

Fidelity Natl. Tit. Ins. Co. v Legend Abstract Corp.
2018 NY Slip Op 30710(U)
March 4, 2018
Supreme Court, Rockland County
Docket Number: 035558/2013
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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FIDELITY NATIONAL TITLE INSURANCE
COMPANY,

Plaintiff,

**DECISION AND ORDER AFTER
TRIAL**

-against-

Index No. 035558/2013

LEGEND ABSTRACT CORP., WALKILL
ASSOCIATES@32, LLC AND SHERMAN AVENUE
ASSOCIATES@WALDEN LLC,

Defendants.

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Hon. Thomas E. Walsh II, J.S.C.

This Court conducted a one (1) day trial on October 5, 2016 on Plaintiff's Complaint which alleges causes of action for breach of Agency Agreement against Defendant Legend Abstract Corp, breach of fiduciary duty against Defendant Legend Abstract Corp, Negligence against Defendant Legend Abstract Corp. and indemnification against all of the Defendants.

The Defendant Legend Abstract Corporation served as Plaintiff's policy issuing agent pursuant to the terms of an Issuing Agency Contract between Legend and Plaintiff's predecessor Lawyer's Title dated August 25, 1996. As per the terms of the Agency Agreement Defendant legend was authorized to issue title insurance commitments and title insurance policies underwritten by Plaintiff subject to rules, procedures, limitations and obligations. The subject transaction occurred on July 30, 2004 when Landco mortgage made a \$535,000 loan to the borrowers. In return Landco received a promissory note and mortgage encumbering two (2) pieces of real property - (a) a parcel of real property located on Route 32 in Walden, New York

and (b) a parcel of real property known as 33 Sherman Avenue, Walden , New York. Defendant Legend Abstract was the settlement agent for the transaction and on behalf of Plaintiff, Legend issued Landco its successors and/or assigns a lender's policy of title insurance to insure that the aforementioned mortgage was first priority lien on the two properties. The closing on the two properties occurred on or about July 30, 2004. Plaintiff submits that Defendant Legend did not record the mortgage until May 18, 2005, which was almost ten (10) months from the closing date.

Subsequent to the closing Landco assigned the insured mortgage to State Bank of Long Island and subsequently, State Bank assigned the Insured Mortgage to NTC and Co. f/b/o Matthew Solof IRA. On September 30, 2004 two months after the insured mortgaged closed the borrower Sherman conveyed the Sherman Avenue property to a third party. Plaintiff avers that after the conveyance the borrowers retained the proceeds of the aforementioned sale and did not pay off all or part of the insured mortgage. Eventually the borrowers defaulted on their repayment of the subject insured mortgage and the insured attempted to foreclose on the property. According to Plaintiff at the instant time they learned that the property located on Sherman had been sold prior to the subject insured mortgaged was recorded. As a result, the insured's right to foreclose on the property on Sherman Avenue was "cut off." The insured was able to foreclose on the second parcel, the property on Route 32 in Walden, New York and submitted a claim to Plaintiff pursuant to the terms of the policy. As a result of the claim and the failure to record the insured mortgaged the Plaintiff had to pay the insured \$286.380 to compensate them for their loss. Plaintiff further submits that they incurred \$3,077.55 in expenses and costs in handling the claim, which does not include the costs and fees associated

with Plaintiff commencing the instant action.

BREACH OF AGENCY AGREEMENT - FIRST CAUSE OF ACTION

Under New York Law to prevail on a claim for breach of contract the Plaintiff must (1) demonstrate the formation of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant's failure to perform and (4) resulting damages. [*Dee v. Rakower*, 112 AD3d 204, 208-209 (2d Dept 2013); *Brualdi v. IBERIA*, 79 AD3d 959, 960 (2d Dept 2010); *JP Morgan Chase v. J.H. Electric of New York, Inc.*, 69 AD3d 802, 803 (2d Dept 2010)]. In discerning the rights of parties to a contract, "the courts may not fashion a new contract under the guise of contract construction." [*Slatt v. Slatt*, 64 NY2d 966, 967 (1985); *Morlee Sales Corp. v. Manufacturer's Trust Co.*, 9 NY2d 16 (1961)]. Mutual assent is essential to the formation of a contract and a party cannot be held to have contracted if there was no assent or acceptance. [22 N.Y. Jur.2d Contracts § 29].

