Chicago Tit. Ins. Co. v Brookwood Tit. Agency, LLC
2017 NY Slip Op 30130(U)
January 11, 2017
Supreme Court, Kings County
Docket Number: 501487/16
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of November, 2016.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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CHICAGO TITLE INSURANCE COMPANY,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 501487/16

BROOKWOOD TITLE AGENCY, LLC, et al.,

Defendants.

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The following papers number 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 3
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Affidavits (Affirmations)	
Other Papers Memoranda of Law	4, 5, 6

Upon the foregoing papers, defendants Brookwood Title Agency, LLC (Brookwood) and Mendel Zilberberg (Zilberberg) move for an order, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), as well as pursuant to CPLR 3016 (b), dismissing the complaint of plaintiff Chicago Title Insurance Company as asserted against them.

Background

Plaintiff commenced the instant action by filing a summons and verified complaint on February 3, 2016. Plaintiff alleges that it is an out-of-state title insurance company; Brookwood, pursuant to a written agreement with plaintiff, served as a policy-issuing agent in Brooklyn for plaintiff. The agreement requires that Brookwood diligently, and in accordance with plaintiff's standards, examine the title history of a parcel of real property before issuing a title insurance policy underwritten by plaintiff. The agreement contains an indemnity clause whereby Brookwood agrees to indemnify plaintiff for losses incurred due to improper closing of title. Additionally, Zilberberg—who executed the agreement on behalf of Brookwood—executed a personal guaranty of Brookwood's performance in favor of plaintiff.

The pleadings assert that, on or about June 21, 2007, Brookwood issued a title insurance policy (underwritten by plaintiff) to a lender that recorded a mortgage encumbering the premises known as 1229 Halsey Street in Brooklyn. The policy asserted that a chain-of-title search revealed that the mortgage was the most senior lien on the subject property. Accordingly, the policy insured good title without exceptions. However, at that time there were in fact two recorded notices of pendency encumbering the property, that represented liens asserted by the New York City Department of Housing Preservation and Development (the City).

The City subsequently obtained judgments against the subject property. Thereafter, the insured lender foreclosed on its mortgage and, on July 31, 2014, a public sale was

conducted. The purchaser at the public sale discovered the notices of pendency and judgment, and the lender thus learned that its mortgage was subordinate (or inferior or junior) to the City's liens. The lender asserted a claim against plaintiff pursuant to the terms of the policy, and plaintiff settled the claim by paying the City $103,000.00 to satisfy the liens.

In this action, plaintiff seeks recovery of the settlement sum plus associated costs. Plaintiff asserts four claims against Brookwood: breach of contract (the agency agreement), breach of fiduciary duty, negligence, and indemnification. Additionally, plaintiff claims that, pursuant to the subject guaranty agreement, Zilberberg is personally liable for Brookwood's acts and omissions.

After filing the summons and verified complaint, plaintiff provided the court with affidavits of service of process on the various defendants. In lieu of an answer, Brookwood and Zilberberg have moved to dismiss the verified complaint.

Arguments

In support of their motion, movants allege that plaintiff's breach of contract claim should be dismissed because it is time-barred. Movants note that the applicable limitations period for a breach of contract claim is six years from accrual. Furthermore, movants contend that such a claim accrues when the alleged breach occurred. Here, argue movants, plaintiff claims that Brookwood breached the agency agreement in June of 2007, when its agents failed to discover evidence of senior liens during a title search. Alternatively, if such a claim accrues at the discovery of the breach, movants submit that plaintiff knew of the breach before November 5, 2009—the date plaintiff denied a claim relating to the notices of

pendency, and under either theory the instant claims—made in 2016—are untimely. Lastly, movants cite appellate authority for the proposition that a breach of contract claim accrues at the time of the breach even if the claiming party is not damaged until later.

Next, movants challenge the breach of fiduciary duty and negligence claims noting plaintiff is, in essence, making the same allegation contained in the breach of contract claim, and that these claims are simply duplicates of the breach of contract claim and should be dismissed. Alternatively, movants allege that the record establishes that there was no fiduciary relationship between the parties. The parties were simply involved in a conventional business relationship—companies who had negotiated an insurance agency agreement at arm's length. Again in the alternative, movants argue that the breach of fiduciary duty claim should be dismissed because plaintiff failed to plead the elements of a fiduciary relationship with particularity, as required by CPLR 3016.

