

**Fidelity Natl. Title Ins. Co. v NY Land Title Agency
LLC**

2012 NY Slip Op 33504(U)

March 21, 2012

Sup Ct, New York County

Docket Number: 650727/2010

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 650727/2010
FIDELITY NATIONAL TITLE
vs.
NY LAND TITLE AGENCY LLC,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
10, 11, 12
15,
16

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision/ order.*

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

Dated: 3/21/12

Shirley Werner Kornreich
JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Index No.: 650727/2010

Plaintiff,

DECISION and ORDER

- against -

NY LAND TITLE AGENCY LLC, LAND TITLE
ASSOCIATES AGENCY LLC, and EPHRAIM FRENKEL,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

In this action, plaintiff Fidelity National Title Insurance Co. (Fidelity) seeks contract and tort damages against defendants in connection with the issuance of a defective certificate of title and title policy insuring an \$8 Million purchase money mortgage. Defendants are: Fidelity’s policy-issuing agent NY Land Title Agency LLC (NY Land Title); NY Land Title’s sole member and managing agent Ephraim Frenkel (Frankel); and their affiliated agency Land Title Associates Agency LLC (Land Title Assoc.).

Defendants move to dismiss, under CPLR 3211(a)(1) and (7), and 3016(b), all but the Second Cause of Action (COA) for contractual indemnification against NY Land Title. Mot. seq. no. 001. Defendants seek to dismiss the: First COA for Breach of Contract, Third COA for Unjust Enrichment, Fourth COA for Breach of Fiduciary Duty, and Fifth COA for Constructive Trust (against [ag.] NY Land Title); Sixth COA for Unjust Enrichment and Seventh COA for Intentional Misrepresentation/Fraud (ag. all defendants); Eighth COA for Negligence/Negligent Misrepresentation; Ninth COA for Indemnification (ag. Frenkel); Tenth COA for

Negligence/Negligent Misrepresentation; and Eleventh COA for Indemnification (ag. Land Title Assoc.). Fidelity opposes.

The court also considers Fidelity's motion for a default judgment (mot. seq. no. 003), which defendants did not oppose. The court will address the motion to dismiss first, then the motion for default judgment as to any remaining claims.

I. *Background*

The Verified Complaint includes the following allegations.

Fidelity is a title insurance company. Pursuant to an Issuing Agency Contract, dated November 19, 2007, between Fidelity and NY Land Title (Agency Contract), Fidelity appointed NY Land Title to be its issuing agent for issuance of title insurance policies in the name of Fidelity.¹ Among the duties included in the Agency Contract, NY Land Title was obligated to: (a) Receive and process applications for title insurance in a timely, prudent and ethical manner; and (b) Base each policy on a determination of insurability of title, including, among other things a search of public records and an examination of all documents affecting title to the subject property.

Paragraph 7A of the Agency Contract provided that NY Land Title would not, without prior written approval of Fidelity, commit Fidelity to a risk in excess of \$2 Million (Schedule A) without Fidelity's prior written approval. Schedule B provided that NY Land Title was required to: (I) obtain and keep in full force, at its expense, a Title Insurance Agent's errors and omissions policy with opinion of title coverage, with an insurance company acceptable to Fidelity in an

¹The Agency Contract is not attached to the Verified Complaint, but it was submitted as Exh. B to the Affirmation of defendants' former counsel Evan M. Neuman in support of the motion to dismiss.

amount not less than \$500,000 per claim and \$1 Million aggregate, with a deductible not more than \$5,000 per loss; and (ii) assign to Fidelity all sums, claims, demands and causes of action that NY Land Title might have against the errors and omissions insurer, and to notify the insurer of any claim for which NY Land Title might be liable to Fidelity. Unbeknownst to Fidelity, NY Land Title did not maintain the required errors and omissions insurance.

