

Chen & Lin 7173 Realty LLC v City of New York

2020 NY Slip Op 30864(U)

March 10, 2020

Supreme Court, Kings County

Docket Number: 520686/2017

Judge: Dawn M. Jimenez-Salta

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At an IAS Term, Part 88 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 March 10, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,

Justice.

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CHEN & LIN 7173 REALTY LLC,

Plaintiff,

Index No.: 520686/2017

Mot Seg # 6

-against-

CITY OF NEW YORK, RAYMOND NICKOLSON AS ADMINISTRATOR OF THE ESTATE OF PRISCILLA NICKOLSON, THE GREENPOINT SAVINGS BANK, MIDLAND FUNDING LLC, UNITED STATES DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE, ANN VANTERPOOL BROWN, ESQ., AS REFEREE, BERNARD MITCHELL ALTER, ESQ., AS REFEREE, NYCTL 2008-A TRUST AND THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN FOR NYCTL 2008-A TRUST, THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN FOR NYCTL 1998-2 TRUST, THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL 2014-A TRUST, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, FIDELITY NATIONAL TITLE INSURANCE COMPANY, and

DECISION AND ORDER

“JOHN DOE” #1 through “JOHN DOE #12”, the last twelve names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest or lien upon the premises, described in the complaint,

Defendants.

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Plaintiff Chen & Lin 7173 Realty LLC’s (“Plaintiff”) Notice of Motion for Summary Judgment Pursuant to *CPLR Section 3212* Along with Exhibits to Grant Plaintiff’s Claims in Its Favor Against Defendant Fidelity

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Alternatively Granting Plaintiff's Claims in Its Favor Against Defendants The City of New York and the New York City Environmental Control Board, Dismissing Their Answer and Granting Such Other Further Just and Proper Relief as Deemed by the Court, dated December 20, 2018;

2) Defendant Fidelity's Notice of Cross Motion Pursuant to CPLR 3212(b) with Exhibits and Memorandum of Law in Support of Its Cross Motion and in Opposition to Plaintiff's Motion Because of No Breach of Its Title Insurance Agreement with Plaintiff, dated April 1, 2019;

3) Plaintiff's Reply Affirmation in Further Support of Its Motion and in Opposition to Defendant Fidelity's Cross Motion, dated May 15, 2019;

4) Defendant Fidelity's Reply Memorandum of Law in Support of Its Cross Motion, dated June 7, 2019, all of which submitted June 14, 2019.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	Plaintiff 1 [Exh. A-P]
Notice of Cross-Motion and Affidavits Annexed.....	Defendant 2 [Exh. 1-6]
Order to Show Cause and Affidavits.....	
Verified Answer.....	
Replying Affidavit.....	Plaintiff 4
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law]	Defendant 3 Defendant 5

Upon the foregoing cited papers, the Decision/Order on Plaintiff Chen & Lin 7173 Realty LLC's ("Plaintiff") Notice of Motion for Summary Judgment pursuant to CPLR Section 3212 granting Plaintiff's claims in its favor against Defendant Fidelity National Title Insurance Company ("Fidelity") and dismissing Defendant Fidelity's Answer or in the alternative granting Plaintiff's claims in its favor against Defendants the City of New York and New York City Environmental Control Board and dismissing their Answer and on Defendant Fidelity's Notice of Cross Motion pursuant to CPLR 3212 for judgment in its favor as a matter of law because it has not breached its title insurance agreement with Plaintiff is as follows: Plaintiff's motion is denied, and Defendant Fidelity's cross motion is granted [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

**BACKGROUND,
PROCEDURAL HISTORY
AND
ARGUMENTS**

There was a fire at 71-73 Dalgren Place, Brooklyn, New York, Block 6071, Lots 7 and 8. (the "Premises") in September 2013. As a result, the in-place structures on the Premises were destroyed. Because the property became dangerous, the New York City Department of Buildings ("DOB") issued Immediate Emergency Declarations ("IED") on September 10, 2013 in order to demolish those fire-damaged structures. Since there was a recognizable harm, DOB requested the New York City Department of Housing and Preservation ("HPD") to hire contractors for the task of demolition. HPD created Open Market Orders ("OMOs") on September 10, 2013 with the order numbers DE00181, DE00182, DE00183 and DE00184 (the "subject OMOs"). After the contractors conducted asbestos investigations, they demolished the fire-damaged structures. The work for each of the subject