Also, movants seek dismissal of the cause of action alleging that Zilberberg is personally liable for Brookwood's acts and omissions, arguing that plaintiff's claim is, in essence, a claim for indemnification. To that end, plaintiff points out that Zilberberg executed a personal guaranty of Brookwood's performance,however, note movants, the guaranty instrument (which was provided by plaintiff as an exhibit to the pleadings) does not contain a general indemnity clause for Brookwood's liabilities. Instead, the guaranty document contains Zilberberg's covenant to indemnify plaintiff for losses relating to either delinquent remittances or escrow account shortages only, two situations not implicated here.

Movants acknowledge that Zilberberg agreed to guarantee Brookwood's performance under the subject agency agreement; however, they claim the performance guarantee provision contains no indemnity language. Movants claim that the absence of general indemnity language (instead of indemnity language relating to a specific obligation) in the guaranty instrument establishes the lack of merit in plaintiff's claim against Zilberberg. Moreover, movants provide copies of correspondence between plaintiff and Zilberberg that contains negotiations over the terms of the guaranty. Movants assert that the communications indicate that Zilberberg had no intention to be bound by broad indemnification provisions. Also, movants contrast the facts of this matter with those of other similar cases involving personal guaranty instruments containing indemnity language for any and all losses. Finally, movants argue that the terms of the guaranty instrument are not ambiguous; however, if this court finds any ambiguity, it must resolve the ambiguity against plaintiff. For these reasons, movants ask this court to dismiss the cause of action alleging Zilberberg's personal liability.

Next, movants argue that the cause of action sounding in indemnity should be dismissed. As to Brookwood, movants claim that despite plaintiff's invocation of indemnity, this cause of action is no different than the one alleging a breach of the agency agreement. Therefore, reason movants, this cause of action is similarly time-barred and should thus be dismissed. Movants then maintain that plaintiff fares no better if it attempts to characterize the indemnification claim pursuant to common-law principles. Movants allege that the existence of written agreements (the agency agreement and guaranty) requires this court to dismiss a common-law indemnification claim. Alternatively, movants argue that plaintiff

cannot recover under a common-law theory of indemnification because plaintiff was not injured by movants' tortious acts. Movants conclude that, irrespective of how plaintiff characterizes a cause of action for indemnification, such a cause of action is meritless and must therefore be dismissed.

Lastly, and again in the alternative, movants claim that all claims should be dismissed as against them because the record demonstrates that plaintiff has not suffered any pecuniary harm as a result of the alleged acts. Specifically, movants contend that the instrument used to satisfy the insured's title claim was a check[1] ostensibly drawn on an account maintained by "Fidelity National Financial" and not plaintiff. Movants reason that documentary evidence establishes that a company other than plaintiff paid the City to remove the liens on the subject property. Since plaintiff suffered no pecuniary loss[2] in this matter, say movants, the entire complaint should be dismissed.

Opposition

In opposition to the instant motion, plaintiff argues that its breach of contract claim is timely, pointing out that the agency agreement contains an indemnity obligation, which plaintiff alleges movants have breached. Plaintiff states that a claim based on a written agreement to indemnify does not accrue until the indemnitee has sustained damage. Here, damage was sustained in 2014 when plaintiff made payments to satisfy its insured's title

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[1] A copy of which is provided as exhibit 1-D to movant's affirmation of Samuel Karpel.

[2] Alternatively, movants contend that any alleged loss should be offset by payments to plaintiff from escrow accounts maintained by Brookwood.

claim, and accordingly, the instant claims are within the six-year limitations period for contract claims.

Next, plaintiff asserts that its breach of fiduciary duty and negligence claims against movants are independently proper. Plaintiff argues that the subject agency agreement both placed Brookwood in a position of trust and imposed a duty of care with respect to title searches. Plaintiff claims that by issuing the subject policy without identifying the encumbrances on the property, Brookwood abused plaintiff's trust and failed to act as a reasonably competent insurance agent. Plaintiff maintains that the pleaded facts are sufficient (as well as sufficiently particularized) to support both claims.