The Agency Contract also obligated NY Land Title to indemnify Fidelity for attorney's fees, costs, losses and other expenses resulting from, among other things: errors or omissions; failure of any title insurance commitment, policy, endorsement or other title assurance to correctly reflect title, the description of the insured real property, or the vesting of title; failure to comply with the contract or other instructions from Fidelity; issuance of a commitment, policy, endorsement, or other title assurance insuring an extra-ordinary risk, extra-hazardous risk, or a risk the agent knew or should have known to be based upon a disputed title, not approved by Fidelity in advance of the issuance by the agent of documents committing Fidelity to insure; and any act or failure to act by the agent or its employees, officers, agents, independent contractors or subcontractors which results in Fidelity being liable for contractual or other damages. Under ¶10, NY Land Title was obligated to give Fidelity access to its books and records relating to business carried out pursuant to the agreement, including after its termination.

On or about August 14, 2007, NY Land Title caused a Certificate of Title to be issued on Fidelity's behalf to Fidelity's insured the Bank of Smithtown. The certificate related to an \$8 Million purchase money mortgage granted by the bank to borrower ST NY LLC as a first priority lien encumbering real property located on Beattie Road in the Town of New Windsor, Orange County, New York (the Property). As early as October 2006, NY Land Title and its sole member

and managing agent Ephraim Frenkel, used Land Title Assoc. to secure a title search of the Property from Hyper-Abstract Corporation. Frenkel was the sole and managing member of Land Title Assoc. Hyper-Abstract issued a certification dated October 25, 2006, disclosing that: a portion of the Property was encumbered by a pre-existing mortgage (the Arbor Mortgage), which had been originally recorded on March 6, 2006; a subsequent extension and an assignment of the Arbor Mortgage had been recorded on October 12, 2006; and a UCC Financing Statement had been filed on October 17, 2006, in favor of Arbor as the secured party.

Thereafter, Frenkel and NY Land Title, through Land Title Assoc., issued a title commitment to Smithtown dated August 14, 2007 in Fidelity's name (Certificate of Title). Although a Mortgage Schedule to the Certificate of Title disclosed that Hyper-Abstract had reported three pre-existing mortgages encumbering the Property, there was no disclosure that Hyper-Abstract had also reported the \$1 Million Arbor Mortgage, along with the subsequent extension, assignment and UCC Financing Statement. Without first seeking Fidelity's written approval as required by the Agency Contract, on December 14, 2007, NY Land Title issued a policy of mortgage title insurance (Title Policy) on behalf of Fidelity, insuring Smithtown's first priority lien on the Property for \$8 Million. The Title Policy did not disclose the Arbor Mortgage. Also on December 14, 2007, ST NY LLC acquired title in a \$25 Million sale and purchase of the Property, which became secured by an \$8 Million mortgage from Smithtown, Fidelity's insured.

Two months later, on February 26, 2008, defendants provided Fidelity with a Request for Authorization seeking written approval for issuance of an \$8 Million Title Policy. Defendants included the Certificate of Title, but not the already-issued Title Policy with the Request for

Authorization, making it appear that the policy had not yet been issued. In response, Fidelity “expressly raised the issue of the defendants’ omission of the Arbor Mortgage on the Certificate of Title.” ¶28.

On or about March 20, 2009, Arbor commenced an action to foreclose the Arbor Mortgage on the Property, claiming priority of its lien over the Smithtown mortgage. Thereafter, Fidelity sought to fully audit NY Land Title’s books and records but Frenkel denied Fidelity the opportunity, contrary to the Agency Contract. Instead, Frenkel produced to Fidelity limited and incomplete documentation. That documentation, however, did reveal “potential improprieties concerning *inter alia*, defendants’ allocation and disbursement of the \$8,000,000 loan proceeds from Smithtown. Among other things, the identity of a number of the recipients of the Smithtown loan proceeds disbursed by defendants, strongly suggests that defendants were at the center of and coordinated a fraudulent scheme to divert and misappropriate . . . proceeds that should have been used to pay off the pre-existing Arbor Mortgage.” ¶31. Frenkel then was evasive and provided incomplete answers in response to Fidelity’s questions about allocation and disbursement of the loan proceeds. ¶32. Fidelity has incurred costs and expenses in defending the priority of the Smithtown mortgage in the Arbor foreclosure action, and Fidelity will likely incur additional costs and expenses pursuant to the Title Policy.