OMOs was duly completed by October 22, 2013 [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Approximately two (2) years later, Plaintiff Chen & Lin 7173 Realty LLC (“Plaintiff”) states that it purchased the Premises for \$760,000.00 (Seven Hundred Sixty Thousand Dollars) from Defendant Raymond Nickolson¹ (“Nickolson”) on June 19, 2015. The purchase was memorialized by a deed executed and delivered by Defendant Nickolson on June 19, 2015. The deed was subsequently recorded in the Office of the City Register of the City of New York on July 9, 2015. The proceeds of the sale were used to pay and satisfy numerous tax liens on the Premises, totaling more than \$200,000.00 (Two Hundred Thousand Dollars). According to Plaintiff, Defendant Nickolson received a check for \$431,738.21 (Four Hundred Thirty-One Thousand Seven Hundred Thirty-Eight Dollars and Twenty-One Cents) at the closing on June 19, 2015 from Plaintiff. Plaintiff also states that he paid a contract deposit of \$76,000.00 (Seventy-Six Thousand Dollars) on the Premises [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

According to Plaintiff, Defendant Nickolson covenanted that he had neither caused nor allowed anything to encumber the Premises in any way. Plaintiff states that Defendant Nickolson executed an Affidavit of Title, dated June 19, 2015, swearing that no work had been performed by the City of New York upon the Premises nor was there any demand by the City of New York for any such work which may result in charges. Plaintiff states that Defendant Nickolson swore that no charges have been levied, charged, created or incurred which may become a tax or other lien² [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Plaintiff purchased a title insurance policy (“Policy”), dated June 19, 2015 (“Date of the Policy”) on the Premises from Defendant Fidelity National Title Insurance Company (“Fidelity”). The Policy insured the title to the Premises. As of the Date of the Policy and after the Date of the Policy, the Policy insured against any loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured for any defect or lien or encumbrance on the Title. It included but was not limited to insurance against loss from the lien of real estate taxes or assessments imposed on the Title by a governmental authority *due or payable (emphasis added)*, but unpaid. The Policy included *exclusions (emphasis added)* for coverage when the Company will not pay loss or damage, costs, attorneys’ fees or expenses which arise by reason of defects, liens, encumbrances, adverse claims or other matters, attaching or created *subsequent to the Date of the Policy (emphasis added)* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Following its payment of its contractors, HPD transferred the charges for the subject OMOs associated with the 2013 emergency repair work to the New York City Department of Finance (“DOF”) on March 18, 2016,

¹ This Court notes that the property was sold by Raymond Nickolson as the Administrator of the Estate of Priscilla Nickolson. Mr. Nickolson received a Letter of Administration as the Administrator of the Estate of Priscilla Nickolson on May 1, 2000. The Letter of Administration was modified on June 5, 2015 to allow the sale of the Premises [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

² This Court observes that the Affidavit of Title, dated June 19, 2015 which was signed by Defendant Nickolson reads that there are no known pending actions affecting the property. In addition, there are no contracts of sale, restrictions, easements or defects affecting the property other than as set forth in the report to the best of Defendant Nickolson’s knowledge. There are no facts known to Defendant Nickolson relating to the title of the property which have not been set forth [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

approximately two and half years after the 2013 emergency repair work. DOF initially invoiced Plaintiff for these charges on quarterly statements of account on June 3, 2016 (the "June Statements of Account"). The charges were billed a second time in the next quarterly statement of account, dated August 26, 2016 (the "Second Statements of Account"), (collectively with June Statements of Account, "the Quarterly Statements of Account"). Each of the Second Statements of Account clearly stated that the "ERP Demolition" work, i.e., the assessments for the emergency repair work pursuant to the subject OMOs (the "ER Real Estate Taxes") were due and payable as real estate tax on October 1, 2016. Pursuant to *City of New York Administrative Code Section 27-2144(b) and (c)*, HPD charges, appearing on a property's statements of account only become liens against the property if they are not paid by their due and payable date [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Plaintiff filed a claim on August 9, 2016 with Fidelity for coverage of the ERP Real Estate Taxes. However, Defendant Fidelity declined coverage in its November 11, 2016 letter ("letter") because the ERP Real Estate Taxes did not become liens until 2016 when the Policy was issued in June 2015. Defendant Fidelity pointed out in its letter to Plaintiff that the "Covered Risks" provision (2)(b) established that *only real estate liens as of the Date of the Policy in June 2015 were covered (emphasis added)*. It called Plaintiff's attention to the *exclusions from the Policy which specifically exclude liens attaching or created subsequent to the Date of Policy (emphasis added)* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Plaintiff filed a Summons and Verified Complaint, dated October 25, 2017 for: 1) a declaratory judgment to quiet title and declare Plaintiff the lawful and sole fee owner of the Premises and to declare the parties' interests in the Premises pursuant to *RPAPL Section 15*, 2) a declaratory judgment against Defendant Fidelity pursuant to the Policy as well as 3) breach of deed covenant, indemnity and contribution against Defendant Raymond Nickolson [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Defendant Raymond Nickolson as Administrator of the Estate of Priscilla Nickolson filed an Answer, dated January 30, 2018. Defendant Fidelity filed its Answer, dated August 29, 2018. Defendants City of New York and New York City Environmental Control Board filed their Answer, dated September 17, 2018 [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Defendant Fidelity moved to dismiss the Verified Complaint against it by Notice of Motion, dated February 26, 2018. The Honorable Katherine A. Levine, J.S.C., Kings County Supreme Court denied Defendant Fidelity's motion to dismiss without prejudice for renewal on May 18, 2018. Defendant Fidelity appealed the Decision/Order, dated May 18, 2018 to the Appellate Division of the Supreme Court, Second Department on September 5, 2018. However, Defendant Fidelity withdrew its appeal on May 13, 2019 [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