(a) Argument Presented by Plaintiff

Plaintiff presented testimony of one witness, Anthony Medina, an Assistant Vice President and Senior Recoupment Counsel at Plaintiff Fidelity National Title Insurance Company, who was assigned to the subject claim requiring payment. Mr. Medina testified that Defendant Legend and Plaintiff Fidelity had an agency relationship based on an agency agreement (a/k/a agency contract). Defendant Legend would issue insurance policies on mortgages on behalf of Plaintiff Fidelity, which Mr. Medina testified were not reviewed by Plaintiff prior to their issuance. Mr. Medina testified that Plaintiff did not review the underlying

documents that were being insured prior to the policy being issued and Plaintiff had no involvement in the underlying transaction prior to the policy being issued. Further, Mr. Medina testified that the first time Plaintiff would be involved in the transaction would be if a claim was made.

Plaintiff introduced the aforementioned agency agreement through their witness, Mr. Medina, who directed the Court's attention to section four (4) of the agreement. According to Mr. Medina, his understanding of section 4 (e) of the agency agreement is that the agent would be liable if anything goes wrong at the closing, which opens up "the company" to a title claim which would require "the company" to pay a loss. Mr. Medina further testified that the failure to record a mortgage in a timely fashion would be included under section 4(e) of the agency agreement for which the agent would be liable.

As to the subject insured mortgage, Mr. Medina testified that the mortgage was dated July 30, 2004 and according to the recording cover page it was not recorded by Defendant Legend with the Orange County Clerk until May 18, 2005. According to the testimony the deed on the property is dated September 30, 2004 and was recorded on October 19, 2004. Mr. Medina further testified that according to Defendant legend's traffic run sheets the Defendant only sent out the insured mortgaged for recording once between January 2005 and May 2005.

Anthony Medina testified that Plaintiff first received a claim from it's insured on the aforementioned policy in 2009 and generated a claim acknowledgment form acknowledging receipt of the claim on May 21, 2010. According to the testimony the claim was eventually resolved by an initial payment of \$265,000 and a subsequent payment of \$21,000 to the insured lender by Plaintiff. The witness testified that payment was made to the insured since they lost

interest in the subject property due to the failure to timely record the mortgage and the filing of an intervening deed. According to Mr. Medina if the subject insured mortgage was recorded prior to the intervening deed then the insured would not have lost their priority of their mortgage and the mortgage would have been satisfied upon sale of the subject property.

Based on the witnesses testimony Plaintiff submits that it is undisputed that Plaintiff and Defendant were parties to the Agency Agreement. Further, Plaintiff argues that Mr. Medina's testimony supports the argument that section 4 of the Agency Agreement provides that Defendant legend is liable for "[a]ny improper closing or attempted closing by [Legend] including, but not limited to (1) loss or misapplication of customer funds, documents, or other things pf value entrusted to [Legend] in any custodial or fiduciary capacity, (2) failure to disburse or close in accordance with escrow or closing instructions."

Plaintiff further asserts that based on the traffic runs provided by Defendant Legend and the testimony fo Anthony Medina, the Defendant had possession of the original insured mortgaged from the closing date on July 30, 2004 and only attempted to record the document once on February 8, 2005. Plaintiff submits that Defendant did nothing to attempt to record the subject insured mortgage and failed to notify Plaintiff of the failure to timely record the mortgage.

Plaintiff submits that the Defendant had a duty pursuant to Section 4(e) of the Agency Agreement to indemnify Plaintiff for the Defendant's misapplication of documents received at the closing due to Defendant's failure to timely record the subject mortgage. According to Plaintiff these actions are a breach of Defendant's contractual obligations and were the direct cause of the damages incurred by Plaintiff in the instant action. Therefore, Plaintiff avers that

through the testimony of Anthony Medina, traffic runs of Defendant Legend, the date of the intervening deed and the date of the recording of the subject mortgage they have proven the required elements of the first cause of action for breach of contract.

(b) Argument Presented by Defendant

Due to the illness of the Defendant's witness, Neil Halfon, the parties stipulated that his entire Examination Before Trial (hereinafter EBT) transcript would be admitted into evidence. Defendant's post trial memorandum delineates "excerpts" from Mr. Halfon's testimony in support of arguments raised within the trial and in the post-trial memorandum.

Defendant argues that there is only one issue for the Court to consider - what the reason was that subject insured mortgage did not get filed by the Orange County Clerk for ten (10) months after the closing of title. According to Defendant the Plaintiff admitted at trial that they do not know why the mortgage did not get recorded for ten (10) months after the closing and that they failed to inquire with Defendant Legend or the Orange County Clerk as to the reason for the failure to file. Further, Defendant submits that the Plaintiff delayed in notifying Defendant legend of the claim for three (3) years after Plaintiff received the claim, which Defendant avers was not made until five (5) years after the closing.

