SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A

----------X

Alma Campbell, Daniel Shaw, Michael Shaw, & Robert Shaw

Plaintiffs,

-against-

JP Morgan Chase Bank N.A., fka Chemical Bank and First American Title, fka United General Title,

Defendants.

----------X

Index No.: 21289/12E

Decision and Order

HON. ALEXANDER W. HUNTER, JR.

Defendant First American Title, fka United General Title's ("First American") motion for an order pursuant to C.P.L.R. 3212 and 3211(a)(5), granting summary judgment as to First American and dismissing the complaint, is granted pursuant to C.P.L.R. 3211(a)(5) and the complaint is dismissed as to defendant First American.

Plaintiffs seek to recover money damages resulting from defendant JP Morgan Chase Bank N.A. fka Chemical Bank's ("Chase") failure to record a satisfaction of mortgage encumbering plaintiffs' property.

On or about November 6, 1990, plaintiffs entered into a mortgage installment loan agreement with Chase's predecessor, Chemical Bank, in the principal amount of $30,000.00 on the real property located at 3302 Wickham Avenue, Bronx, New York (the "subject property"). The Chase mortgage was paid in full in April 1996. The satisfaction of mortgage was recorded on June 21, 2010.

In December 2004, plaintiffs entered into a mortgage agreement with Ameriquest Mortgage ("Ameriquest") encumbering the subject premises. Ameriquest requested a title report to ensure that its lien would be superior to all other liens recorded on the subject property. The previously satisfied Chase mortgage in the amount of $30,000.00 was listed on the title report as being open and outstanding.

The loan from Ameriquest closed on January 11, 2005. Plaintiffs assert that Ameriquest instructed Prelude Abstract that a payment of $30,000.00 was to be made to Chase in satisfaction of the Chase mortgage. On or about January 11, 2005, the $30,000.00 payment was either forwarded to Chase or held in escrow by First American's predecessor, United General Title Insurance Company. Plaintiffs aver that Prelude Abstract, acting as agent for First American failed to request the satisfaction of the mortgage from Chase after the payment of $30,000.00 was made to Chase.

Plaintiffs commenced the instant action on or about June 26, 2012. Plaintiffs allege two causes of action against First American. In its fourth cause of action for "careless contractual work", plaintiffs argue that "Defendant First American failed to exercise reasonable skill in its role in the transaction as escrowee, to hold said funds in escrow. Defendants either misplaced the record of said funds being transferred or never transferred said funds did not secure the satisfaction from defendant Chase after the funds were allegedly transferred". In its fifth cause of action for negligence, plaintiffs argue that "Defendant First American's agent Prelude Abstract, breached its duty of care to the Plaintiff's [*sic*] by failing to ensure that after the check was issued to Chase, that a satisfaction of the mortgage was received and recorded by its agent Prelude Abstract."

In its answer, First American asserts as its eleventh affirmative defense that plaintiffs' causes of action are barred by the applicable statute of limitations. On or about August 3, 2012, defendant Chase made a motion to dismiss plaintiffs' complaint as to Chase. On or about September 5, 2012, plaintiffs submitted an affirmation in opposition to Chase's motion. In its opposition, plaintiffs assert that Chase received a second payoff of the mortgage in the amount of $30,000.00 in December 2004. Plaintiffs also annexed a copy of a letter dated January 11, 2005 from Ameriquest to Chase enclosing the payoff check in the amount of $30,000.00.

Defendant First American asserts that plaintiffs' fourth and fifth causes of action should be dismissed because they are time-barred by the six year statute of limitations for contract actions and three year statute of limitations for negligence actions, respectively. First American contends that plaintiffs' fifth cause of action against First American accrued on the date of alleged injury giving rise to plaintiffs' action, in January 2005, when First American allegedly failed to transmit the payoff check or obtain a satisfaction of the Chase mortgage. Plaintiffs' fourth cause of action against First American accrued on the date the contract was breached, again in January 2005. Moreover, First American asserts that there is no cause of action for "careless contractual work" as a matter of law.

