

**Fidelity Natl. Tit. Ins. Co. of N.Y. v CHM Abstract,  
LLC**

2013 NY Slip Op 31841(U)

August 8, 2013

Supreme Court, New York County

Docket Number: 153054/2012

Judge: Ellen M. Coin

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

PRESENT: Coin  
ELLEN M. COIN Justice

PART 63

Fidelity Nat'l Title  
J.S.C.

INDEX NO. 153054/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -  
CHM Abstract

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Enjunctive Relief

	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 AND CROSS-MOTION(S) ARE  
DECIDED IN ACCORDANCE WITH ANNEXED  
DECISION AND ORDER.**

*This constitutes the decision and order of  
the Court.*

Dated: 8/8/13 \_\_\_\_\_  
EW  
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: PART 63

-----X

FIDELITY NATIONAL TITLE INSURANCE  
COMPANY OF NEW YORK, COMMONWEALTH  
LAND TITLE INSURANCE COMPANY, AND  
CHICAGO TITLE INSURANCE COMPANY AS  
SUCCESSOR IN INTEREST TO TICOR TITLE  
INSURANCE COMPANY,

Plaintiffs,

- against -

CHM ABSTRACT, LLC, CHM ABSTRACT LAND  
TITLE RESEARCH CORP., and PERRY P. MOY,

Defendants.

-----X

**For Plaintiffs :**

The Law Division of Fidelity  
National Title Group, Inc.  
By David William Tyler, Esq.  
350 Fifth Avenue, Suite 3000  
New York, New York 10118  
646-708-8093

**For Defendants:**

Friend & Reiskind  
By Edwin M. Reiskind, Jr.  
100 William Street, Suite 1220  
New York, New York 10038  
212-587-1969

Papers considered in review of this order to show cause and cross-motion:

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Mot. and Affirm in Supp.....	<u>2</u>
Memo. of Law in Opp. to Cross-Mot and in Reply.....	<u>3</u>

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**ELLEN M. COIN, J.:**

Plaintiffs Fidelity National Title Insurance Company of New York (Fidelity), Commonwealth Land Title Insurance Company (Commonwealth), and Chicago Title Insurance Company as successor in interest to Tigor Title Insurance Company (Tigor) move for a preliminary injunction to maintain the status quo established by the court's temporary restraining order of June 5, 2012. That order restrained defendants CHM Abstract, LLC (CHM Abstract), CHM Abstract Land Title Research Corporation (CHM Land) and Perry P. Moy, named personally as the sole principal of

CHM Abstract and CHM Land, from transferring, dissipating or encumbering funds received in the course of business with plaintiffs, and from destroying any records related to the course of business with plaintiffs. Defendants have not submitted opposition papers to plaintiffs' application, having instead elected to cross-move to dismiss plaintiffs' complaint as untimely.

Defendant CHM Abstract, a insurance agency owned by Moy, entered into an agency agreement with Ticor on October 25, 2001; plaintiffs allege that Ticor terminated the agreement on January 5, 2008. CHM Land, another insurance agency separately owned by Moy, entered into agency agreements with Fidelity and Commonwealth. CHM Land was dissolved on December 29, 1999, although it continued to do business with plaintiffs after dissolution. The agency agreement with Commonwealth was executed on January 9, 1996, and is alleged to have been terminated by Commonwealth on May 2, 2010. The agency agreement with Fidelity was entered into on November 5, 1996, and alleged to have been terminated by Fidelity on January 21, 2008. The agency contracts authorized defendants to issue title insurance policies underwritten by plaintiffs.

### **BACKGROUND**

On February 17, 2011, a title insurance claim was submitted to Commonwealth, on an unrecorded deed from a May 6, 2009 closing, which was conducted by CHM Land. CHM Land did not record the deed until February 2011. Though the agency agreement obligated CHM Land to report all new policies issued to Commonwealth, CHM Land failed to do so in this instance.

After learning that the policy which the claim was made on was unreported, plaintiffs attempted to contact defendants in order to gain access to that policy, and all other policies issued

by defendants. On June 2, 2011, Aida Moy (Perry Moy's spouse) left a voicemail indicating that CHM Abstract and CHM Land moved from their office at 380 Rector Place, New York, NY to the Moy residence at 21 South End Avenue, New York, NY. On June 6, 2011, Sarah Lambert, the vice-president of Fidelity's New York operations and audit office, spoke to Aida Moy, who indicated that the policy documents had been shredded prior to the move.

Plaintiffs continued to request access to the files which had not been destroyed, and on March 29, 2012, plaintiffs' attorney sent a demand letter to defendants. The documents were not provided, and this action was commenced on May 23, 2012. In total, plaintiffs claim that defendants possess 1183 assigned, but unreported policies. Plaintiffs have so far identified eighteen of these unreported policies.

## **DISCUSSION**

### *Statute of Limitations*

Defendants CHM Abstract and CHM Land seek dismissal of the complaint on the grounds that the six year statute of limitations for contract claims has run, and that condition precedent required by the agency contracts to seek redress in court has not been met. The court takes note that defendants' attorney has not submitted either an affirmation or a legal memorandum, nor has he cited any legal authority to support the cross-motion.