The Defendant also argues that Legend provided Plaintiff the entire original closing file at Plaintiff's request and have no access to documentation within the file that would clarify the first date that the insured mortgage was presented to the Orange County Clerk for filing. Further, the Defendant submits that Plaintiff has not refuted the fact that the original file was provided to them by Defendant Legend, but Plaintiff asserts that the whereabouts of the original file are not

known to Plaintiff.

Defendant submits that Plaintiff has failed to meet their burden of proof as to all of causes of action against Defendant Legend. According to Defendant Legend they have no obligation to affirmatively prove that they were free from any breach of contract, negligence or breach of fiduciary duty. Further, Defendant avers that the burden remains on Plaintiff to establish the reason that the mortgage was not filed for ten (10) months after the subject closing. Defendant argues that Plaintiff's failure to investigate, obtain evidence or provide admissible evidence to the Court demonstrating that the failure to file the subject insured mortgage from July 2004 through May 2005 demonstrates that the Plaintiff has not satisfied their burden and that the instant action should be dismissed.

In a synopsis of Plaintiff witness, Anthony Medina's testimony, the Defendant states that Medina admitted that paragraph 4(e) of the contract between the underwriter and the agent (the Agency Agreement) states that the agent is liable if the agent loses or misapplies a document. Further, Defendant submits that Medina testified that he was not aware of Defendant Legend or its President, Neil Halfon, losing any document related to the insured mortgage at the closing. Additionally, Defendant argues that Medina also admitted that he was unaware if Defendant Legend or its President, Neil Halfon, misapplied any document related to the insured mortgage at the closing.

Defendant also synopsised Defendant President, Neil Halfon's testimony providing excerpts of his deposition testimony. Mr. Halfon testified that Defendant Legend usually took two (2) to three (3) weeks to record a document after closing. As to the subject insured mortgage, Mr. Halfon testified that the mortgage was rejected numerous times by the Orange

County Clerk, but he could not recall the reason for the rejections. Halfon further testified that the original file was sent to Plaintiff Fidelity at their request and that reason that the mortgage was rejected would be written on the file jacket. The witness further testified that Plaintiff's Exhibit 4 are check-stubs that relate to the instant recordings with Orange County Clerk and demonstrate that the subject insured mortgage was first submitted on August 5, 2004, within one (1) month of the closing. Additionally, Mr. Halfon testified that based on the traffic sheets provided by Defendant the subject insured mortgage was "fixed" and "re-sent" to a person named "Mary." Mr. Halfon testified that the aforementioned notation in the traffic sheet meant that the notation that the agreement was "fixed" and re-sent to a person named Mary means that there was an issue with the first filing and that on February 8, 2005 made a second attempt at recording the "fixed" insured mortgage. However, throughout Halfon's EBT testimony he stated due to the "missing" original closing file he is unable to clarify what the issue was with the filing of the documents.

(c) Court Decision as to the First Cause of Action - Breach of Contract as to Defendant

Legend

Upon review of the testimony of Plaintiff's witness, Anthony Medina and the documents accepted into evidence at trial the Court finds that the Plaintiff was required to demonstrate the existence of a contract between the parties, performance by the Plaintiff, a breach of the duty and obligations set forth in the contract by the Defendant and damages that were directly related to the breach. The Plaintiff and Defendant agree that a contract existed between the Plaintiff and Defendant. There is also no question of the Plaintiff's performance pursuant to the contract

(Agency Agreement). The parties disagreed as to whether the Defendant Legend breached their duties and obligations as defined in the contract and whether the damages that resulted directly resulted from the alleged breach.

In considering whether Defendant legend breached the Agency Agreement the Court considered the entire document as it applied to all of the Defendant's obligations as an agent of Fidelity (formerly lawyer's Title Insurance). The Court finds that the Agency Agreement does not contain a specifically delineated section which defines the agent's role including time frames and requirements as to the recording of documents post closing. The Plaintiff acknowledging this deficit in the agreement argued that the failure of the agent to properly record the subject insured mortgage falls under Section 4 addressing the liability of the agent. The Court finds that there is nothing within Section 4 of the Agency Agreement that applies to the facts as they are presented in the instant action.

