Fidelity Natl. Tit. Ins. Co. v Assured Tit. Agency, Corp.
2021 NY Slip Op 30131(U)
January 15, 2021
Supreme Court, Kings County
Docket Number: 507343/2020
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Plaintiff,

- against -

ASSURED TITLE AGENCY, CORP.,

Defendant.

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DECISION / ORDER

Index No. 507343/2020
Motion Seq. No. 1 and 2
Date Submitted: 1/07/2021

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion to dismiss.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	28-33
Notice of Cross Motion, Affirmations, Affidavits, and Exhibits Annexed..	34-38
Affirmation in Opposition to cross motion (and Exhibits Annexed) and in Reply to Motion	42-45

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Plaintiff is a title insurance company formed in Pennsylvania (hereafter "Fidelity") and defendant (hereafter "Assured Title") is a New Jersey corporation that provides title services directly to clients, that is, buyers of real estate, mortgagee banks, etc., pursuant to a written contract with Fidelity, and Fidelity provides the title and mortgage insurance. This is an action brought by Fidelity wherein Fidelity seeks to be reimbursed the sum of Two Hundred Fifty Thousand Dollars which Fidelity paid to settle a claim, which Fidelity avers it had to pay (to a non-party bank) solely as a result of negligence on the part of defendant's employee/agent, along with its related expenses. Fidelity asserts two causes of action in the complaint, breach of contract and common law indemnification. The plaintiff claims, in brief, that the defendant's title closer relied on a

satisfaction of mortgage which was fraudulent, and it should not have omitted the mortgage from the exceptions to the policy, as it was not in fact satisfied. Apparently the satisfaction was recorded in the time between the issuance of the title report (where the mortgage was listed as a lien) and the closing date, and the title closer should have investigated further and/or contacted the lender, before omitting it and relying on the (allegedly fraudulent) recorded document as proof that it was paid. The court notes that the satisfaction piece at issue has not been adjudicated to have been fraudulent, nor has it been expunged from the chain of title. Apparently, plaintiff reached a settlement in 2019 with the lender in the lender's foreclosure action, 24018/2008, *Deutsche Bank v Daisley*, which had been consolidated with Deutsche Bank's action to expunge the satisfaction of mortgage (16315/2014).

Defendant has answered the complaint, and moves, in Mot. Seq. #1, pursuant to CPLR 3211 (a) (1) [documentary evidence] and (a) (7) [failure to state a claim] to dismiss the complaint. Plaintiff cross-moves to compel disclosure in Mot. Seq. #2.

At oral argument, held virtually, counsel for defendant explained that the branch of the motion under CPLR 3211 (a) (1) is to limit plaintiff's claim to the sum $2,500.00, pursuant to the parties' written agreement. The branch under CPLR 3211 (a) (7) is to dismiss the contractual or common law indemnification claim as inconsistent with the breach of contract claim. Plaintiff argued in response that the contract does not limit its recovery to $2,500 as against defendant, and that the complaint asserts two causes of action because plaintiff is pleading in the alternative, which is permissible, and that plaintiff does not expect to recover under both causes of action.

Discussion

First, the contract between the parties is not "documentary evidence" as contemplated by CPLR 3211 (a) (1), evidenced by the fact that the meaning of the contract is in dispute. "To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (see *Cali v Maio*, ___AD3d___, 2020 NY Slip Op 07853, *1 [2d Dept 2020]). The court thus must analyze the motion under CPLR 3211 (a)(7).

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 [1994]; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *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 Mfg. 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 [2d Dept 2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013]), citing *Leon v Martinez, 84* NY2d 83, 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 N.Y. Slip Op. 30484(U); 2010 NY Misc LEXIS 2518 [Sup Ct, NY County 2010]).

The branch of the motion to dismiss the cause of action for indemnification is denied. Plaintiff is entitled to plead two alternative causes of action. "Although the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*see Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008]).

Turning to the branch of the motion to limit the *ad damnum* to $2,500 is also denied. The contract between the parties here is in the motion papers as E-File Doc. 37. It was entered into in 2006 between Fidelity as "principal" and Assured Title as "agent." It states that defendant is appointed thereunder as "a policy issuing agent of Principal." Both sides agreed this is the applicable contract, and neither disputed that the copy provided was admissible and complete.

The relevant sections of the contract, with regard to movant's claim that its liability is capped at $2,500, are as follows. Paragraph 6 states "INSURANCE. Agent shall maintain Insurance as shown on Schedule B or C, as appropriate, attached thereto." Schedule B provides "Agent shall immediately obtain and keep in full force, at Agent's expense, during the term of this Contract (i) Title insurance Agent's errors and omissions policy with opinion of title coverage, with an insurance company acceptable to Principal in a sum of not less than $1,000,000 per claim and $1,000,000 aggregate, with a deductible provision of no more than $10,000 per loss." The action here is, in essence, a claim for coverage under defendant's required errors and omissions policy, which defendant did obtain. However, plaintiff's claim was denied, resulting in this action.

