

Augeri v Fidelity Natl. Title Ins. Co.

2011 NY Slip Op 33206(U)

December 5, 2011

Supreme Court, Nassau County

Docket Number: 5919/11

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MOD

JOSEPH AUGERI and MARJORIE AUGERI,

Plaintiffs,

Motion Sequence #1
Submitted September 6, 2011

-against-

INDEX NO: 5919/11

FIDELITY NATIONAL TITLE INSURANCE
COMPANY,

Defendant.

The following papers were read on this motion:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4-6
Affs in Reply.....	7&8
Memoranda of Law.....	9-11a

Upon the foregoing, it is ordered that this motion by defendant Fidelity National Title Insurance Company (Fidelity) for an order pursuant to CPLR 3211(a)1. and (a)7. dismissing the plaintiffs' complaint is granted to the extent that the first, third, fourth, fifth and sixth causes of actions of the complaint are dismissed. The second cause of action remains and the action shall continue.

In this action, plaintiffs, the owners since on or about July 27, 2007, of premises known as 4 Kathy Court, Locust Valley, New York seek to recover money damages predicated on defendant Fidelity's alleged breach of a title insurance policy issued to plaintiffs, bearing policy number 27-031-0633-16898. Plaintiffs allege that defendant failed to provide them with a proper defense in accordance with the policy in an action brought by adjoining property owners who claim ownership, by adverse possession, of certain real property along a common boundary line between their property and plaintiff's property.

That action brought by Carole A. And John A. Martinelli, and Delcha Tufano as Trustee of the Testamentary Trust created in the Last Will and Testament of John. J. Martinelli Index No. 7517/2010 is presently pending in this Court before the Hon. F. Dana Winslow. The plaintiffs claim that they timely provided notice to defendant of the Martinelli claims and tendered their defense in that action to defendant Fidelity requesting that the insurer provide them with a defense without a reservation of rights. In the event defendant Fidelity did not withdraw its reservation of rights, plaintiffs requested that defendant permit plaintiffs to be defended by counsel of their own choice at defendant Fidelity's expense.

By letter dated June 11, 2010, defendant Fidelity's claims counsel, David M. Buddingh accepted the tender of coverage, i.e., defense of plaintiffs in the Martinelli action subject to certain reservation of rights. In this regard, the letter states as follows:

"The Company specifically reserves its rights pursuant to *Exclusions from Coverage* section of the Policy which reads in pertinent part:

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed, or agreed to by the Insured Claimant;

The Company reserves all rights and defenses it has under Exclusion 3(a), including its right to terminate its defense of the Insured and to

deny indemnification under the Policy based on the Insured's knowledge of the boundary dispute with Plaintiffs as evidenced in the purchase agreement, or a court of competent jurisdiction determines that the insured prevented, obstructed or otherwise disallowed the adjustment, pursuant to the purchase agreement with the Riccardis, of the boundary with the Plaintiff."

Plaintiffs allege that, from the outset, they requested that defendant Fidelity provide a defense without a reservation of rights or, if it did not do so, authorize plaintiffs to employ counsel of their choice at the insurer's expense. They contend that defendant Fidelity has failed to provide a proper defense in the underlying action causing them to incur thousands of dollars in costs and legal fees to protect their interests for which defendant refuses to reimburse them.

Because defendant Fidelity refused to accede to plaintiffs' request, despite repeated demands to do so, plaintiffs commenced this action seeking a declaration, *inter alia*, that insurer must waive its reservation of rights. Plaintiffs also request consequential and punitive damages arising from defendant Fidelity's alleged breach of contract; bad faith claims handling practices; and fraud.

Defendant Fidelity seeks to dismiss the complaint pursuant to CPLR 3211(a)1. and (a)7., on the grounds that plaintiffs' claims are legally deficient in that it has provided plaintiffs with a legal defense at its own expense in the underlying adverse possession action in accordance with ¶ 5(a) of the title insurance policy which allows the insurer to select counsel of its own choice to represent the insured.

Said paragraph 5(a) of the title insurance policy provides as follows:

"Upon written request by the Insured . . . the Company [Fidelity], as its own cost and without unreasonable delay, shall provide for the defense of the Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured . . . The Company shall have the right to select

counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel."

In addition, defendant asserts that plaintiffs' erroneously argue that they are entitled to be represented by counsel of their own choosing because counsel selected to represent plaintiffs in the Martinelli action is affected by a conflict of interest due to defendant Fidelity's reservation of rights. Defendant Fidelity contends that insurance companies are not required to pay for counsel of the insured's choice in every reservation of rights situation. Rather, they are only required to do so where the insurer's interest is to win the insured's lawsuit only on grounds that negate coverage.

Plaintiffs maintain that defendant Fidelity failed to raise the very provision on which it bases its reservation of rights, as an exception to title either before, during or after closing which occurred nearly three years ago. The provision at issue which is contained in the second rider to the contract of sale between plaintiffs as purchasers, and Joseph and Debra Riccardi as sellers, reads as follows:

"Sellers agree, at their own expense, to resolve a boundary line issue with the adjoining landowner by entering into a boundary line agreement whereby the Purchasers shall deed a small strip of property on the northwest side of the property beyond the bushes to the adjoining landowner and the adjoining landowner shall deed a small strip of property within the fence on the northeast side of the property to the Purchasers. In order to secure this obligation, Sellers shall place \$7,500 in escrow with their attorney to be released to Sellers once the respective deeds are duly recorded with the County Clerk or released to Purchasers if this transaction is not completed within (1) year of closing."

Plaintiffs further maintain that defendant Fidelity's reservation of rights is improper and, given the conflict between defendant insurer's interest and plaintiffs' interest, plaintiffs

must be represented by counsel of their own choosing at defendant Fidelity's expense in the underlying action.

On a motion to dismiss pursuant to CPLR 3211(a)7., the court's function is to determine whether the plaintiff's actual allegations fit within any cognizable legal theory (*Nonnon v City of New York*, 9 NY3d 825, 827), without regard to whether these allegations can ultimately be established. (*Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706, 708). The court must afford the pleading a liberal construction and give the plaintiff the benefit of every possible legal inference. (*Halliwell v Gordon*, 61 AD3d 932, 933). On such a motion, however, the court will not accept as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. (*Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372).

A motion to dismiss pursuant to CPLR 3211(a)7. will be denied " 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.' " (*Sokol v Leader*, 74 AD3d 1180, 1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Where a party offers evidentiary proof on a CPLR 3211(a)7. motion, the focus of the inquiry turns from whether the plaintiff has stated a cause of action to whether the plaintiff actually has one. (*Guggenheimer v Ginzburg*, *supra*, at 275).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)1., the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 796; *Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837).

Furthermore, in order for evidence to qualify as documentary, it must be unambiguous, authentic and undeniable. (*Fontanetta v Doe*, 73 AD3d 78, 85). Affidavits submitted by defendant do not qualify as documentary evidence upon which a proponent of dismissal can rely. (*Crepin v Fogarty*, 59 AD3d 837, 838).

Viewing the complaint in the light most favorable to plaintiffs (*Kaplan-Bello Associates, Inc. v D'Angelo*, 57 AD3d 948), and assuming the factual allegations contained therein to be true for the purpose of this motion (*Union State Bank v Weiss*, 584, 585), the complaint adequately states a cause of action for breach of contract (second cause of action).

As a general rule, an insurer has the right to control the defense of underlying litigation against its insured based on the right of the insurer to protect its financial interests. (*Staats v Wegmans Food Mkts., Inc.*, 48 AD3d 1115). A fiduciary relationship exists between an insurer and its insured requiring good faith by the carrier in its dealings with the insured. In defending a claim, an insurer is obligated to act with undivided loyalty. It may not place its own interests above those of the insured. (*Hartford Acc. & Indem. Co. v Michigan Mut. Ins. Co.*, 93 AD2d 337, 340-41).

