

Podesta v Assumable Homes Dev. II Corp.

2013 NY Slip Op 32445(U)

October 7, 2013

Sup Ct, Suffolk County

Docket Number: 04208/2008

Judge: William B. Rebolini

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Robert M. Podesta, James J. Podesta, John J. Podesta, Donald F. Podesta and Jane M. Prydatko,

Index No.: 04208/2008

Plaintiffs,

Motion Sequence No.: 010; MOT.D

Motion Date: 6/12/13

Submitted: 7/31/13

-against-

Assumable Homes Development II Corp., Jed Pavlin, William Desalvio, Steven Prince, Robert Cox, Jeffrey Silver, Rocco Marini, Antonio Marini, Shining Sung, Shankarji Corp., Durgaji Corp., State of New York and "John Doe" names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Motion Sequence No.: 011; MOT.D

Motion Date: 6/19/13

Submitted: 7/31/13

Defendants.

Attorneys/Parties [See Rider Annexed]

Assumable Homes Development II Corp. and Jed Pavlin,

Third Party Plaintiffs,

- against -

Mid Island Abstract LLC and Fidelity National Title Agency of New York, Inc.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 43 read upon this application for dismissal of the complaint and motion to compel disclosure: Notice of Motion and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 15; 32 - 34; Replying Affidavits and supporting papers, 16 - 23; 35 - 43; it is

ORDERED that this motion by defendant/third-party defendant, Fidelity National Title Insurance Company of New York, sued in this action as Fidelity National Title Agency of New York, Inc., (Fidelity) is granted only to the extent that the fifth cause of action in the amended verified complaint for recovery in contract is hereby dismissed against it, and in all other respects the motion is denied, without prejudice to the making of an application for summary judgment following the completion of all discovery proceedings; and it is further

ORDERED that the separate motion by plaintiffs for an order compelling disclosure is granted to the extent indicated herein and the parties are directed to appear before this Court on **Wednesday, October 30, 2013 at 10 AM** for a further preliminary conference, at which time a schedule for the satisfaction of all discovery obligations, including the completion of depositions, shall be prepared.

Plaintiffs commenced this action to recover damages and to establish the priority of a purchase money mortgage on an 11-acre plot in the amount of \$1,187,500.00 that was allegedly given to them in 2003 by defendant/third-party plaintiff, Assumable Homes Development II Corp. (Assumable). It is alleged that as part of a subdivision application Assumable agreed to dedicate approximately 4.6 acres of the property to the Town of Brookhaven for open space, and that in March 2006 plaintiffs agreed to release from their mortgage lien those 4.6 acres under a partial release. Plaintiffs claim that the "Schedule A" that accurately described the 4.6 acres that were to have been released from the lien was not recorded with the partial release, however, and a handwritten "Schedule A" describing the entire 11 acre plot was erroneously substituted and attached to the partial release and filed in the office of the Suffolk County Clerk. Defendant/third-party defendant now moves for an order dismissing the complaint against it. Plaintiffs have opposed the application.

On a motion to dismiss the complaint for failure to state a cause of action, the Court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiffs can succeed upon any reasonable view of the facts stated (*Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). Plaintiffs' claims for recovery in breach of contract against Fidelity must fail since the parties did not have a contractual relationship. The owner's policy of title insurance that was issued by Fidelity was given to the Town of Brookhaven. As plaintiffs were neither parties to nor third-party beneficiaries of the policy issued to the Town of Brookhaven, the breach of contract claims asserted in the verified amended complaint must be dismissed (*see East Coast Athletic Club, Inc. v Chicago Title Insurance Co.*, 39 AD3d 461, 833 NYS2d 585 [2d Dept 2007]).

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To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92). To the extent that defendant/third-party defendant Fidelity seeks dismissal of the fourth and sixth causes of action against it, such application must be denied. It is asserted in the amended verified complaint that the alleged "alteration to the partial release was done by some agent or employee of the defendant Fidelity. . ." The law is well-established that a principal must answer to an innocent third person for the misconduct of an agent acting within the scope of its authority (*Faith Assembly v Titledge of New York Abstract, LLC*, 106 AD3d 47, 961 NYS2d 542 [2d Dept 2013]). While movant asserts that Mid Island Abstract LLC (Mid Island) was a limited policy-issuing agent for Fidelity, the evidence submitted to the Court on the motion fails to conclusively establish such fact. The copy of the agreement that was submitted by movant is undated and it does not set forth the effective date of the agreement. Thus, the documentary evidence before this Court fails to prove that at the time of the underlying incident the agency agreement between Fidelity and co-defendant Mid Island was limited solely to countersign and issue title insurance policies. Although defendant submitted in its reply papers an affidavit of merit by its Agency Representative/Business Advisor, the submission of evidence in reply papers can not be considered in determining whether defendant met its initial burden of proof on the motion (*see Sawyers v Troisi*, 95 AD3d 1293, 945 NYS2d 188 [2d Dept 2012]). Moreover, absent conclusive evidence showing that Mid Island's authority was expressly limited, it can not be said that the review and filing of a lien release on insured property was outside the scope of duties contemplated for a title abstract company. Likewise, movant has not sustained its initial burden of demonstrating that dismissal of the third-party claims against movant for contribution and/or indemnification in negligence is warranted.

To the extent that defendant Fidelity also seeks an order granting summary judgment in its favor dismissing the complaint against it, such motion is denied, since no affidavit of merit was submitted in support of the application. It is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied, especially where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (*see Mazzola v Kelly*, 291 AD2d 535, 738 NYS2d 246 [2d Dept 2002]; *see also Baron v Incorporated Village of Freeport*, 143 AD2d 792, 533 NYS2d 143 [2d Dept 1988]).

Plaintiffs' separate motion to compel disclosure of items requested in their Notice for Discovery & Inspection dated October 27, 2010, which was withdrawn by stipulation as against defendant Fidelity, is granted to the extent that the parties shall disclose the names and addresses of all officers of Assumable Homes Development II Corp. in response to demand number 1 and the addresses requested in demands 2 through 9. Disclosure of the information requested in demands 67 through 75 shall also be made to the extent that such demands seek the names and addresses of employees or agents. Copies of written communications demanded in items numbered 82, 86, 87, 88 and 89 shall also be provided. The aforementioned disclosure shall be made within fifteen (15)

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days from the date of this order. In all other respects the motion is denied, as the remaining demands are overly broad, or they seek information which is not material and necessary to the prosecution of plaintiff's claims or information that is publicly available.

Dated: 10/7/2013


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

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Clerk of the Court