

Chicago Tit. Ins. Co. v Eastcor Land Servs., Inc.
2022 NY Slip Op 34309(U)
November 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 521946/2021
Judge: Carolyn E. Wade
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS HON. CAROLYN E. WADE, J.S.C.

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CHICAGO TITLE INSURANCE COMPANY,

Plaintiff,

Index No: 521946/2021

- against -

EASTCOR LAND SERVICES, INC. dba EASTCOR
NATIONAL TITLE SERVICES, ANTHONY VIA,
CECIL WILLIAMS, AND LAKERAM BISSOONDIAL,

MS# 1, 2 & 4

Defendants.

-----X
EASTCOR LAND SERVICES, INC. dba EASTCOR
NATIONAL TITLE SERVICES,

DECISION AND ORDER

Third-Party Plaintiff,

- against -

TRINA COTTON a/k/a KATRINA COTTON a/k/a
TRISH COTTON a/k/a LATRICE GENNEL GRANT,
LAW OFFICES OF ABRAHAM HOSCHANDER a/k/a
ABRAHAM HOSCHANDER, ESQ., and FIDELITY
NATIONAL TITLE GROUP,

Third-Party Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of
Plaintiff/Third-Party Defendants' Motions and Defendant-Third-Party Plaintiff's Cross-
Motion:

<u>Papers</u>	<u>NYSCEF #'s</u>
Order to Show Cause/Notice of Motion and	
Affidavits/Affirmations Annexed.....	36, 37, 44, 45, 50
Cross-Motion and Affidavits/Affirmations.....	85, 86
Answering Affidavits/Affirmations.....	56
Reply Affidavits/Affirmations.....	109
Defendant's Memorandum of Law.....	107

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Upon the foregoing cited papers and after virtual oral argument, Plaintiff, CHICAGO TITLE INSURANCE COMPANY ("Chicago Title") moves to dismiss, Defendant Lakeram Bissoondial's ("Bissoondial") first counterclaim pursuant to CPLR § 3211(a)(7) (MS #1);

Chicago Title and Third-Party Defendant, FIDELITY NATIONAL TITLE GROUP ("Fidelity"), move to: (i) dismiss Defendant, EASTCOR LAND SERVICES, INC.'s, ("Eastcor") first, second, and third counter-claims pursuant to CPLR § 3211(a)(1) and (a)(7); and (ii) to dismiss the Third-Party Complaint as against Fidelity (MS #2);

Eastcor cross-moves for leave to amend its counter-claims, and Third-Party Complaint pursuant CPLR§3025(b) (MS #4).

The motions are decided as follows:

Chicago Title's Motion to Dismiss Bissoondial's First Counterclaim (MS #1)

Chicago Title's CPLR § 3211 (a)(7) motion to dismiss Bissoondial's first counter-claim for legal fees and sanctions pursuant to 22 NYCRR 130-1.1 is **GRANTED**. "New York does not recognize a separate cause of action to impose sanctions pursuant to 22 NYCRR 130-1.1." (*Praxis Intl. Corp. v Prime Alliance Group, Ltd.*, 202 AD3d 840, 841 [2d Dept 2022] [internal citations and quotations omitted]). Accordingly, Bissoondial's first counter-claim is dismissed.

Chicago Title's Motion to Dismiss Eastcor's First, Second, and Third Counterclaims (MS #2)

In support of its motion to dismiss Eastcor's declaratory judgment counterclaim, Chicago Title argues that it has a right to seek indemnification pursuant to the agency contract. In opposition, Eastcor contends that it has fulfilled its obligations under the agency contract and owes no duty of indemnification to Chicago Title.

A motion to dismiss a counterclaim for a declaratory judgment should be denied "where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the

rights and other legal relations of the parties to a justiciable controversy” (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013]).

Here, Defendant’s allegations adequately assert a cause of action for a declaratory judgment. Eastcor sufficiently alleges that it fulfilled its obligations under the agency agreement; thus, it invokes the Court’s power to render a declaratory judgment that it owes no duty of indemnification. Accordingly, Plaintiff’s motion to dismiss the first counterclaim is **DENIED**.

In support of its motion to dismiss the second counterclaim for breach of contract, Chicago Title argues that Eastcor failed to plead a breach of contract claim. Eastcor, in opposition, contends that Chicago Title breached the contract by commencing the underlying action, and that it suffered damages.

A breach of contract consists of the following elements: “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). Where “evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR § 3211 (a)(7), the question becomes whether the plaintiff has a cause of action.” *Id.*

Here, contrary to Eastcor’s argument, Plaintiff’s commencement of this action does not constitute a breach of the agency agreement. In fact, the agency agreement includes a fee shifting provision that awards attorney’s fees to the prevailing party in litigation (Agency Contract, Plaintiff’s Exhibit “E” NYSCEF doc. No. 51). Accordingly, Plaintiff’s motion to dismiss the second counterclaim is **GRANTED**.

In support of its motion to dismiss the third counterclaim for attorney’s fees, Plaintiff argues that it is premature to enforce the agency contract’s fee shifting provision. It also contends that it is

improper to seek this relief in the form of a counterclaim. In opposition, Defendant asserts that its entitlement to attorney's fees cannot be determined in a motion to dismiss.

"Even if plaintiff is entitled to seek attorney fees, costs, and expenses, a claim for attorney fees may not be maintained as separate cause of action" (*Bd. of Mgrs. of the Hudson Tower Condominium v Thyssenkrupp El. Corp.*, 2017 NY Slip Op 30126[U], *4 [Sup Ct, NY County 2017]). Moreover, "[a]n award of attorneys' fees is a form of relief, not an independent cause of action" (*Jhg Mgt. [Md.] LLC v W. 44th St. Hotel LLC*, 2020 NY Slip Op 31552 [U], *5 [Sup Ct, NY County 2020]).

Here, Eastcor's third counterclaim seeks to enforce the agency contract's fee shifting provision as a cause of action. Accordingly, Plaintiff motion to dismiss the third counterclaim for attorney's fees is **GRANTED**.

Fidelity's Motion to Dismiss the Third-Party Complaint (MS #2)

Fidelity's motion to dismiss the third-party complaint against is **GRANTED**. Fidelity is not a party to the agency contract. Thus, the mere fact that Fidelity issued a pre-litigation demand letter as counsel to Plaintiff is insufficient to support Eastcor's claims for a declaratory judgment against it. Accordingly, the third-party complaint is **DISMISSED** as against Fidelity.

Eastcor's Cross-Motion to Amend its First and Second Counterclaims and Third Party

Complaint (MS #4)

Eastcor's crossmotion to amend its first and second counterclaims and third-party complaint is **GRANTED** to the extent that the first counterclaim for a declaratory judgment is amended as proposed. All other relief sought is **DENIED**.

Accordingly, based upon the above, it is,

ORDERED, Plaintiff's motion to dismiss Bissondial's first counterclaim (Mot. Seq. #1) is **GRANTED**.

ORDERED that Plaintiff, Chicago Title and Third-Party Defendant, Fidelity's motion to dismiss the first, second, and third counterclaims, and the third-party complaint as against Fidelity (Mot. Seq. #2) is **GRANTED TO THE EXTENT** that the second and third counterclaims are **DISMISSED**; and the Third-Party Complaint is **DISMISSED** as against Fidelity; and further

ORDERED that Eastcor's cross-motion to amend its first and second counterclaim, and its third-party complaint (Mot. Seq. #4) is **GRANTED TO THE EXTENT** that the first counterclaim is amended as proposed. All other relief sought is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: 11/29/2022

ENTER:


HON. CAROLYN E. WADE, J.S.C.

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