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

PRESENT: HON. PAUL WOOTEN Justice PART 7

221 SECOND AVENUE, LLC,
Plaintiff,

-against-

FIDELITY NATIONAL FINANCIAL, INC., FIDELITY NATIONAL TITLE INSURANCE COMPANY, LYNCH MOB ASSOCIATES, JOSEPH C. JANNETTY, THOMAS D. GAMMINO, JR., JAMES GOMEZ, 14TH STREET HK REALTY CORP. and 242 EAST 14TH STREET ASSOCIATES, L.P.,
Defendants.

INDEX NO. 106027/2009

MOTION SEQ. NO. 010

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 010 and 011 are hereby consolidated for purposes of disposition.

Under motion sequence 010, plaintiff 221 Second Avenue, LLC (221 LLC) moves for an order, pursuant to CPLR 3212, granting summary judgment as to liability against defendants Fidelity National Financial, Inc. (FNFI) and Fidelity National Title Insurance Company (Fidelity). FNFI and Fidelity cross-move for an order, pursuant to CPLR 3212, granting a summary judgment dismissal of the complaint as against each of them on several grounds including a lack of privity of contract between 221 LLC and FNFI. In its reply papers, plaintiff concedes the merits of the cross-motion with respect to FNFI, and the Court notes that counsel for 221 LLC, FNFI, and Fidelity entered into a stipulation of discontinuance, dated July 10, 2012 and filed in the office of the New York County Clerk on July 17, 2012, discontinuing the action as to FNFI.

Under motion sequence 011, Fidelity moves for an order, pursuant to CPLR 2221(d), granting leave to reargue that part of this Court's Order, dated July 13, 2012 and entered on August 6, 2012 (Prior Order), that denied its motion for summary judgment against defendants Lynch Mob Associates (LMA), Joseph C. Jannetty (Jannetty) and Thomas D. Gammino (Gammino) (together, the LMA Defendants).

BACKGROUND

Although the underlying facts were set forth at length in this Court's previous decisions and orders dated September 23, 2011 and July 13, 2012, familiarity with which is presumed, the facts, as relevant here, are as follows. 221 LLC commenced this action to recover damages stemming from its February 12, 1998[1] purchase of a building located at 221 Second Avenue, New York, New York (the Property) from LMA. LMA had not disclosed the fact that, approximately five months prior to the closing, it had granted a light and air easement in favor of a neighboring property (the Easement), thereby diminishing the value of the Property to its new owner. Neither the contract of sale, nor the Title Affidavit, nor the Bargain and Sale Deed (Deed), revealed the existence of the encumbrance, and the pre-closing title search conducted by Fidelity also failed to uncover the encumbrance. It is 221 LLC's theory that the recording of the Easement was purposefully timed so that its existence was not likely to be discovered prior to, or at the time of, the closing, and in fact, the Easement was not recorded in the New York County Office of the City Registrar (City Registrar) until June 26, 1998, some nine months after it was granted, and just three days before the Deed was recorded in the same office, on June 29, 1998.

In its complaint, 221 LLC charged the LMA Defendants with breach of contract, breach of warranty, unjust enrichment and fraud, and Fidelity with breach of contract. Fidelity cross-

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[1] The parties alternately date the sale as February 1, 1998.

claimed against the LMA Defendants for fraud, indemnification and contribution.

