

Fidelity Natl. Title Ins. Co. v Dasilva

2023 NY Slip Op 30789(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 156474/2020

Judge: Lori S. Sattler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

-----X

FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

- v -

ERNANI DASILVA, HERITAGE TITLES, JOSEPH MURO,
MELISSA MURO,

Defendant.

INDEX NO. 156474/2020

MOTION DATE 11/10/2022,
11/10/2022

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

-----X

ERNANI DASILVA

Plaintiff,

-against-

WEB TITLE AGENCY, ROCHESTER EQUITY PARTNERS,
CASCADE SETTLEMENT AGENCY, CUSTOMIZED
LENDERS SERVICES, GEN STAR INSURANCE COMPANY

Defendant.

Third-Party
Index No. 595957/2022

HERITAGE TITLES

Plaintiff,

-against-

WEB TITLE AGENCY, ROCHESTER EQUITY PARTNERS,
CASCADE SETTLEMENT AGENCY, CUSTOMIZED
LENDERS SERVICES, GEN STAR INSURANCE COMPANY

Defendant.

Second Third-Party
Index No. 595976/2022

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 180, 192, 194, 195, 196, 197, 198, 199, 200, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 193, 201, 224, 225

were read on this motion to/for

DISMISSAL

In this action for common law indemnification and negligence, plaintiff Fidelity National Title Insurance Company (“Fidelity”) moves, in Motion Sequence 007, to dismiss the counterclaim and certain affirmative defenses of defendant Ernani DaSilva (“DaSilva”), pursuant to CPLR 214(4) and 3211(a). DaSilva opposes this motion. In Motion Sequence 008, Fidelity moves to dismiss the counterclaim and affirmative defenses of pro se defendants Heritage Titles, Joseph Muro, and Melissa Muro (“Heritage Defendants”) pursuant to CPLR 214(4) and 3211(a). The Heritage Defendants oppose this motion. The motions are consolidated for disposition.

This case arises out of a series of mortgages that encumbered the property at 29 Ford Drive South, Massapequa, New York. The then-owner, Linda Alioglu-DaSilva, executed a mortgage with Fremont Investment & Loan, which was recorded on June 23, 2003. Ms. Alioglu-DaSilva executed another mortgage with Ameriquest Mortgage Company in 2004, which was recorded on November 3, 2004. The Nassau County Clerk’s Office recorded a satisfaction of mortgage for the Fremont mortgage on December 28, 2004. However, the endorsement page for this satisfaction mistakenly referenced the information for the Ameriquest mortgage.

Ms. Alioglu-DaSilva died in 2005 and the property passed to her husband, defendant Ernani DaSilva. He executed a reverse mortgage on the property with Bank of America in 2010. Bank of America purchased a Lender Policy of Insurance from Fidelity (“Lender Policy”) in connection with its issuance of the reverse mortgage and contracted with an outside vendor to conduct a title search on the property.

Heritage Titles performed the title search, which the Heritage Defendants maintain was conducted pursuant to a subcontract with third-party defendant Rochester Equity Partners, Inc.

d/b/a WebTitle Agency, Cascade Settlement Agency and Customized Lenders Services (“WebTitle”). Heritage Titles is a sole proprietorship. Joseph Muro was the sole operator of Heritage Titles at the time of the title search and remained so until 2013; Melissa Muro has been the sole operator since 2013.

The Heritage Defendants did not identify the Ameriquest mortgage as encumbering the property when they performed the title search. Consequently, the Lender Policy issued by Fidelity to Bank of America for the reverse mortgage did not except the Ameriquest mortgage from coverage.

Wilmington Savings Fund Society was assigned the Ameriquest mortgage in 2014 and commenced a foreclosure action against DaSilva in 2016. Bank of America was named as a defendant in the foreclosure action. Champion Mortgage Company, Bank of America’s servicer for the reverse mortgage, submitted a claim to Fidelity under the Lender Policy. Fidelity defended the foreclosure action on behalf of Bank of America. Wilmington Savings prevailed in the foreclosure action, which established the Ameriquest Mortgage as having first lien position against the property, and therefore as having priority over the reverse mortgage.

Fidelity fulfilled its obligations under the Lender Policy and resolved the servicer’s claim by paying approximately \$294,000 to satisfy the Ameriquest Mortgage. In August 2020, Fidelity commenced this action for common law indemnification against DaSilva and the Heritage Defendants seeking \$354,574.27 in damages arising out of its performance under the Lender Policy.

Fidelity filed its Second Amended Verified Complaint on September 21, 2021. Defendants moved for its dismissal in Motion Sequence 005 and 006. The Court denied both motions in an order dated July 6, 2022 (NYSCEF Doc. No. 157). DaSilva and the Heritage

Defendants interposed their respective answers to the Second Amended Verified Complaint on September 8 and 9, 2022.¹

Motion Sequence 007

In his Answer to the Second Amended Verified Complaint, DaSilva asserts ten affirmative defenses, a negligence counterclaim against Fidelity, and a cross claim against the Heritage Defendants. Fidelity now moves to dismiss DaSilva's negligence counterclaim and his second, third, sixth, and ninth affirmative defenses.

DaSilva alleges in his counterclaim that Fidelity's negligence caused him damages in the loss of his home in the foreclosure action. He asserts that Fidelity failed to properly search the relevant property records in connection with the issuance of the policy for the reverse mortgage; had it done so, Fidelity allegedly would have discovered the erroneous satisfaction of the Ameriquest mortgage. DaSilva further argues that Fidelity "failed to pay off the proper bank, and should have paid Wilmington and not Bank of America" and that this failure resulted in the foreclosure on DaSilva's home.

Fidelity moves to dismiss DaSilva's counterclaim as barred by the three-year statute of limitations for negligence. Because the purportedly negligent title search took place in 2010, Fidelity contends that the statute of limitations expired in 2013. DaSilva counters that his counterclaim for negligence accrued at the time of Fidelity's injury: January 26, 2018. This was the date on which Wilmington was granted summary judgment in the foreclosure action and which was, in DaSilva's account, "the date it became apparent that Bank of America's reverse mortgage lost priority." Although in this scenario the statute of limitations would have expired

¹ The Answer to the Second Amended Verified Complaint filed by the Heritage Defendants indicates that it is only submitted on behalf of "[t]he defendant HERITAGE TITLES" (NYSCEF Doc. No. 190). However, the Court treats this Answer as including Joseph and Melissa Muro for the purposes of this motion.

on January 26, 2021, DaSilva maintains that it was tolled for 228 days by Executive Order 202.8. He also argues that his negligence counterclaim arose out of the same transaction as Fidelity's indemnification claim and is therefore not time-barred, pursuant to CPLR 203(d).

The Court dismisses DaSilva's counterclaim as untimely under CPLR 3211(a)(5). The statute of limitations for negligence is three years (CPLR 214[4]). Even assuming that the cause of action accrued in January 2018 when the foreclosure action was decided, the statute of limitations for DaSilva's negligence counterclaim would have ran on September 11, 2021 under the Executive Order 202.8 tolling provision (*see Murphy v Harris*, 210 AD3d 410 [1st Dept 2022]). DaSilva interposed his Answer to the Second Amended Verified Complaint including his crossclaim on September 8, 2022, nearly one year after the latest possible date on which the statute of limitations on the negligence claim could have expired.

Fidelity next asserts that DaSilva's second, third, sixth, and ninth affirmative defenses for failure to join necessary parties, statute of limitations, failure to state a cause of action, and documentary evidence, respectively, should be dismissed. A "plaintiff bears the heavy burden of showing that [an affirmative] defense is without merit as a matter of law" when moving to dismiss pursuant to CPLR 3211(b) (*Emigrant Bank v Rosabianca*, 210 AD3d 527 [1st Dept 2022] [internal citations and quotation marks omitted]). "The allegations in the answer must be viewed in the light most favorable to the defendant . . . and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*id.*, citing *Pugh v New York City Hous. Auth.*, 159 AD3d 643 [1st Dept 2018]).

DaSilva's second affirmative defense is dismissed. In it, he asserts that Fidelity failed to join necessary parties, namely: the Estate of Linda Alioglu-DaSilva a/k/a Linda DaSilva, "the attorney who prepared the satisfaction of mortgage incorrectly resulting in the title error", "the

attorneys who handled the closing on the reverse mortgage,” “the title company at the closing of the reverse mortgage,” and “the insurance company in which a claim was withdrawn for no apparent reason” (sic). CPLR 1001(a) requires the joinder of “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” However, it is well-settled that “joint tortfeasors are not necessary parties to an action” (*Hasenzahl v 44th St. Dev. LLC*, 203 AD3d 602, 603 [1st Dept 2022]; *Weinstein v W.W.W. Assoc., LLC*, 178 AD3d 486, 487 [1st Dept 2019]). Here, DaSilva argues that these non-joined parties were partially responsible for the loss underlying Fidelity’s indemnification claim. As purported joint tortfeasors, these parties are not necessary to this action (*id.*). DaSilva’s second affirmative defense is therefore without merit.

The Court also dismisses DaSilva’s third affirmative defense under the statute of limitations. DaSilva claims that this action is time-barred because his only act possibly giving rise to Fidelity’s cause of action against him was his acquisition of the reverse mortgage in May 2010, which is outside the six-year statute of limitations for indemnification (*see* CPLR 213[1], [2]). This argument is unavailing. The six-year statute of limitations for an indemnification claim accrues only when the party seeking indemnification pays the underlying claim (*Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007]). Here, Fidelity alleges that it began defending Bank of America in the foreclosure action in April 2016 and that it paid the claim on the foreclosure on October 22, 2018; it began this action in August 2020. The action was therefore timely commenced, and DaSilva’s third affirmative defense is without merit.

