

<b>Greenpoint Mtge. Funding, Inc. v Ticor Title Ins. Co.</b>
2012 NY Slip Op 30848(U)
March 26, 2012
Supreme Court, Nassau County
Docket Number: 15979/11
Judge: Anthony L. Parga
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SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 6  
GREENPOINT MORTGAGE FUNDING, INC.,

-against-

Plaintiff,

INDEX NO.: 15979/11

MOTION DATE: 02/16/12  
SEQUENCE NO. 001

TICOR TITLE INSURANCE COMPANY,  
FIDELITY NATIONAL FINANCIAL, INC., and  
CHICAGO TITLE,

Defendants,

-----X

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Upon the foregoing papers, defendants' motion to dismiss the plaintiff's amended complaint, pursuant to CPLR §3211 (a)(1) and (7) is denied, however, the portion of defendant's motion seeking to dismiss the complaint against defendant Fidelity National Financial, Inc., only, is granted.

Defendants Ticor Title Insurance Company (hereinafter "Ticor") and Fidelity National Financial, Inc. (hereinafter "FNF") initially moved to dismiss plaintiff's original complaint for plaintiff's failure to state a cause of action against Ticor and based upon documentary evidence that FNF did not issue the title policies at issue herein and therefore is not in privity with the plaintiff. After service of defendants' motion, plaintiff amended its complaint, as of right, and the parties stipulated that the instant motion to dismiss the plaintiff's initial complaint shall be deemed a motion addressed to plaintiff's amended complaint. Plaintiff's amended complaint added Chicago Title as a defendant. As per the parties stipulation, this Court will address

defendants' motion to dismiss plaintiff's complaint as a motion to dismiss plaintiff's amended complaint.

This is an action brought by plaintiff Greenpoint Mortgage Funding, Inc. (hereinafter "Greenpoint") to recover upon two separate title insurance policies issued solely by defendant Ticor. The title policies were issued to insure a \$356,000 first mortgage and an \$89,000 second mortgage given on March 30, 2007 by plaintiff to non-party Ricardo Mohammed with respect to property located at 25 East 42<sup>nd</sup> Street, Brooklyn, New York. The mortgages were security for two promissory notes executed and delivered by Ricardo Mohammed to Greenpoint for monies which were to be used to fund Mr. Mohammed's purchase of the above-noted property. The title insurance policies insure Greenpoint against loss or damage sustained as a result of, *inter alia*, the invalidity or unenforceability of the lien of the insured mortgage upon the title.

On or about July 17, 2007, non-party Patricia Marshall commenced an action in Kings County Supreme Court seeking an order voiding the deed for the above-noted property from Patricia Marshall to Ricardo Mohammed, dated March 20, 2007, which was recorded in Kings County. The action also included a cause of action seeking to void the two mortgages held by Greenpoint. On November 12, 2007, Ticor undertook the defense of said action on behalf of Greenpoint. On June 29, 2010, Justice David B. Vaughan issued an order and judgment granting plaintiff's motion for summary judgment, which voided the deed and cancelled the first and second mortgages as liens against the premises. The time to appeal said order has expired.

Defendants move for dismissal of plaintiff's complaint contending that even accepting the truth of plaintiff's allegations, plaintiff failed to state a claim for relief under the insurance policies. Defendants contend that the title policies at issue herein insure plaintiff "against loss or damage...sustained or incurred by the insured" and that the plaintiff has not alleged that it sustained an actual loss herein. Defendants claim that as a title insurance policy is one of indemnity only, no claim arises until after the insured suffered an actual loss. As plaintiff has not alleged that it obtained a judgment against Ricardo Mohammed that it has not been able to satisfy, defendants maintain that plaintiff has failed to state a cause of action.

In addition, defendants contend that plaintiff cannot maintain the action against defendant FNF as the title policies in question were issued solely by Ticor (now Chicago Title), which

maintains a separate corporate existence from FNF. Defendant argues that because FNF was not a party to the title insurance policies at issue herein, plaintiff is not in privity with FNF and cannot assert a breach of action cause of action against it.

