At an IAS Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of June, 2023.

P R E S E N T:

HON. JOY F. CAMPANELLI,

Justice.

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321 MANHATTAN AVE, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 500904/20

STEWART TITLE INSURANCE COMPANY,

Defendant.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	48-49, 71-73
Opposing Affidavits (Affirmations)	102
Affidavits/ Affirmations in Reply	113
Other Papers: Affidavits/Affirmations in Support	60

Upon the foregoing papers, plaintiff 321 Manhattan Ave, LLC moves for an order, pursuant to CPLR 3212, granting summary judgment on its first and second causes of action for declaratory judgment and breach of contract, respectively, and setting this matter down for a hearing as to damages. Defendant Stewart Title Insurance Company moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

Plaintiff commenced this action seeking a declaratory judgment and breach of contract damages stemming from defendant's denial of plaintiff's claim under a title policy. Plaintiff took title to the subject property at 321 Manhattan Avenue in Brooklyn by deed dated July 29, 2015. The subject property is situated directly to the south of the neighboring parcel at 323 Manhattan Avenue. In conjunction with the purchase of the subject property, plaintiff secured a $1,375,000 policy from defendant to provide insurance against loss or damages sustained as a result of defects in title or encroachments on the subject property. The policy provided, in part, that defendant insured against loss or damage, not exceeding the amount of insurance, sustained, or incurred by plaintiff by reason of:

> 2. Any defect in or lien or encumbrance on the Title. This Covered risk includes but is not limited to insurance against loss from
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> * * *
>
> (b) Any encroachment, encumbrance, violation, variation, or adverse circumstances affecting the Title that would be disclosed by an accurate and complete survey of the land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

The policy set forth certain exclusions from coverage, including matters that arise by reason of:

> 3. Defects, liens, encumbrances, adverse claims, or other matters
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> (a) created, suffered, assumed, or agreed to by the Insured Claimant.

Schedule B of the policy set forth certain exceptions to coverage, which included:

> 1. Rights of tenants or persons in possession
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> * * *
>
> 5. Survey by AAA Group dated June 29, 2015 shows a two story building.
>
> * * *
>
> Shows on North – Building herein, possible no northerly wall.

Following the closing of title, plaintiff discovered that the southerly wall of the adjacent premises encroached approximately five feet into the second floor of the subject property for a length of approximately fifteen feet, which encroachment was discovered in the course of performing demolition. The encroachment was caused by the extension of the second-floor bedroom of the adjacent property into and upon the subject property. By letter dated February 4, 2016, plaintiff provided defendant with notice of its claim. The claim was denied by letter dated March 17, 2016, based on the aforesaid exclusion "3(a)" (encumbrance was created, suffered, assumed, or agreed to by plaintiff) and the aforesaid exceptions "1" (rights of tenants or persons in possession) and "5" (possibility of no northerly wall). Plaintiff subsequently resubmitted its claim by email dated October 18, 2016. The claim was again denied by defendant. In the meantime, plaintiff commenced an action against the owners of the adjacent property (*321 Manhattan Ave, LLC v Antonio Prisco, et ano.*, Kings County index No. 504326/16) (Ejectment Action), seeking, inter alia, an order ejecting the adjacent owners from the subject property. In the Ejectment Action, the adjoining owner defendants interposed a counterclaim asserting title to the encroachment by way of adverse possession. The Ejectment Action was

subsequently settled and discontinued pursuant to a stipulation of settlement dated July 13, 2017.

The instant action seeking a declaratory judgment and breach of contract damages was commenced on January 13, 2020. In the complaint, plaintiff maintains that defendant is obligated under the policy to provide coverage for loss or damage incurred by "[a]ny encroachment" and that the policy's exceptions to coverage "are not applicable." In its answer, defendant sets forth affirmative defenses which include the exception language regarding rights of "persons in possession," and possible missing northern wall in addition to the exclusion language regarding an insured's assumption of defects, liens, encumbrances, adverse claims, or other matters.

Following completion of discovery, plaintiff, and defendant each moved for summary judgment. In its motion, plaintiff argues that there was no way of knowing that the encroachment existed because it was concealed entirety by opaque sheetrock walls and painted over. Plaintiff argues that under prevailing national caselaw the "persons in possession" exception may only be applied to deny coverage where the possession was open, visible and exclusive. Plaintiff contends that because the encroachment was not perceptible, exclusion "3(a)" pertaining to defects and encroachments assumed or agreed to by the insured is likewise inapplicable. Plaintiff also asserts that the possibility of no northern wall exception must be narrowly construed under applicable law, and therefore because there was no explicit exception pertaining to the actual encroachment (despite the absence of a northern wall), defendant cannot rely on the exception to deny coverage. Plaintiff contends, in other words, that the loss and damages were not sustained as a

result of the absence of a northerly wall, but rather because of the encroachment by the adjoining owners onto plaintiff's property.

In opposition to plaintiff's motion and in support of its own motion for summary judgment dismissing the complaint, defendant argues that based upon New York case law (as opposed to the out of state case law relied on by plaintiff) the "persons in possession" exception is applicable to the subject encroachment, which was subject to a claim of adverse possession by the adjoining owners.

"[A] policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title" (*L. Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, 188 [1981]; *see Appleby v Chicago Tit. Ins. Co.*, 80 AD3d 546, 549 [2d Dept 2011]). "A policy of title insurance insures 'against loss by reason of defective titles and encumbrances and insur[es] the correctness of searches for all instruments, liens or charges affecting the title to such property' " (*Citibank v Commonwealth Land Tit. Ins. Co.*, 228 AD2d 635, 636 [2d Dept 1996], quoting Insurance Law § 1113 [a] [18]). A "title insurer's liability to its insured is based, in essence, on contract law" (*A. Gugliotta Dev., Inc. v First Am. Tit. Ins. Co. of N.Y.*, 112 AD3d 559, 560 [2d Dept 2013). As such, "that liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy" (*id.*).

In its motion for summary judgment, plaintiff argues, among other things, that in order for the "persons in possession" exception to apply, the possession must be open and visible. Plaintiff maintains that the encroachment was hidden behind a finished wall and,

as a result, the possession of the adjoining owners was therefore not open and visible. Plaintiff relies primarily on *Guarantee Abstract & Tit. Ins. Co. v St. Paul Fire & Mar. Ins. Co.* (216 So 2d 255 [Fla]). In said case, the subject policy excepted from coverage "the rights or claims of parties other than the insured in actual possession of any or all of the property." The court held that in order for the "actual possession" exception to apply, such possession "must be open, visible, and exclusive" (*Guarantee Abstract & Tit. Ins. Co.*, 216 So 2d at 257), and that the subject encroachment, consisting of an easement along which water pipelines were buried underground, could not be deemed an "actual possession" as it was hidden from plain view.

However, unlike the possessor of the hidden easement in *Guarantee Abstract*, the adjoining owners in the instant matter claimed ownership of the encroachment by way of adverse possession. In *Melamed v First Am. Tit. Ins. Co.* (190 AD3d 724 [2d Dept 2012]), the Appellate Division, Second Department, affirmed the lower court's granting of summary judgment to the insurer based on a similar "rights of persons in possession" exception, holding that the claim for possession of a portion of the insured plaintiffs' property by adverse possession "was a claim arising from the rights of persons in possession" (*id.* at 726) and that "[c]ontrary to the plaintiffs' contention, there was no other reasonable interpretation of this exception to the policy" (*id.*). It is noted that the plaintiffs in *Melamed* argued extensively in its appellate briefs, citing *Guarantee Abstract*, that the rights of persons in possession exception was not applicable as the subject encroachment was not open and visible (NYSCEF Doc Nos 93, 94). In particular, the *Melamed* plaintiffs alleged that the encroachment, consisting of a fence

erected by the former adjoining owners, was never enclosed and thus did not put the plaintiffs on notice that there was a basis for an adverse possession claim. Nevertheless, the Second Department concluded that the adjoining owners' claim of adverse possession triggered "the rights of persons in possession" exception to coverage in the *Melamed* plaintiffs' title policy.

Here, the adjoining owners' claim of ownership of the encroachment, like the adjoining owners in *Melamed*, is grounded in adverse possession, the elements of which include an open, notorious, and exclusive possession. While plaintiff argues that the encroachment was not perceptible from its property by casual inspection, the adjoining owners' adverse possession claim nonetheless "fell squarely within the [rights of persons in possession] exception from coverage" (*Melamed*, 190 AD3d at726-727; *see Murphy v Chicago Title Ins. Co.*, 2008 NY Slip Op 30092[U] [Sup Ct, Nassau County 2008] ["rights of tenants or person in possession exception . . . includes claims under adverse possession").

Accordingly, it is hereby declared that defendant has no obligation, under the rights of persons in possession exception of the subject policy, to provide coverage, indemnify or reimburse plaintiff with respect to is claims regarding the encroachment.

Therefore, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted. The complaint is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.