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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

KAREN RIBARO HOPPER,

Plaintiffs,

- against -

MICHAEL LEOGRANDE, KIM LEOGRANDE, ROBERT PINTUCCI, FERN PINTUCCI, JERRY DABROWSKI and ELIZABETH DABROWSKI,

Defendants.

Index No. 004261/10
Mot. Seq. # 05
Mot. Date 8-2-11
Submit Date 9-8-11

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MICHAEL LEOGRANDE

Third-Party Plaintiff,

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK,

Third-Party Defendant.

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1,2
Answering Affidavit 3
Reply Affidavit..... 4

Third-party defendant FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, (hereinafter "First American") moves by notice of motion for the following relief: a) an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint; b) granting First American costs and attorneys fees.

Third-party plaintiff MICHAEL LEOGRANDE (hereinafter "Leogrande"), and his estranged wife, Kim Leogrande, purchased premises known as 155 Floral Avenue, Bethpage, NY on September 5, 2003. Leogrande seeks indemification under a title insurance policy issued by First American. In the principal action, plaintiff KAREN RIBARO HOPPER seeks injunctive relief and damages against all defendants, including Leogrande, with respect to a Declaration of Driveway Easement dated June 10, 1983 and recorded August 26, 1983 in Liber 9496, Page 664 in the Nassau County Clerk's Office (hereinafter "Right of Way") allegedly affecting the premises.

First American states that the title policy specifically excludes from coverage any loss or damage which arises by reason of the Right of Way. In support of its application, First American attaches a copy of the title policy's Schedule "B" and the Survey Reading. It argues that since the Right of Way is specifically excluded from coverage under the title policy, the third-party complaint fails to state a valid claim and the third-party complaint must be dismissed.

Leogrande opposes the application stating that First American failed to discover and appropriately report in its title search and ultimately its fee title policy, a recorded declaration of mutual driveway easement which was discovered only by virtue of the underlying lawsuit. The written easement gives rights to three separate property owners located behind Leogrande's property, the right of ingress and egress by foot and vehicle over a substantial portion of the property and provide that a substantial portion of the property must be kept open and un-obstructed as a passageway or driveway.

The attorney for Leogrande states that he is personally familiar with the facts and circumstance herein as he represented Leogrande at the closing of the premises. Leogrande states that the portion of the mutual driveway easement affecting the property is undetectable to the eye and no portion of the property has ever been used as a driveway or passage way for the three lots benefitted by the easement. Moreover, a prior owner planted trees that have existed on the property for more than fifteen years which covers a portion of the easement. Leogrande asserts that at the time of the closing, he and his attorney had no idea that there was a driveway easement in addition to utility easements that were returned in the title report.

Leogrande's attorney states that in connection with its title search, First American obtained an existing survey from a prior insurer in the chain of title and conducted a survey inspection on September 12, 2003 just three days before the closing. The attorney states that the survey and survey reading were only seen by him at the closing table. He argues that First American's reliance on the survey reading absolving them of liability is contrary to law.

In reply, First American urges the court to reject Leogrande's strained attempt to create an ambiguity in the applicable policy exclusion here. Whereas, item D of the Survey Reading

plainly states that the survey "also shows...Westerly terminus of a 30 foot Right of Way extends onto the southerly side of the subject premises. Rights and easements of others to use same thereby excepted".

First American argues that nowhere in Leogrande's opposition papers does he dispute that this right of way is the very same easement upon which plaintiff Hopper's lawsuit is based. Moreover, Leogrande's attorney admits that he represented him when he purchased the property. As an experienced real estate attorney, he knew at the time of closing what was being excepted from his client's title insurance policy. As such, the attorney's failure to dispute that Item D of the Survey Reading was the right of way in question in the main action here nullifies Leogrande's third-party complaint. The fact that the policy exclusion could have been phrased differently is legally irrelevant. Since the manner in which the policy exclusion was phrased was clear and unambiguous, the exclusion must be applied.

Base on the foregoing, the decision of the court is as follows:

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim (see *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571, 841 N.E.2d 742, 807 N.Y.S.2d 583; *FG Harriman Commons, LLC v FBG Owners, LLC,* 75 AD3d 527, 527-528, 906 N.Y.S.2d 62; *GuideOne Specialty Ins. Co. v Admiral Ins. Co.*, 57 AD3d 611, 613, 869 N.Y.S.2d 565). Although the facts alleged in the complaint are regarded as true, and the plaintiffs are afforded the benefit of every favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972), allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (see *Adler v 20/20 Cos.*, 82 AD3d 915, 918 N.Y.S.2d 585; *Prudential Wykagyl/Rittenberg Realty v Calabria-Maher*, 1 AD3d 422, 422-423, 766 N.Y.S.2d 885; *New York Community Bank v Snug Harbor Sq. Venture*, 299 AD2d 329, 330, 749 N.Y.S.2d 170; see also *Maas v Cornell Univ.*, 94 NY2d 87, 91, 721 N.E.2d 966, 699 N.Y.S.2d 716)." *Nisari v Ramjohn*, 85 A.D.3d 987

The policy submitted by First American excepted from coverage Item D of the Survey Reading which plainly states that the survey "also shows...Westerly terminus of a 30 foot Right of Way extends onto the southerly side of the subject premises. Rights and easements of others to use same thereby excepted".

"'[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" (*L. Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, 188, 418 N.E.2d 650, 437 N.Y.S.2d 57; see *Darbonne v Goldberger*, 31 AD3d 693, 695, 821 N.Y.S.2d 94). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a

question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267, 878 N.E.2d 1019, 848 N.Y.S.2d 603; see *Appleby v Chicago Tit. Ins. Co.*, 80 AD3d 546, 549, 914 N.Y.S.2d 257).'" *Nisari v Ramjohn*, supra. at 989.

Applying the above principals to the case at bar, the documentary evidence submitted by First American contradict the allegations contained in the third-party complaint. There is no claim by Leogrande that the exception noted in Item D of the Survey Report is different than the driveway easement upon which the third-party action is based. As such, the court will not rewrite the terms and conditions of the contract herein where the language of the contract is unambiguous. The court determines that the third-party action must be dismissed.

Accordingly, it is

ORDERED, that the application pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party complaint, is **GRANTED**.

This constitutes the decision and order of the court. All matters not specifically addressed herein are denied.

Dated: October 4, 2011

ENTERED
OCT 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

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