Fidelity Natl. Title Ins. Co. v Boundary Title Servs., Inc.
2025 NY Slip Op 34959(U)
December 17, 2025
Supreme Court, New York County
Docket Number: Index No. 156365/2025
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Plaintiff,

- v -

BOUNDARY TITLE SERVICES, INC.,

Defendant.

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INDEX NO. 156365/2025

MOTION DATE 08/12/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is granted in part.[1]

Background

This case regards responsibility for a mistake in a title insurance policy. Plaintiff, Fidelity National Title Insurance Company, is the title insurance company and Defendant, Boundary Title Services, Inc, is a company retained by Plaintiff as an issuing agent. The parties formalized this relationship pursuant to a 1999 agreement (the "Agency Agreement").

A nonparty to this action brought a property located at 23-31 31st Street, Long Island City, New York 11105 (the "LIC Property") in June 2013. In conjunction with that sale, Defendant issued a title insurance policy underwritten by Plaintiff (the "LIC Policy"). Similarly, a different nonparty to this action bought a property located at 3-29 150th Street, Whitestone, New York (the "Whitestone Property") in June 2013. In conjunction with that sale, Defendant issued a title insurance policy underwritten by Plaintiff ("Whitestone Policy").

[1] The Court would like to thank Special Master to the Court, Jason Lowe, Esq., for his assistance in this matter.

Though Defendant was in possession of a relevant Judgment of Foreclosure and Sale at the time it issued the LIC Policy and the Whitestone Policy, Defendant did not include a Judgment and Foreclosure and Sale as an exclusion to either policy. After additional litigation, the buyers of the LIC Property and the Whitestone Property made claims on the title policies which eventually resulted in Plaintiff paying its insureds.

Plaintiff brings this action against Defendant asserting causes of action for breach of the Agency Agreement as well as contractual and common law indemnification stemming from the above. Defendant's motion to dismiss the complaint is the subject of this motion.

Legal Standard

Plaintiff moves to dismiss the counterclaims pursuant to both CPLR 3211(a)(1), (5), and (7). The Court may dismiss a cause of action pursuant to CPLR 3211 (a) (1) the grounds that "a defense is founded upon documentary evidence." "A motion to dismiss founded upon documentary evidence may be granted 'only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law'" (*Stem v Farney Daniels, P.C.*, 2018 NY Slip Op 32768[U], 2018 NY Misc LEXIS 4955, *13 [Sup Ct, NY County 2018],quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]).

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. See *Avgush v Town of Yorktown*, 303 AD2d 340, 755 N.Y.S.2d 647 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348, 756 N.Y.S.2d 96 [2d Dept 2003].

In order to obtain dismissal of an action based on expiration of statute of limitations under CPLR 3211(a)(5), the movant must demonstrate "prima facie, that the time within which to commence the cause of action has expired" (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644, 102 N.Y.S.3d 25 [1st Dept 2019]). If the movant succeeds, then the opposing party has the burden to "raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period" (*id*. at 645). The parties agree that the statute of limitations for the causes of action alleged in the complaint, both based on professional malpractice, is 3 years. (*R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 N.Y.3d 538 [2004]).

Discussion

Statute of Limitations

Defendant argues that the claims in the complaint are barred by the statute of limitations because the breaches occurred more than 6 years ago. There are two breaches of contract alleged: (1) a breach due to Defendant's failure to process the LIC Policy in accordance with the Agency Agreement and (2) a breach due to Defendant's failure to indemnify Plaintiff for its loss. The first breach, regarding the failure to process the LIC Policy in accordance with the Agency Agreement, occurred when Defendant processed the LIC Policy, in 2013. As that was more than 6 years ago, that portion of the breach of contract claim is dismissed.

However, the statute of limitations for Defendant breach of contract due to failure to indemnify Plaintiff for its loss only began to accrue when Plaintiff paid the underlying claim. *Residential Bd. of Mgrs. of Platinum v. 46th Street Development LLC,* 154 A.D.3d 422, 422-23 [1st Dept. 2017] [claim for indemnity accrues only when the person seeking indemnification has paid the underlying claim]. That is alleged to have occurred in June 2019, which was less than 6

years prior to when this action was filed. Therefore, the motion to dismiss the breach of contract claim based on Defendant's failure to indemnify Plaintiff for its loss is denied.

Failure to State a Claim and Documentary Evidence

Defendant also moves to dismiss the contractual and common law indemnification claims due to failure to state a claim and based on documentary evidence. With regards to common law indemnification, Defendant argues that the cause of action is not available to Plaintiff because it is based on its own wrongdoing rather than vicarious liability. Defendant is incorrect. A common law indemnification claim is properly asserted against a party for their own wrongdoing. *McCarthy v. Tuner Construction, Inc.*, 17 N.Y.3d 369, 374-75 [2011]["[O]ur case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which a party should be held liable for indemnity."]

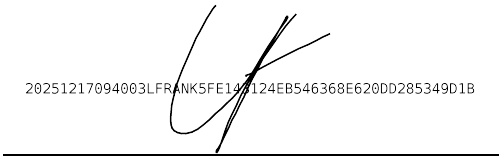
With regards to the contractual indemnification claim, Defendant argues the complaint does not allege facts which support such a claim. This is incorrect. The complaint does sufficiently allege facts to establish a contractual indemnification claim. See, e.g., Complaint ¶¶ 6-12, 69-72.

Therefore, Plaintiff's motion to dismiss for failure to state a claim and based on documentary evidence is denied.

Accordingly, it is hereby

ORDERED the Defendants' motion to dismiss is granted solely with respect to the aspect of the breach of contract claim which is based on Defendant's failure to process the LIC Policy in accordance with the Agency Agreement; and it is further

ADJUDGED that the motion to dismiss is otherwise denied.



12/17/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE