Fuentes v 158 Mgt., LLC
2020 NY Slip Op 30627(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 159122/2017
Judge: Laurence L. Love

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE **PART** IAS MOTION 62

Justice

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MARIANA FUENTES,

Plaintiff,

- v -

158 MANAGEMENT, LLC,WISEMAN MANAGEMENT LLC,THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE NYC DEPARTMENT OF BUILDINGS,

Defendant.

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INDEX NO. 159122/2017

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

158 MANAGEMENT, LLC

Plaintiff,

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, VIGOR REALTY LLC

Defendant.

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Third-Party
Index No. 595413/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action seeking to recover for injuries allegedly sustained on August 5, 2017 when a sidewalk collapsed at a premises described as 537-539 West 158th Street, in New York County. Said premises are allegedly owned by 158 Management, LLC and managed by Wiseman Management, LLC. Plaintiff commenced the instant action by the filing of a summons and complaint, dated October 9, 2017. Issue was joined by the service of defendants, 158 Management, LLC and Wiseman Management, LLC's answer, dated December 14, 2017.

Thereafter, the parties stipulated to amend the caption and pleadings to add the City of New York, the New York City Department of Transportation and the New York City Department of Buildings. The amended verified complaint was filed and on October 25, 2018, defendants filed a verified answer to the amended verified complaint, with cross-claims asserted against the City defendants. On May 17, 2019, Third-Party plaintiffs filed a third-party complaint against First American Title Insurance Company of New York and Vigor Realty, LLC.

Said third-party complaint alleges that prior to March 2, 2009, First American Title (i) "had a duty to manage, maintain and to keep in good repair the subject premises and adjacent sidewalk located at 537-539 West 158th Street," (ii) "were negligent in their management, maintenance, repair and control of the subject premises and adjacent sidewalk in question, and for creating the trap-like conditions which resulted in plaintiff's injuries," (iii) "had prior knowledge of the alleged trap-like conditions of the subject premises and adjacent sidewalk located at 537-539 West 158th Street," (iv) "had prior knowledge of the alleged trap-like conditions and failed to disclose said conditions to" Third-Party Plaintiffs, and (v) "should have known of the trap-like conditions in the subject location and adjacent sidewalk but failed to disclose said conditions to" Third-Party Plaintiffs. Arising out of said allegations, allege four causes of action, (i) negligence, (ii) breach of contract, (iii) breach of warranty of habitability, and (iv) breach of warrant of skillful construction.

Prior to service of the third-party complaint, First American Title learned of this action pursuant to CPLR R. 3402(b). By an email dated June 3, 2019, Anthony Prisco, a Senior Claims Counsel for First American Title, contacted Joseph Fritzon of Sobel Pevzner, LLC, counsel for Third-Party Plaintiffs, seeking an explanation of "why an alleged 'trap-like' condition on adjacent sidewalk to the property at issue would be the responsibility of a title [insurance] company." Mr.

Prisco further requested that Mr. Fritzon "speak to your clients about discontinuing this action against [First American Title] before we have to go through the expense of retaining counsel to move to dismiss the action." By an email dated June 5, 2019, Mr. Prisco reiterated his prior email, again asking Mr. Fritzon to "provide a basis for the action against" First American Title, and noted that while First American Title has located the Title Policy, "it does not appear that any claim was ever submitted to [First American Title] concerning this matter and [First American Title] would not be responsible for any defects in the sidewalk per the allegations in the Plaintiff's main complaint." Mr. Prisco again requested that the claims against First American Title be discontinued. On June 10, 2019, counsel to First American Title sent a letter to Mr. Fritzon further detailing the Third-Party Complaint's deficiencies, and specifically advising that First American Title "intend[s] to move to dismiss any third-party complaint and to seek sanctions pursuant to § 130- 1.1 of the Rules of the Chief Administrative Judge." On June 11, 2019, First American Title was served with the third-party summons and complaint, resulting in the instant motion to dismiss pursuant to CPLR 3211(a)(1), (5), and (7) and seeking sanctions against third-party plaintiffs. Third-Party plaintiffs cross-move to amend the third-party complaint.

Third-party plaintiff's proposed amended complaint alleges "that prior to March 2, 2009, defendant, 158 Management, LLC retained and paid First American Title Insurance Company of New York to act as its title company in connection with the purchase of the subject premises from Vigor Realty, LLC." The complaint further alleges that First American Title "was required to, inter alia, determine the metes and bounds of the subject premises." Based upon these allegations third-party plaintiffs propose three causes of action, (i) negligence, in that "in the performing its duties as a title company, [First American Title] had, or should have had, prior knowledge of the alleged trap-like conditions of the [Property] and adjacent sidewalk located at 537-539 West 158th Street,

and that the failure to disclose such conditions to Third-Party Plaintiffs constituted negligence," (ii) breach of contract, in that third-party defendants failed to advise third-party plaintiffs of the alleged trap-like conditions, and (iii) for indemnification.

On a CPLR 3211(a) motion to dismiss, although the pleaded facts are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration. See Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dept 1999), aff'd, 94 N.Y.2d 659 (2000); Gertler v. Goodgold, 107 A.D.2d 481, 485 (1st Dept 1985), aff'd, 66 N.Y.2d 946 (1985). A motion to dismiss "should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi, 257 A.D.2d at 81. Where extrinsic evidence is submitted the standard of review becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" and the pleadings must be dismissed "where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi, 257 A.D.2d at 81.

It is undisputed that the sole connection between 158 Management, LLC and First American Title Insurance Company of New York is that First American acted as 158 Management, LLC's title insurance company when they purchased the property in 2009. The Court notes that Wiseman Management, LLC has no connection to First American Title. The crux of third-party defendants argument is that a title insurer, by definition, is not an insurer for the purposes of premises liability and is never liable in the circumstances at issue in this case. As articulated by the Court of Appeals:

> By definition, title insurance involves 'insuring the owners of real property * * * against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property.' Or, as one lower court has expressed it, '[a] policy of title insurance

> means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured.' Essentially, therefore, a policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title. L. Smirlock Realty Corp. v. Tit. Guar. Co., 52 N.Y.2d 179, 187-88 (1981)

In support of its motion, third-party defendants submit a copy of the relevant title insurance policy, which establishes that First American Title merely insures 158 Management's title to the Premises, that First American Title does not insure the Premises itself, and that the Title Policy is not a risk or general liability policy, or a homeowner's risk policy. Third-party defendants further establish that New York State prohibits title insurance companies from offering insurance policies other than title policies, See, N.Y. Insurance Law §§ 6401, 6402(c), 6403(b). Accordingly, there is no basis to argue – or for Third-Party Plaintiffs to reasonably believe – that the Title Policy is a risk or general liability policy and that First American Title could possibly be liable to indemnify Third-Party Plaintiffs for any damages assessed against them due to the claims asserted by Fuentes. Furthermore, as discussed in Brucha Mortg. Bankers Corp. v. Nations Title Ins., Inc., 275 A.D.2d 337, 337- 38 (2d Dept 2000), It is well settled that "[a] title insurer's obligation to indemnify is defined by the policy itself and limited to the loss in value of the title as a result of title defects against which the policy insures" (Citibank v Chicago Tit. Ins. Co., 214 AD2d 212, 221). As such, First American Title has utterly refuted third-party plaintiff's allegation under both the original third-party complaint and the proposed amended third-party complaint, having established that the subject contract does not insure the risk at issue in this action and that First American Title has no duty to manage, maintain and to keep in good repair the subject premises and adjacent sidewalk located at 537-539 West 158th Street.

In opposition, third party plaintiffs argue that as the policy insures against loss and damage sustained by reason of defects in the title, including loss from "[a]ny encroachment, encumbrance,

violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land," that as the survey of the land does not indicate that there is a vault underneath the sidewalk, that such issue implicates the metes and bounds description of the property and as such is a defect in title. Third-party plaintiffs further argue that the policy "warrants that certain sidewalk citations have been resolved and that the property is no longer in violation of the underlying ordinances," and as plaintiff allegedly fell through a sidewalk, such a warranty triggers the policy.