Also, plaintiff rejects movants' arguments concerning Zilberberg's personal liability. Plaintiff acknowledges that the guaranty agreement was negotiated before it was executed. Specifically, correspondence between the parties indicates that Zilberberg did not agree to be personally responsible for fraudulent acts of third parties. Nevertheless, the guaranty agreement unmistakably provides that Zilberberg is personally liable for Brookwood's performance under the agency agreement. This action seeks damages for Brookwood's failure to perform its obligations, and therefore, Zilberberg is subject to personal liability. Plaintiff argues that any reading of the guaranty that suggests otherwise would render Zilberberg's promise to guarantee Brookwood's performance illusory.

Next, plaintiff asserts that it has properly pled a claim for indemnity against movants. Plaintiff, pleading in the alternative is permitted, and a claim for indemnification is distinct from a breach of contract claim. Plaintiff reasons that since indemnity is based on a different

legal principle than ordinary breach of contract, the claim for indemnification is thus sustainable.

Lastly, plaintiff claims to have suffered a loss as a result of the underlying transactions. Plaintiff claims that the subject check was sent with a cover letter that references both the subject property and a claim identifier. Moreover, plaintiff points out that it is part of the Fidelity National Financial family of companies. Plaintiff suggests that it is thus disingenuous for movants to suggest that plaintiff did not suffer a loss.

Discussion

(1)

In considering a motion to dismiss, the pleadings must be given their most favorable intendment (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). However, a complaint containing factual claims that are flatly contradicted by documentary evidence should be dismissed (*Well v Rambam,* 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]). To properly support a motion for dismissal pursuant to CPLR 3211 (a) (1), the contents of the proffered documentary evidence must be "essentially undeniable" (*Fontanetta v John Doe 1*, 73 AD3d 78, 85-85 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Examples of such "essentially undeniable" documentary evidence include judicial records, mortgages, deeds, contracts, written agreements (such as trust and lease agreements) and notes (*Fontanetta*, 73 AD3d at 84-85). Documents that are, in essence, unilaterally created by a party (such as

affidavits, letters, notes or file documents) do not contain "essentially undeniable" information and thus do not properly support a motion to dismiss pursuant to CPLR 3211 (a) (1) (*Fontanetta*, 73 AD3d at 85-86). "In sum, to be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta*, 73 AD3d at 86, citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22).

(2)

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, "the pleadings must be liberally construed" and "[t]he 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" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 531 [2d Dept 2008]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). This court may consider affidavits and other evidentiary material submitted by the movant to establish conclusively that no viable cause of action exists (*Simmons v Edelstein*, 32 AD3d 464, 465 [2006]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). A court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731 [2d Dept 2013]); nevertheless,

allegations in the complaint that either consist of bare legal conclusions or contain factual claims flatly contradicted by the record are not entitled to favorable inferences (*see e.g. Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996], *lv denied* 89 NY2d 811 [1997]). In essence, the court must determine whether the alleged causes of action are sustainable "upon any reasonable view of the facts as stated" (*Schneider v Hand*, 296 AD2d 454, 454 [2d Dept 2002]; *see also Manfro v McGivney*, 11 AD3d 662, 663 [2d Dept 2004]).

(3)

Contrary to plaintiff's arguments, this court must dismiss, pursuant to CPLR 3211 (a) (5), the breach of contract claim against movants. A cause of action for breach of contract accrues when the contract is breached (*Bulova Watch Co., Inc. v Celotex Corp.*, 46 NY2d 130 [1979]), even if actual damages are sustained after the breach (*see e.g. Endicott Johnson Corp. v Konick Indus. Inc.*, 249 AD2d 744 [3d Dept 1998]; *see also* 75 NY Jur 2d, Limitations and Laches § 66). Here, the pleaded facts indicate that the breach occurred in 2007, when Brookwood failed to conduct an adequate title search relative to the subject policy. Accordingly, based on the six-year limitations period for contract actions (CPLR 213 [2]), plaintiff had until 2013 to timely assert this claim. Since the instant action was not commenced until February 3, 2016, the breach of contract action is time-barred and thus must be dismissed.

Next, this court must dismiss both the negligence and breach of fiduciary duty claims asserted against movants. The pleaded facts indicate that the rights and obligations of plaintiff, Brookwood and Zilberberg were defined in two written agreements: the agency agreement and the guaranty agreement. Thus, no extracontractual duty of care or fiduciary relationship[3] existed among the parties. Since "[s]imply alleging a duty of care does not transform a breach of contract [claim] into a tort claim" (*Clemens Realty, LLC v New York City Dept. of Educ.*, 47 AD3d 666, 667 [2d Dept 2008] [internal quotation marks and citation omitted]), the causes of action alleging negligence and breach of fiduciary duty are dismissed as duplicative of the breach of contract claim (*see e.g. Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913 [2d Dept 2011]).

However, the court sustains the cause of action seeking indemnification against Brookwood. Here, the indemnity provision is contained in the agency agreement, and, therefore, the applicable limitations period is six years from accrual (CPLR 213 [2]). In contrast with an ordinary breach claim a cause of action for indemnification "is not complete until loss is suffered [and] familiar Statute of Limitations principles dictate that *accrual occurs upon payment by the party seeking indemnity*" (*McDermott v City of New York*, 50

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[3] Additionally, the breach of fiduciary duty claim should be dismissed because the complaint here failed to plead facts (rather than just the legal conclusion) demonstrating the existence of such a relationship (*see e.g. Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Moreover, CPLR 3016 (b) provides that claims based upon (among other theories) a breach of trust must be supported by stating the facts constituting the wrong in detail (*see e.g. Edem v Grandbelle Intl., Inc.*, 118 AD3d 848, 849 [2d Dept 2014] ["the second cause of action, which alleged business fraud, and the third cause of action, which alleged breach of fiduciary duty . . . were not pleaded with the particularity required by CPLR 3016 (b)"]). The pleadings here do not meet the heightened pleading requirements of CPLR 3016 (b).

NY2d 211, 217 [1980] [emphasis added], citing *Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 54 [1978]; *Musco v Conte*, 22 AD2d 121, 125-126 [2d Dept 1964]). Since "the indemnity claim is a separate substantive cause of action, independent of the underlying wrong, this accrual rule remains the same, whatever the underlying breach of duty for which indemnification is sought" (*McDermott*, 50 NY2d at 218). Hence, the instant cause of action seeking indemnification is sustainable, and is neither time-barred nor duplicative of a different cause of action.

Additionally, the claims alleging personal liability against Zilberberg are sustained. There is no dispute that Zilberberg executed the personal guaranty agreement and that the agreement requires him to personally guarantee Brookwood's performance under the agency agreement. Therefore, the guaranty agreement allows plaintiff to seek Zilberberg's substituted performance for Brookwood's. Zilberberg's arguments to the contrary, which suggest that he need not guarantee performance when doing so would be tantamount to indemnity, lacks merit. "Where the terms of a contract are clear and unambiguous, the contract must be enforced according to its terms" (*Genovese Drug Stores, Inc.*, 63 AD3d at 1103-1104; *see also Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] ["a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear*

Co., Inc., 1 NY3d at 475 [internal quotation marks omitted]). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]). Lastly, and to the extent that Zilberberg's affidavit suggests facts that contradict those stated in the complaint, this court declines to consider the sworn statement in connection with this motion to dismiss (*see e.g. Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]).

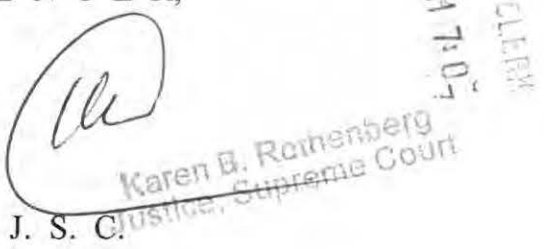
Finally, this court rejects movants' contention that plaintiff did not suffer a loss. Accepting the facts as true, and viewing all inferences[4] in favor of the non-moving plaintiff, the complaint has adequately pleaded facts suggesting a pecuniary loss.

Accordingly, it is

ORDERED, that Brookwood and Zilberberg's motion is granted solely to the extent that plaintiff's first, second and third causes of action are dismissed, and is otherwise denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

[4] For example, the inference that plaintiff nevertheless had to account for funds disbursed by Fidelity National Financial or a related company.