Paragraph 8 of the contract states, in pertinent part:

> LIABILITY OF AGENT. Agent shall be liable to and agrees to indemnify and to save harmless Principal for all attorneys' fees, court costs, administrative and other expenses and loss or aggregate of losses resulting from any one or more of the following:
>
> A. Errors or omissions in any commitment, policy, endorsement or other title assurance which were disclosed by the application, by the abstracting, examination or other work papers or which were known to Agent or which, in the exercise of due diligence, should have been known to Agent;
>
> B. Errors and/or omissions in any commitment, policy, endorsement or other title assurance caused by the abstracting or examination of title by Agent, Agent's employees, Agent's subcontractors or Agent's independent contractors;
>
> * * * * * *
>
> G. Any act or failure to act by Agent or its employees, officers, agents, independent contractors or subcontractors which results in allegations of liability with respect to Principal or which results in Principal being liable for punitive, contractual or extracontractual damages.

Based on the above, it is clear that defendant was obligated to purchase insurance to cover the matter at hand, that it did so, that plaintiff as "principal" paid a claim due to a claimed error on defendant's part, and that there is insurance coverage

available for this error. However, there is an additional clause in the contract that has resulted in this dispute.

Schedule A to the contract states that the contract shall be construed, enforced and governed by the laws of New York,[1] and has the following provision: "G. General Liability of Agent: Subject to the provisions of Paragraph 8, Agent shall be liable for the first $2,500.00 of any Loss sustained or incurred by Principal as a result of the issuance of the Title Assurances by Agent" [emphasis added].

Defendant's counsel argues that the contract language is clear, and that the "express $2,500 limitation of liability" applies. Plaintiff's counsel provides an affidavit from Jonathan Gass, Assistant Vice President / Senior Recoupment Counsel for Plaintiff Fidelity, who discusses the contract, notes that it provides in Section 8 for contractual indemnification, and concludes "Defendant's strained reading of the Agency Contract is not only deceitful, it defies logic." He states at ¶ 29: "Essentially, Paragraph 8 holds Defendant liable for, inter alia, its malfeasance. 30. In this case, Plaintiff sues Defendant for its specific malfeasance, i.e., failing to ensure satisfaction of the Prior Mortgage and marking 'omit', despite Fidelity's commitment showing its existence. See, Complaint, ¶ 11-12." Essentially, he argues that the "General Liability" provision is for matters that do not involve errors and/or omissions, and the "Liability of Agent" provision is for matters that do involve errors and/or omissions.

The court is left to determine this issue of contract interpretation. It comes down to a determination of what "subject to the provisions of" means. The dictionary says,

[1] Defendant's claim that the contract should be interpreted by applying New Jersey law is incorrect.

"subject to" is defined as "affected by or possibly affected by (something)."[2] In many court decisions, these words mean "under the rubric of" or "governed by," such as "subject to a six-year statute of limitations", or "subject to prior court approval." In contracts, "subject to" generally means "as modified by" or "as governed by." For example, in one decision, *Parauda v Encompass Ins. Co. of Am.*, ___AD3d___, 2020 NY Slip Op 06802, [2d Dept 2020], the court states "it did not involve a 'collapse' for which coverage is provided and was subject to various exclusions under the policy." Here, the clear meaning is "as modified by." Another example is *Regency Homes Realty Group, Inc. v Leo & Laura, LLC*, 155 AD3d 1075, 1077 [2d Dept 2017], where "the buyer was taking the property subject to a pre-existing mortgage" meaning the property was to be transferred "encumbered by" the mortgage.

It is clear that the use of the term "subject to," in every instance means that whatever the provision, law, etc., if it is "subject to" something, that something takes priority. Thus, the contract at issue gives priority to the provisions in Paragraph 8, which is completely in accord with the plain meaning of the contract.

The court must also follow the "principles of contract interpretation." Some of these are set forth in *Cohen v Cohen*, 187 AD3d 707, 709 [2d Dept 2020], internal citations omitted:

> "Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used. . . . A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language in such a way as would distort the contract's apparent meaning. . . In making the determination, the court should examine the entire contract and consider the relation of the parties and the circumstances under which the contract was executed."

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[2] *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/subject%20to. Accessed 15 Jan. 2021.

Here, there would be no purpose to require defendant to obtain a million dollars of coverage for its errors and omissions, and to provide that defendant would indemnify plaintiff for its errors and omissions, if plaintiff was only permitted to seek indemnification for a maximum of $2,500 for defendant's errors and/or omissions.

Accordingly, it is **ORDERED** that defendant's motion to dismiss the complaint is denied.

IT IS FURTHER ORDERED that the branch of plaintiff's cross motion to compel discovery is moot, as was revealed at oral argument, and thus is denied. The branch of plaintiff's motion which seeks sanctions against defendant was previously withdrawn.

This shall constitute the decision and order of the court.

Dated: January 15, 2021

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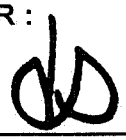

Hon. Debra Silber, J.S.C.