

**Old Republic Natl. Tit. Ins. Co. v Junction Abstract  
Inc.**

2015 NY Slip Op 32711(U)

February 19, 2015

Supreme Court, Nassau County

Docket Number: 602153/14

Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 10 NASSAU COUNTY

PRESENT:

*Honorable Karen V. Murphy*  
Justice of the Supreme Court

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OLD REPUBLIC NATIONAL TITLE INSURANCE  
COMPANY,

Plaintiff(s),

-against-

JUNCTION ABSTRACT INC. and  
EZEQUIEL SALDANA,

Defendant(s).

\_\_\_\_\_ x

Index No. 602153/14

Motion Submitted: 11/25/14

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....XX

Defendant Junction Abstract Inc. (Junction) moves this Court for an order dismissing the complaint against it pursuant to CPLR § 3211 (a)(1), based upon documentary evidence, and pursuant to CPLR § 3211 (a)(7), for failure to state a cause of action and in the alternative seeks a stay pursuant to CPLR § 2201. Plaintiff opposes the requested relief.

In order to succeed on a motion to dismiss based upon documentary evidence, “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” (*Scadura v Robillard*, 256 AD2d 567 [2d Dept 1998]).

“[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’” (*Fontanetta v. Doe*, 73 AD3d 78, 84-85 [2d Dept 2010], citing *Siegel, Practice Commentaries, McKinney's Cons*

*Laws of NY, Book 7B, CPLR C3211:10*, at 21-22).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether “from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

The amended complaint alleges a cause of action against Junction for contractual indemnification, and a cause of action against Junction for common law indemnification. Most of the facts are undisputed. This action arises from plaintiff’s having paid its insured on a claim for loss of priority of the insured’s mortgage held against certain premises.

The undisputed facts are that, on or about January 16, 2007, Ezequiel Saldana bought real property from another individual. In connection with the sale, Robert Cornacchia made two separate loans to Saldana, one in the amount of \$350,000 and the other in the amount of \$50,000. These loans were to be secured by mortgages drafted by Douglas Sinski, Esq. and Schwartz & Sinski, P.C., who plaintiff alleges represented Cornacchia, plaintiff’s insured. The closing of the Saldana real estate transaction occurred on February 2, 2007, and the mortgage documents related thereto are dated February 2, 2007.

During the summer of 2007, the Nassau County Clerk rejected multiple attempts by Junction Abstract, Inc. to record the mortgages, based upon various defects contained therein. Neither the rejection slips nor any evidence of the nature of the alleged defects giving rise to the rejections have been provided to the Court.

In mid-August 2007, Junction sent the defective mortgages to Douglas Sinski, Esq., accompanied by a letter and a check in the amount of \$3,373.00, for the prompt recording of the mortgages. The letter states that, “by accepting the enclosed check, you agree to promptly record the mortgages . . . and agree to indemnify and hold Junction Abstract harmless from any claims, lawsuits, etc. as a result of your failing to record said mortgage.” It appears from defendant’s Exhibit 4 submitted in support of its motion that Sinski deposited the check on August 24, 2007. Junction did not advise Old Republic that it was delegating the responsibility it had undertaken to record the mortgages to Sinski nor did Junction provide any explanation of steps it took to address the alleged defects in documents it accepted for recording.

On or about February 21, 2008, Saldana gave another mortgage to Emigrant Mortgage Company on the same subject property, in the amount of \$210,000, which mortgage was recorded on March 5, 2008. Saldana's default on the Emigrant mortgage resulted in a foreclosure action against Saldana by Emigrant.

Saldana's \$350,000 mortgage given to Cornacchia in 2007 was not recorded by Sinski until March 12, 2009.<sup>1</sup> Ultimately, plaintiff determined that Emigrant's lien had priority over the Cornacchia mortgage, and paid its insured \$267,000 in settlement of Cornacchia's claim under the title insurance policy issued by plaintiff, and plaintiff expended \$36,143 in attorneys' fees and expenses in defending the interests of Cornacchia.