No affidavits have been submitted in support of or opposing the motion to dismiss, other than attorney affirmations not based on personal knowledge. The court will summarize the circumstances of defendants’ alleged default in the discussion below.

II. Discussion and Conclusions of Law

A. Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(7) (failure to state a claim), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Rovello, supra*, 40 NY2d at 636. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d 250. A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello* at 635-636. On the other hand, “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211[(a)(7)] unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action.’” *Lawrence v Miller*, 11 NY3d 588, 595 (2008), quoting *Rovello*, 40 NY2d at 635-636.

The pleadings should give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); see *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993).

Finally, dismissal under CPLR 3211(a)(1) (documentary evidence) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10; *Leon v Martinez*, 84 NY2d 83, 88 (1994); see *Bishop v Maurer*, 33 AD3d 497, 498 (1st Dept

2006) (“The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence”); *see Sokol v Leader*, 74 AD3d 1180, 1182 (2d Dept 2010) (when court considers evidentiary material on 3211 motion, criteria is whether plaintiff has cause of action, not whether he has stated one).

1. *Claims Against NY Land Title*

Breach of Contract (First Cause of Action)

The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Noise in Attic Productions, Inc. v. London Records*, 10 A.D.3d 303 (1st Dept. 2004). Fidelity has sufficiently alleged breach of the Agency Contract against its issuing agent NY Land Title. There is no dispute regarding the existence of the Agency Contract, the terms of which are described in detail in the Verified Complaint.

Moreover, Fidelity specifies the breaches as: failing to report the Arbor Mortgage in the certificate of title or to list it in the Title Policy as an exception to coverage; issuing the Title Policy in material excess by \$6 Million of the \$2 Million limit, without first obtaining Fidelity's written approval; refusing to allow Fidelity to audit its books and records, including escrow records, accounts and procedures related to the insured mortgage; and failing to maintain the required errors and omissions insurance in favor of Fidelity. The allegations sufficiently detail the contractual requirements related to these claims and NY Land Title's acts of breach. Defendants do not dispute the claims of breach except to argue that: NY Land Title did disclose the Arbor Mortgage by including the UCC Financing Statement for it with the certificate of title;

and (3) contract damages have not been adequately pled. The court finds these arguments unavailing.

The Verified Complaint alleges that the Arbor Mortgage was not disclosed in the certificate of title and the UCC Financing Statement was not included. Defendants do not deny that the Arbor Mortgage was not disclosed in the certificate. They include with the certificate a copy of the Arbor and other UCC Financing Statements related to the Property, claiming this establishes disclosure. There is, however, no undisputed evidence that these statements were attached to and incorporated into the certificate of title. An attorney's affirmation is not evidence and the actual evidence defendants provide shows, at best, the existence of an issue of fact. Paragraph 16 of Schedule B-1 to the certificate provides that the Property sellers have "been run for . . . UCC's, and . . . the following have been found: . . . NONE." Additionally, the Mortgage Schedule lists three mortgages, but numbers them "1", "2", and "4", indicating that number "3" was simply deleted. It is reasonable to infer that number "3" is the Arbor Mortgage. Further, the page listing "DEPARTMENTAL SEARCHES" does not include the New York Department of State.

Fidelity's allegations of additional breaches also are sufficient. NY Land Title's issuance of the Title Policy months before transmitting the certificate of title to Fidelity defeated the entire purpose of the title search and rendered any purported disclosures entirely meaningless. The failure to secure errors and omissions insurance denied Fidelity the future possibility of recouping its losses caused by NY Land Title's issuance of title insurance based on clouded title.

Additionally, the damage allegations are sufficient. Damages for a breach of contract must be actual and not speculative. *Lexington 360 Assoc. v First Union Natl. Bank of N.*

Carolina, 234 AD2d 187, 190 (1996). Fidelity alleges that it has incurred, and it continues to incur, attorney's fees, costs and expenses in defending Smithtown in the Arbor Mortgage foreclosure action NY Land Title's failure to transmit the certificate of title to Fidelity until after the policy had been improperly issued, proximately caused these losses. Compliance with the contractual provision requiring prior approval for the excessive coverage would have given Fidelity the opportunity to cure the title problems or change the terms of the policy before it was issued.

