

53 Spencer Realty LLC v Fidelity Natl. Tit. Ins. Co.
2017 NY Slip Op 32601(U)
December 14, 2017
Supreme Court, New York County
Docket Number: 520249/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

53 SPENCER REALTY LLC,

Plaintiff,

DECISION / ORDER

-against-

Index No. 520249/16

Motion Seq. No. 1

Date Submitted: 9/7/17

**FIDELITY NATIONAL TITLE INSURANCE COMPANY,
SPENCER FIFTY THREE LLC, EMMANUEL
SCHWARZ, ABRAHAM FRANCOZ, LAZAR
WALDMAN and CONGREGATION B'NEI MEIR MOSHE,**

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Fidelity National Title Insurance Company's pre-answer motion to dismiss.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits Annexed.....	<u>1-14</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>15-17</u>
Reply Affirmation and Exhibits Annexed.....	<u>20-22</u>
Other: <u>Memoranda of Law</u>	<u>23, 24</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a pre-answer motion by defendant Fidelity National Title Insurance Company ("Fidelity"), pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), to dismiss the complaint as against it. Plaintiff opposes the motion. For the reasons stated herein, the motion is granted in part and denied in part.

The Complaint

The complaint filed in this action alleges eleven causes of action, including fraud

(against Emmanuel Schwarz, Lazar Waldman and Spencer Fifty Three LLC), unjust enrichment (against Congregation B'Nei Meir Moshe), breach of contract (against movant Fidelity), unjust enrichment (against Fidelity), unjust enrichment (against Abraham Franczoz), civil RICO (against Schwarz and Waldman), conversion (seemingly against all defendants), fraudulent misrepresentation (seemingly against Schwarz and Waldman, but possibly against others as well), and to quiet title.

Background

The complaint in the instant action alleges that, by a deed dated March 20, 2006, defendant Congregation B'Nei Meir Moshe ("Congregation") conveyed the subject property (53 Spencer Street, Brooklyn, New York; Block 1716, Lot 1) to plaintiff for \$1,150,000. The deed was executed by defendant Emmanuel Schwarz as President of Congregation. A court's order approving the sale, as was then required for property owned by a Religious Corporation, was provided to defendant Fidelity and to the Lender, Washington Mutual. The deed was recorded at CRFN 2006000190162. The complaint also avers that on that same date, plaintiff received a loan of \$862,000 (the actual amount in the recorded mortgage is \$862,500) from Washington Mutual Bank, (Wamu) which was secured by a mortgage encumbering the property. A part of the funds which were applied to the purchase price was paid by means of plaintiff's assumption of Congregation's mortgage, by an assignment of mortgage from Astoria to Wamu, as is discussed further below. Movant Fidelity issued an American Land Title Association (ALTA) Owner's Policy to plaintiff, with an effective date of March 20, 2006, to insure plaintiff's fee in the property. Fidelity also issued a Mortgage Loan Policy to Washington Mutual to insure its mortgage.

The complaint further alleges that, on July 3, 2006, after the closing, defendant Schwarz filed a change of address form with the NYS Department of State, Division of Corporations, in which he falsely claimed to be a member of plaintiff, an LLC, and requested that its records be amended to list his home address, 108 Wallabout Street #1-B, Brooklyn New York, 11211, for service of process upon plaintiff. It is noted that in this document, (Exhibit A to the plaintiff's opposition) Mr. Schwarz' name appears as "Emmanuel Schwartz," and that in various documents in the papers, the spelling of Mr. Schwarz's first and last name varies, with Emmanuel sometimes having two "m's" and Schwartz sometimes having no "t." The court will assume all refer to the same person, and will spell his name as it appears in the caption in this action instead of using the spelling on each document.

The complaint also alleges that, on or about July 10, 2006, Schwarz procured a mortgage from Madison Park Investors LLC, allegedly on behalf of plaintiff and others in the amount of \$2,750,000, secured by a mortgage encumbering this property and six other properties. The borrower in this transaction was noted to be Atlantic Lofts Corp., in care of Emmanuel Schwarz. He is the person who signed the mortgage. At this point in time, the lien of this mortgage has been removed from this property, so further details are unnecessary. The court file in *Madison Park Investors et al v Atlantic Lofts Corp*, index no. 16046/08, a foreclosure action, provides further information. Of note is Mr. Emmanuel Schwarz's representation in that action that he was the sole member of 53 Spencer Realty LLC, the plaintiff herein. Further, there are affidavits from owners of some of the seven properties which allege that they did not authorize Schwarz to put a mortgage on their property.

Plaintiff then defaulted in paying the Wamu mortgage, which was by then in the inventory of Wamu's successor in interest, JP Morgan Chase Bank, N.A. After the default, JP Morgan Chase commenced a foreclosure proceeding (Ind. 4534/2009). Service was effectuated on plaintiff by service on the Secretary of State, which would have then been sent to Mr. Schwarz at his home. Subsequently, JP Morgan Chase assigned the mortgage to 53 Spencer Holdings LLC. The foreclosure action resulted in judgment to 53 Spencer Holdings LLC, a foreclosure sale and the issuance of a Referee's deed back to 53 Spencer Holdings LLC, dated June 5, 2013 and recorded on July 12, 2013. The merger of deed and mortgage resulted in the cancellation of the mortgage. Plaintiff LLC herein appeared in the foreclosure by counsel, answered the complaint and opposed the bank's motions. That attorney has been suspended from the practice of law. The court has no way to determine whether the attorney was retained by Mr. Schwarz or by plaintiff LLC.

On or about August 15, 2010, Mr. Schwarz executed a deed on behalf of plaintiff, while the foreclosure was pending, thus following the filing of the Notice of Pendency. The deed conveyed title to the property to an entity named Island Properties NYC LLC. This deed became void after the Referee's deed was recorded.

On or about August 26, 2013, that is, after the Referee's conveyance back to the lender, the Congregation commenced an action (Ind. 505015/2013) to quiet title, based upon its claim that the 2006 conveyance to plaintiff herein was consummated without their permission and was not conducted with proper adherence to the NYS Not-for-Profit Corporations Law and Religious Corporations Law. Specifically, the complaint alleges that the sale was never approved by either the court or the New York State

Attorney General, nor was it approved by the Congregation, and that the documents purporting to indicate such approval were forged. The court again notes that the person who signed the 2006 deed to plaintiff herein on behalf of the Congregation was Emmanuel Schwarz.

The court confirms that there is no record of the court approving the sale to plaintiff in the County Clerk's minutes, and that the Attorney General's office issued a letter to Congregation's counsel (which is in the court file in the quiet title action) that their office had not approved the sale either.

Plaintiff herein was served with the summons and complaint in the quiet title action by service upon the Secretary of State on September 3, 2013. The Secretary of State would have forwarded the papers to Mr. Schwarz' home, at the address plaintiff claims Schwarz provided to the Secretary of State in 2006 for the purpose of diverting any and all papers served on plaintiff to himself. Plaintiff herein failed to timely answer the complaint in the quiet title action, and claims it was not aware of it.

What is in the court's file, however, is an application by Congregation to obtain court approval to mortgage the property, under index no. 16919/05, which was approved on June 2, 2005 and entered on June 10, 2005. That application, brought by a petition dated May 22, 2005 and signed by Emmanuel Schwarz, included minutes of a meeting of the board of Congregation approving the mortgage and a copy of the "Certificate of Corporation" of Congregation, dated March 2, 1986, which indicates that one of the original incorporators was Emmanuel Schwarz. Affixed to the order is the New York Attorney General's approval stamp. The mortgage, which was approved by the court, closed on August 11, 2005 and that mortgage, signed by Emmanuel Schwarz

as Congregation's President, was recorded on August 22, 2005. The lender, Astoria Federal, tendered \$550,000 to Congregation in this transaction.

The allegedly forged order approving the sale to plaintiff bears index no. 3843/06, which file does not include an order approving the sale. The file contains a petition for approval of the sale, dated January 30, 2006 and signed by Emmanuel Schwarz on behalf of Congregation, but no order or proposed order. No RJI was filed and no judge was assigned to this index number. The purported order given to movant Fidelity at the closing, which is included in the file for the quiet title action, is dated March 10, 2006. This order is ostensibly signed by the same judge as the order which approved the mortgage, and the same Deputy Attorney General. The clear inference is that the order was fabricated by cutting and pasting from the prior order which granted Congregation permission to place a mortgage on its building.