Plaintiffs assert that the contract between First American's predecessor, United General Title Insurance Company and plaintiffs was for protection for losses arising through defects in title. Under the terms of the contract, First American was obligated to guarantee the owner of the property against any loss due to defects in title. Contrary to First American's argument, plaintiffs argue that the title insurance policy remains in effect for as long as the insured and his or her heirs own the property. Since the insured still owns the property, the statute of limitations has yet to run on plaintiffs' fourth and fifth causes of action. Plaintiffs also argue that defendants have failed to make a prima facie showing of entitlement to summary judgment and therefore, the burden has not shifted to plaintiffs to prove the existence of a triable issue of fact. As such, plaintiffs aver that First American's motion should be denied in its entirety.

In reply, First American notes that plaintiffs do not refute that the facts that gave rise to the instant action occurred in December 2004 or January 2005. First American contends that

plaintiffs' causes of action against First American must be dismissed as time-barred. Defendant First American further avers that plaintiffs' opposition papers, consisting solely of an attorney's affirmation without personal knowledge of the facts constituting the claims, are wholly inadequate to defeat its motion for summary judgment. First American asserts that plaintiffs have failed to present any evidence in admissible form to establish the existence of a triable issue of fact.

C.P.L.R. 3212(b) provides that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by any other available proof, such as depositions and written submissions. The affidavit shall be by a person having knowledge of the facts..." It is well settled that summary judgment is a drastic remedy that should only be granted when there are no triable issues of fact. **Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Andre v. Pomeroy, 35 N.Y.2d 261 (1974); C.P.L.R. 3212(b).** The onus is upon the movant to make a prima facie showing of entitlement to summary judgment as a matter of law. **Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986).** Once such a showing is made, the party opposing the motion must submit proof in admissible form to show the existence of a triable issue of fact. **Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).** In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. **People v. Grasso, 50 A.D.3d 535 (1st Dept. 2008).** However, mere conclusory allegations or defenses are insufficient to summary judgment. **Zuckerman, 49 N.Y.2d 557.**

Defendant First American has failed to make a prima facie showing to warrant summary judgment in its favor. Consequently, the burden did not shift to plaintiffs to demonstrate the existence of a triable issue of fact. As such, defendant First American's motion for summary judgment is denied.

In a motion to dismiss pursuant to C.P.L.R. 3211(a)(5) on the ground that the cause of action is barred by the statute of limitations, the burden lies with defendant to establish a prima facie showing that the action is time-barred. **Kennedy v. Fischer, 78 A.D.3d 1016 (2nd Dept. 2010).** Once such a showing is made, then the burden shifts to plaintiff to raise a question of fact as to the applicable statute of limitations. **DeStaso v. Condon Resnick, LLP, 90 A.D.3d 809 (2nd Dept. 2011).**

Plaintiffs' fourth cause of action for "careless contractual work" is simply a breach of contract claim recast as a tort claim. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." **Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 389 (1987).** Moreover, a cause of action for negligent performance of a contract simply does not exist as a matter of law. **City of New York v. 611 W. 152nd St., 273 A.D.2d 125 (1st Dept. 2000); Megaris Furs v. Gimbel Bros., 172 A.D.2d 209 (1st Dept. 1991).**

A cause of action for a breach of contract accrues on the date the contract is breached. **See, Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 N.Y.2d 399 (1993).** Plaintiffs'

knowledge of the wrong is not necessary to commence the running of the statute of limitations in contract causes of action. **Varga v. Credit-Suisse, 5 A.D.2d 289 (1st Dept. 1958) *affd.* 5 N.Y.2d 865 (1958).** A cause of action for negligence accrues on the date of the injury, even if the injured party is unaware of the wrong or injury. **Kirkland v. American Title Ins. Co., 692 F. Supp. 153 (E.D.N.Y. 1988).**

Plaintiffs commenced this action in June 2012, more than four years after the expiration of the statute of limitations on the fifth cause of action for negligence and one year after the expiration of the statute of limitations on the fourth cause of action for contract actions. This court finds that plaintiffs have failed to raise a question of fact as to the statute of limitations governing plaintiffs' fourth and fifth causes of action. Therefore, plaintiffs' complaint as to First American must be dismissed as time-barred.

Accordingly, defendant First American's motion to dismiss plaintiffs' complaint, is granted and the complaint is dismissed with costs and disbursements to defendant First American as taxed by the Clerk upon the submission of an appropriate bill of costs.

The Clerk is directed to enter judgment accordingly.

Movant is directed to serve a copy of this order with notice of entry on all parties and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: January 2, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR