

<b>Chicago Tit. Ins. Co. v Brookwood Tit. Agency LLC</b>
2020 NY Slip Op 32942(U)
September 4, 2020
Supreme Court, Kings County
Docket Number: 507480/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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CHICAGO TITLE INSURANCE COMPANY,  
Plaintiff, Decision and order

- against - Index No. 507480/18

BROOKWOOD TITLE AGENCY LLC, & MENDEL  
ZILBERBERG,  
Defendants, September 4, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3211 seeking to dismiss a counterclaim filed by the defendants. The defendants opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, the plaintiff a title insurance company sued Brookwood Title Agency LLC, a policy issuing agent and Mendel Zilberberg. Harold Tischler obtained a loan and gave a mortgage on property located at 4316 17<sup>th</sup> Avenue in Kings County. Title insurance was obtained from Brookwood underwritten by the plaintiff herein insuring the mortgage. On November 22, 2011 the Supreme Court of Kings County issued an order cancelling the mortgage and voiding the conveyance of the property and restoring the property to Esther, a sister of Harold. Upon the cancellation of the mortgage the plaintiff satisfied its obligations to the lender.

The plaintiff instituted this lawsuit alleging three causes of action against the defendants, that Brookwood breached its duty, as

agent of the plaintiff, that Zilberberg breached a personal guaranty and lastly against both defendants seeking indemnification.

The court already held that such guaranty encompassed the indemnification claims sought. That determination was affirmed by the Appellate Division (see, Chicago Title Insurance Company v. Brookwood Title Agency LLC, 179 AD3d 887, 114 AD3d 703 [2d Dept., 2020]). Specifically, the Appellate Division noted that "in the first clause of the guaranty, Zilberberg guaranteed Brookwood's performance of its obligations under the issuing agency contract. Since that contract included an obligation to indemnify, such indemnification obligation was covered under the guaranty" (*id.*). The defendant then filed an amended answer and asserted a counterclaim of fraud. The counterclaim is based on the assertion that Chicago Title represented the guaranty was limited to escrow funds and did not include the claims sought here.

#### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). It is

well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

In this case notwithstanding any representations that may have been made by Chicago Title, the guaranty was presumably read by Zilberberg and signed by him. Thus, Zilberberg was afforded an opportunity to review the terms of the guaranty and the extent of its reach. Consequently, Zilberberg cannot establish justifiable reliance when he was giving the ability to read the guaranty (Prompt Mortgage Providers of North America LLC v. Zarzour, 155 AD3d 912, 64 NYS3d 106 [2d Dept., 2017]). Further, there is no showing that Chicago Title engaged in any fraud, duress or some other wrongful act (Boucher v. Eastern Savings Bank, 145 AD2d 520, 536 NYS2d 463 [2d Dept., 1988]). The defendant's true basis for the counterclaim is the fact this court and the Appellate Division interpreted the guaranty as encompassing the indemnification claims sought here. Whether the defendant believed the guaranty should have been read so broadly

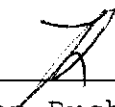
and whether the defendant would not have signed such guaranty if it had known of this broad interpretation does not constitute fraud on the part of Chicago Title.

Therefore, based on the foregoing the motion seeking to dismiss that counterclaim is granted.

So ordered.

ENTER:

DATED: September 4, 2020  
Brooklyn NY

  
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Hon. Leon Ruchelsman  
JSC