The Honorable Katherine A. Levine, J.S.C., Kings County Supreme Court issued her Decision/Order, dated June 14, 2019, granting Defendants City of New York and New York City Environmental Control Board's motion for summary judgment in its entirety. Both Defendants City of New York and New York City Environmental Control Board were dismissed from this action as the liens which are the subject of this action are fully enforceable and not subject to discharge because Plaintiff was on notice of the imminent liens pursuant to *City of New York Administrative Code Section 27-2144* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

In its Notice for Motion for Summary Judgment pursuant to *CPLR Section 3212*, dated December 20, 2018, Plaintiff claims that the Emergency Repair Charges constituted a lien at the time of closing for which Defendant Fidelity was liable. It argues that the Policy covers Plaintiff because Defendant Fidelity had notice of the City of New York's imminent lien regarding the Emergency Repair Charges. It contends that not only is Defendant Fidelity bound by "Covered Risks" 11 of the Policy but prior legal precedent also mandates it. In the alternative, since it is a bona fide purchaser, it argues that its title is immune from the City of New York's Emergency Repair Charges,

corresponding tax bills and liens. See *Matter of Greene Residence, LLC v. New York City Dept. Of Hous. Preserv.*, 93 AD3d 794, 939 NYS2d 889 (2nd Dept., 2012); *NYADC Section 27-2144*; *RPL Section 291*; *NYADC Section 28-215.1*; *NYADC Section 27-2144(b) and NYADC Section 27-2144 (c)*; *NYADC Section 11-129*; *NYADC Section 27-2144(a)*; *Rosenbaum v. City of New York*, 96 NY2d 468, 756 NE2d 62, 730 NYS2d 774 (2001); *Perez Strahl, Inc., v. Fid. Nat'l Tit. Ins. Of NY*, 9 Misc.3d 1110(A) (Sup. Ct. Kings 2005); *New York City Charter Section 643*; *Wallace v. 600 Partners*, 86 NY2d 543, 634 NYS2d 669 (1995); *Teichman v. Community Hosp., of W. Suffolk*, 87 NY2d 514, 663 NE2d 628, 640 NYS2d 472 (1996); *Sievert v. Morlef Holding Co.*, 241 AD2d 445, 663 NYS2d 978 (2nd Dept., 1997); *380 Kings Highway v. Fidelity National Title Inc. Co.*, 33 Misc3d 1233(A), 946 NYS2d 69 (Sup. Kings. County, 2011), judgment entered 2012 WL 11916318 (Sup. Kings Co., 2012); *Ahava Dairy Products Corp., v. Trident Leasing Corp.*, 768 NYS2d 229 (2nd Dept., 2003); *Neulist v. Nassau County*, 108 Misc.2d 160, 437 NYS2d 239 (Sup. Ct., 1981), aff'd 88 AD2d 587, 450 NYS2d 762 (2nd Dept., 1982); *Weiner v. Greyhound Bus Lines, Inc.*, 55 AD2d 189, 389 NYS2d 884 (2nd Dept., 1976); *American Ins. Co., v. Messinger*, 43 NY2d 184, 401 NYS2d 36 (1977); *Ioannou v. Southold Town Planning Bd*, 304 AD2d 578, 758 NYS2d 358 (2nd Dept., 2003); *Farrell v. Sitarus*, 22 AD3d 518, 803 NYS2d 659 (2nd Dept., 2005) [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

In its Notice of Cross Motion for Summary Judgment, pursuant to *CPLR 3212(b)*, dated April 1, 2019, Defendant Fidelity asserts that there is no coverage under the Policy for the ERP Real Estate Taxes. See *Consolidated Edison Co., of NY v. Allstate Ins. Co.*, 98 NY2d 208 (2002); *Serrano v. Republic Ins.*, 48 AD3d 665 (2nd Dept., 2008). It underscores that insurance contracts are to be construed according to the plain, ordinary meaning of the terms which the parties used. If they are clear and unambiguous, it maintains that the terms are to be taken and understood in their plain, ordinary and proper sense. See *Hartol Prods. Corp., v. Prudential Ins. Co., of Am.*, 290 NY 44 (1943); *Johnson v. Travelers Ins., Co.*, 269 NY 401 (1936); *Appleby v. Chicago Title Ins., Co.*, 80 AD3d 546 (2nd Dept., 2011); *Greenfield v. Philles Record, Inc.*, 98 NY2d 562 (2002); *Darbonne v. Goldberger*, 31 AD3d 693 (2nd Dept., 2006); *Brucha Mortgage Bankers Corp., v. Nations Title Ins. Of New York, Inc.*, 275 AD2d 337 (2nd Dept., 2000); *Ghaly v. First American Title Ins. Co., of New York*, 260 AD2d 535 (2nd Dept., 1999); *Monti v. Harran Transp. Co., Inc.*, 266 AD2d 440 (2nd Dept., 1999); *Zandri Constr. Co., v. Stanley Calkins, Inc.*, 54 NY2d 999 (1981); *A. Meyers & Sons Corp., v. Zurich Am. Ins. Group*, 74 NY2d 298 (1989); *Physicians' Reciprocal Insurers v. Loeb*, 291 AD2d 541 (2nd Dept., 2002) [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Because the Title Policy's "Covered Risks" Section 2(b) specifically excludes taxes levied after the Date of the Policy of June 19, 2015, Defendant Fidelity emphasizes that the lien is specifically excluded from coverage. See *City of New York Administrative Code Section 27-2144(b) and (c)*; *Metropolitan Life Ins. Co., v. Union Trust Co., of Rochester*, 283 NY 33 (1940); *Mayers v. Van Schaick*, 268 NY 320 (1935); *Trenton Potteries Co., v. Title Guarantee & Trust Company*, 176 NY 65 (1903); *TIMAC Realty v. G&E Tremont LLC*, 121 AD3d 457 (1st Dept., 457); *Cole v. Home Title Guaranty Co.*, 29 AD2d 552 (2nd Dept., 1967), aff'd 23 NY2d 760 (1968); *Ghaly v. First American Title Ins., Co. Of New York, supra*; *Zandri Constr. Co., v. Stanley H. Calkins, Inc., supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Defendant Fidelity argues that Plaintiff has no entitlement to insurance coverage for the ERP Real Estate Taxes since neither "Covered Risks" 5 and 6, *NYADC Section 28-215.1* nor the abstract company's alleged knowledge of a possible tax lien assessment at some later date allows such an interpretation. See *Consolidated Edison Co., of New York v. Allstate Ins. Co., supra*. It points to Plaintiff's failure to establish coverage pursuant to "Covered Risks" 5 and 6 since they are inapplicable to tax assessments for emergency repair work nearly two (2) years prior to Plaintiff's purchase of the Premises in June 2015. See *Consolidated Edison Co., of New York v. Allstate Ins Co., supra*. If "Covered Risks" 5 and 6 were applied to the instant matter, it postures that it would

negate “Covered Risk” 2 and “Exclusion” 3 in violation of the rules of contract interpretation. See *John E. Andrus Memorial Home v. DeBuono*, 260 AD2d 635 (2nd Dept., 1999); *Corhill Corp., v. SD Plants, Inc.*, 9 NY2d 595 (1961); *Aguirre v. City of New York*, 214 AD2d 692 (2nd Dept., 1995); *Muzak Corp., v. Hotel Taft Corp.*, 1 NY2d 42 (1956); *Sutton v. East Riv. Sav. Bank*, 55 NY2d 550 (1982); *Aivaliotis v. Continental Broker Dealer Corp.*, 30 AD3d 446 (2nd Dept., 2006); *Vermont Teddy Bear Co., Inc., v. 538 Madison Realty Co.*, 1 NY3d 470 (2004). It claims that any alleged possible knowledge of the HPD records does not create coverage. See *Darbonne v. Goldberger, supra*. It contends that neither the New York endorsement nor the case of *380 Kings Highway, LLC v. Fidelity Nat. Title Ins., Co., supra* mandate or create insurance coverage. See *Article 2 of the New York Lien Law; New York City Administrative Code Section 27-2144* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