In considering a motion to dismiss for failure to state a cause of action, the court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*Brooks v. Key Trust Co. Nat'l. Ass'n*, 26 A.D.3d 628 (3d Dept. 2006), *quoting*, *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005)). In doing so, the Court determines only whether the facts as alleged fit within any cognizable legal theory. (*Id*, *quoting*, *Leon v. Martinez*, 84 N.Y.2d 83, 683 N.E.2d 511 (1994); *see also*, *Khoury v. Khoury*, 78 A.D.3d 903, 912 N.Y.S.2d 235 (2d Dept. 2010), *citing*, *Gougenheim v. Ginzberg*, 43 N.Y.2d 268, 372 N.E.2d 17 (1977)). Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005); *see also*, *Sokol v. Leder*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010)). 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 N.Y.2d 179, 437 N.Y.S.2d 57 (1981)). In the instant action, the title insurance policy issued by Ticor insured Greenpoint for loss or damage sustained as a result of the invalidity or unenforceability of the lien of the insured mortgage upon the title. In plaintiff's amended complaint, it has alleged the existence of the contract (issued for valuable consideration), plaintiff's performance under the contract, defendant's breach of the contract after the mortgages were voided and payment was demanded, and that it sustained damages of no less than \$445,000, as it can no longer enforce the mortgages since Ricardo Mohammed, who is in default, did not have title to the property. As such, accepting all of the plaintiff's allegations as true, plaintiff has sufficiently stated a cause of action against the defendants herein. Accordingly, defendants' motion to dismiss plaintiff's action, pursuant to CPLR §3211(a)(1) for its failure to state a cause of action against the defendants is denied.

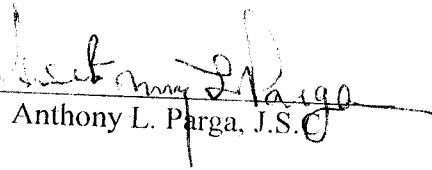
Regardless of same, plaintiff may not maintain its cause of action for breach of contract against defendant FNF. Defendant FNF is a stranger to the title insurance policies at issue, and plaintiff is not in privity with defendant FNF. As such, plaintiff cannot assert a breach of contract claim against FNF. Plaintiff contends that there is a corporate relationship between FNF

and Ticor/Chicago Title based upon FNF's website (which states that Fidelity completed its acquisition of Chicago Title, Ticor Title and Security Union in 2000), but contends that it has not had an adequate opportunity to conduct discovery to determine the nature of the relationship between Ticor, Chicago Title, and FNF. Regardless of same, however, "liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties." (*CDJ Bldrs. Corp. v. Hudson Group Constr. Corp.*, 67 A.D.3d 720, 889 N.Y.S.2d 64 (2d Dept. 2009), citing *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 878 N.Y.S.2d 97 (2d Dept. 2009)). In addition, liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary, but rather, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored. (*SUS, Inc. v. St. Paul Travelers Group*, 75 A.D.3d 740, 905 N.Y.S.2d 321 (3d Dept. 2010); *Town of Smithtown v. National Union Fire Ins. Co.*, 191 A.D.2d 426, 594 N.Y.S.2d 318 (2d Dept. 1993)(liability of the parent company for the contractual obligations of its subsidiary may not be imposed)). There is no basis for liability against FNF herein, as Ticor issued the policies to plaintiff directly and there is no evidence to suggest that Ticor is not a separate corporate entity from FNF. In addition, plaintiff's amended complaint fails to allege any contractual relationship between the plaintiff and FNF in order to state a cause of action for breach of contract against defendant FNF. Accordingly, plaintiff's amended complaint is dismissed as against defendant FNF only.

Defendants Ticor and Chicago Title may serve an answer to plaintiff's amended complaint within thirty (30) days of this Order. Plaintiff is hereby directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within twenty (20) days of the date of this Order. The parties shall appear for a **Preliminary Conference on May 29, 2012, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

This constitutes the decision and order of this court.

Dated: March 26, 2012

  
Anthony L. Parga, J.S.C.

**ENTERED**  
**MAR 29 2012**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

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