Following almost three years of litigation, on March 3, 2016, the plaintiff (Congregation) and the answering defendants to the quiet title action executed a Stipulation of Settlement which resolved that action, which was so-ordered by the undersigned on March 11, 2016. Under the so-ordered stipulation, with the consent of all settling parties, plaintiff herein being in default, 53 Spencer Holdings LLC and the other defendants agreed that title to the subject premises would revert back to the Congregation in exchange for an agreed payment to 53 Spencer Holdings LLC, the lender and assignee of JP Morgan Chase. An order of the court which was issued simultaneously with the stipulation, so that it could be recorded, authorized a new conveyance, in favor of Spencer Fifty Three LLC, a defendant in the instant action, but which entity was not a party to the Congregation's quiet title action. It is noted that the

so-ordered stipulation was signed on behalf of the Congregation by Emmanuel Schwarz. The order specifies that the deed to plaintiff herein, recorded on April 6, 2006 under CRFN 2006000190162, along with other documents recorded on the lot, including the mortgage recorded on April 6, 2006 under CRFN 2006000190164, the mortgage consolidation, modification, and extension agreement, recorded on April 6, 2006 under CRFN 2006000190165, the assignment of mortgage recorded on June 25, 2010 under CRFN 20100000212622, the deed recorded on August 18, 2010 under CRFN 20100000278755 and the Referee's deed, recorded on July 12, 2013 under CRFN 2013000275854, were all deemed null and void.

On June 15, 2016, three months after the settlement, and three years after plaintiff in this action was ostensibly served with the complaint in the quiet title action, plaintiff in the instant action attempted to file an answer with counterclaims in the Congregation's disposed action, which was rejected by plaintiff therein, the Congregation. Then, plaintiff herein commenced a third party action against Fidelity, Spencer Fifty Three, Schwarz, Franczoz, Waldman and the Congregation in the disposed quiet title action. It is noted that plaintiff herein never moved to vacate its default in the Congregation's quiet title action, nor did it move to obtain a confirmatory deed, as is authorized by New York Religious Corporations Law § 12(9). The Congregation (as well as other third-party defendants) then filed a motion to dismiss plaintiff's third-party action, which the court granted by order dated November 13, 2016, without prejudice to plaintiff filing a plenary action. Plaintiff then commenced the instant action on November 15, 2016.

The pre-answer motion to dismiss (Motion Seq. #1) now before the court was

filed by Fidelity on January 31, 2017, following a stipulation extending its time to answer or move to dismiss. Four additional motions to dismiss were then filed by four of the remaining defendants. On March 2, 2017, plaintiff's counsel, Jon A. Lefkowitz, filed an Affirmation in Opposition to this motion (Sequence # 1) as well as to Motion Seq. # 2. On April 3, 2017, plaintiff's counsel, Jon A. Lefkowitz, notified the court and all counsel by letter that he had been suspended from the practice of law. By that date, he had yet to oppose the other three motions. Plaintiff's new counsel, Jerome Goldman, filed a Substitution of Attorneys form on May 4, 2017. The parties agreed, by stipulation dated May 11, 2017, to adjourn the return date for the five motions to June 15, 2017. On June 15, 2017, the parties e-filed a stipulation further adjourning the motions to September 7, 2017. The stipulation (E-file Doc. No. 167) contains the following language: "It is further stipulated and agreed that plaintiff's opposition papers to the motions, **except for those motions that already have been opposed**, shall be e-filed on or before August 10, 2017, and reply papers will be e-filed on or before September 5, 2017." [emphasis added]. The court also notes that Mr. Goldman orally informed the court and counsel he would be adopting Mr. Lefkowitz's opposition to Motion Sequence #1 & 2 when he sought an adjournment. However, on July 24, 2017, Mr. Goldman e-filed a document titled "Affirmation in Opposition to All Motions," although it only addresses Motion Sequences 1-4, not # 5. He did not request or receive leave of the court to file a supplemental submission concerning this motion. As such, the court has not considered Mr. Goldman's opposition to the instant motion, nor has the court considered Fidelity's letter and supplemental affirmation in reply, except to the limited

extent that Fidelity's letter urges the court not to consider the supplemental affirmation in opposition.

On September 7, 2016, the court granted three motions from the bench (Motion Sequence 2-4) and dismissed the complaint as against defendants Abraham Franczoz, Spencer Fifty Three LLC and Lazar Waldman. On October 30, 2017, the court granted the motion to dismiss brought by defendant Emmanuel Schwarz (Motion Sequence #5) solely to the extent of ordering a traverse hearing.

Defendant Congregation B'Nei Meir Moshe has not appeared in this action. As more than a year has passed since it defaulted, plaintiff has abandoned the action as to it, as plaintiff has not sought a default judgment. Thus, the only defendants remaining are Fidelity and, if service is sustained at the traverse hearing, Schwarz.

The Allegations against Fidelity in the Complaint

Plaintiff's Third cause of action alleges that plaintiff purchased a title insurance policy from Fidelity, which insured plaintiff against all claims which might affect title to the premises from the date it acquired title to the subject property on March 20, 2006, and that plaintiff suffered a loss in March 2016 "upon recording of the deed . . . which transferred the property back to defendant Cong. Bnai (sic) Meir Moshe." In actuality, what plaintiff is referring to is the court order which declared the deed from the Congregation to plaintiff herein to be a nullity.

Plaintiff avers it duly notified Fidelity of its loss in April 2016, and Fidelity then refused to honor its contractual obligation to defend or insure or reimburse plaintiff for its claims, and that by failing to insure or defend plaintiff, Fidelity is in breach of its contract and its insurance policy, and that Fidelity should be compelled to defend or

insure or reimburse plaintiff for the damages that plaintiff claims to have suffered by virtue of the plaintiff's loss of its property.

Alternatively, plaintiff's Fourth cause of action alleges that Fidelity received the benefits of the insurance premium from plaintiff and did not fulfill its obligation to defend or insure or reimburse plaintiff for claims against its title to the insured property, which was the bargained-for consideration and that therefore it would be inequitable for Fidelity to retain the benefit of the bargain by keeping the title insurance premium.

The court notes that, because of confusing wording, it is unclear from the complaint whether plaintiff is asserting its Ninth cause of action (for conversion) or its Tenth cause of action (for fraudulent misrepresentation) against movant Fidelity. However, plaintiff, in its opposition to this motion, concedes that it is not asserting its Ninth or Tenth causes of action against movant. Therefore, those causes of action are dismissed as against movant Fidelity, without opposition.

Fidelity's Motion

In support of the instant motion, movant submits an attorney's affirmation and the following exhibits: the complaint in the prior action; an affidavit of service of the complaint in the prior action; a letter from plaintiff's (Congregation) counsel in the prior action, dated June 16, 2016, rejecting the answer and counterclaims served on June 15, 2016 by the plaintiff herein; the stipulation settling the prior action; the Notice of Entry of the order in the prior action; the plaintiff's rejected answer in the prior action; plaintiff's Third-party complaint in the prior action; the order dismissing the Third-party complaint in the prior action; and the complaint in the instant action. Additionally, movant submits an affidavit from Cynthia Barnes, the Vice President and Senior Claims

Counsel at Fidelity National Title Insurance Company; annexed as exhibits to Ms. Barnes' affidavit are the title insurance policy and a copy of the 2010 deed for the subject property from plaintiff to Island Properties NYC LLC.

The affidavit from Ms. Barnes states that Fidelity maintains books and records in the regular course of its business and it is Fidelity's regular practice to maintain such books and records in connection with its insurance policies. Ms. Barnes states that Fidelity issued an ALTA 1992 Owner's Policy No. 1312-621251, with an effective date of March 20, 2006, to plaintiff to insure its fee in 53 Spencer Street, Brooklyn, New York. She also states that, on or about August 15, 2010, Emmanuel Schwarz executed a deed on behalf of plaintiff 53 Spencer Realty LLC conveying title to 53 Spencer Street, Brooklyn, New York, to Island Properties NYC LLC. It is Fidelity's position that this conveyance terminated the title insurance policy, as plaintiff no longer had an interest in the property.

