

SKC Corp. v Regent Abstract Servs., Ltd.

2012 NY Slip Op 32296(U)

August 21, 2012

Supreme Court, Suffolk County

Docket Number: 38524-2010

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 05-08-2012
Motion Submit Date: 05-29-2012
Motion Sequence No.: 002 MG
003 MD

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[X] NON FINAL

_____ X
SKC CORP.,
Plaintiff,

Attorney for Plaintiff
Alexander Novak, Esq.
Novak, Juhase & Stern
483 Chestnut Street
Cedarhurst, New York 11516

-against-

**REGENT ABSTRACT SERVICES, LTD., and
UNITED GENERAL TITLE INSURANCE
COMPANY,**
Defendants.

Attorney for Defendant
DelBello Donnellan Weingarten Wise &
Wiederkehr, LLP
Daniel G. Walsh, Esq.
One North Lexington Avenue, 11th Fl.
White Plains, New York 10601

ORDERED that the branch of the motion¹ (Mot. Seq. # 002) by plaintiff pursuant to CPLR 3025 for leave to serve a Second Amended Verified Complaint is granted; and it is further

ORDERED that plaintiff's Second Amended Verified Complaint dated January 5, 2012, is deemed served upon defendants as of the date of this order; and it is further

ORDERED that defendant United General Title Insurance Company's ("UGT") time to serve an answer to the Second Amended Verified Complaint is extended to 10 days after service upon them

_____ ¹ The Court would like to acknowledge the valuable aid of Stephen McLinden, Legal Intern.

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of this Order with notice of entry; and it is further

ORDERED that the branch of the motion (Mot. Seq. # 002) by plaintiff pursuant to CPLR 3215 seeking a default judgment against defendant Regent Abstract Services, Ltd. is granted; and it is further

ORDERED that an assessment of damages against Regent is hereby stayed until the final determination of the main action, either by settlement or at the time of trial; and it is further

ORDERED, that the cross-motion (Mot. Seq. # 003) by defendant pursuant to CPLR 3211(a)(7) and 3212 for summary judgment dismissing the plaintiff's complaint is denied with leave to renew upon the completion of discovery.

Factual and Procedural Background

In this action for, *inter alia*, breach of contract, plaintiff SKC Corp. ("Plaintiff") seeks to recover \$330,995.56 from defendants Regent Abstract Services, Ltd. ("Regent") and United General Title Insurance Company ("UGT"). In motion sequence # 002, Plaintiff moves for leave to serve a Second Amended Verified Complaint and for a default judgment against defendant Regent. Defendant UGT cross-moves, pursuant to CPLR 3211 and 3212, for an order dismissing the First Amended Complaint.

The following undisputed facts are gleaned from the parties' respective Statements of Material Facts submitted pursuant to Commercial Division Rule 19-a. In 2007, Plaintiff loaned non-party Toner Development Corp. \$230,000 and received a mortgage on a piece of real estate in Brooklyn. A title report issued by Regent prior to the closing on the loan showed the property to be free of any liens, judgments, or other mortgages. The mortgage was not recorded until 2010. After Toner defaulted on the note in 2008, Plaintiff learned that the property had been previously encumbered with environmental liens, a claim for conveyance by a previous owner, and three mortgages held by two banks. To date, over \$900,000 of mortgages and judgments precede Plaintiff's mortgage on the property, which was recently appraised with a value of \$300,000.

Plaintiff commenced this action in 2010. The First Amended Complaint dated January 28, 2011, asserts four causes of action against both defendants. It is alleged, among other things, that Regent issued the title report as an agent of UGT. The first cause of action alleges breach of contract for failing to record the mortgage in 2007. The second cause of action alleges breach of contract for failing to inform Plaintiff that there were other mortgages on the property. The third cause of action alleges that the defendants were negligent in issuing an inaccurate title report. The fourth cause of action seeks attorneys' fees that Plaintiff expects to incur in collecting on the note.

