

Brown v Commonwealth Land Title Ins. Co.
2011 NY Slip Op 33819(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, INC.,

Defendants.
-----X

Index No.: 17495/10
Motion Date: 4/6/11
Motion Cal. No.: 4
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as against H&Z Abstract, Inc., for failure to state a claim upon which relief may be granted and pursuant to CPLR 3211(a)(1) dismissing the complaint based on documentary evidence.

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

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

Facts

Defendants, H&Z Abstract (hereinafter H&Z”) move for a order to dismiss pursuant to CPLR §3211(a)(1) and (7) for failure to state a claim upon which relief can be granted and based on documentary evidence. In April, 2007 plaintiff Hayden Brown (hereinafter “Brown”) purchased real property located at 139-45 249th Street, Rosedale, New York. Defendants H&Z

Abstract (hereinafter “H&Z”) and Commonwealth Land Title Insurance (hereinafter “Commonwealth”) issued an insurance policy for the land with H&Z acting as agents of Commonwealth. Barry S. Zornberg (hereinafter “Zornberg”) was the sellers’ attorney and the alleged partial owner of H&Z. On November 1, 2007 the original owner of the property brought suit against Brown alleging fraudulent predatory foreclosure that resulted in Brown obtaining wrongful title to the property. Commonwealth refused to defend Brown because on an exemption clause in the contract covering tenants in possession. Additionally Brown personally inspected the property and the contract has an “as is” clause stating Brown fully inspected the property and takes it as is (plaintiff exhibit C). The rider to the contract states there were tenants in possession at the time of closing and that a notice to quite the premises had been given (plaintiff exhibit C). Brown seeks to recover attorney’s fees and alleges Defendants knew there was a tenant in possession at time of sale.

Based on the foregoing, defendant H&Z’s motion to dismiss, solely as to H&Z, pursuant to CPLR §3211 (a)(7) is granted.

Analysis

Upon a motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*RBE N. Funding Inc. v. Stone Mtn. Holdings, LLC* 78 A.D.3d 807 [2nd Dept. 2010]). Plaintiff contends H&Z committed fraud by adding in the exemption from coverage in owner’s policy schedule B because they were aware of the tenants in possession and Plaintiff was not. 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].) However, H&Z contends that as an agent they are not responsible for the breach of contract.

An agent who acts on behalf of a disclosed principle will generally not be held liable for breach of contract. (*Matter of Anderson v. PODS, Inc.*, 70 A.D.3d 820, 821 [2nd Dept. 2010]). A principle is disclosed if at the time of the transaction conducted by the agent, the other party to the contract had notice that the agent was acting for the principal and knew the principles identity. (*Id.* at 821). Plaintiff contends H&Z should be held personally liable even though they were agents of Commonwealth. From the papers submitted there is no claim that Commonwealth was an undisclosed principle. Further, insurance agents have a common-law duty to obtain requested coverage for their client within reasonable time or inform client of inability to do so but have no continuing duty to advise, guide or direct a client to obtain additional coverage except in exceptional and particularized circumstances where their conduct or contracts create additional duties. (*Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 272 [Ct. App. 1997]; *McColgan v. Brewer*, 75 A.D.3d 876, 877 [3rd Dept. 2010]).

Plaintiff contends Defendants committed fraud by adding in the exemption from coverage in owner's policy schedule B because they were aware of the tenants in possession and Plaintiff was not. The essential elements of fraud are representation of a material existing fact, falsity, scienter, deception and injury. (*RBE N. Funding Inc.*, at 807). However, as noted in the decision of this court dated June 23, 2011, Sequence #1, the allegations of fraud did not specify the factual basis for its determination that H&Z acted fraudulently. (*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[.]”].) Therefore, there can be no sufficient action for fraud based on failure to specify factual particulars in the complaint.

“The plaintiff also failed to establish that the defendant's motion for summary judgment was premature, because he did not demonstrate that additional discovery might lead to relevant evidence, or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the defendant.” (*Davis v. Rochdale Village, Inc.*, 83 A.D.3d 991 [2nd Dept. April 26, 2011].)

Conclusion

For the reasons set forth above, defendant H&Z’s motion to dismiss, solely as to H&Z, pursuant to CPLR §3211 (a)(7) is granted.

Dated: June , 2011

Bernice D. Siegal, J. S. C.