Paragraph #2 of the conditions and stipulations of the title insurance policy provides that the coverage of the policy shall continue in force "in favor of an insured only so long as the insured retains an estate or interest in the land . . ." Movant further notes that paragraph #3 of the conditions and stipulations in the policy specifies that the insured shall notify the company promptly in writing "(ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate, as insured, and which might cause loss or damage for which the Company may be liable by virtue of its policy . . ." It goes on to state "if prompt notice shall not be given to the Company, then as to the insured all liability of the company shall terminate with regard to the matters for which prompt notice is required; provided, however, that

failure to notify the company shall in no case prejudice the rights of any insured under this policy unless the company shall be prejudiced by the failure and then only to the extent of the prejudice.”

Exclusion 3(a) of the policy provides that Fidelity is not liable for loss or damage, costs, attorney’s fees or expenses that arise by reason of “defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant” Further, Exclusion 3(d) of the policy excludes from coverage “those defects, liens, encumbrances, adverse claims or other matters attaching or created subsequent to Date of Policy.”

Fidelity argues that plaintiff’s two principal causes of action against it are breach of contract and unjust enrichment, arising out of a title insurance policy for real property which plaintiff does not own, and has not owned since 2010, thus rendering plaintiff ineligible for coverage under any legal theory.

Specifically, movant argues that the plaintiff’s causes of action as against it should be dismissed pursuant to CPLR 3211 (a)(7), because the four corners of the complaint fail to state any cognizable cause of action. Movant also argues that the causes of action as against it should be dismissed pursuant to CPLR 3211 (a)(1), because the documentary evidence conclusively establishes a complete defense to the asserted claims. Finally, movant argues that plaintiff’s causes of action should be dismissed pursuant to CPLR 3211 (a)(5), because plaintiff’s time to commence an action has expired, as plaintiff seeks to assert its claims more than six years after its interest in the property was terminated by its transfer of ownership in 2010.

It is movant’s position that, because a title insurer cannot breach a non-existent

policy and all limitations periods have passed, none of plaintiff's claims against Fidelity can succeed, as a matter of law.

The Opposition

In opposition to the motion, plaintiff submits an attorney's affirmation and an affidavit from someone named Gitta Brull, and the following exhibits: a certified copy of the Articles of Organization of plaintiff;¹ a certified copy of the Certificate of Change filed by Schwarz; and the transcript of a June 12, 2014 court appearance in the prior action.²

The affidavit of Gitta Brull states that she is a member of plaintiff LLC, and avers that plaintiff only became aware that its status as owner of 53 Spencer Street had changed, or was in dispute, on April 10, 2016, when a tenant was arrested for trespass at the building. Ms. Brull states that defendants Lazar Waldman and Emmanuel Schwarz claimed to the Police that they were the true owners. She avers that plaintiff was unaware of the "theft" of its property or of being a named party to Congregation's quiet title action. She states that, since purchasing the property in 2006, 53 Spencer Realty LLC has paid all municipal taxes and water and sewer charges. She states that the evidence of this is annexed as Exhibit E, but there is no such Exhibit. She claims 53 Spencer Realty LLC leased the apartments, collected the rents and hired a property

¹ This document indicates that Ms. Brull was the "organizer" of the LLC. The address provided thereon, for the Secretary of State to forward served papers, is listed, and is not the address on Wallabout Street that Mr. Schwarz changed it to.

² Plaintiff's prior counsel claims in his affirmation the transcript is annexed as "the law of the case" with regard to the court's informing counsel for Spencer Holdings that (page 20) the date of the recording of a document such as the 2006 deed to 53 Spencer Realty LLC is not the date the Congregation is deemed to have notice of the fraud, as he was arguing.

manager to care for the day to day management of the property, such as garbage removal and sidewalk cleaning. She says plaintiff was unchallenged by any supposed subsequent owner until 2016. Ms. Brull makes reference to an Exhibit F, which is also not annexed. She avers that the deed to the property was fraudulently transferred to Island Properties NYC LLC by defendant Schwarz without the knowledge or consent of 53 Spencer Realty LLC. She avers that plaintiff's loss was created by the "unauthorized usurper and thief," defendant Schwarz, who conveyed the property without plaintiff's knowledge or consent.

The court must at this point take judicial notice that, as part of Congregation's quiet title action, on March 31, 2015, this court appointed a Receiver for the subject premises who was directed to "demand, collect and receive from the occupants, tenants and licensees in possession . . . all the rents and license fees thereof . . . due and unpaid or . . . to become fixed and due . . . and/or apply to the court to fix reasonable rental value if no rental agreement exists and to compel the tenants and occupant(s) to attorn to the Receiver in accord with the requirements of rent regulatory statutes." The court must also take notice of the subsequent litigation concerning the Receiver's efforts to collect rent, the tenants' efforts to determine the legal rents for the building's apartments, as well as the receiver's accounting and the managing agent's invoices. This would seem to contradict Ms. Brull's claim with regard to collecting rents and paying bills after about April 1, 2015. But there is nothing in the record that contradicts her statement for the period March 2006 to March 2015, other than her omitting to say anything about the plaintiff's default on the mortgage.

It is plaintiff's position that plaintiff's interest in the subject property was not

terminated on August 5, 2010, when title was “purportedly” transferred to Island, as the deed and transfer were void, since the transferor (Schwarz) did not have the power or authority to convey anything. Further, plaintiff argues that it was instead stripped of its interest in the subject property on March 11, 2016, by the court’s voiding of the 2006 sale of the subject premises by the Congregation to the plaintiff and declaring it a nullity. As such, plaintiff argues that Fidelity has no valid defense and must be compelled to honor plaintiff’s claim. Plaintiff also argues that Fidelity was unjustly enriched by keeping the policy insurance premium.

Plaintiff further avers that its claim is based on a fraud, which is governed by a six- year statute of limitations. See, CPLR 213 (8). Plaintiff argues that an action must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or could have been discovered with reasonable diligence, and that plaintiff has done so. Counsel argues that plaintiff did not exceed the statute of limitations to file a claim against the Congregation, or Fidelity, since plaintiff was unaware of the theft of its property, or of being a named party to the quiet title action, until March or April 2016. Plaintiff 53 Spencer Realty LLC avers it is still the rightful owner of the property, or should be, and therefore has standing to sue Fidelity.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court’s role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall*

Apartments Co., LLC, 14 AD3d 479, 480 [2d Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

Analysis

The purpose of title insurance is to indemnify an insured party for loss or damage caused by a defect, lien or encumbrance that impairs an insured’s interest in

the title to real property (*Citibank N.A. v Chicago Title Ins.*, 214 AD2d 212, 221 [1st Dept 1995]). In evaluating whether a claim is covered, both the insuring provisions and the exclusions must be examined (*Albert J Schiff Assoc., Inc. v Flack*, 51 NY2d 692, 60 [1980]). If a plaintiff's claims under a policy are found to fall within the policy's exclusions, the defendant insurance company is relieved of any obligation to defend or indemnify (*Zandri Constr. Co v Stanley H. Calkings, Inc.*, 54 NY2d 999, 1001 [1981]). New York has adopted a standard form of title insurance, promulgated by ALTA, which enumerates the exclusions, exceptions and conditions to coverage which, if triggered, would eliminate an insurer's duty to defend or indemnify. Like other contracts, title insurance policies are to be enforced as written, according to their plain meaning. (See *In re Estates of Covert*, 97 NY2d 68, 76 [2001]).

Plaintiff's Cause of Action for Breach of Contract.

The court finds that movant has not made a prima facie showing that plaintiff has failed to state a cause of action for breach of contract.

As stated above, in a pre-answer motion to dismiss for failing to state a cause of action, "the role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory." Here, as the policy contains no specific exclusion from coverage in the event the deed conveying the property to plaintiff was fraudulent, a complaint alleging that the title company wrongfully disclaimed coverage does state a cause of action for breach of contract. (See *Francis v D & W Saratoga, Inc.*, 49 AD3d 597 [2d Dept 2008]; *Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 950 [2d Dept 2013]).

Paragraph #2 of the Conditions and Stipulations of the Policy provides that coverage in favor of an insured shall continue for “only so long as the insured retains an estate or interest in the land.” Herein, plaintiff alleges in its complaint that it would still be the owner were it not for Schwarz’ fraud. The court is of the opinion that it may be more accurate to state that plaintiff would have retained its title until the Referee’s deed in June 2013, as plaintiff’s failure to pay the mortgage, which resulted in the foreclosure, is not attributed to Schwarz in the complaint, nor is it even mentioned.

