

Brown v Commonwealth Land Title Ins. Co.
2011 NY Slip Op 33818(U)
June 1, 2011
Sup Ct, Queens County
Docket Number: 17495/10
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
HAYDEN BROWN,

Plaintiff,

-against-

COMMONWEALTH LAND TITLE INSURANCE
COMPANY, H&Z ABSTRACT,

Defendants.
-----X

Index No.: 17495/10
Motion Date: 4/6/11
Motion Cal. No.: 3
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), dismissing this action and all claims asserted therein as against Commonwealth, with prejudice.

	PAPERS NUMBERED
Notice of Order to Show Cause-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

STATEMENT OF FACTS

On June 20, 2007, Commonwealth Land Title Insurance Company (hereinafter “Commonwealth”) issued a title insurance policy to Hayden Brown (hereinafter “Brown” or “Plaintiff”) for real property Brown had purchased from a seller represented by H&Z Abstract (hereinafter “H&Z”). H&Z was also responsible for brokering the insurance policy between Brown and Commonwealth. Under the section titled Exclusions from Coverage 3(a), the policy

states that Commonwealth is not liable for costs or indemnity for adverse claims created by the insured.

At the time of the sale, Commonwealth and H&Z were both aware that Josefina L. Labao (hereinafter "Labao"), who believed she had sold the property to a straw man (H&Z's client), was residing on the premise. On or about November 1, 2007, Labao brought suit against Brown (and others) accusing Brown of fraudulent behavior by which he wrongfully obtained title to the property. On or about April 5, 2010, all claims against Brown were dismissed as the court held Brown was a "bona fide encumbrancer and purchaser for value." (Defendant Commonwealth's Exhibit C).

Following the dismissal, Brown commenced the current action against Commonwealth and H&Z essentially for breach of contract arising from defendants' failure to defend and indemnify Brown in the underlying lawsuit with Labao; a declaratory judgment on the same grounds; damages for breach of contract; punitive damages; attorney fees, incidental and consequential damages; and any other relief. Commonwealth filed a notice of motion to dismiss the complaint against it based on Exclusions from Coverage 3(a) of the insurance policy between Commonwealth and Brown.

DISCUSSION

The motion for an order pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7), dismissing this action and all claims asserted therein as against Commonwealth, is denied. Under CPLR §3211, "[t]he applicable standard ... is whether, within the four corners of the complaint, any cognizable cause of action has been stated. "A motion pursuant to CPLR 3211(a)(1) may be granted 'only where the documentary evidence utterly refutes plaintiff's

factual allegations, conclusively establishing a defense as a matter of law.” (*Thompson v. Baier*, 2011 WL 1902071 [2nd Dept May 17, 2011] citing *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 [2002].) Based on the papers supplied by the parties in opposition, plaintiff has stated a cognizable cause of action.

I. Breach of Contract and Associated Damages

Under the applicable law, the first, second, third and fifth causes of action against Commonwealth demanding Commonwealth to defend and indemnify the plaintiff for the underlying action, a declaratory judgment ordering Commonwealth to defend and indemnify, breach of contract, and attorney’s fees, incidental damages and consequential damages are cognizable causes of action. In *Fortress Ins. Co. v. Kollander*, the court held that “[a]n insurer can be relieved of its duty to defend by establishing, as a matter of law, that there is no possible factual or legal basis to indemnify the insured.” (*Fortress Ins. Co. v. Kollander*, 41 A.D.3d 423, 424 [2nd Dept. 2007].) To determine whether there is a legal basis, we look to the language of the insurance policy. Title insurance policies are contracts agreed to under the terms defined by the language contract including a “title insurer’s obligation to indemnify [a]s defined by the policy itself.” (*Brucha Mortg. Bankers Corp. v. Nations Title Ins. of New York, Inc.* 275 A.D.2d 337, 337-38 [2nd Dept. 2000].) It follows that the provider of an insurance policy is not obligated to indemnify or defend when the “factual predicate for the claim falls wholly within the a policy exclusion.” (*Howard & Norman Baker, Ltd. v. American Safety Cas. Ins. Co.*, 75 A.D.3d 533, 534 [2nd Dept. 2010].) However, an exclusionary clause is only applicable if it is clear and unambiguous and must be construed in favor of the insured. (*Id.* at 534.) In evaluating the applicability of an exclusionary clause “the plain meaning of a policy’s language may not be

disregarded to find an ambiguity where none exists.” (*Id.*)

The relevant exclusionary clause in the insurance policy between Commonwealth and Brown reads, “The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees, or expenses that arise by reason of: ... 3. Defects, liens, encumbrances, adverse claims, or other matters, (a) created, suffered, assumed, or agreed to by the Insured Claimant.” (Defendant Commonwealth’s Exhibit A). The contract’s parameters are thus defined by this clause. (*See, Brucha*, 275 A.D.2d 337 [2nd Dept. 2000].) The plain meaning of the clause is clear: If the insured created the adverse situation, the insurer is not required to defend or indemnify. Since Brown was held to be a bona fide purchaser of value in the underlying lawsuit between Labao and Brown, Brown could not have created a situation within the definition of the exclusionary clause and Commonwealth is responsible for defending or indemnifying Brown. (*See, Campoverde v. Fabian Builders, LLC.*, 83 A.D.3d 986 [2nd Dept. 2011].) Accordingly, since Defendant had an obligation to defend and indemnify the plaintiff in the underlying action, any damages accrued as a result of the breach of contract give rise to cognizable causes actions as to the first, second, and third causes of action for attorney's fees, incidental damages, and consequential damages.

II. Tortious Behavior and Punitive Damages

Defendant's motion to dismiss the fourth cause of action for punitive damages is granted. The general rule is that punitive damages are not administered in a breach of contract case unless there is a tortious element intertwined in the facts of the case. (*Tartaro v. Allstate Indem. Co.*, 56 A.D.3d 758 [2nd Dept. 2008].) Punitive damages are meant to “vindicate public rights.” (*Id.* at 758.) Therefore, punitive damages may only be recovered when, in addition to the breach of

contract, the case “also involves a fraud evincing a high degree of moral turpitude, and demonstrating ... a criminal indifference to civil obligations, and where the conduct was aimed at the public generally.” (*Id.*)

Here, Plaintiff asserts Commonwealth acted fraudulently through H&Z as its agent. Commonwealth incorrectly argues that the fraud allegations should be disregarded because they were first addressed in the plaintiff’s affirmation in opposition. In fact, the plaintiff did address fraud in the original complaint. (Defendant Commonwealth’s Exhibit D.) The issue, instead, is that the allegations of fraud did not specify the factual basis for its determination that H&Z and therefore, Commonwealth, acted fraudulently. (Defendant’s Exhibit D; *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 134 [2nd Dept. 2009] [“CPLR 3016 requires the pleading of factual particulars in actions sounding in ... fraud[.]”].) Even within the affirmation in opposition where the fraud allegations are expanded in an effort to establish a claim for punitive damages, the plaintiff fails to state the particulars of the fraudulent behavior. (*East Hampton*, 66 A.D.3d 134 [2nd Dept. 2009].) Therefore, there can be no sufficient action for fraud based on failure to specify factual particulars in the complaint. Since there is no claim for fraud there is no basis for seeking punitive damages in connection with the alleged breach of contract.

If, however, the fraud claim was sufficient, the cause of action seeking punitive damages must be dismissed because the alleged fraud was not directed at the general public. (*See, East Hampton*, 66 A.D.3d 122 [2nd Dept. 2009].) The contract was between Commonwealth and Brown. It was a specific title insurance policy that extended not to the general public, but only to the plaintiff. While one may argue that this was a form contract and therefore the problem

extends to all those seeking title insurance, the plaintiff chose to sign the contract. Therefore, the contract is specific to the two parties who signed the contract agreeing to its terms, and is not a matter concerning the general public. Therefore, the cause of action for punitive damages is dismissed.

CONCLUSION

The complaint states a cognizable cause of action as to breach of contract for failure to defend and indemnify because, in the underlying action, the court held that Brown was a bona fide purchaser of value. Thus, Brown could not have caused the situation leading to the underlying action. Therefore, Brown's first, second, third, and fifth causes of actions are cognizable and should not be dismissed.

However, the cause of action for punitive damages is dismissed. Although the plaintiff alleged fraudulent behavior in the complaint, the complaint failed to specify factual particulars of the fraud. Moreover, the alleged fraudulent behavior was not aimed at the general public and was, instead, a private matter between Brown and Commonwealth. Therefore, there is no basis for seeking punitive damages.

For the reasons set forth above, the motion for an order pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7), dismissing this action and all claims asserted therein as against Commonwealth, is denied, in part, as to the first, second, third, and fifth causes of action, and granted, in part, as to the fourth cause of action demanding punitive damages.

Dated: June , 2011

Bernice D. Siegal, J. S. C.