It is well settled that where a conflict of interest is probable, such as here, where the insurer offers to defend a suit against its insured only under a reservation of rights, the interests of the insured and insurer are best accommodated by permitting the insureds to choose their own counsel and by requiring the insurer to pay the reasonable fees of that counsel. (*Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 401; *Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32; *City of New York v Clarendon Natl. Ins.*

Co., 309 AD2d 779; *69th Street and 2nd Ave. Garage Assoc. v Ticor Tit. Guar.*, 207 AD2d 225, 227 *lv den.*, 87 NY2d 802). Where there is a potential conflict of interest between an insured and an insurance provider, the insured should be permitted to select his own attorney with the reasonable value of such services, both past and future, to be paid by the insurance provider. (*Prashker v Limited States Guarantee Co.*, 1 NY2d 584, 593).

Notwithstanding defendant Fidelity's assertions to the contrary, its reservation of rights based on a provision of the contract which was not raised as an exception to the policy herein, and of which the insurer was aware prior to closing, raises an issue as to whether the insurer breached its contract of insurance with plaintiffs by refusing to withdraw its reservation of rights or, alternatively, by refusing to afford plaintiffs the opportunity to retain counsel of their own choice to represent them in the underlying action at the insurer's expense. Given that factual issues exist as to whether defendant breached its duties under the policy herein, the second cause of action must be sustained.

Plaintiffs' request set forth in the fifth cause of action for consequential damage (legal fees and litigation costs) must be dismissed. An insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle his/her rights under a policy. [*Silva v F.R. Real Estate Development Corp.*, 58 AD3d 449, 450 (citations and quotation marks omitted)]. While attorney's fees may be recovered where the insurer acts in bad faith (*Bi-Economy Market, Inc. v Harleysville*, 10 NY3d 187), such a claim is not viable under the facts at bar.

Since no private cause of action can be maintained for unfair insurance settlement practice, the first and third causes of action wherein plaintiffs seek monetary damages and

a declaration that defendant Fidelity acted in bad faith in dealing with plaintiffs in violation of Insurance Law § 2601 must be dismissed. (*Kantrowitz v Allstate Indem. Co.*, 48 AD3d 753).

As a further reason to dismiss the third cause of action, the court notes that a claim predicated on a breach of the implied covenant of good faith is duplicative of the breach of contract claim set forth in the second cause of action. Insurance law § 2601 provides that insurers must deal fairly with its insureds and the public at large. It does not give rise to a private cause of action and cannot be construed to impose a tort duty of care to the insured separate and apart from the insurance contract. (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 317).

Similarly, the fourth cause of action for fraud is deficient in that a course of action for fraud does not lie where the only fraud alleged relates to a breach of contract. (*Hylan Elec. Contr., Inc. v MasTec N. Am. Inc.*, 74 AD3d 1148, 1149).

A demand for punitive damages as asserted in the sixth cause of action does not constitute a separate cause of action for pleading purposes and must be dismissed. (*Rocanova v Equitable Life Assur.Socy. of U.S.*, 87 NY2d 603, 613). Moreover, the complaint neither alleges conduct of such an egregious nature directed at plaintiffs, nor a pattern of such conduct directed at the public in general, sufficient to sustain a demand for punitive damages. (*Denenberg v Rosen*, 71 AD3d 1876, 196; *Johnson v Allstate Ins. Co.*, 33 AD3d 665, 666). Punitive damages are recoverable where a defendant's conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. [*Dowlings, Inc. v Homestead Davies, Inc.*,

88 AD3d 1226 (internal quotation marks and citations omitted)]. The complaint is devoid of allegations sufficient to support a claim for punitive damages.

Dated: **DEC 05 2011**



UTE WOLFF LALLY, J.S.C.

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