In its Reply Affirmation in Support of its Motion and in Opposition to Defendant Fidelity’s Cross Motion, dated May 15, 2019, Plaintiff challenges Defendant Fidelity’s legal reasoning. See *NYADC Section 27-2144(a); NYADC Section 28-215.1; Rosenbaum v. City of New York, supra; Peretz Strahl, Inc., v. Fidelity National Title Ins., of New York, supra; Matter of Greene Residence, LLC v. New York City Dept., of Hous. Preserv., supra; NYADC Section 27-2144; Teichman v. Community Hosp., of W. Suffolk, supra; Sievert v. Morlef Holding Co., supra*. It contends that Defendant Fidelity not only misread but also misapplied the Courts’ decisions in *Metropolitan Life Ins. Co., v. Union Trust Co., of Rochester, supra; Mayers v. Van Schaick, supra; Trenton Potteries Co., v. Title Guarantee & Trust Company, supra; Cole v. Home Title Guaranty Co., supra; TIMAC Realty v. G&E Tremont LLC, supra*. It highlights that those decisions were issued prior to the creation of the current statutory laws which govern the enforcement of the City of New York’s emergency repair charges and applicable notice provisions. It claims that the cases are not relevant since they do not address emergency repair charges. It reiterates that the Policy provides coverage for the emergency repair work pursuant to “Covered Risks” 5 [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

In its Reply Memorandum of Law in Further Support of Its Cross Motion, dated June 7, 2019, Defendant Fidelity underscores Plaintiff’s concession of no coverage for the ERP Real Estate Taxes under “Covered Risks” 2 of the Policy. It challenges Plaintiff’s claim that “Covered Risks” 5 or 6 extend coverage because they are inapplicable to tax assessments resulting from emergency repair work completed nearly two (2) years prior to Plaintiff’s purchase of the Premises. See *Consolidated Edison Co., of NY v. Allstate Ins., Co., supra; Serrano v. Republic Ins., supra; City of New York Administrative Code Section 28-215.1; Nisari v. Ramjohn*, 85 AD3d 987 (2nd Dept., 2011). Because of the lien’s specific exclusion from coverage, it counters that the *City of New York Administrative Code* cannot extend coverage under the Policy because the *City of New York Administrative Code* is limited to the law with respect to the City of New York in relation to an owner of property. In contrast, it points out that the title policy and “Exclusion” 3(d) address a relationship between a purchaser of property and its title insurance company. See *Zandri Contr. Co. v. Stanley H. Calkins, Inc., supra; Zev Cohen LLC v. Fidelity Nat. Title Ins. Co.*, 15 Misc3d 798 (Sup. Ct. 2007); *Exclusion 3(d) of the Policy; Darbonne v. Goldberger, supra; Brucha Mortgage Bankers Corp., v. Nations Title Ins. Of New York, Inc., supra; Rosenbaum v. City of New York, supra; Cole v. Home Title Guaranty Co., supra; Giacalone v. City of New York*, 104 Misc2d 405 (Sup. Ct. Queens County 1980); *Luboff v. Security Title & Guaranty Co.*, 46 Misc2d 599 (NY Sup. Ct. Westchester County 1965). It underscores that application of “Covered Risks” 5 and 6 to the instant matter would negate “Covered Risks” 2 and “Exclusion” 3 in violation of the rules of contract construction. It disputes Plaintiff’s argument about the case law as inapplicable. See *Metropolitan Life Ins. Co., v. Union Trust Co., of Rochester, supra; Mayers v. Van Schaick, supra*. It refutes Plaintiff’s analysis that “Covered Risks” 11 which was added to the Policy by the standard New York Endorsement extends coverage in this matter. See *380 Kings Highway LLC v. Fidelity Nat. Title Ins. Co.*,