Unjust Enrichment (Third Cause of Action)

Fidelity claims that NY Land Title was unjustly enriched when it received a commission after allowing the insured mortgage to close without disclosing or reporting the Arbor Mortgage. The claim in *quasi-contract* is barred. The Agency Contract governs the subject matter of Fidelity's claim for unjust enrichment and the claim for breach of contract is based on the same facts and circumstances. *See IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009); citing *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 (1987).

Breach of Fiduciary Duty and Imposition of a Constructive Trust (Fourth and Fifth Causes of Action)

Fidelity claims that NY Land Title owed it a fiduciary duty arising from its agency obligation to account for, apply and be responsible for the funds it received or collected in its capacity as Fidelity's title issuing agent, and not to divert or misappropriate such funds for its own benefit. These claims are insufficient as a matter of law. The allegations describe contractual duties included in ¶4(G) of the Agency Contract, which covers, "those instances where Agent closes real estate transactions and receives and disburses funds of others, . . ." The

contract then includes specific duties, including putting the “fiduciary funds” into an escrow account and disbursing the funds “only for the purpose for which they were entrusted.”

¶4(G)(iii). However, ¶4(J) provides, “The parties hereto acknowledge that Agent is not an agent of Principal for purposes of conducting a Closing . . .” The closing-related duties described in the contract are expressly for the purpose of protecting the Principal from liability for the Agent’s acts. The fiduciary in this instance would be Smithtown, the lender, whose funds NY Land Title allegedly misappropriated. In turn, the alleged misappropriation would be in breach of the Agency Contract.

Additionally, the factual allegations are woefully deficient. The Verified Complaint fails to describe the closing-related provisions of the Agency Contract, and the contract is not attached. NY Land Title’s submission of the contract in support of its motion meets the requirements of CPLR 3211(a)(1) for dismissal of a pleading based on documentary evidence that “conclusively establishes a defense.” The complaint also fails to detail the alleged “misappropriations,” although the court agrees that this deficiency is at least in part the result of defendants’ acts preventing Fidelity from auditing the books and records in contravention of the contract. That alone does not warrant denial of the motion as to the Fourth and Fifth Causes of Action.

2. *Claims Against All Defendants*

Unjust Enrichment (Sixth Cause of Action)

Recovery against Fidelity under a theory of unjust enrichment for misappropriation of the loan proceeds is based on the same subject matter as the Agency Contract and is therefore barred.

See IDT Corp., 12 NY3d 142.

Intentional Misrepresentation/Fraud (Seventh cause of Action)

To plead a cause of action for fraud, “a plaintiff must allege misrepresentation or concealment of material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury.” *Zanett Lombardier, Ltd. V Maslow*, 29 AD3d 495, 495 (1st Dept 2006). CPLR 3016(b) requires that fraud be “stated in detail.” Fidelity has not included sufficient detail in the Verified Complaint to provide adequate notice to inform the defendants of the incidents complained of, which is the “purpose” of CPLR 3016(b). *See Sargiss v Magarelli*, 12 NY3d 527, 530 (2009). Fidelity’s claim is based on the omission of the Arbor Mortgage from the certificate of title and the title policy. Other than stating that the mortgage was not disclosed in the certificate and the policy, Fidelity does not include any details. There are no allegations of fact tying Land Title Assoc. to issuance of either the certificate or the policy, only that it was tasked with conducting the requisite title searches. Furthermore, the policy was issued without Fidelity’s approval and months before NY Land Title provided the certificate to Fidelity. Fidelity was automatically bound under the policy and could not have relied on any representations made in it or in the certificate it had not yet seen when the policy was issued.

3. *Claims Against Frenkel*

Negligence/Negligent Misrepresentation (Eighth Cause of Action)

Fidelity’s claim is based on the failure to disclose the Arbor Mortgage. A claim for negligent misrepresentation requires allegations of a privity-like relationship imposing a duty on the defendant to impart correct information, that the information was incorrect, and that plaintiff relied on it. *JAO Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007) (insufficient allegations). This claim does not sufficiently allege that Frenkel owed any duty to disclose to

Fidelity and, for the reasons stated above, Fidelity could not have relied on the alleged misinformation. Even if Frenkel were a party to the Agency Contract, which he was not, the claim would be duplicative. *See Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118 (1st Dept 1998) (fraud claim must be based on duty distinct from contractual duty).

Indemnification (Implied) (Ninth Cause of Action)

Common law, or implied indemnification shifts the loss from a party being held responsible by operation of law solely because of his relationship to the party at fault. *McCarthy v Turner Const. Inc.*, 17 NY3d 369, 375 (2011). Fidelity does not allege any facts to support the conclusion that it had a relationship with Frenkel, as opposed to NY Land Title, or that it is being held responsible by operation of law for specified wrongful or tortious acts of Frenkel.

4. *Claims Against Land Title Associates*

Fidelity's claims against Land Title Associates based on Negligent Misrepresentation and Indemnification (Tenth and Eleventh Causes of Action) are deficient for the same reasons set forth above as to claims against Frenkel.

B. *Motion for a Default Judgment.*

"When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.* "A verified complaint may be submitted instead of the affidavit when the complaint has been properly served." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70 (2003) *citing* CPLR 3215. Pursuant to Uniform Civil Rule 202.27(a) and CPLR 3215(a), a court

may enter a default judgment against a party for failure to appear at a scheduled status conference at which the other party is present. Rule 12 of the Commercial Division Rules also allows for a default judgment where a party fails to appear at a conference. Where a corporation fails to appear by counsel as required under CPLR 321(a), a default judgment is allowed. *See Jimenez v Brenillee Corp.*, 48 AD3d 351, 352 (1st Dept 2008).

Personal service has been established by the Affirmation of counsel Donald G. Davis and submission of affidavits of service (Exh. C). Fidelity has also established that the two corporate defendants failed to obtain new counsel after their former counsel was relieved by the court in an order dated September 22, 2011 (Exh. I). Defendants were ordered to obtain new counsel, and they were granted significant time in that regard. Defendant Frenkel, although *pro se*, was repeatedly provided with sufficient notice of conference dates, location and times, yet he failed to appear (Exhs. D-N), inevitably culminating in a conference order dated November 22, 2011 stating, "All Defendants are . . . in default and [Plaintiff] may move for default judgment against them." Exh. A. That Order was served on defendants.

As the court explains above, the Verified Complaint adequately establishes the First cause of Action for Breach of Contract against NY Land Title. The complaint also establishes the Second Cause of Action for Contractual Indemnification against NY Land Title. All other claims are dismissed. Accordingly, it is hereby

ORDERED that the partial motion to dismiss is denied as to the First Cause of Action against defendant NY Land Title Agency LLC, and the motion is granted as to the Third through the Eleventh Causes of Action which are severed and dismissed, the Clerk is directed to enter judgment accordingly, and the remainder of the action is continued; and it is further

ORDERED that plaintiff Fidelity's motion for a default judgment is granted, as to liability only, as to the remaining First (Breach of Contract) and Second Causes of Action (Contractual Indemnification) against NY Land Title Agency LLC; and it is further

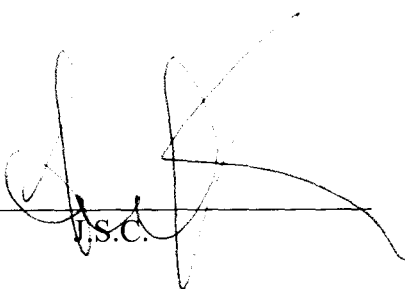
ORDERED that the issues of damages and plaintiff's reasonable attorney's fees are referred to a Special Referee to hear and determine; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Fidelity National Title Insurance Company and against NY Land Title Agency LLC in an amount to be determined by a Special Referee along with plaintiff's reasonable attorney's fees, as determined by a Special Referee, and with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's counsel shall within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date and to notify all parties of the date of the hearing.

Dated: March 21, 2012

Enter:



A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be the name of the Special Referee Clerk. Below the signature, the letters "S.C." are printed.

²Copes are available in Rm. 119M at 60 Centre Street and on the court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.