A time line of events is as follows. On January 6, 1997, Jannetty, Gammino and James Gomez (Gomez) formed LMA, a New York general partnership. On the same day, LMA acquired title by deed to the Property from nonparty Brause and Brause. On or about January 16, 1998, Gomez formed 221 LLC, under section 203 of New York's Limited Liability Company Law. On September 3, 1997, LMA and the owners of the neighboring property, HK Realty and 242 East, executed the Easement, which was dated March 12, 1997. On February 12, 1998, LMA sold the Property to 221 LLC for $1,400,000.00, and in anticipation of the sale, 221 LLC purchased a policy of title insurance from Fidelity. The policy, under Fidelity policy number 5312-375430 (Title Policy), which went into effect on February 12, 1998, did not note the existence of the Easement, although it did except a mortgage held by Brause and Brause in the amount of $450,000.00, and two mechanic's liens, one filed/dated February 27, 1997, in the amount of $4,436.24, in favor of nonparty Metropolitan Lumber, Hardware & Building Supplies, Inc., and the other filed/dated November 12, 1997, in the amount of $6,400.00, in favor of nonparty Embee Contracting Co. On June 26, 1998, the Easement was recorded with the City Registrar and on June 29, 1998, the Deed, containing the information relating to LMA's sale of the Property to 221 LLC, was also recorded with the City Registrar. On or about March 19, 2003, a Zoning Lot Description was filed with the City Registrar, and in or about 2006, a zoning analysis was performed in relation to the Property. In or about December 2008, an architect hired by 221 LLC for the purpose of planning an upward expansion of the Property, conducted a title search and discovered the Easement encumbering the Property. By letter dated January 20, 2009, 221 LLC's attorney Robert Zimmerman (Zimmerman) notified Fidelity that his client had recently learned that a light and air easement had been recorded during the period after the closing and before the recording of the deed, which is commonly referred to as the "gap" period, and was making a claim for the policy limit. By letter dated March 9, 2009, Fidelity

acknowledged receipt of plaintiff's notice of claim, assigned it Claim No. 312222, and requested documentation relating to the claimed loss. Fidelity did not pay out on the claim. On April 29, 2009, plaintiff commenced the instant action.

By order dated December 22, 2009, the Hon. Michael Stallman, before whom this matter was then pending, granted the motion of the LMA Defendants to the extent of dismissing 221 LLC's causes of action sounding in breach of contract, breach of warranty and unjust enrichment as time-barred.[2] The Court denied the motion with respect to the fraud claim, finding that discovery was needed to determine whether plaintiff, through reasonable diligence, could have discovered the existence of the easement more than two years prior to its commencement of the action. If so, plaintiff's fraud claim would also be time-barred pursuant to CPLR 213(8), which states:

> "[t]he time within which the [fraud] action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

After initially appearing in this action, Gomez failed to comply with discovery orders, to appear for an examination before trial, or to submit opposition to pending motions. As a result, by order dated September 9, 2011, this Court precluded Gomez "from offering any evidence at trial of this action." By order, dated September 23, 2011, this Court denied the motion of Gammino, Jannetty and LMA for a summary judgment dismissal of the complaint (fraud claim) and Fidelity's cross-claims against it. In the Prior Order, this Court denied LMA's motion for reargument, granted plaintiff's cross-motion for summary judgment as to liability against LMA, Jannetty and Gammino on the fifth cause of action (fraud), and as to liability against Gomez on the fraud claim as well as the second (breach of contract) and third (breach of warranty) causes of action, on default. Plaintiff's motion was denied as to the unjust enrichment claim against

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[2] The Court also dismissed the action as against the owners of the neighboring property in whose favor the Easement had been granted.

Gomez, and FNFI and Fidelity's cross-motion for summary judgment against the LMA Defendants was denied.

As set forth in the Prior Order, 221 LLC has established that LMA general partner Gomez was acting within the scope of ordinary partnership business when he caused the Easement to be granted in favor of the adjoining property on September 3, 1997. Plaintiff also established that, not only did LMA and its general partners fail to disclose the existence of the encumbrance prior to the sale/closing of the Property, but that these defendants actively withheld this information from plaintiff by execution of the Title Affidavit and the Deed. The Title Affidavit, which was sworn to by Gammino and delivered by LMA at the February 1998 closing, stated, in relevant part:

> "2. With the exception of a first mortgage in favor of Brause and Brause in the approximate amount of $450,000 and a mechanic's lien in favor of Metropolitan Lumbar in the approximate amount of $6,400, I am unaware of any monetary liens or encumbrances against the Premises."

The Deed, which was dated February 1, 1998, and executed by each of the general partners, also failed to except the Easement. It states, in relevant part: "[LMA] covenants that [LMA] has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid." These documents, coupled with the timing of the recording of the Easement and Deed to ensure that the Easement was unlikely to be discovered prior to the sale/closing, established fraudulent conduct on the part of the LMA Defendants, and on that basis, plaintiff's cross-motion for summary judgment as to liability against LMA, Jannetty and Gammino on its fifth cause of action was granted.