Plaintiff's reliance on Section 4(e) of the Agency Agreement is misplaced, as there is no allegation of an improper closing or attempted closing alleged in the instant action. Further, Plaintiff has failed to demonstrate that Defendant Legend, as the Agent, lost or misapplied customer funds, documents or any other items entrusted to them in their custodial or fiduciary capacity. Plaintiff has failed to demonstrate that the Defendant's alleged failure to record the subject insured mortgage before February 8, 2005 was due to an improper closing, a loss or misapplication of customer funds or documents or the failure to disburse funds in accordance with the closing instructions. There has been no evidence provided by Plaintiff as to the basis for the delay in recording the subject insured mortgage or of the existence of an improper closing. No evidence has been presented that the insured mortgage or any other documents were lost, but

rather mere consluory allegations that Defendant Legend must have delayed recording the insured mortgage based on the ten (10) month delay in recording. Plaintiff has failed to demonstrate their burden as to the First Cause of Action, breach of Contract and as such that cause of action is dismissed.

BREACH OF FIDUCIARY DUTY- SECOND CAUSE OF ACTION

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant and (3) damages directly caused by the defendant's misconduct. [*Litvinoff v. Wright*, 150 AD3d 714, 715 (2d Dept 2017); *Deblinger v. Sani-Pine Products Co., Inc.*, 107 AD3d 659, 660 (2d dept 2013); *Kurtzman v Bergstol*, 40 AD3d 588 (2d Dept 2007)].

(a) Arguments presented by Plaintiff

The Plaintiff submits that the evidence presented at trial demonstrates that they have met all of the elements necessary to allow recover for a breach of fiduciary duty. Specifically, the Plaintiff avers that Plaintiff and Defendant had a fiduciary duty based on Plaintiff entrusting Defendant with the authority to issue title insurance policies that bind Plaintiff to its insured without Plaintiff's review or approval of the documents submitted. Further, Plaintiff asserts that based on the documentary evidence and testimony at the trial Plaintiff demonstrated that Defendant engaged in misconduct by their failure to timely record the subject insured mortgaged after the title insurance policy was issued. Finally, Plaintiff submits that they have demonstrated that they had to pay a claim on the title insurance policy due to Defendant's failure to timely

record the subject insured mortgage.

(b) Arguments presented by Defendant

The Defendant does not address each of the causes of action separately within their post trial memorandum. Rather, the Defendant argues that the Plaintiff has failed to meet its burden of proof as to all of the causes of action due to the fact that Plaintiff is not aware of the reason that the subject insured mortgage was not recorded for a period of ten (10) months after the closing and has failed to investigate the reasons for the delay. Defendant relies on a synopsis of both the testimony of Plaintiff's witness', Anthony Medina, and the EBT testimony of Neil Halfon, President of Defendant Legend.

(c) Court's Decision as to the Second Cause of Action - Breach of Fiduciary Duty as to Defendant Legend

The Plaintiff was required to demonstrate the existence of a fiduciary relationship between the Plaintiff and Defendant Legend, that Defendant legend engaged in misconduct and that Plaintiff suffered damages directly caused by Defendant Legend's misconduct. Upon review of the testimony of Plaintiff's witness, Anthony Medina, the Defendant's witness, Neil Halfon, and the documents accepted into evidence at trial the Court finds that the Plaintiff has failed to demonstrate all of the elements necessary to recover for a breach of fiduciary duty.

Based on the trial record the Plaintiff established that based on the Agency Agreement there is a fiduciary relationship between the Plaintiff and Defendant. However, the Plaintiff failed to establish through testimony or documentary evidence that the Defendant Legend engaged in misconduct in the delay in recording the subject insured mortgage. Specifically, the

Plaintiff failed to demonstrate that there were any actions of the Defendant Legend that caused the delay in the recording. Further, the Plaintiff failed to rebut the testimony of Neil Halfon which was supported by documentary evidence that Defendant Legend first attempted to record the subject insured mortgage on August 5, 2004. Defendant's witness testified and referred to a check stub dated August 5, 2004, several weeks after the closing, that the check was submitted to the Orange County Clerk along with the subject insured mortgage for recording. Additionally, the traffic runs introduced by Plaintiff and clarified through the EBT testimony of Neil Halfon demonstrate that on February 8, 2005 the agreement was fixed and re-filed. Neither party has presented any evidence as to the issue that existed with the original filing that caused it to be rejected, need to be fixed and re-filed. Based on that lack of evidence, the Plaintiff has failed to demonstrate that it was the actions of the Defendant that caused the delay in recording the subject insured mortgage. As the Plaintiff has failed to demonstrate the Defendant's misconduct the Court need not address the damages element.

Based on the foregoing the second cause of action for breach of a fiduciary duty is dismissed.

NEGLIGENCE- THIRD CAUSE OF ACTION

In a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, that the duty was breached by the defendant and an injury occurred to the plaintiff as a result of the breach. [*Akins v. Glens Falls City School Dist.*, 53 NY2d 325, 333 (1981); *Turcotte v. Fell*, 68 NY2d 432, 437 (1986); *Jiminez v Shahid*, 83 AD3d 900, 901 (2d Dept 2011)].