Plaintiffs argue that the omission of an attorney affirmation and memorandum of law is, without more, grounds for denial of the cross-motion, as is defendants' failure to indicate any legal basis for dismissal in the notice of cross-motion. They also argue that the motion fails on

the merits, stating that their claims are timely, and that they did satisfy the condition precedent by making demands for the documents before instituting this action.

From what the Court can glean from the notice of cross-motion and Mr. Moy's affidavit, defendants appear to argue that Fidelity's and Commonwealth's claims are untimely because all agreements with CHM Land terminated when it was dissolved in 1999. Defendants argue that Ticor's claims are also untimely because Ticor terminated the agency agreement by letter on August 23, 2004 ( *see* Moy's affidavit in support, exhibit 2).

Defendants' argument that the claims against CHM Land are untimely due to CHM Land's dissolution is unavailing. CHM Land continued to hold itself out as a corporation and continued to benefit from the agency contracts long after dissolution. Pursuant to Business Corporation Law § 1006(b), "a corporation undergoing dissolution continues to exist for the purpose of and for so long as is necessary to provide for its debts and it may sue and be sued until its business affairs are fully adjusted." (*Matter of Rodgers v Logan*, 121 AD2d 250, 253 [1<sup>st</sup> Dept 1986]; *see also* Business Corporation Law § 1006[a][1]). Despite dissolution becoming final and complete, the corporation "may still be held liable on a cause of action that accrues after dissolution if the corporation continued its operations, operated its premises, and held itself out as a de facto corporation, notwithstanding its dissolution." (*Bruce Supply Corp. v. New Wave Mechanical, Inc.* 4 AD3d 444, 445 [2d Dept. 2004] [citations omitted]; *see also H.E.G. Dev. & Mgt. Corp. v Blumberg*, 171 Misc 2d 740, 742 [Sup Ct, New York County 1997]).

Additionally, an individual who acts in the name of a dissolved corporation is personally responsible for the obligations which he incurs (*Lodato v Greyhawk North America, LLC*, 39

AD3d 496, 497 [2d Dept 2007] [quotations omitted]) when he “purport[s] to act on behalf of a corporation which had neither a *de jure* nor a *de facto* existence.” (*Brandes Meat Corp.*, 146 AD2d 666, 666-67 (2d Dept 1989) [internal citations omitted]). Thus, CHM Land remains liable for claims arising after its dissolution.

CHM Land’s agreement with Commonwealth was terminated by the letter of May 2, 2010 (Moy’s Affid., Ex. 3), and plaintiffs have alleged that CHM Land’s agreement with Fidelity was terminated on January 21, 2008. Both of these dates are within six years of commencement of this action on May 23, 2012, and the claims against CHM Land are thus deemed timely.

Defendants’ argument that Ticor’s claims against CHM Abstract are untimely is also without merit. Despite defendants’ claim that the agreement was terminated by the letter of August 23, 2004 (Moy’s Affid., Ex. 2), the letterhead on the correspondence is that of Fidelity, and the letter itself contains no reference to Ticor. This is not the type of documentary evidence sufficient to dismiss Ticor’s claims, but at most raises an issue of fact as to their timeliness.

Defendants’ argument that plaintiffs failed to comply with the contractual condition precedent of a demand for an accounting prior to suit is without basis. Moy admits that he received a demand for an accounting on March 26, 2012. This suit was commenced two months later, after plaintiffs had not received any of the documents they demanded. Therefore, defendants’ cross-motion to dismiss is denied in its entirety.

*Preliminary Injunction*

The court grants plaintiffs' application for a preliminary injunction. "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Here, plaintiffs have demonstrated a likelihood that they will prevail on their claims. All three agency contracts specify the right to the documents; the claims are timely; and defendants have not made any meaningful argument as to why plaintiffs should not be granted access to their files. It is clear that plaintiffs will continue to have difficulty administrating claims by their insureds if more files are destroyed. As far as balancing the equities, refraining from destroying documents will not prejudice, inconvenience, or otherwise harm defendants in any way, while greatly benefitting plaintiffs.

In accordance with the foregoing, it is hereby

**ORDERED** that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants or otherwise, any of the following acts:

- (a) transferring, dissipating or encumbering any funds received from any source in connection with any transaction in which plaintiffs' title policies were issued by defendants, including, but not limited to, escrow accounts and settlement fund accounts; and (b) destroying, transferring, defacing or concealing any

record, book, account, document or file or any kind which relates to the activities of any defendant under any agency agreements with plaintiffs, including, but not limited to: (i) title reports, searches, surveys, affidavits, and underwriter approvals received by any defendant prior to issuing any policy on behalf of plaintiffs; and (ii) title commitments, policies and endorsements; and it is further

ORDERED that as a condition of continued enforcement of the preliminary injunction issued, plaintiffs shall post within fourteen (14) days from the date of the docketing of this order an undertaking pursuant to CPLR §6312 (b) in the amount of \$500.00, conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the cross-motion of defendants CHM Abstract, LLC, CHM Abstract Land Title Research Corporation and Perry P. Moy for dismissal of the complaint is denied.

This constitutes the decision and order of the Court.

Dated: August 8, 2013

ENTER:  
Ellen  
Ellen Coin, A.J.S.C.