With respect to 221 LLC's breach of contract (breach of the Title Policy) cause of action against Fidelity, it is well settled that the purpose of title insurance is to protect the purchaser:

> "of real property . . . against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property. . . . Essentially, therefore, 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" (*L. Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, 187 - 188 [1981] [internal quotation marks and citations omitted]; *see also Logan v Barretto*, 251 AD2d 552, 552 [2d Dept 1998], *lv denied* 92 NY2d 815 [1998]).

An examination of the terms of the Title Policy reveals the inclusion of a "Gap Endorsement." A "Gap Endorsement" obligates Fidelity to provide coverage against any intervening liens or encumbrances recorded during the period between the dates of the closing (February 12, 1998) and the recording of the deed (June 29, 1998), inclusive. Despite this endorsement, and its obligation to cover 221 LLC against any loss it sustained (in an amount not to exceed $800,000) by reason of "any defect in or lien or encumbrance on the title" (*see* Title Policy § 2, and Schedule A), Fidelity has failed and refused to tender payment on 221 LLC's claim against the Title Policy. As a result, 221 LLC charges Fidelity with breaching the terms of the Title Policy by failing to either clear title to the Property, or to compensate it for such failing.

221 LLC supports its motion with copies of: the pleadings and discovery responses; the executed Deed, Title Affidavit and recording documents; the notarized Easement and recording document, the Title Policy, including the report from nonparty Title Serve, the title insurance service company which performed the search; and the correspondence between Zimmerman and Fidelity pertaining to 221 LLC's claim under the Policy. 221 LLC also submits the deposition testimony of Paul Malon, Esq., Fidelity's senior agency counsel who, among other things, explained that the amount of recovery under the Title Policy ($800,000), was set at the time of the transfer of title "in the minimum amount of the purchase price or fair market value" pursuant to insurance department regulations (Malon deposition at 47). When questioned about the term "encumbrance," as it was used in the Title Policy, Malon acknowledged that it included the air and light easement at issue. He also stated that the encumbrance at issue was not excepted from coverage and that Fidelity has not paid on the claim.

221 LLC contends that, having demonstrated that: (1) Fidelity issued Title Policy covering the subject Property; (2) the Easement falls within the scope of coverage of the Policy; (3) title to the Property was and is encumbered by the Easement; and (4) Fidelity has failed and refused to pay following receipt of 221 LLC claim for benefits under the Title Policy, it is entitled to judgment as to liability (*see Bronx, LLC v Washington Tit. Ins. Co.*, 2009 NY Slip Op 31696[U] [Sup Ct, Queens County 2009], *affd* 73 AD3d 673 [2d Dept 2010]).

Fidelity does not meaningfully dispute that, with the exception of damages, plaintiff made a prima facie showing of entitlement to judgment on its breach of contract claim. Rather, it is Fidelity's position that questions of fact exist as to whether 221 LLC knew, or should have known, of the Easement prior to December 2008, and whether such knowledge rendered its notice of claim tardy and its breach of contract claim time-barred. In addition to arguing that 221 LLC should have discovered the Easement when the Zoning Lot Description was filed in March 2003, and/or when the zoning analysis was performed in 2006, Fidelity contends that the LLC had reason to know of the Easement prior to its purchase of the Property because its principal, Bruce Slovin (Slovin), had a long-term working relationship with Gomez, which predated the 1997 organization of 221 LLC, the 1997 granting of the Easement, and the February 1998 sale/closing.[3] Plaintiff further contends that, because Gomez held a significant role in the formation and running of 221 LLC, knowledge of the Easement should be imputed to the LLC from the time it was granted.

Next, Fidelity asserts that coverage for the encumbrance is precluded due to 221 LLC's

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[3] Fidelity also argues, as did the LMA Defendants in a prior motion, that during a telephone conversation between an associate of Gomez's, Robert George (George), and Slovin, at some nonspecific time in the late 1990's, Slovin was advised that a light and air easement might, at some point, be granted in favor of 223 Second Avenue. For the reasons set forth in the Prior Order, Fidelity's assertion that, based on Slovin's conversation with George, 221 LLC either had knowledge of the Easement, or could have discovered it with reasonable diligence, was rejected by the Court when the argument was raised by the LMA Defendants, and the Court will not address the merits of the argument again.

failure to disclose its existence when the Title Policy was obtained. Fidelity explains that, because the same general partner who handled the Easement for LMA, Gomez, was also an agent, member and organizer of 221 LLC, 221 LLC must be charged with knowledge of its existence, and the Title Policy precludes coverage for a known encumbrance which the insured fails to disclose. The Title Policy, at Exclusions From Coverage § 3, states, in relevant part:

> "[t]he following matters are expressly excluded from the coverage of this policy . . . [d]efects, liens, encumbrances, adverse claims or other matters . . . (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy."