(a) Arguments presented by Plaintiff

Plaintiff submits that as a subrogee of the insured lender has established that Defendant Legend was negligent based on the fact that the title agent who agrees to record a mortgage is under a duty to do so with due care. In the instant circumstance in which the timely filing of a mortgage insures the priority of that mortgage due care on the part of the title agent requires a mortgage to be recorded promptly after closing. Plaintiff directs the Court to the testimony of Defendant's witness, Neil Halfon, in which he testified that Defendant Legend usually recorded mortgages within two (2) to three (3) weeks after the closing and that if there was an issue with the recording the insured would be informed that the mortgage was not recorded. In support of the instant cause of action Plaintiff submits that Defendant Legend failed to inform the insured that almost ten (10) months had passed from the closing to the filing of the subject insured mortgage. Further, Plaintiff avers that Defendant failed to inform Plaintiff Fidelity that they would be obligated to indemnify the insured if losses were caused by the delay in recording. Accordingly, Plaintiff asserts that based on the facts and the failure of Defendant to inform the insured and Plaintiff of the delay in recording the subject insured mortgage they have demonstrated that Defendant did not act with due care.

(b) Arguments presented by Defendant

The Defendant does not address each of the causes of action separately within their post trial memorandum. Rather, the Defendant argues that the Plaintiff has failed to meet its burden of proof as to all of the causes of action due to the fact that Plaintiff is not aware of the reason that the subject insured mortgage was not recorded for a period of ten (10) months after the

closing and has failed to investigate the reasons for the delay. Defendant relies on a synopsis of both the testimony of Plaintiff's witness', Anthony Medina, and the EBT testimony of Neil Halfon, President of Defendant Legend.

(c) Court's Decision as to the Third Cause of Action - Negligence by Defendant Legend

The Plaintiff was required to demonstrate that Defendant owed Plaintiff a duty to use reasonable care, that the duty was breached by the Defendant and an injury occurred to the Plaintiff as a result of the breach. Upon review of the testimony of Plaintiff's witness, Anthony Medina, the Defendant's witness, Neil Halfon, and the documents accepted into evidence at trial the Court finds that the Plaintiff has failed to demonstrate all of the elements necessary to demonstrate common law negligence.

Based on the trial record the Plaintiff established that based on the Agency Agreement Defendant owed a general duty to Plaintiff as the title agent. However, the Plaintiff failed to establish through testimony or documentary evidence that the Defendant Legend owed a specific duty to timely record the subject insured mortgage. The Court notes that Section 4(e) of the Agency Agreement does not specify that the title agent is to record any documents post closing in any specific time frame. Further, none of the other sections within the Agency Agreement address the title agent's responsibility in recording post closing documents. As such, the Court cannot place a term into a contract that the parties did not themselves contemplate. Based on that lack of evidence provided demonstrating a specific duty owed by Defendant to plaintiff for timely recording of documents post closing, the Plaintiff has failed to demonstrate the first element to sustain the cause of action for common law negligence. As such, the third cause of

action for negligence is dismissed.

INDEMNITY- FIFTH CAUSE OF ACTION

The Court finds that since the cause of action for negligence was dismissed, that the indemnity clause of the Agency Agreement is not invoked. Therefore, since the Court found no negligence or misconduct on the part of Defendant Legend, Plaintiff is not entitled to indemnification. The fourth cause of action for indemnification is dismissed as moot.

The Court has considered the remainder of the factual and legal contentions of the parties, and finds them to be either without merit or rendered moot by other aspects of this Decision and Order.

Counsel for Plaintiff shall retrieve from the Part Clerk of the Court any exhibits introduced into evidence within twenty (20) days from the date of this Decision and Order.

Accordingly it is hereby,

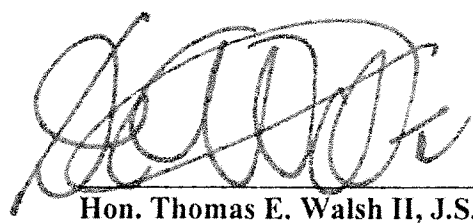
ORDERED that the First, Second, Third and Fifth causes of action are all dismissed; and it is further

ORDERED that the instant action is dismissed after trial after a finding for the Defendants; and it is further

ORDERED that all future court appearance are vacated and the matter is marked disposed.

The foregoing constitutes the Decision and Order of the Court after trial.

Dated: New York, New York
March 1, 2018



Hon. Thomas E. Walsh II, J.S.C.

TO:
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