleguard, who entered into the Underwriter Agreements at issue with Plaintiff.

Plaintiff opposes Stuart's motion submitting, *inter alia*, that 1) Stuart's motion is based on conclusory and unsubstantiated allegations; 2) Stuart has failed to submit documentation or other proof in support of her claim that she was merely an employee of Titleguard, and never acted as a corporate officer, accountant, bookkeeper or authorized agent of any underwriter; 3) Stuart's denials do not address the allegations in the Complaint regarding her participation in the misappropriation of Trust Funds and receipt of benefits from that misappropriation; and 4) the documentation provided by Plaintiff, and by plaintiff in the Related Action, rebuts Stuart's claims regarding her lack of involvement.

RULING OF THE COURT

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).

The Court recently denied Stuart's motion to dismiss the complaint in the Related Action and incorporates the legal principles discussed in that decision herein by reference.

The Court denies Defendant Stuart's motion to dismiss in light of evidence submitted by Plaintiff that establishes the viability of the causes of action in the Complaint against Stuart. That evidence includes 1) documentation establishing that Stuart had check writing authority on Titleguard's bank accounts, and exercised that authority in disbursing checks related to the closings that are the subject of this action, 2) payments made by Stuart to the Affiliated Companies, including Timoney's real estate holding companies, and by Timoney and Stuart to bank accounts controlled by Timoney, 3) the Underwriting Approval form submitted by Stuart, on Titleguard's behalf, for underwriting approval in excess of \$3 million in connection with a file that is at issue in this litigation, regarding which Defendants allegedly failed to pay transfer taxes and failed to record the deed, 4) Titleguard checks, signed by Stuart, that were used to make disbursements in connection with transactions involved in this litigation, regarding which Defendants failed to record deeds, mortgages and related instruments, and diverted funds intended for recording fees and transfer taxes, and 5) a check from a separate Titleguard account in which Stuart's name, along with Timoney's name, is printed on the check, and regarding which Stuart was an authorized signator.

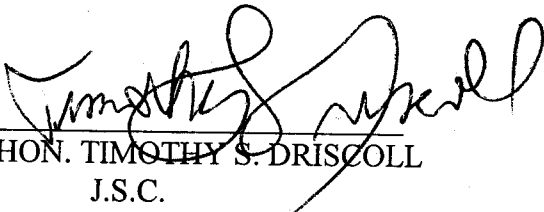
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on June 22, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 24, 2011


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

ENTERED
MAY 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE