

**New York Community Bank v Fidelity Natl. Tit. Ins.  
Co.**

2011 NY Slip Op 33966(U)

November 14, 2011

Supreme Court, New York County

Docket Number: 650236/2011E

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN  
Justice

PART 12

Index Number : 650236/2011 E  
NEW YORK COMMUNITY BANK  
VS.  
FIDELITY NATIONAL TITLE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

*PC 12/14/11 2<sup>15</sup>pm*

Dated: NOV 14 2011

*SHF*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

NEW YORK COMMUNITY BANK,  
Plaintiff,

Index Number 650236/2011E  
Mot. Seq. No. 001

against

FIDELITY NATIONAL TITLE INSURANCE  
COMPANY, BETTER HOMES DEPOT, INC.,  
BETTER HOMES DEPOT OF THE BRONX, INC.,  
VENETIAN HOMES, INC., ERLAN HOLDING  
CORP., and ERIC FESSLER,  
Defendants.

**DECISION AND ORDER**

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**For the Plaintiff:**  
Zeichner Ellman & Krause LLP  
By: William L. Brewer, Esq.  
David S. Hamilton, Esq.  
575 Lexington Ave.  
New York, NY 10022

**For Fidelity National:**  
Butler, Fitzgerald, Fiveson & McCarthy, P.C.  
By: David K. Fiveson, Esq.  
36 W. 44<sup>th</sup> St., ste 816  
New York, NY 10036

**For remaining Defendants:**  
*no appearance*

E-filed papers considered in review of this motion for default judgment and summary judgment :

<b>Papers</b>	<b>E-file Document Number:</b>
Notice of Motion, Affirmation, Affidavits, Exhibits	7 (1 - 13), 10 (1-2)
Memorandum of Law in Support	9
Affirmation, Supp. Affidavit in Opposition	11, 15
Suppl. Affidavit, Memorandum in Reply	13, 14
Transcript of Proceedings of 07/13/2011	16
Letter to Court 08/08/2011	17

**PAUL G. FEINMAN, J.:**

Plaintiff New York Community Bank ("NYCB") moves pursuant to CPLR 3215 for an order granting judgment on default as against defendants Better Homes, Depot, Inc., Better Homes Depot of the Bronx, Inc., Venetian Homes, Inc., Erlan Holding Corp., and Eric Fessler; NYCB also moves pursuant to CPLR 3212 for summary judgment as against defendant Fidelity National Title Insurance Company ("Fidelity"). For the reasons which follow, the branch of the motion which seeks to enter a default judgment is granted in part and otherwise denied, and the

branch of the motion which seeks summary judgment against Fidelity is denied.

Plaintiff NYCB claims breach of contract against all defendants and seeks a declaratory judgment as concerns defendant Fidelity National Title Insurance Company (Doc. 7-2, Ver. Compl.). According to the verified complaint, in June 2007, NYCB made a loan in the amount of \$296,000 to defendants Better Homes Depot, Depot of the Bronx, Venetion Homes, and Erlan (collectively “the borrower”); the loan was secured by a first priority mortgage and security agreement on certain real property located on Gates Avenue, Brooklyn, New York, and guaranteed by defendant Eric Fessler, the companies’ president (Doc. 7-2, Ver. Compl. ¶¶ 12-13). Fidelity issued a title insurance policy to NYCB in connection with the mortgage (Doc. 7-2, Ver. Compl. ¶ 1). Beginning in February 2008, the borrower failed to make monthly mortgage payments and defaulted on the loan (Doc. 7-2, Ver. Compl. ¶ 14). Although NYCB would have foreclosed against the Brooklyn property, its mortgage became unenforceable as a result of a court order issued on April 8, 2008 which vacated and canceled of record the deed that had conveyed title to the borrower (Doc. 7-2, Ver. Compl. ¶ 15).<sup>1</sup>

According to its complaint, after NYCB learned in August 2009 that title to the Brooklyn property was no longer in the borrower’s name, it submitted a claim to Fidelity (Doc. 7-2, Ver. Compl. ¶¶ 16-17). Its claim has allegedly been pending since August 12, 2009 and Fidelity has neither paid nor explicitly denied the claim (Doc. 7-2, Ver. Compl. ¶¶ 19, 21). NYCB commenced its action in January 2011. The verified complaint contains three causes of action sounding in breach of contract as against the borrowers, Fessler as guarantor, and Fidelity, and

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<sup>1</sup>*Martin Wydra v Chai*, 50 AD3d 779 (2d Dept 2008), *lv denied* 11 NY3d 711 (2008).

one cause of action seeking a declaratory judgment as concerns Fidelity and its obligation to pay NYCB's claim under the title insurance policy.

Fidelity served and filed its verified answer on February 23, 2011 (Doc. 5). The other defendants have not answered or appeared. NYCB seeks a default judgment as against the non-answering defendants, and summary judgment as against Fidelity on the third and fourth causes of action.

#### Default Judgment

CPLR 3215 (f) requires an application for a default judgment to provide proof that the summons and complaint was properly served, proof of the claim; and proof of default. As set forth below, CBNY sufficiently establishes entitlement to a default judgment as against the borrowers, but not as against guarantor Eric Fessler.

As to proof of service of the pleadings on the defendant borrowers, NYCB provides copies of the affidavits of service dated February 9, 2011, stating that on February 8, 2011, defendants Better Homes Depot of the Bronx Inc., Better Homes Depot, Inc., Venetian Homes, Inc., and Erlan Holding Corp., each were served process by service on the office of the New York State Secretary of State, pursuant to Business Corporation Law § 306 (Doc. 3). The summons and verified complaint, along with a Notice of Service of Process dated February 28, 2011, were also mailed to each of the four borrowers at their last known address on March 1, 2011, in order to satisfy CPLR 3215 (g) (4). (Doc. 7-3, p. 9 [Rosario Aff. of Service by First Class Mail, 03/01/2011]).

As to proof of claim, NYCB submits copies of the secured promissory note signed by the borrower and issued to NYCB in which the borrower agreed to pay NYCB the principal of

\$296,000 plus interest in monthly installments (Doc 7-7 [Secured Promissory Note]). It proffers a copy of the June 18, 2007, Mortgage and Security Agreement signed by the borrower for the benefit of NYCB, encumbering the property, and shows that the mortgage was recorded on April 23, 2008 in the Office of the City Register of the City of New York (Doc. 7-8). It provides a copy of the Guaranty signed by Fessler on June 18, 2007 in which he unconditionally guarantees the payments and amounts due under the note and mortgage (Doc 7-9, ¶ 4 [Guaranty]). NYCB also provides a copy of the notice of default it sent to the borrower and to Fessler on December 29, 2008, claiming a total outstanding due as of December 15, 2008 to be \$308,439.89, including principal, interest, and late fees (Doc. 10-1 [NYCB letter of 12/29/2008]). NYCB's vice president, Lisa Delfoe, avers that they have not repaid the loan, and are in default under the Note and the Guaranty (Doc. 7-6 [Delfoe Aff. in Supp. ¶ 11]). There is a payment history provided.

NYCB sufficiently establishes its claims and that it is entitled to a judgment on default as against the borrowers Better Homes Depot, Inc., Better Homes Depot of the Bronx, Inc., Venetian Homes, Inc., and Erlan Holding Corp., although as it appears to claim, without substantiating documentation, that none of the principal was paid, the amount actually owed must be resolved at an inquest.

However, as to defendant Fessler, the proof of notice is not sufficient. NYCB submits an affidavit of service indicating that on February 5, 2011, Fessler was served at his residence by service on Josephine Roxas, a domestic employee (Doc. 7-4, p. 2 [Kustka Aff. of Service, 02/08/2011]). The summons and verified complaint were then mailed to Fessler at his residence on April 4, 2011, in order to satisfy CPLR 3215 (g) (3) (Doc. 7-4, p. 3 [Rosario Aff. 04/04/2011]). Here, the issue is insufficient compliance with the Servicemembers Civil Relief

Act, 50 USC Appx § 521, and New York Military Law § 303 (3) which requires a showing that a non-answering individual defendant was not engaged in military service at the time of the default. Although the process server inquired of the domestic employee as to Fessler's military status when serving the papers, and was informed that Fessler was not in the military (Doc. 7-4, p. 2 [Kustka Aff. of Service]), even if such inquiry were sufficient evidence, it was premature. Inquiry into a defendant's military status is to be made at the time of default, not at the time of service which is prior to the default occurring (*see Avgush v De La Cruz*, 2011 NY Slip Op. 50076U [App. Term. 2d Dept. 2011]; *Palisades Acquisition, LLC v Ibrahim*, 12 Misc 3d 340, 342 [Civ Ct, New York County 2006]; *Citibank, N.A. v McGarvey*, 196 Misc 2d 292, 299 [Civ Ct, Richmond County 2003]). Accordingly, NYCB's motion must be denied without prejudice as against Fessler.

#### Summary Judgment

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial. (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

In addition to the alleged default by the borrower and guarantor, and the divestiture of the borrower's title to the property, as held in *Martin Wydra v Chai*, 50 AD3d 779 (2d Dept 2008), NYCB's motion relies on the June 2007 mortgage title insurance policy purchased from Fidelity simultaneously with the issuance of the \$296,000 loan and mortgage to the borrower (Doc. 7-10 [Insurance Policy]). This policy insures that the mortgage is an enforceable first priority lien on

the property and that the borrower is the fee owner. The covered risks include: where title is vested in any party other than the borrower; defects, liens, or encumbrances on the title; unmarketable title; and invalid or unenforceable lien on the property (*id.*). NYCB argues that given what has occurred in the *Wydra* litigation involving title to the Brooklyn property, Fidelity is liable under the terms of the title insurance policy to cover NYCB's insurance claim.

Fidelity offers two substantive arguments in opposition.<sup>2</sup> One is that because it is in process of settling the matter, it should not be found in breach because it is attempting to resolve the issue of title (Doc. 11, Aff. in Opp. ¶¶ 4-8). It points to paragraph 7 of the policy stating that Fidelity may, in addition to other remedies, settle the claim with parties other than the insured, and paragraph 9 which provides that if, "in a reasonably diligent manner by any method," the insurer "removes the alleged defect, lien or encumbrance . . . or establishes the lien of the Insured Mortgage, . . . it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured" (Doc. 7-10 [Insurance Policy ¶¶ 7, 9]). The second argument is that NYCB's claim is premature in that the extent of loss or damage has not been definitely fixed in accordance with the insurance policy (Doc. 11, Aff. in Opp. ¶¶ 9 *et seq.*).

Fidelity explains that the identity of the entity to which title to the Brooklyn property reverted has remained at issue following both the Second Department's 2008 vacatur of the foreclosure deed in *Wydra v Chai*, 50 AD3d 779, a decision which also allowed the intervention

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<sup>2</sup>Its argument based on insufficiencies of NYCB's affidavit is unpersuasive in that the affidavit presents the documents which are relied on by NYCB to establish its prima facie entitlement to summary judgment (*cf. Adam v Cutner & Rathkopf*, 238 AD2d 234, 240 [1<sup>st</sup> Dept 1997] [holding that an attorney's affirmation may serve as the "vehicle for the submission of acceptable attachments" by which to provide evidentiary proof in admissible form]).

of New York Contact Realty (NY Contact Realty) as a party claiming an interest, and the March 22, 2010 decision in Kings County Supreme Court in a related litigation *Martin Wydra v Anthony Major*, Index No. 22405/2008, which partially denied New York Contact Realty's motion to dismiss the complaint and cancel the notice of pendency (Doc. 11, p. 23 *et seq.* [Ex. B to Aff. in Opp.]). Fidelity contends that it has "diligently sought" to re-establish the insured mortgage as a first lien on the Brooklyn property by negotiating with New York Contact Realty (Doc. 11, pp. 6 *et seq.* [Thiele Aff. ¶ 8]). Fidelity's claims counsel, Sheila Thiele, avers that Fidelity provided NYCB a defense after the insurer received NYCB's August 12, 2009 letter claim concerning the challenge by New York Contact Realty to the foreclosure sale (Doc. 11, pp. 6 *et seq.* [Thiele Aff. ¶¶ 1, 3]). Thiele avers that since shortly after the issuance of the March 22, 2010 State Supreme Court decision in *Wydra v Major*, she has held several conferences with New York Contact Realty "to purchase any claim it may have had to the Premises, and affirm title in [the borrower]" (Doc. 11, pp. 6 *et seq.* [Thiele Aff. ¶ 5]). A quit claim deed, Thiele explains, would clear title and establish that the insured mortgage is a first lien on the premises (*id.*). According to Thiele's April 20, 2011, affidavit, she reached a "tentative verbal agreement" with NY Contact Realty's counsel on April 11, 2011, as well as an agreement from Martin Wydra's counsel to discontinue his action making a claim to the Brooklyn property; she projected that the matter would be resolved in 60 days (Doc. 11, pp. 6 *et seq.* [Thiele Aff. ¶ 6]). Thus, she concludes that Fidelity has fulfilled its obligations under the title insurance policy, providing a defense in the NY Contact Realty claims, and "indeed reach[ing] an agreement with Contact Realty to re-establish the insured mortgage as a first lien on the Premises" (Doc. 11, pp. 6 *et seq.* [Thiele Aff. ¶¶ 7-8]).

Fidelity also argues that under the policy, only when liability and the extent of loss or

[\*9]

damage have been “definitely fixed in accordance with these conditions” is the insurer obligated to make payment (Doc. 7-10 [Insurance Policy ¶ 9]). It points to paragraph 8 of the policy, concerning determination and extent of liability, which provides that Fidelity agrees to indemnify “against actual monetary loss or damage sustained or incurred by the Insured Claimant,” and the “extent of liability . . . for loss or damage under this policy shall not exceed the least of (i) the Amount of Insurance, (ii) the indebtedness, (iii) the difference between the value of the Title as insured and the value of Title subject to the risk insured against by this policy.” (Doc. 7-10 [Insurance Policy § 8 (a)]). Its attorney argues in this situation, its liability will be limited to the value of the premises against which the insured mortgage was a lien, and notes that there is no evidence in this record of the market value of the Brooklyn premises (Doc. 11, Aff. in Opp. ¶¶ 10-11). It further argues NYCB has not presented evidence of Fidelity’s present obligation to pay under the policy and is therefore not entitled to indemnification (*id.* ¶ 11).

An insured may recover for breach of contract from a title insurance company when a title defect is discovered that arose prior to the date of the title insurance (*U.S. Bank Natl. Assoc. TR U/A DTD 12/01/98 v Stewart Title Ins. Co.*, 37 AD3d 822, 824 [2d Dept 2007]). The liability of the title insurer is based in the contract, and the rights of the parties are limited to its terms (*Udell v City Title Ins. Co.*, 12 AD2d 78, 80 [1<sup>st</sup> Dept 1960]).

NYCB agrees that there “is no dispute as to the options available to Fidelity under the Policy,” but argues that the insurer has taken an unreasonable amount of time in pursuing any course of action (Doc. 14, Memo in Reply pp. 5-6, citing *Webster’s Red Seal Pubs., Inc. v Gilberton World-Wide Pubs. Inc.*, 67 AD2d 339, 343 [1<sup>st</sup> Dept 1979], *affd* 53 NY2d 643 [1981]). It admits that the question of what constitutes a reasonable time turns on the particular

circumstances of each case and is normally a jury question, citing *Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993], *rearg denied* 82 NY2d 893 [1993]). However, although it argues that Fidelity has “do[ne] nothing for almost 2 years from the date of the claim” (Doc. 14, Memo in Reply p. 6), it does not address the statement by Thiele that Fidelity provided its defense in the litigation involving NY Contact Realty’s claims to the title. Thus, whether Fidelity is taking an unreasonable time to settle the claim remains a question of fact, although Fidelity has not shown, as Thiele stated, that it has reestablished the insured mortgage as a first lien on the Brooklyn property. Indeed, its attorney’s letter addressed to the court on August 8, 2011, advised that the matter had not been settled (Doc. 17).

The affidavit of Sheila Thiele, while not including any documentary proof of the “tentative verbal agreement,” is sufficient to raise a question of fact as to the efforts made by the insurer, contrary to NYCB’s assertions (Doc. 14 Memo in Reply p. 6). NYCB does not point to the terms in its insurance policy that would require Fidelity to simply pay its claim of \$296,000, the amount loaned to the defaulting defendants, and then pursue whatever third-party claims it may have against other parties (Doc. 14, Memo in Reply p. 7). Thus summary judgment against Fidelity on NYCB’s breach of contract claim is denied.

Furthermore, given the terms of section 8 (a) of the insurance policy providing that the extent of Fidelity’s liability for loss or damage “shall not exceed the least of (i) the Amount of Insurance, (ii) the indebtedness, (iii) the difference between the value of the Title as insured and the value of Title subject to the risk insured against by this policy,” the branch of NYCB’s motion seeking summary judgment on its fourth cause of action against Fidelity seeking a declaration that Fidelity is obligated to NYCB for an amount not less than \$296,000 and is

required to pay such amount, is also denied.<sup>3</sup>

It is

ORDERED that the branch of the motion seeking a default judgment is granted as against Better Homes Depot, Inc., Better Homes Depot of the Bronx, Inc., Venetian Homes, Inc., and Erlan Holding Corp., only, and is otherwise denied; and it is further

ORDERED that an inquest as to damages shall be held at the time of the trial of the remainder of the action, and that upon completion of the inquest the Clerk of the Court shall enter judgment against Better Homes Depot, Inc., Better Homes Depot of the Bronx, Inc., Venetian Homes, Inc., and Erlan Holding Corp., in the amount determined at the inquest to be owing, together with costs and disbursements; and it is further

ORDERED that the matter is severed and continues as against Fidelity National Title Insurance Company; and it is further

ORDERED that the parties shall appear in Supreme Court, 60 Centre Street, room 212, on December 14, 2011 at 2:15 p.m. for a preliminary conference.

This constitutes the decision and order of the court.

Dated: November 14, 2011  
New York, New York

  
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J.S.C.

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<sup>3</sup>At oral argument, the parties referred to a restraining notice issued in a separate litigation prohibiting the transfer of the Brooklyn property's title (Doc. 16, Tr. pp. 10 *et seq.*). Although discussed with the court, this issue requires separate motion practice and cannot be addressed in the present motion.