Fidelity supports its argument with selected portions of Slovin's testimony in which he acknowledged his relationship with Gomez, an individual he understood to be a real estate broker and lawyer. Slovin also acknowledged that, back in the 1990's, Gomez showed him multiple properties for sale in Manhattan, including 221 Second Avenue (Slovin deposition at 10 - 12), and that Gomez handled the organization process for 221 LLC (*id.* at 11 - 12, 86), a fact which is confirmed by the Amended and Restated Operating Agreement of 221 Second Avenue LLC, entered into on January 31, 2007, and the Second Amended and Restated Operating Agreement of 221 Second Avenue LLC, entered into on July 15, 2011. Both operating agreements provide, in relevant part:

> WITNESSETH:
> WHEREAS, 221 Second Avenue LLC (the "Company") was formed by James Gomez (the "Organizer") by the filing of Article[s] of Organization with the New York Department of State on January 16, 1997 in accordance with the New York Limited Liability Company Act . . . ." (Fidelity's notice of cross-motion, exhibits 7 and 8, Witnesseth ¶¶ 1).

As proof that Gomez was also a member of the LLC, Fidelity offers Witnesseth paragraph 2, of the Second Amended and Restated Operating Agreement which states:

> "WHEREAS, prior to February 1, 1998 the Organizer transferred all right title and interest in the Company to the Members."

Fidelity insists that this language shows that Gomez must have been a member as well as its organizer because otherwise he could not have "had all right title and interest in" the LLC to transfer to its members, and because he was a member, his knowledge of the Easement must be imputed to 221 LLC.

Next, Fidelity offers copy of 221 LLC's Articles of Organization filed with the New York State Department of State in January 1997 (Articles), as proof that Gomez was an agent for 221 LLC in addition to his other two roles. The Articles provide, at paragraph 4:

> "[t]he Secretary of State of the State of New York is designated as the agent of the Limited Liability Company upon whom process against it may be served, and the post office address, within or without this state, to which the Secretary of State shall mail a copy of any process against the Limited Liability Company served upon him or her is:
> C/O James Gomez // 303 East 53rd Street // New York, New York 10022" (*id.*, exhibit 9).

Relying on the above provisions which indicate that Gomez was a member, agent and organizer of the LLC, and on Slovin's history of working with Gomez, Fidelity asserts that 221 LLC had knowledge, actual or imputed, of the Easement. Therefore, Fidelity maintains, the Easement is excluded from coverage under the Title Policy, and plaintiff's breach of contract claim is time-barred, regardless of any actions taken by the LMA Defendants to conceal its existence.

Furthermore, because 221 LLC had knowledge of the Easement within six years of the date the cause of action accrued, or within two years from the time it could, with reasonable diligence, have discovered that it had been granted, its failure to file a claim prior to January 2009, rendered its notice of claim was untimely and vitiated the contract of insurance, and its failure to commence this action prior to April 2009, rendered its breach of contract claim untimely as well.

Lastly, Fidelity asserts that plaintiff has not established that it suffered damages due to the Easement. As damages are a necessary element of a claim for breach of contract, plaintiff

has not established entitlement to judgment in its favor.

For its part, 221 LLC does not dispute that Gomez organized the LLC or that he was also the person designated to receive a mailed copy of process against the LLC which had been served upon the Secretary of State. It, nevertheless, denies that either, or both, of these responsibilities elevated Gomez to the position of member or agent. In addition to directing Fidelity and the Court to New York Limited Liability Company Law § 203(b), which states: "[a]n organizer may, but need not be, a member of the limited liability company that he or she forms," 221 LLC points out that the task of organizing the LLC ended when it was formed in 1997, some seven months before the Easement was granted, and approximately one year prior to its purchase of the Property.

With respect to Fidelity's claim that Gomez must have been a member because he, as organizer of the LLC, "transferred all right title and interest in the Company to the Members" (Second Amended and Restated Operating Agreement), plaintiff submits the portion of Slovin's testimony in which he denied that Gomez had a membership interest in his LLC and explained that, in the majority of his real estate purchases, "[he] was the controlling holder, but [he] bought most of [his] properties in the name of [his] three children, in trusts" (Slovin deposition at 14 - 15). Plaintiff also submits Slovin's sworn affidavit in which he avers that: "commencing on or after February 1, 1998, I was a principal member and the remainder membership interest was split between the trusts of my three children: to wit: The Karl Slovin Trust, The Eric Slovin Trust and The Karen Slovin Trust" (Plaintiff's affirmation in reply, exhibit A).

Additionally, 221 LLC submits the sworn affidavit of plaintiff's real estate attorney, Zimmerman, and selected portions of his deposition testimony to establish that no title search was conducted for the zoning analysis or the zoning description, because it was not required in either instance. Zimmerman acknowledged that he was the attorney who drafted the Amended and Restated Operating Agreement, and that he did so when his firm's documentary search

proved unsuccessful, and his attempt to get hold of an original operating agreement from David Kriss, the attorney for 221 LLC who handled the closing, was also unsuccessful. According to Zimmerman, he prepared the Amended and Restated Operating Agreement, which does not identify Gomez as a member, based on information provided by nonparty Anna Pfeiffer, a Slovin employee assigned to manage Slovin's records, by nonparty Edward Haiken, the trustee of 221 LLC's member trusts, and by Slovin himself.

With respect to damages, 221 LLC points out that it is moving for summary judgment as to liability only, and that it does not need to provide proof of damages until time of trial. Nevertheless, 221 LLC does annex, what appears to be, an unsworn expert appraisal of the financial impact of the Easement on the Property, which Fidelity disputes.

To successfully oppose 221 LLC's motion for summary judgment, Fidelity must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

An examination of Fidelity's submissions fails to reveal competent evidence that Gomez was a member of the LLC at the time of the February 1998 sale/closing, or that Slovin granted, or permitted, Gomez to hold an equity interest in the Property at any time thereafter, or that Gomez held himself out to be a member of the LLC. Well articulated assertions are not a substitute for evidentiary proof in admissible form.

Fidelity also fails to provide any admissible proof that Gomez was an agent of 221 LLC, other than as the person to whom the Secretary of State was to mail a copy of process served upon it relating to the LLC. "Agency is a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act (Restatement, Agency 2d, § 1)" (*L.*

Smirlock Realty Corp. v Title Guar. Co., 70 AD2d 455, 464 [2d Dept 1979], *affd* 52 NY2d 179). Furthermore, "an agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority" (*Confidential Lending LLC v Nurse*, 33 Misc3d 1210[A] *2, [Sup Ct, NY County 2011], citing *Andrews v Kneeland*, 6 Cow. 354, 357 [Sup Ct, NY County 1826]).

Fidelity's assertions notwithstanding, it has failed to show that Gomez's role as agent extended beyond that set forth in the Articles of Organization. Lacking, is competent evidence that Slovin and/or any member of 221 LLC granted Gomez the authority to act on its behalf for any purpose other than to receive process from the Secretary of State, or that the LLC held him out to be, or Gomez held himself out to be, an agent with greater authority. There is also no competent evidence that Gomez's role as organizer extended beyond formation of 221 LLC in or about January 1998.

Instead of admissible proof, Fidelity advances as fact, unsubstantiated assertions that Gomez held a significant role in 221 LLC, such that his knowledge of the Easement should be charged to the LLC. This, however, is inadequate to rebut plaintiff's showing and forestall summary judgment as to liability (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562).

With respect to damages, contrary to Fidelity's contention, plaintiff's motion does not need to be denied based on lack of competent proof as to the amount of damages plaintiff sustained due to the undisclosed Easement. Although denominated as a one for summary judgment, 221 LLC's motion is actually one for partial summary judgment as to liability, with proof of damages reserved for trial. Additionally, and as set forth above, the purpose of title insurance is to compensate the purchaser of real property "against loss by reason of defective titles and encumbrances" including an unrecorded light and air easement (*L. Smirlock Realty Corp.*, 52 NY2d at 187). Under the instant facts, the central issue is the amount of the loss sustained due to the undisclosed Easement, not whether the insured sustained a loss. The

parties will have an opportunity to provide evidence as to damages caused by the Easement at trial.

The Court now turns to Fidelity's motion, pursuant to CPLR 2221(d), for leave to reargue that part of the Prior Order that denied its motion for summary judgment against the LMA Defendants. CPLR 2221(d) provides, in relevant part, that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." It is based only on the papers submitted in connection with the prior motion and is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (*see McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *15 E. 63 St. Co. v Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

The gravamen of Fidelity's motion is its contention that, because this Court granted summary judgment to 221 LLC on its fraud claim against the LMA Defendants, but denied Fidelity's fraud claim against the LMA Defendants, without distinguishing between the two "essentially identical" claims, the Court must have overlooked Fidelity's fraud claim. However, upon examination of the record, including the papers submitted on the original motion, the motion for leave to reargue must be denied, as Fidelity has not made the requisite showing, choosing to present many of the same arguments it made in the original motion, only in far greater detail, while failing to address the Court's reason for its denial.

Underlying its cross-claims against the LMA Defendants is the title insurance policy that Fidelity issued to 221 LLC on February 12, 1998. Fidelity's theory of liability is premised on its obligation, under the Title Policy, "to indemnify its insured for loss occasioned by a defect in title" (*L. Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d at 188), a defect which was caused

by the fraudulent conduct of the LMA Defendants in failing to disclose the unrecorded Easement at, or prior to, the sale/closing. If Fidelity were not the insurer which issued the Title Policy, it would not have the capacity to cross-claim against the LMA Defendants, yet Fidelity failed to submit a copy of the policy for the Court to review in support of its original motion. This error was central to the Court's prior decision, and in its current application, Fidelity fails to explain, or to even address, the omission except to note that it has now attached a copy of the Title Policy to its motion to reargue.

Compounding this error, was the fact that the papers submitted by Fidelity in connection with the prior motion failed to articulate why, and demonstrate how, Fidelity, as the title insurance company, as opposed to the purchaser of the Property, would be entitled to summary judgment against the LMA Defendants. Fidelity's involvement, as title insurer, was incidental to the contractual relationship between the property buyer, 221 LLC, and the property seller, LMA. They are not similarly situated parties. And while much of the proof necessary to prove Fidelity's cross-claim for fraud against the LMA Defendants may be similar to that relied upon by 221 LLC in its fraud claim against the LMA Defendants, precisely how that evidence applies to Fidelity in its role as title insurer cannot, on a motion for summary judgment, be presumed. The Court did not overlook the cross-claim for fraud, rather it was Fidelity that overlooked its own burden of demonstrating entitlement to judgment as a matter of law as against the LMA Defendants, and its failure to make the requisite showing required a denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls*, 10 NY3d 733, 735 [2008]; *Alvarez*, 68 NY2d at 324).

Accordingly, it appearing that plaintiff 221 Second Avenue, LLC is entitled to judgment on liability against Fidelity National Title Insurance Company and that the only triable issues of fact arising on plaintiff's motion for summary judgment against this defendant relate to the issue of damages to which plaintiff is entitled, it is

ORDERED that the motion by 221 Second Avenue, LLC, under motion sequence 010, is granted with regard to liability as against Fidelity National Title Insurance Company; and it is further,

ORDERED that the motion by 221 Second Avenue, LLC, under motion sequence 010, for an order granting it summary judgment against defendant Fidelity National Financial, Inc. is denied as moot; and it is further,

ORDERED that the cross-motion of Fidelity National Financial, Inc., under motion sequence 010, is denied as moot; and it is further,

ORDERED that the cross-motion of Fidelity National Title Insurance Company, under motion sequence 010, is denied in its entirety; and it is further,

ORDERED that the motion of Fidelity National Title Insurance Company, under motion sequence 011, for an order granting it leave to reargue this Court's order dated July 13, 2012, is denied; and it is further,

ORDERED that any relief requested but not expressly granted, is denied.

This constitutes the Decision and Order of the Court.

Dated: Oct. 11, 2013

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**