"Metes and bounds" are defined as "[t]he territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties," or "[t]he method of describing a tract by limits so measured, esp. when the descriptions of the limits are arranged as a series of instructions that, if followed, result in traveling along the tract's boundaries." Black's Law Dictionary (11th ed. 2019). What is under the ground is irrelevant to the metes and bounds of the property and is similarly irrelevant to the issue of title. Furthermore, the sidewalk citations are specifically excepted from coverage in Schedule B of the policy. As such, third-party plaintiff's opposition is without merit and third-party defendants, First American Title Insurance Company of New York are entitled to dismissal.

On a motion for leave to amend a pleading pursuant to CPLR 3025[b], leave shall be freely given where the asserted causes of action were not "palpably insufficient or patently devoid of merit" (Lucido v. Mancuso, 49 A.D.3d 220, 222 (2d Dept 2008). As discussed *supra* the causes of action contained in third-party plaintiffs' complaint and proposed amended complaint are patently devoid of merit and as such, leave to amend same is denied.

Third-party defendants further seek the imposition of costs and sanctions as against third-party defendants. New York State Rule of Court § 130-1.1 empowers courts to impose sanctions

or award costs if a litigant or its counsel engaged in "frivolous conduct." 22 NYCRR § 130-1.1. Conduct is frivolous and can be sanctioned under the court rule if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or "it asserts material factual statements that are false." 22 NYCRR § 130–1.1(c)(1) and (3). Specifically, the imposition of sanctions is appropriate where a party refuses to withdraw or amend its pleadings "... when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel." 22 NYCRR § 130-1.1(c), See also, Moran v. Regency Sav. Bank, F.S.B., 20 A.D.3d 305, 306-07 (1st Dept 2005) (affirming the motion court's award of sanctions and costs in light of plaintiff's counsel's "unjustifiable and consistent refusal to discontinue the action ... in the face of unrebutted documentary evidence" that plaintiff's claims lacked merit); Timoney v. Newmark & Co. Real Estate, 299 A.D.2d 201, 202 (1st Dept 2002) (holding that Plaintiff's conduct was frivolous and warranted sanctions where, among other things, "defendant sent plaintiff's counsel information showing that plaintiff had no claim").

Here, counsel for First American Title warned counsel for third-party plaintiffs on three separate occasions prior to service of the third-party actions that any action against First American Title would be meritless as they are a title insurer and not a liability insurer. Counsel received the two emails and a formal letter containing said warning, failed to reply to same and proceeded to serve the third-party complaint. Upon receipt of First American Title's motion seeking dismissal of the third-party complaint, which contains a veritable treatise on the purpose of title insurance, its limitations, and its complete inapplicability to the current action, third-party plaintiff's counsel not only refused to discontinue, but cross-moved to assert equally meritless claims against third-party defendant. Perhaps most galling is that third-party plaintiffs took title to the subject property

in 2009 and plaintiff's alleged accident occurred eight years later in 2017. As such, the imposition of costs in the full amount of third-party plaintiff's legal fees in responding to third-party plaintiff's frivolous action are appropriate, together with an appropriate sanction.

ORDERED that the motion of third-party defendant First American Title Insurance Company of New York to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said third-party defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining third-party defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

The court having determined that plaintiff [defendant] has engaged in frivolous conduct as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator as set forth above, and

having set out above the reasons why the conduct has been found frivolous and that costs and sanctions should be awarded, , it is now therefore

ORDERED that third-party defendant's motion for costs and sanctions is granted to the extent that counsel for the parties to the third-party action are directed to appear for a hearing on April 16, 2020 at 9:30 AM at 80 Centre Street, Courtroom 122 to determine the appropriate amount of costs and sanctions.

3/3/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE