

Fidelity Natl. Title Ins. Co. v DaSilva

2023 NY Slip Op 32070(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 156474/2020

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

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

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FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

- v -

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

Defendant.

INDEX NO. 156474/2020

MOTION DATE 04/25/2023

MOTION SEQ. NO. 010

**DECISION + ORDER ON
MOTION**

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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

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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

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 280, 281, 282, 283,
284, 285, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301

were read on this motion to/for DISMISSAL.

In this action for common law indemnification and negligence, third party defendants Web Title Agency, Rochester Equity Partners, Cascade Settlement Agency, and Customized Lenders Services (collectively “Movants”) move for an order pursuant to CPLR §§ 3211(a)(3) and (7) dismissing the Amended Third Party Complaint of defendant/third-party plaintiff Ernani DaSilva.

This case arises out of a series of mortgages that encumbered the property at 29 Ford Drive South, Massapequa, New York. A longer recitation of the action’s factual background are contained in this Court’s decisions of July 6, 2022 and March 16, 2023 (NYSCEF Doc. Nos. 157, 158, 288, and 289) and are incorporated by reference herein.

In relevant part, DaSilva encumbered the property with a reverse mortgage issued by Bank of America, which in turn purchased a Lender Policy of Insurance from plaintiff Fidelity National Title Insurance Company (“Fidelity”). Bank of America allegedly contracted with the Movants to perform a title search on the property in connection with the issuance of the reverse mortgage. Movants then subcontracted with defendant Heritage Titles, a sole proprietorship operated by defendants Joseph and Melissa Muro, to perform the title search. Fidelity alleges that Heritage Titles failed to identify a prior mortgage that was encumbering the property. The prior mortgage was consequently not excepted from coverage under the Fidelity policy.

DaSilva subsequently defaulted on the prior mortgage and the holder of the prior mortgage brought a foreclosure proceeding against DaSilva. Bank of America was named a defendant in the foreclosure action and was defended by Fidelity under the policy. Summary judgment was granted in the holder’s favor and the prior mortgage was found to have priority over the reverse mortgage. Fidelity paid approximately \$294,000 to satisfy the prior mortgage pursuant to the policy it issued to Bank of America. Fidelity then commenced this action in

August 2020 against DaSilva and Heritage seeking indemnification for \$354,574.27 in damages arising out of its performance under the policy.

DaSilva and Heritage Titles (inclusive of Joseph and Melissa Muro) commenced third party actions against Movants and Gen Star Insurance Company on December 1, 2022 and December 5, 2022, respectively.¹ DaSilva filed an amended Third Party Summons and Complaint, subject of the instant motion, on February 2, 2023 (NYSCEF Doc. No. 244). In his Amended Third Party Complaint, DaSilva alleges that “other professionals [Movants] were excluded from the original lawsuit who share responsibility for failing to identify the prior mortgage” as the Movants “were also responsible for searching the title to the property and detecting any open mortgages or title problems and are all owned by the same company” (*id.* ¶ 3). DaSilva further contends that representatives of Movants were present at the closing of the reverse mortgage “and were responsible for advising that no open mortgage needed to be paid off, which resulted in the foreclosure case” against him (*id.*). Finally, the Amended Third Party Complaint alleges that Movants were responsible for “pay[ing] the outstanding taxes and advising [DaSilva] there was no open mortgage to be paid” (*id.* ¶ 5).

Movants now seek to dismiss DaSilva’s Amended Third Party Complaint pursuant to CPLR §§ 3211(a)(3) and (a)(7). They argue that DaSilva fails to assert any legally cognizable claim against them and that he lacks standing to sue them based on any alleged title search they performed as DaSilva has no relationship or privity with any of them. Specifically, Movants contend that DaSilva fails to allege that they owed him any duty such that they could be held vicariously liable to him for any damages under a theory of common law indemnification. They further argue that DaSilva may not assert a cause of action for contribution against them as such

¹ DaSilva discontinued his third-party action as against Gen Star Insurance Company only on February 24, 2023 (NYSCEF Doc. No. 260).

relief is unavailable for purely economic losses, which are the only damages DaSilva purportedly seeks from Movants.

DaSilva contends that he sufficiently states causes of action for contractual and common law indemnification against Movants. He argues in opposition that he is not required to allege privity with Movants or a special duty on Movants' part in order to state a cause of action for common law indemnification. He also argues that his losses are not merely economic, as he lost his home in the foreclosure proceeding, along with personal property "when he was evicted from occupancy by the landlord tenant court," and suffered health consequences as a result.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory" (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). "A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law" (*id.*). However, "factual allegations which fail to state a viable cause of action" or "that consist of bare legal conclusions . . . are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

Here, the Court is unable to discern a cognizable legal theory within the four corners of DaSilva's five-paragraph Amended Third Party Complaint. The pleading does not articulate a theory of "common law indemnification" or "contribution" by name, nor does it expressly assert any other legal theory. To the extent that DaSilva purports to assert a cause of action for common law indemnification, it would fail because DaSilva cannot be said to have been wholly

without fault with respect to his claimed damages – the loss of his home in the foreclosure agreement – as it was his default on the prior mortgage that led to the foreclosure action. Although common law indemnification “may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff” (*Chatham Towers, Inc. v Castle Restoration & Constr., Inc.*, 151 AD3d 419, 420 [1st Dept 2017]), it is unavailable as a cause of action for a “party who has itself actually participated to some degree in the wrongdoing” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotation marks and citation omitted]).

Any claim DaSilva might make for contribution against Movants would similarly fail to state a cause of action. Under CPLR 1401, “two or more persons who are subject to liability for damages for the same . . . injury to property . . . may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” It is well-established that “purely economic loss resulting from a breach of contract does not constitute ‘injury to property’” within the meaning of CPLR 1401 (*Children’s Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009], quoting *Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Here, Fidelity’s claim for damages against DaSilva arise out of Fidelity’s contractual obligations to Bank of America under the insurance policy it paid out after the foreclosure proceeding. Any damages incurred by DaSilva in this action would therefore be pecuniary in nature and outside of the purview of CPLR 1401.

Finally, DaSilva’s Amended Third Party Complaint fails to assert a cognizable cause of action in negligence against the Movants, as it fails to allege that Movants owed him any duty with respect to the title search work they performed in connection with the issuance of the

reverse mortgage (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976] [“It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff”]).

Accordingly, it is hereby:

ORDERED that the motion is granted, and Defendant/Third-Party Plaintiff Ernani DaSilva’s Amended Third-Party Complaint is dismissed as against Third-Party Defendants Web Title Agency, Rochester Equity Partners, Cascade Settlement Agency, and Customized Lenders Services; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Third-Party Defendants Web Title Agency, Rochester Equity Partners, Cascade Settlement Agency, and Customized Lenders Services dismissing all claims and cross-claims made against them in the third party action bearing New York County Index Number 595957/2022, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

6/23/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

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Motion No. 010

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