The motion is denied as to DaSilva’s sixth affirmative defense in which he asserts that Fidelity fails to state a cause of action against him as he did not “actively, wrongfully, directly,

or proximately” cause it damages (NYSCEF Doc. No. 177, DaSilva Answer ¶ 7). In general, “failure to state [a cause of action] may be asserted at any time even if not pleaded and is therefore mere surplusage as an affirmative defense” (*San-Dar Assoc. v Fried*, 151 AD3d 545, 545-546 [1st Dept 2017] [internal quotations and citations omitted]). This affirmative defense may be dismissed where all others fail as a matter of law (*Raine v Allied Artists Productions, Inc.*, 63 AD3d 914, 915 [1st Dept 1978]). Here, Fidelity only moves to dismiss four of DaSilva’s ten affirmative defenses. As the Court does not dismiss all of DaSilva’s other affirmative defenses, it declines to dismiss the sixth affirmative defense alleging failure to state a cause of action.

DaSilva’s ninth affirmative defense of “documentary evidence” is dismissed as it is without merit. Although documentary evidence may raise or support a defense, “documentary evidence is not by itself an affirmative defense” (*Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993], citing CPLR §§ 3211[a][1], 3018[b]). Furthermore, DaSilva does not support this affirmative defense with any factual or legal support aside from the conclusory assertion that “[t]he Complaint should be dismissed upon documentary evidence” (DaSilva Answer ¶ 11).

Motion Sequence 008

Fidelity next moves to dismiss the Heritage Defendants’ affirmative defenses and counterclaim. In their Answer to the Second Amended Verified Complaint, the Heritage Defendants assert four affirmative defenses: failure to state a cause of action, no breach of duty to Fidelity, failure to join necessary parties, and lack of “capacity and/or standing” to sue. As to their putative counterclaim, the Heritage Defendants appear to set forth a series of factual

allegations pertaining to the alleged scope of the work they was contracted to perform in connection with the title search for the reverse mortgage.

Fidelity's motion is granted as to the Heritage Defendants' first affirmative defense. In it, the Heritage Defendants assert Fidelity's "[f]ailure to state a cause of action against Defendant Heritage Titles, upon which can be granted as to each and every cause of action more particularly set forth in the Plaintiff's Verified Complaint" (NYSCEF Doc. No. 190, Heritage Amended Answer ¶ 2). Although this defense amounts to "mere surplusage" (*San-Dar Assoc.*, 151 AD3d at 545-546), it may be dismissed where, as here, all other affirmative defenses fail as a matter of law (*Raine v Allied Artists Productions, Inc.*, 63 AD3d 914, 915 [1st Dept 1978]).

The Heritage Defendants' second affirmative defense is dismissed. Here, they allege that the "[Second Amended] Complaint is barred, in whole or in part, because Defendant Heritage Titles has not breached any duty, legal or otherwise, owed to [Fidelity]" (Heritage Amended Answer ¶ 3). This defense is inapplicable to Fidelity's cause of action, as the essence "of an indemnity claim is not that the defendant has breached some duty of care which it owes directly to the plaintiff" (*City of New York v Lead Indus. Ass'n*, 222 AD2d 119, 126 [1st Dept 1996]). In its Second Amended Verified Complaint, Fidelity merely alleges that the Heritage Defendants were "actively at fault" for its damages caused by the failure to identify the Ameriquest Mortgage and does not allege any breach of duty on their part.

The Court dismisses the Heritage Defendants' third affirmative defense in which they allege that Fidelity failed to "join all necessary parties, including but not limited to Web Title Agency, [Rochester] Equity Partners, Inc. and Cascade Settlement Agency" (Heritage Amended Answer ¶ 4). These parties are at most joint tortfeasors for the alleged loss caused by the

Heritage Defendants’ purportedly negligent title search performed by Heritage and are therefore not necessary parties (*Hasenzahl*, 203 AD3d at 603).

Finally, the Heritage Defendants’ fourth affirmative defense asserts that “[u]pon information and belief, Plaintiff lacks the capacity and/or standing to commence this action” (Heritage Amended Answer ¶ 5). The Court dismisses this defense as it consists of one conclusory sentence with no facts alleged in support of its contention (*see Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2006] [affirming dismissal of certain affirmative defenses found conclusory]).

The Heritage Defendants’ putative counterclaim against Fidelity is dismissed. The Court is unable to discern any theory of liability that the Heritage Defendants purport to advance against Fidelity. Although the Heritage Defendants recite what they believe to be the factual basis of their lack of negligence in their Answer, they do not allege that Fidelity caused them any injury or articulate the elements of any cause of action necessary to survive dismissal under CPLR 3211(a)(7).

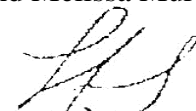
Accordingly, it is hereby:

ORDERED that Motion Sequence 007 is granted to the extent that the counterclaim and second, third, and ninth affirmative defenses of defendant Ernani DaSilva are dismissed; and it is further

ORDERED that Motion Sequence 007 is denied as to the sixth cause of action of defendant Ernani DaSilva; and it is further

ORDERED that Motion Sequence 008 is granted in its entirety and the counterclaim and all affirmative defenses of defendants Heritage Titles, Joseph Muro, and Melissa Muro are dismissed.

3/16/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE