| **Chicago Ins. Title Co. v Brookwood Title Agency LLC** |
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| 2023 NY Slip Op 30304(U) |
| January 31, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 507480/2018 |
| 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 INSURANCE TITLE COMPANY,
Plaintiff, Decision and order

- against - Index No. 507480/2018

BROOKWOOD TITLE AGENCY LLC, & MENDEL ZILBERBERG,
Defendants, January 31, 2023
----------x Motion Seq. #3
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement on the second and third causes of action in the amount of $650,000 plus interest from April 13, 2018 plus costs and disbursements. The defendants oppose 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. The basis for the lawsuit follows: In 2003 an individual, Esther Tischler owned property located at 4316 17th Avenue in Kings County. on May 12, 2003 Esther's sister in law Jeanette Tischler was appointed a guardian ad litem for Esther in an action entitled *Tischler v. Fahnestock & Company Inc., and Gold*, Index Number 11341/2003 (see, NYSCEF Doc. No. 78]). On January 3, 2004, Jeanette deeded the property to Esther's brother Harold Tischler. Harold obtained a loan for $650,000 and granted the lender, Approved Funding Corp., [hereinafter 'Approved'] a mortgage in the property. Title insurance was obtained from Brookwood

underwritten by the plaintiff herein insuring the mortgage. On September 18, 2012 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. That order stated that Esther Tischler was the "sole owner" of the property and that the note executed by Harold should "not affect or obligate Esther Tischler in any way in her ownership of the property" (see, Order and Judgement dated September 18, 2012 [NYSCEF Doc. No. 88]). Upon the cancellation of the mortgage the plaintiff satisfied its obligations to Approved and tendered the policy limits to Approved. Thus, essentially, the plaintiff was required to tender the policy limits when the insured mortgage was invalidated. The plaintiff argues there are no questions of fact that Brookwood's failure to adequately examine the chain of title of the mortgage caused this payment. Specifically, the plaintiff asserts that Brookwood should have investigated that Jeanette, a mere guardian ad litem, had no authority to transfer the deed to Harold. The plaintiff seeks a summary determination concerning the causes of action against Zilberberg for the breach of a personal guaranty and against both defendants seeking indemnification. The defendants oppose the motion arguing the plaintiff has failed to eliminate all questions of fact.

Conclusions of Law

Where the material facts at issue in a case are in dispute

summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021). Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (Citibank N.A. v. Cabrera, 130 AD3d 861, 14 NYS3d 420 [2d Dept., 2015]). In this case, the plaintiff submitted the affidavit of Staci Ulrich, senior recoupment counsel of the plaintiff who stated that she reviewed the plaintiff's records in connection with the payment made (see, Affidavit of Staci Ulrich [NYSCEF Doc. No. 74]). Specifically, she

stated that she was familiar with all the facts and circumstances of the lawsuit based upon her own personal knowledge and a review of the records maintained by the plaintiff (see, Affidavit of Staci Ulrich, ¶1). She further stated that as security for the note Harold obtained in exchange for $650,000 Harold executed a mortgage and that "in connection with the Insured Mortgage transaction, Approved Funding Corp., it's successors and/or assigns, obtained a loan policy of title insurance from Brookwood, underwritten by Plaintiff, in-the amount of $650,000.00 insuring, inter alia, that the Insured Mortgage was a valid first lien on the Property" (see, Affidavit of Staci Ulrich, ¶18). She further states that following the cancellation of that mortgage by order in September 2012 "on February 19, 2015, Plaintiff, not as a volunteer, but pursuant to its obligations under the Policy to the Insured, tendered the Policy limits in the amount of $650,000.00 to the Insured" (see, Affidavit of Staci Ulrich, ¶25). Thus, the plaintiff has established the admissibility of records relied upon since Ms. Ulrich had knowledge of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). The specific record in support of the motion seeking summary judgement is a loss of payment statement which demonstrates the payment by the plaintiff of $650,000 for which it seeks recovery (see, NYSCEF Doc. No. 89). Further, Ms. Ulrich provided a supplemental affidavit wherein she further

demonstrated her knowledge of plaintiff's record keeping practices and her basis for her knowledge regarding the facts of the case especially the payment made in the amount of $650,000 (see, Supplemental Affidavit [NYSCEF Doc. No. 109]). The proper foundation for the admission of such document has been provided by Ms. Ulrich who establish familiarity with the record keeping practices of the plaintiff (see, JPMorgan Chase Bank N.A., v. Rads Group Inc., 88 AD3d 766, 930 NYS2d 899 [2d Dept., 2011]).

The defendants argue that first, there is no evidence a claim was ever submitted under the title insurance policy at all and that in any event the plaintiff failed to establish the loss payment statement was produced in the regular course of business and thus there are questions of fact about its authenticity. However, as noted, the affidavits of Ms. Ulrich provides the necessary evidentiary support for the contentions. There are no questions of fact raised merely because Ms. Ulrich did not adequately explain the nature of her senior status or how she acquired the requisite knowledge of the plaintiff's business practices. Indeed, the supplemental affidavit provided eliminated any of these potential issues. Consequently, there are no questions that raise any factual issues regarding her ability to provide a foundation for the authentication of the pay loss document or to provide general information in support of the summary judgement request.

Next, concerning the guaranty, the defendant argues there are

questions of fact whether the defendant Zilberberg intended to guaranty situations such as this case which do not involve trusted escrow funds. The defendant points to a letter he sent the same day the amendment and guaranty was signed wherein he expresses concern about the nature and scope of the guaranty (see, Letter [NYSCEF Doc. No. 105]). However, it is well settled that an agreement that is clear and unambiguous on its face shall be enforced according to its plain terms (Greenfield v. Philles Records Inc., 98 NY2d 562, 750 NYS2d 565 [2002]). Extrinsic evidence demonstrating the true intent of the parties is generally inadmissible (Pentacon LLC v. 422 Knickerbocker LLC, 165 AD3d 829, 86 NYS3d 177 [2d Dept., 2018]). Such extrinsic evidence may be admissible if an ambiguity exists and whether such ambiguity exists is a question of law (NRT New York, LLC, Brown, 167 AD3d 764, 89 NYS3d 695 [2d Dept., 2018]). Further, extrinsic evidence may not be submitted to create an ambiguity (Brad H. v. City of New York, 17 NY3d 180, 921 NYS2d 221 [2017]). A contract will be considered ambiguous if susceptible to more than one interpretation (id). The terms of the guaranty are clear and are not ambiguous in any manner. As the Appellate Division concluded in examining the guaranty "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" (see, Chicago Title Insurance Company v. Brookwood Title Agency LLC, 179 AD3d 887, 114 NYS3d 703 [2d Dept., 2020]). Thus, there are no questions of fact raised by any subjective belief Zilberberg maintained about the scope of the guaranty.

Therefore, based on the foregoing, the motion seeking summary judgement on the second and third causes of action is granted.

So ordered.

ENTER:

DATED: January 31, 2023
Brooklyn NY

Hon. Leon Ruchelsman
JSC