supra [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

COURT RULINGS

In *Brucha Mortgage Bankers Corp., v. Nations Title Insurance of New York, Inc.*, *supra*, the Second Department ruled that a title insurance policy is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title. It further determined that a title insurer's obligation to indemnify is defined by the policy itself. See also *Darbonne v. Goldberger*, *supra*. While most forms of insurance protect against events which develop following the policy's issuance, the Court of Appeals held that title insurance conversely indemnifies against defects which existed prior to the date of the policy. See *Metropolitan Life Ins., Co., v. Union Trust of Rochester*, *supra*. The Court of Appeals determined in *Greenfield v. Philles Records, Inc.*, *supra* that a contract is unambiguous if its language is definite and precise, unattended by danger of misconception. According to the Second Department in *Ghaly v. First American Title Ins. Co., of New York*, *supra*, a title insurer did not breach a policy of title insurance by refusing to defend and/or indemnify when the facts alleged did not concern events covered under the policy. See also *Monti v. Harran Transp. Co., Inc.*, *supra*. If a plaintiff's claims are found to fall within the policy's exclusions, the Court of Appeals held that the defendant insurance company is relieved of any obligations to defend or indemnify because a complained about matter is *specifically excluded (emphasis added)* from the policy. See *Zandri Constr. Co., v. Stanley H. Calkins, Inc.*, *supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

This Court is cognizant of its responsibility in the interpretation of a contract. Its task is to arrive at a construction which will give a fair meaning to all of the language employed by the parties. This Court must reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. See *John A. Andrus Memorial Home v. De Buono*, *supra*. A contract should not be interpreted in such way as would leave one of its provisions substantially without force or effect. See *Corhill Corp., v. SD Plants, Inc.*, *supra*. If there is an inconsistency between a general provision and a specific provision of an insurance contract, the specific provision must control. See *Aguirre v. City of New York*, *supra*; *Muzak Corp., v. Hotel Taft Corp.*, *supra*. Since a contract is a voluntary undertaking, it should be interpreted to give effect to the parties' reasonable expectations. See *Sutton v. East Riv. Sav. Bank*, *supra*. A court should not imply a term which the parties themselves failed to insert or otherwise rewrite the contract. See *Aivaliotis v. Continental Broker Dealer Corp.*, *supra*; *Vermont Teddy Bear Co., Inc., v. 538 Madison Realty Co.*, *supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

This Court's duty is to compare the allegations of the complaint to the terms of the policy in its determination of the issue of coverage and whether there is indeed an obligation to defend. See *A. Meyers & Sons Corp., v. Zurich Am. Ins. Group*, *supra*. It must scrutinize the operative facts giving rise to recovery in the underlying action to determine whether, if at all, there is coverage by the policy. See *Ghaly v. First American Title Ins. Co., of New York*, *supra*; *Physicians' Reciprocal Insurers v. Loeb*, *supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Since the insured must establish coverage under a policy of insurance by showing that the covered risks apply to his or her situation, he or she must do something more than merely cite a covered risk. See *Consolidated Edison Co., of NY v. Allstate Ins. Co.*, *supra*. However, because the general rules of contract construction apply to title insurance policies, an ambiguity in the policy is to be construed in favor of the insured. See *Appleby v.*

Chicago Title Co., *supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Consequently, this Court finds no provision of the Policy which extends coverage to Plaintiff's claim. In fact, Plaintiff's claim is specifically excluded from coverage. Accordingly, Plaintiff's motion for summary judgment pursuant to *CPLR 3212* is denied, and Defendant's cross motion for summary judgment pursuant to *CPLR 3212* is granted [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Initially this Court finds the terms of the Title Policy to be unambiguous because its language is definite and precise. The tax liens in the present case are addressed by two specific provisions of the Policy, i.e., "Covered Risks" 2(b) and "Exclusion" 3(d). "Covered Risks" 2(b) clearly states that tax liens will be insured if they were *due and payable (emphasis added)* on the Date of the Policy. "Exclusion" 3(d) specifically states that liens which *only (emphasis added)* arise after the Date of the Policy are not covered. Thus, the Title Policy specifies that the Company insures, as of the Date of Policy against loss or damage by reason of the lien of real estate taxes or assessment imposed on the Title by a governmental authority *due and payable (emphasis added)* but unpaid. See "Covered Risks" 2(b) and "Exclusion" 3(d). See *Greenfield v. Philles Records, Inc.*, *supra*; *Ghaly v. First American Title Ins., Co., of New York*, *supra*; *Monti v. Harran Transp. Co., Inc.*, *supra*; *Zandri Constr. Co., v. Stanley H. Calkins, Inc.*, *supra*; *John A. Andrus Memorial Home v. De Buono*, *supra*; *Corhill Corp., v. SD Plants, Inc.*, *supra*; *Aguirre v. City of New York*, *supra*; *Muzak Corp., v. Hotel Taft Corp.*, *supra*; *Sutton v. East Riv. Sav. Bank*, *supra*; *Aivaliotis v. Continental Broker Dealer Corp.*, *supra*; *Vermont Teddy Bear Co., Inc., v. 538 Madison Realty Co.*, *supra*; *A. Meyers & Sons Corp., v. Zurich Am. Ins. Group*, *supra*; *Physicians' Reciprocal Insurers v. Loeb*, *supra*; *Consolidated Edison Co., of NY v. Allstate Ins. Co.*, *supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

The City of New York Administrative Code Section 27-2144(b) and (c) state that a tax assessment for emergency work shall *only (emphasis added)* constitute a lien upon the premises when such charge is *due and payable (emphasis added)*. Notwithstanding any other provision of the law, it shall be the due and payable date for such charge provided on the second statement of account containing such charge [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

In the present case, the DOF sent its first tax bill on June 3, 2016 and its second tax bill on August 26, 2016. The Quarterly Statements of Account indicated that the date for which the ERP Real Estate Taxes were due was October 1, 2016. Thus, it is explicit that the ERP Real Estate Taxes do not become a lien until the due date of October 1, 2016. Since the HPD did not send the information to DOF until March 18, 2016, it was nine (9) months following Plaintiff's purchase of the Premises on June 19, 2015. Consequently, at the time of issuance of the Title Policy on June 19, 2015, none of the ERP Real Estate Taxes were even assessed or even "*due and payable (emphasis added)*". Therefore, they were not a lien on the Premises. See "Covered Risks" 2(b) and "Exclusion" 3(d). As the Court of Appeals and the Appellate Divisions have pronounced, taxes and assessments which only become liens after the issuance of a policy, even for work prior to the date of the policy are not covered. See *Metropolitan Life Ins. Co., v. Union Trust Co., of Rochester*, *supra*; *Mayers v. Van Schaick*, *supra*; *Trenton Potteries Co., v. Title Guarantee & Trust Company*, *supra*; *TIMAC Realty v. G&E Tremont LLC*, *supra*; *Cole v. Home Title Guaranty Co.*, *supra*. Since they were not liens on the Date of the Policy in June 2015, the ERP Real Estate Taxes are not covered by the Policy because of no provision in the Policy which provides coverage for a real estate tax which only becomes a lien post-policy. Consequently, there is no contractual basis for coverage or a claim of breach of contract. See *Ghaly v. First American Title Ins. Co., of New York*, *supra*; *Cole v. Home Title Guaranty Co.*, *supra*. Because the ERP Real Estate Taxes only attached on October 1, 2016 well after the Date of the Policy in June 2015 pursuant to the *City of New York Administrative Code Section 27-2144(b) and (c)*, the ERP Real Estate Taxes were not a defect, lien or encumbrance at the time of the issuance of the Title Policy in June

2015 due to their specific exclusion from the Policy [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

This Court finds that “Covered Risks” 5 and 6 are inapplicable. “Covered Risks” 5 in the Policy addresses violations or enforcement of any law, ordinance, permit or governmental regulation including those relating to building and zoning, restricting, regulating, prohibiting or relating to the occupancy, use or enjoyment of land or environmental protection. “Covered Risks” 6 addresses enforcement action based upon the exercise of governmental police power not covered by “Covered Risks” 5. Since neither of these “Covered Risks” refers to tax assessments which are addressed by “Covered Risks” 2 and “Exclusion” 3, they are inapplicable. Accordingly, Plaintiff has failed to meet its burden of establishing insurance coverage pursuant to “Covered Risks” 5 and 6 because they are limited to enforcement actions but not to costs and expenses associated with enforcement actions. See *Consolidated Edison Co., of New York v. Allstate Ins. Co., supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Moreover, since the tax liens in the present case are addressed by two specific provisions of the Policy, i.e., “Covered Risks” 2(b) and “Exclusion” 3(d), the general provisions of “Covered Risks” 5 and 6 are trumped by the two specific provisions of the Policy, “Covered Risks” 2(b) and “Exclusion” 3(d) because in any inconsistency between a general provision and a specific provision of an insurance contract, the specific provision must control. See *Aguirre v. City of New York, supra*; *Muzak Corp., v. Hotel Taft Corp., supra*; *Corhill v. SD Plants, supra* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Plaintiff’s argument that Defendant Fidelity allegedly had notice of the HPD expenses because of its title agent KCT Abstract LLC’s search is unavailing. However, as the Second Department ruled in *Matter of Greene Residence, LLC v. New York City Department of Housing Preservation and Development, supra*, the purchaser had notice of the forthcoming RPAPL 7-A liens when it purchased the property because HPD had filed its work orders for the emergency repairs related to the property as required by the *Administrative Code of the City of New York, Section 27-2144*. The Second Department addressed a purchaser’s notice of record in *Farrell v. Sitarus, supra* in counties, using a “block and lot” indexing system, which enables the title searcher to readily find all conveyances within a given time frame which affect a particular parcel of land. The Second Department determined in *Farrell v. Sitarus, supra* that a purchaser is charged with record notice of all matters indexed under the block and lot numbers corresponding to the purchaser’s property regardless of whether such information appears in his or her direct chain of title. Consequently, as a result of that same search, this Court notes that Plaintiff was aware of the HPD charges. Therefore, because it was on notice, it was not a bona fide purchaser. Accordingly, its title to the Premises is not immune from the City of New York’s Emergency Repair Charges, corresponding tax bills and liens. See *Matter of Greene Residence, LLC v. New York City Department of Housing Preservation and Development, supra*; *Farrell v. Sitarus* [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Due to the contractual relationship between Plaintiff and Defendant Fidelity which is entirely dictated by the terms of the agreement between them, the Policy must be construed according to its terms. See *Darbonne v. Goldberger, supra*. As the Policy clearly states, it will cover liens “*due and payable (emphasis added)* but unpaid” on the Date of the Policy in June 2015. Liens which are not due and payable are not covered. See Policy, “Covered Risks” 2(b) and “Exclusion” 3(d). Consequently, Plaintiff’s argument fails because the tax lien was not due and payable when the Policy was issued in June 2015 [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

This Court finds unpersuasive Plaintiff’s proposal about “Covered Risks” 11 extending coverage in this matter because it was added to the Policy as a result of the standard New York endorsement. Citing *380 Kings*

Highway LLC v. Fidelity Nat. Title Co., supra, Plaintiff asserts that "Covered Risks" 11 applies. However, the New York Endorsement in Plaintiff's Title Policy is not so broad as the one in 380 Kings Highway LLC v. Fidelity Nat. Title Co., supra which applied to "any statutory lien" without any limitations. Instead the New York Endorsement in Plaintiff's Policy applies to any statutory lien arising under Article 2 of the New York Lien Law. Because the latter is confined to any statutory lien arising under Article 2 of the New York Lien Law (emphasis added), it limits the breadth of the New York Endorsement. Thus, it materially changes the provision in existence in 380 Kingshighway LLC v. Fidelity Nat. Title Co., supra. Since the tax lien in the present case resulted from the City of New York Administrative Code Section 27-2144 but did not arise under Article 2 of the New York Lien Law, "Covered Risks" 11 is inapplicable [Plaintiff 1, Exhs. A-P; Defendant 2, Exhs. 1-6; Defendant 3; Plaintiff 4; Defendant 5].

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff Chen & Lin 7173 Realty LLC's motion for summary judgment pursuant to CPLR Section 3212, granting Plaintiff's claims in its favor against Defendant Fidelity National Title Insurance Company and dismissing Defendant Fidelity's Answer is DENIED. Plaintiff's request to grant its claims in its favor against Defendants the City of New York and New York City Environmental Control Board and dismissing their Answer is DENIED AS MOOT. See Chen & Lin 7173 Realty LLC v. City of New York et al, Kings County Supreme Court Index Number 520686/2017 - Decision/Order of the Honorable Katherine A. Levine, JSC, Kings County Supreme Court Decision/Order, dated June 14, 2019. Plaintiff's request that its title be deemed immune from the City of New York's Emergency Repair Charges, corresponding tax bills and liens is DENIED.

Defendant Fidelity National Title Insurance Company's cross motion for summary judgment pursuant to CPLR 3212 for judgment in its favor as a matter of law because it has not breached its title insurance agreement with Plaintiff is GRANTED, and the case is DISMISSED against Defendant Fidelity National Title Insurance Company. Clerk to notify parties.

This constitutes the Decision and Order of the Court.

DATE: March 10, 2020
Chen & Lin 7173 Realty LLC v.
City of New York et al
(#520686/2017)


DAWN JIMENEZ-SALTA
J.S.C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

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KINGS COUNTY CLERK
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