Junction was plaintiff's agent, having entered into an Agency Agreement dated October 1, 1999. The Agency Agreement, which is submitted both by Junction and plaintiff, does not impose a specific duty upon Junction to record any mortgages, nor does it impose any specific responsibility for loss upon Junction for failure to record mortgages. Junction's duties are enumerated in section III of the Agreement, identified by letters A through G, and, the parties' respective responsibilities for loss are enumerated in section VII of the Agreement. For example, there is no allegation that Junction failed to comply with plaintiff's specific instruction to record this or any other mortgage (see Agency Agreement, Section VII [1][B]). Likewise, the Agreement does not contain a prohibition against Junction delegating the task of recording the mortgage to the insured's attorney. Nonetheless, it is clear that Junction collected mortgage taxes and recording fees and attempted to record the documents thus supporting Old Republic's allegation that Junction assumed the duty to timely record the mortgage (*See First American Title Insurance Company of New York v Fisperve Fulfillment Services, Inc*, 2008 WL 282019 [USDC SD NY, 2008]). Further, Section IX. CLAIMS, requires that "if an Agent *becomes aware of any circumstances which may give rise to a claim* under any such exposure, Agent agrees to immediately notify Insurer. Junction did not do so. Whether acceptance of that responsibility and Junction's knowledge that there was a problem in recording the mortgages gives rise to a violation of Section IX of the Agreement cannot be determined by examination of the Agreement, thus the documentary evidence is not dispositive of this issue and a cause of action is stated.

The Loan Policy contains language in the "Exclusions from Coverage" section (section [3][a]) that plaintiff will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of "Defects, liens, encumbrances, adverse claims or other matters (a) created, suffered, assumed or agreed to by the insured claimant."

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<sup>1</sup>The action identified by Nassau County Index No. 2648/2012 is a legal malpractice action commenced by Cornacchia against Sinski and his firm, arising from the transaction detailed herein.

Defendant Junction relies upon this exclusion in maintaining that plaintiff's payment to Cornacchia was a voluntary payment, and thus not subject to a claim of common law indemnification. Specifically, Junction maintains that, since the insured's attorney created the problem of loss of lien priority by failing to timely record the mortgages, plaintiff was not compelled to pay Cornacchia's claim made pursuant to the policy, thereby imputing counsel's failure to Cornacchia (*Fidelity National Title Insurance Company of New York v Consumer Home Mortgage, Inc.*, 272 AD2d 512 [2d Dept 2000]). Junction's position is unavailing in that Junction first assumed responsibility for the timely recording of the mortgages and did not notify Old Republic that it failed to do so. Absent evidence of the nature of the alleged defect it is not possible to determine who was responsible for the loss.

Notably, plaintiff's opposition papers fail to address the exclusion language set forth in section (3)(a) of the Loan Policy, but plaintiff states that it had "absolute discretion to pay its insured, and settle with its insured," referring to sections 2, 5, and 6 of the Loan Policy listing covered events. The covered events relied upon by plaintiff in its argument that it was compelled to make payment to Cornacchia pursuant to the terms of the policy are: "2) any defect in or lien or encumbrance on the title; 5) the invalidity or unenforceability of the lien of the insured mortgage upon the title, and 6) the priority of any lien or encumbrance over the lien of the insured mortgage."

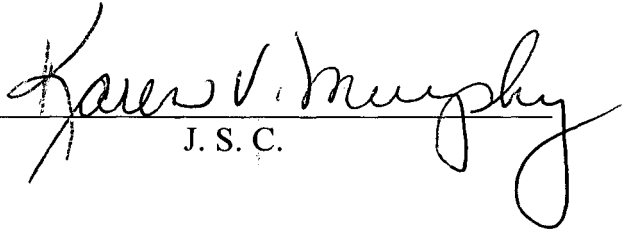
In this case, plaintiff avers in the complaint that Robert Sinski, Esq. was Cornacchia's attorney, that plaintiff paid Cornacchia's claim after it determined that the Cornacchia's mortgage was not recorded with the Nassau County Clerk until March 12, 2009, and that Emigrant's lien had first priority over the Cornacchia mortgage (Verified Complaint, paragraphs 21, 28). Priority of any lien or encumbrance over the lien of the insured mortgage is covered by this policy, subject to certain exclusions. Junction argues that the Loan Policy exclusion language contained in section (3)(a) appears to impute counsel's failure to Cornacchia, thereby making plaintiff's payment to Cornacchia a voluntary payment. The documentary evidence does not establish that the insured claimant, nor his attorney created, suffered, assumed or agreed to any defects, liens encumbrances, adverse claims or other matters warranting exclusion. Any such determination would rely on facts not developed on this motion and thus the policy language does not conclusively dispose of plaintiff's claim.

Defendant Junction's motion to dismiss the complaint asserted against it is denied in its entirety. The Complaint states causes of action for indemnification and the documentary evidence is not dispositive of the matter.

The application for a stay pursuant to CPLR §2201 is denied. The legal malpractice claim against Sinski by Cornacchia, while stemming from the same transaction, has no bearing on Old Republic's contractual claims against Junction.

The foregoing constitutes the Order of this Court.

Dated: February 19, 2015  
Mineola, N.Y.

  
J. S. C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE