

**Timac Realty v G&E Tremont, LLC**

2013 NY Slip Op 31047(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 652370/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK

BARBARA JAFFE NEW YORK COUNTY J.S.C.

DECEASED [Redacted] Jaffe

PART 12

Index Number : 652370/2011
TIMAC REALTY LLC
vs
G & E TREMONT, LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. 652370/11
MOTION DATE 11/29/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to [blank], were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits
Answering Affidavits -- Exhibits
Replying Affidavits

No(s) 13, 13-1, 13-2, 13-3,
29, 30, 31 19, 19-2
32, 32-1 19-1,
35, 35-1 19-3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 3/27/13

[Signature] J.S.C.

- 1. CHECK ONE: ... CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
TIMAC REALTY,

Plaintiff,

-against-

Index No. 652370/11

Subm.: 11/28/12

Motion seq. nos.: 001, 002

**DECISION & ORDER**

G & E TREMONT, LLC, COMMONWEALTH LAND  
TITLE INSURANCE COMPANY, KENSINGTON  
TITLE AGENCY LLC, and KENSINGTON  
VANGUARD NATIONAL LAND SERVICES, LLC,

Defendants.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
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**For Kensington:**  
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By notice of motion dated October 7, 2011, defendant Commonwealth Land Title Insurance Company (Commonwealth) moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff's claims against it. Plaintiff opposes.

By notice of motion dated November 3, 2011, defendants Kensington Title Agency, LLC and Kensington Vanguard National Land Services, LLC (collectively Kensington) move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff's claims against them. Plaintiff opposes.

I. BACKGROUND

At some unspecified time, plaintiff entered into negotiations with defendant G & E Tremont, LLC to purchase 307-315 East Tremont Avenue in the Bronx, and contacted Commonwealth for title insurance. (Affirmation of Eric Rosenberg, Esq., dated Oct. 7, 2011

[Rosenberg Aff.], Exh. C). Commonwealth retained Kensington to perform a title and tax search, executing an agency underwriting agreement expressly limiting Kensington's authority to act on its behalf. (*Id.*, Exh. G).

Sometime thereafter, Commonwealth issued to plaintiff a Certificate and Report of Title for the property (certificate), providing, in pertinent part, that it "shall be null and void . . . upon the delivery of the policy [and that] [a]ny claim arising by reason of the issuance of this certificate shall be restricted to the terms and conditions of the standard form of the insurance policy." (Supplemental Affirmation of Lawrence Boes, Esq., dated Nov. 5, 2011 [Supp. Boes Aff.], Exh. 1). Annexed thereto is Kensington's report for the property, dated June 20, 2005, reflecting, *inter alia*, that two water meters, numbers 4687 and 6469, are associated with the Department of Environmental Protection (DEP) account for the property, and that there existed a \$24,474.05 outstanding water bill. (*Id.*).

On September 1, 2005, Commonwealth issued to plaintiff a title insurance policy.

(Rosenberg Aff., Exh. C). The policy's coverage is defined as follows:

Subject to the exclusions from coverage, the exceptions from coverage contained in Schedule B and the conditions and stipulations, Commonwealth . . . insures, as of [September 1, 2005], against loss or damage . . . sustained or incurred by the insured by reason of . . . [a]ny defect in or lien or encumbrance in the title.

(*Id.*).

As pertinent here, the exclusions from coverage include "[d]efects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to [September 1, 2005]."

(*Id.*). Moreover, pursuant to Schedule B of the policy, "Exceptions from Coverage," the policy provides no coverage for "water rates, sewer and assessments which are not shown as existing

liens by the public record [and] [a]ny additional meter charges subsequent to the date of the last actual meter reading.” (*Id.*) The policy provides that it, “together with all endorsements, if any[,] . . . . is the entire policy and contract between the insured and the company[,] . . . . [that] [a]ny claim of loss or damage, whether or not based on negligence, . . . shall be restricted to this policy[, and that] . . . . [n]o amendment of or endorsement to this policy can be made except by a writing . . . .” (*Id.*).

On September 1, 2005, plaintiff and G & E closed on the sale of the property. (*Id.*)

Kensington’s final tax report reflects that the \$24,474.50 water bill was paid. (*Id.*)

On May 2, 2006, plaintiff received from DEP a \$62,660.38 bill on water meter number 6489, which was not included in the title and tax report, \$58,656.41 of which arose from usage between January 18, 2002 and September 1, 2005 (pre-closing charges). (*Id.*) On May 30, 2006, plaintiff demanded that Kensington pay or discharge the pre-closing charges, and thereafter, Kensington unsuccessfully contested the pre-closing charges with DEP. (*Id.*) Kensington never paid the bill, and in April 2009, plaintiff’s mortgagee did. (*Id.*) On July 16, 2009, plaintiff demanded that Commonwealth reimburse its mortgagee for the pre-closing charges, and on January 14, 2010, it refused to do so, disclaiming coverage. (*Id.*)

On or about August 25, 2011, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting three causes of action against Commonwealth and Kensington. (*Id.*) In its third cause of action, the first pertaining to Commonwealth and Kensington, plaintiff claims that at the closing, Kensington represented that the only encumbrance on the property was the mortgage, that he relied on this representation and the report in closing the sale, that the pre-closing charges encumbered the property before closing,

and that, as a result of Kensington's failure to mention the existence of water meter 6489 in its report, he could not request a reading on the meter or otherwise protect his interests. (*Id.*) In his fourth cause of action, plaintiff claims that the pre-closing charges are not excluded from coverage under the policy, and thus, that Commonwealth and/or Kensington breached the contract in failing to pay them. (*Id.*) And in his fifth cause of action, he seeks from Commonwealth and Kensington the interest that accrued on the pre-closing charges while they were being contested. (*Id.*)

By affidavit dated October 5, 2011, Andrew Chon, tax manager at Municipal Data Services, Inc., the company that searched the public records for Kensington, states that DEP's records database reflects that February 28, 2006 is the "first date that any charge on [water meter number 6489] was reflected in the records of [ ] DEP (or any other public records)." Annexed thereto are print-outs from DEP's records database reflecting same. (*Id.*, Exhs. A, B).

By affidavit dated January 10, 2012, plaintiff's attorney states that at the closing he requested that an escrow agreement be drafted to protect plaintiff from unpaid water charges, that Kensington's representative assured him that no additional readings of the monitor meters identified in the report are required and that only those meters serviced the property, and that he agreed to proceed with the closing in reliance on those representations.

## II. CONTENTIONS

### A. Commonwealth's motion

To the extent that plaintiff asserts claims for negligent misrepresentation and negligence in his third cause of action, Commonwealth contends that the policy does not constitute a representation and thus may not serve as a basis for a negligent misrepresentation claim, that it

may not be held liable for Kensington's search as the certificate of title merged into the policy, and that it may not be held liable for any representations Kensington made as Kensington's authority is expressly limited by the agency agreement. (Commonwealth's Mem. of Law). Moreover, Commonwealth argues that the pre-closing charges are excluded from coverage as they did not appear in public records until after the closing, and it observes that there exists no provision in the policy requiring it to pay interest on unpaid water bills. (*Id.*).

In opposition, plaintiff clarifies that its third cause of action is for breach of contract, that the policy constitutes a representation that the property's title is free and clear of any encumbrances except those identified in the title and tax report, and that Commonwealth breached the policy in failing to ensure that a reasonably diligent search of public records was performed. (Affirmation of Ross Kordas, Esq., in Opposition, dated Jan. 10, 2012). It argues that the pre-closing charges are covered by the policy, and claims that Commonwealth may be held liable for Kensington's representations at the closing as Kensington had apparent authority to act on Commonwealth's behalf. (*Id.*).

In reply, Commonwealth contends that it may not be held liable for breach of contract under the certificate of title as it merged into the policy, and that Kensington had no apparent authority. (Commonwealth's Mem. of Law in Reply).

#### B. Kensington's motion

Kensington denies that it may be held liable, on the third cause of action, for breach of contract or negligence for its title and tax search, asserting Commonwealth's arguments and observing that there exists no contract between it and plaintiff and that the statute of limitations for negligence has run. (Kensington's Mem. of Law). It also asserts Commonwealth's arguments

on the fourth and fifth causes of action as well. (*Id.*).

In opposition, plaintiff asserts that Kensington had a duty to conduct a reasonably diligent search of public records for defects in the property's title, that the water bill for meter number 6489 constitutes such a defect, and thus, that it should have disclosed the existence of the meter in its title and tax report and that it may be held liable for breach of contract as a result.

(Affirmation of Ross Kordas, Esq., in Opposition, dated Jan. 10, 2012). It reiterates its claims as to the policy's coverage of the pre-closing charges. (*Id.*).

In reply, Kensington claims that its statement regarding the water charges at the closing is immaterial as it was never reduced to writing, and that the policy reflects that it is the sole and complete agreement between the parties. (Kensington's Reply Mem. of Law). It observes that the pre-closing charges did not constitute a lien, defect, or encumbrance before they were entered into the public record. (*Id.*).

### III. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a pleading on the ground that it has a defense based on documentary evidence. Such a motion will be granted only if the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of [ ] plaintiff's claim." (*Erich Fuchs Enters. v Am. Civ. Liberties Union Found., Inc.*, 95 AD3d 558, 558 [1<sup>st</sup> Dept 2012]; *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1<sup>st</sup> Dept 2002]). A contract constitutes documentary evidence. (*Midorimatsu, Inc. v Hui Fat Co.*, 99 AD3d 680 [2d Dept 2012]; *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1 [1<sup>st</sup> Dept 2004]).

Pursuant to CPLR 3211(a)(7), a party may move to dismiss a pleading for failure to state

a claim. In deciding the motion, the court must liberally construe the pleading, “accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

A. Third cause of action

1. As it relates to the certificate and policy

“[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.” (*Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, 187 [1981]). As a title insurance policy does not constitute a representation that there exist no defects in the subject property’s title other than those listed therein, and as a title insurance policy is separate and distinct from a contract for a title search, a cause of action for a negligent title search may not be asserted under a title insurance policy. (*Trenton Potteries Co. v Title Guar. & Trust Co.*, 176 NY 65 [1903]; *Citibank, N.A. v Chicago Title Ins. Co.*, 214 AD2d 212 [1<sup>st</sup> Dept 1995], *lv denied* 87 NY2d 896 [1995]). Moreover, although a cause of action for negligence may be maintained on the certificate of title, where the certificate merges with a subsequently issued title insurance policy, “any action for damages arising out of the search – whether sounding in tort or contract – is foreclosed.” (*Citibank*, 214 AD2d at 217 [quoting *Smirlock Realty Corp. v Title Guar. Co.*, 70 AD2d 455, 465 (2d Dept 1979), *mod. on other grounds* 52 NY2d 179 [1979]).

Here, regardless of whether plaintiff’s third cause of action sounds in negligence or contract, and regardless of whether it is asserting claims under the certificate or the policy, as the certificate was voided by the policy, and as the policy expressly provides that all causes of action

are restricted to its terms, there exists no basis for holding Kensington or Commonwealth liable for the search. (*See Chu v Chicago Title Ins.*, 89 AD2d 574 [2d Dept 1982] [where policy expressly disclaimed coverage of subject violation and provided that all actions against insurer are restricted to policy's terms, plaintiff's negligence and breach of contract claims hold "inadequate as a matter of law"]; *see also Charney v Commonwealth Land Title Ins. Co.*, 215 AD2d 152 [1<sup>st</sup> Dept 1995] [where recovery under title insurance policy predicated on aborted foreclosure sale and court order reflecting defective title, and neither occurred, claim for negligent title search asserted under terms of policy failed]).

2. As it relates to Kensington's representations at the closing

a. Breach of contract

As the policy expressly provides that it is the complete agreement between the parties and that any changes or amendments to it must be made in writing, Kensington's oral representations, never reduced to writing, were not incorporated into the policy and provide no basis for a breach of contract claim against Kensington or Commonwealth.

b. Negligence

An insurer's obligation with respect to a title insurance policy is limited by the policy's terms. (*McGolgan v Brewer*, 75 AD3d 876 [3d Dept 2010]; *Citibank*, 214 AD2d 212). Thus, absent evidence of a special relationship between the insurer and the insured, such as the insured's reliance on the insurer's expertise regarding issues as to coverage, the insurer may only be held liable for loss covered by the policy. (*Murphy v Kuhn*, 90 NY2d 266 [10997]; *McGolgan*, 75 AD3d 876; *Citibank*, 214 AD2d 212).

Here, although plaintiff relied on Kensington's oral representations in agreeing to proceed

with the closing, neither the complaint nor Kordas's affidavit reflects that Kensington's expertise occasioned plaintiff's reliance or that a special relationship otherwise existed between them. (See *Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431 [1<sup>st</sup> Dept 2012] [negligence claims against insurance agent dismissed as allegations in complaint established that "the parties had nothing more than a typical insurance agent-customer relationship"]; see also *McColgan*, 75 AD3d 876 [plaintiff's conclusory allegation that he relied on insurance agent's misrepresentation to his financial detriment insufficient to support motion to amend complaint to include negligence claim against insurance company]).

In light of these determinations, the parties' contentions as to Kensington's authority to act on Commonwealth's behalf need not be addressed

#### B. Fourth cause of action

As with other contracts, unambiguous provisions of a title insurance policy must be interpreted according to their plain and ordinary meaning. (*White v Continental Cas. Co.*, 9 NY3d 264 [2007]; *Nisari v Ramjohn*, 85 AD3d 987 [2d Dept 2011]). As Schedule B unambiguously excepts from coverage water rates not shown as existing liens in the public record, and as Chon's affidavit and the records attached thereto reflect that the pre-closing charges did not appear in public records until after the closing, they are not covered by the policy. That they arose from use predating the closing is immaterial. (See *Giacalone v New York*, 104 Misc 2d 405 [Sup Ct, Queens County 1980] [where water charges from use predating closing were not entered into public record until after closing and title insurance policy expressly excepted from coverage charges that become liens after closing, title insurer not liable for charges]; see also *Metro Life Ins. Co. v Union Trust Co.*, 283 NY 33 [1940] [assessments levied

against property for community improvements made before closing not covered under policy insuring against “defects in, incumbrances upon or liens or charges against the title . . . ’ existing at or prior to the date of the policy” as charges did not constitute liens at time of closing]). Accordingly, neither Commonwealth nor Kensington breached the policy in refusing to pay them.

C. Fifth cause of action

As plaintiff’s breach of contract claims fail, and absent any provision in the policy requiring Commonwealth or Kensington to pay interest that accrues on unpaid water bills, plaintiff fails to state a claim upon which relief may be granted.

IV. CONCLUSION

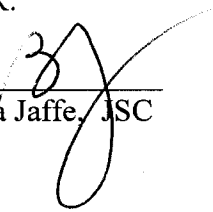
Accordingly, it is hereby

ORDERED, that defendant Commonwealth Land Title Insurance Company’s motion for an order dismissing the complaint is granted, and the complaint is hereby severed and dismissed as against defendant Commonwealth Land Title Insurance Company; it is further

ORDERED, that defendants Kensington Title Agency, LLC and Kensington Vanguard National Land Services, LLC’s motion for an order dismissing the complaint is granted, and the complaint is hereby severed and dismissed as against defendants Kensington Title Agency, LLC and Kensington Vanguard National Land Services, LLC; it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: March 27, 2013  
New York, New York