In its opposition, plaintiff argues that its claim arose when this court issued the order in the prior action in March 2016 which followed the parties’ settlement and restored title to the Congregation. Plaintiff claims the March 2016 order was based in part on the parties’ recognition of the fraudulent order approving the sale. Thus, plaintiff claims the settlement confirmed the existence of the title defect, which was the basis of Congregation’s claims in its quiet title action that the conveyance by Congregation to plaintiff herein was not authorized by Congregation, and that Emmanuel Schwarz acted without their authority, and is also the basis for plaintiff’s claim herein against movant. Plaintiff further argues that its claims are not barred by the six-year statute of limitations, arguing that an action must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or could have been discovered with reasonable diligence. Counsel argues that plaintiff did not exceed the statute of limitations to file a claim against the Congregation, or Fidelity, since they were unaware of the theft of its property, or of being a named party to the quiet title action.

It is true that a title insurer will be liable for hidden defects and all matters

affecting title within the policy coverage and not excluded or specifically excepted from said coverage. (*Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 950, 951-952 [2d Dept 2013]; *Francis v D & W Saratoga, Inc.*, 49 AD3d 597, 598 [2d Dept 2008]; *Citibank v Commonwealth Land Tit. Ins. Co.*, 228 AD2d 635, 637 [2d Dept 1996]). The title insurer's liability to its insured is essentially based on contract law, and liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy (*Nastasi v County of Suffolk*, 106 AD3d 1064, 1066 [2d Dept 2013]; see *Property Hackers, LLC v Stewart Tit. Ins. Co.*, 96 AD3d 818, 819 [2d Dept 2012]).

A deed or mortgage based on forged documents is invalid and unenforceable *ab initio*. See, *First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 741 [2d Dept 2010]; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 522 [2d Dept 2008]; *Cruz v Cruz*, 37 AD3d 754 [2d Dept 2007]. Thus, plaintiff herein argues that its claimed loss, due to the invalidity of the deed to plaintiff, arose prior to the deed to Island which was signed by Schwarz in 2010 or the 2013 Referee's deed in the foreclosure. That is, plaintiff seems to be arguing that if its 2006 deed was invalid because the court's order was forged, Fidelity's policy should cover plaintiff because Fidelity insured their title and didn't insist on certified copy of the court order, which would have been impossible to obtain. Thus, plaintiff avers, had Fidelity required a certified copy, it would have prevented the closing and therefore prevented their payment of the unfinanced part of the purchase price, which reflects a large part of plaintiff's damages.

While the court is perplexed that there is no evidence to back up Ms. Brull's

assertions in her affidavit, and no explanation for plaintiff's failure to pay its mortgage, or any acknowledgment of the Receiver, the court finds that the opposition establishes that there are issues of fact that prevent the court from dismissing the complaint at this point, even before defendant has answered it.

Plaintiff's Cause of Action for Unjust Enrichment

Unjust enrichment is essentially a quasi-contractual claim where the law creates a contract in the absence of any agreement. See, *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]. A plaintiff may state alternative causes of action for breach of contract and unjust enrichment which are predicated on the same facts only where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue. *Modern Art Servs. LLC v Financial Guar. Ins. Co.*, 2016 NY Misc LEXIS 3733, 25 [Sup Ct NY Cty]; *143 Bergen St. LLC v Ruderman*, 39 Misc 3d 1203(A) [Sup. Ct. Kings Cty 2013].

Here, both parties agree that there is a contract, that is, a title insurance policy. Under New York law, there can be no unjust enrichment claim if the matter is controlled by contract. Thus, the cause of action for unjust enrichment is dismissed.

Conclusion

Fidelity's motion to dismiss the complaint is granted with regard to the plaintiff's causes of action for unjust enrichment, fraudulent misrepresentation and conversion, and is denied with regard to the plaintiff's cause of action for breach of contract. Defendant Fidelity shall answer the complaint within 30 days.

The traverse hearing with regard to the service of process upon defendant Emmanuel Schwarz is currently scheduled for December 18, 2017 before a referee in

Part 82. Once that matter is decided, a Preliminary Conference can be scheduled.

This shall constitute the decision and order of the court.

Dated: December 14, 2017

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court