In the proposed Second Amended Verified Complaint, Plaintiff seeks to add several factual allegations, including that UGT issued a Loan Policy of Title Insurance to Plaintiff covering the mortgage given by Toner to Plaintiff. Additionally, Plaintiff's proposed Second Amended Verified Complaint discontinues the breach of contract claims (First and Second Causes of Action) as asserted against UGT based upon the alleged failure to record the mortgage and inform Plaintiff of the prior encumbrances, the negligence claim (Third Cause of Action) and claim for attorney's fees (Fourth Cause of Action) as asserted against UGT. Thus, the proposed Second Amended Verified Complaint contains the following causes of action: breach of contract against Regent only (First), negligence against Regent only (Second), breach of contract against UGT for denying Plaintiff's claim made under the insurance policy issued by UGT (Third), and breach of fiduciary duty against Regent only (Fourth). Thus, the only cause of action in the proposed Second Amended Verified Complaint asserted against UGT is the Third Cause of Action for breach of the insurance policy. The proposed Second Amended Verified Complaint abandons all other causes of action against UGT.

It is noted that the Court has not been provided with a complete copy of the policy. Plaintiff has provided what appears to be an incomplete portion of a contract for a title policy, and counsel asserts that Regent never provided Plaintiff or their attorneys with anything more. UGT has not provided a copy of the policy, but only a sample form from the American Land Title Association.

UGT opposes Plaintiff's motion for leave to serve the Second Amended Verified Complaint and cross-moves to dismiss the First Amended Complaint. In the event that the Court is inclined to grant Plaintiff leave to amend, UGT's counsel has consented, in writing, to the Court treating its

motion as directed against the Second Amended Verified Complaint.

Discussion

CPLR 3025(b) provides that “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” “In the absence of prejudice or surprise resulting from the delay in seeking leave, [applications for leave to amend a pleading pursuant to CPLR 3025(b)] are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v. Mancuso*, 49 AD3d 220, 221 [2d Dept. 2008]). “[A] plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance” (*Id.* at 227). “No evidentiary showing is required under CPLR 3025(b)” (*Id.* at 229). Additionally, whether to grant or deny leave to amend is committed to the court’s discretion (*Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957, 959 [1983]).

Here, UGT has failed to demonstrate that it would be prejudiced or surprised by the allegations and causes of action contained in the proposed Second Amended Verified Complaint. Additionally, UGT has failed to demonstrate that the proposed amendment is palpably insufficient or devoid of merit.

With regard to UGT’s cross-motion, it would be premature for the Court to dismiss Plaintiff’s claim against UGT for breach of the insurance policy without an opportunity to review a complete copy of the policy in question. “It is a well-settled principle that the title insurer’s obligation to indemnify is defined by the policy itself and limited to the loss in value of the title as a result of title defects against which the policy insures” (*Citibank, N.A. v Chicago Tit. Ins. Co.*, 214 AD2d 212, 221 [1st Dept 1995]). The allegations in the Third Cause of Action in the Second Amended Verified Complaint sufficiently state a cause of action for breach of contract against UGT. Additionally, UGT has failed to make a prima facie showing of entitlement to judgment as a matter of law as it failed to submit any evidentiary proof that the insurance policy does not cover Plaintiff’s claim.

Title insurance is an indemnity contract protecting against losses incurred because of defects in title. *Grunberger v Iseson*, 75 AD2d 329, 331 [1st Dept 1980]. Plaintiff and defendant attempt to distinguish their dispute from the facts in *Grunberger*, but, unlike *Grunberger*, without a copy of the policy, this Court is unable to determine if the policy covers the Plaintiff's claim. A complete copy of the policy or an understanding of such a policy may come to light with the benefit of discovery or at trial. Thus, UGT is granted leave to renew its motion for summary judgment following the completion of discovery.

Finally, as it appears that Regent was properly served with the Summons and Compliant and has failed to appear, Plaintiff's motion for a default judgment against Regent is granted, as set forth above.

This constitutes the *DECISION* and *ORDER* of the court.

Dated: August 21, 2012
Riverhead, New York



EMILY PINES
J. S. C.

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