

**Quantum Corp. Funding, Ltd. v Old Republic Natl.
Tit. Ins. Co.**

2011 NY Slip Op 32532(U)

September 12, 2011

Sup Ct, Nassau County

Docket Number: 007437/2011

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

QUANTUM CORPORATE FUNDING, LTD.,
Plaintiff,

INDEX NO.: 007437/2011
MOTION DATE: 7/20/2011
SEQUENCE NO .: 01

- against -

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Defendants.

The following documents were read on this motion:

Defendant's Motion to Dismiss Fourth Cause of Action	1.
Memorandum of Law in Support of Motion	2.
Affirmation in Support of Assignment to Commercial Division	3.
Plaintiff's Affirmation in Opposition to Motion to Dismiss	4.
Defendant's Memorandum of Law in Further Support of Motion	5.
Reply Affidavit in Further Support of Motion	6.

PRELIMINARY STATEMENT

Defendant moves to dismiss the Fourth Cause of Action, which alleges a pattern of deceptive acts in violation of General Business Law §§ 349 and 350. Defendant contends that the claim is barred by the three-year statute of limitations.

BACKGROUND

On or about August 9, 2004 TCRM Commercial Corp. ("TCRM") originated \$380,000 loan to Kountry Kidz Daycare, the security for which was ostensibly a first mortgage lien on

premises 185 Wallins Corner Road, Amsterdam New York. At the closing Sheinker Holdings, Inc. (Sheinker) funded the loan in the foregoing amount. Sheinker secured a policy of mortgage title insurance from Old Republic National Title Insurance Company ("Old Republic"). On or about September 24, 2004 Sheinker assigned its rights in the Mortgage to Quantum Corporate Funding, Ltd. ("Quantum").

In or about May 2005 Quantum allegedly learned that they were not the holder of the first mortgage lien on the premises; rather, there were thirteen (13) Mechanics Liens which had priority over the mortgage. The complaint alleges that Old Republic failed to file the mortgage for four months after the closing, during which time the mechanics liens were filed, thereby obtaining priority over the mortgage.

Quantum allegedly filed a Notice of Claim with Old Republic on or about May 11, 2005. Quantum's counsel advised Old Republic on or about June 9, 2005 that Sunset Service, Inc. ("Sunset") filed a Summons and Complaint seeking to foreclose Mechanics Liens on the premises. On or about June 17, 2005, counsel for Old Republic acknowledged receipt of the Notice of Claim. Plaintiff asserts that litigation adverse to Quantum's claim to be the holder of the first lien on the premises existed as early as November 2004, and had Old Republic adequately investigated the claim, it would have learned of the existence of the Mechanics Liens.

To the contrary, plaintiff asserts that on or about September 19, 2005, a representative of Old Republic advised Quantum's counsel that none of the third parties in the litigation were seeking to enforce the liens. On or about October 18, 2005 Quantum called upon Old Republic to tender a defense on their behalf in the action brought by Sunset. Plaintiff claims that Old Republic had a duty under the terms of the insurance policy to provide for the defense of Quantum's first lien position; pay the amount of the insurance or purchase the indebtedness, or; pay or otherwise settle with the Mechanics Lien Holders or Quantum, without unreasonable delay. Old Republic allegedly refused to provide a defense to Quantum.

In or about May 2007 Quantum commenced a foreclosure proceeding, naming the holders of the Mechanics Liens as defendants. Kountry Kidz filed for bankruptcy in June 2007, but the bankruptcy stay was lifted to complete the foreclosure action. Despite the prior Notice of Claim, Old Republic called upon Quantum to file a Notice of Claim. Nevertheless, Old Republic

continued to deny that it had an obligation to defend or indemnify Quantum.

In October 2007 the United States Trustee supervising the Kountry Kidz bankruptcy, agreed to sell the premises to K & J Properties for \$600,000, proceeds of which were intended to satisfy the Quantum mortgage. Because of the continued existence of the Mechanics Liens, and Old Republic's alleged failure to resolve them, the sale to K & J did not take place. Consequently, plaintiff claims that the loan balance increased without adequate collateral in the premises, plaintiff incurred out-of-pocket expenses for maintenance of the vacant property, and the unmarketability of its mortgage interest. According to the title policy, plaintiff claims that Old Republic is responsible costs of attorneys' fees and expenses incurred in the defense of the title or the lien of the insured mortgage.

Quantum's counsel moved for dismissal of the Mechanics Liens, but, unfortunately, motions remained unresolved for more than three years, increasing the amount due under the mortgage without adequate collateral. Quantum requested authorization from Old Republic's counsel to commence a mandamus action to produce decisions on the motions. After numerous requests, Old Republic denied Quantum's request that the action be authorized. Plaintiff contends that either the grant of the motion to dismiss the liens, or the denial of the motion, would have benefitted Quantum, in that they would either have unencumbered collateral, or the obligation of Old Republic to make payment. In 2009 Old Republic settled the Sunset action, but there remained a number of lienors, until September 2010, when Old Republic eventually settled with them.

In April 2011 Quantum acquired title for a credit bid of \$150,000, with the second highest bid being \$147,000. On April 14, 2011 Quantum filed a Proof of Loss against Old Republic in the amount of \$1,002,423.34, calculated as follows:

Balance Due on Mortgage at Foreclosure Sale	\$1,060,602.34
Plus Legal Expenses not included in Judgment	48,821.00
Plus Repairs Expended but not included in Judgment	28,000.00
Plus Estimated Cost of Needed Repairs not yet Expended	18,000.00
Less: Value of Property Established at Foreclosure Sale	<u>(150,000.00)</u>
Claimed Damages	\$1,002,423.34

This motion is limited to a claim that the Fourth Cause of Action, alleging a violation of

the General Business Law, fails to state a Cause of Action pursuant to CPLR § 3211 (a)(7).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, “accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated”. (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]). The statutes upon which plaintiff bases their Fourth Cause of Action are as follows:

§ 349. Deceptive acts and practices unlawful

1. (a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest.

(d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official

trade commission or such department, division, commission or agency or the federal courts.

(e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

350. False advertising unlawful

1. False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

The issue before the Court is whether, under any fair reading of the Fourth Cause of Action, plaintiff has made out a cause of action under the provisions of the General Business Law.

New York General Business Law § 349 applies solely to matters affecting the consumer public at large. Private contract disputes, unique to the parties, are not covered by the statute. (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24—25, [1995]). As originally enacted in 1970, the statute entrusted sole enforcement power to the Attorney General. A decade later, the Legislature added a private right of action for persons who were injured as a result of the a violation of the section.

As noted in *Oswego Laborers*, the statute, as shown by both its language and its background, is directed a wrongs against the consuming public. General Business Law Article 22-a, of which § 349 is a part, is entitled the “Consumer Protection from Deceptive Acts and Practices”, speaking, as it does, to its public purpose. *Id.* at 24.


The essence of the plaintiff’s complaint is that defendant failed to assure the timely filing of their mortgage, failed to negotiate to resolve the mechanics liens filed between the execution and filing of the mortgage, failed to perform their obligations to defend and indemnify claims against their security interest, and that these failures precluded a 2007 sale approved by the Trustee in Bankruptcy, all of which caused plaintiff to expend funds for the maintenance of the premises, increased the amount of indebtedness on the mortgage, and required the expenditure of legal fees. These are breach of contract claims. While plaintiffs claim that this is a regular course of conduct on the part of defendant, the reality is that this is a unique factual situation not involving the general public.

The Motion to Dismiss the Fourth Cause of Action is granted since it does not allege a public wrong as is required. The complaint fails to allege any violation of the prohibition of false advertising in General Business Law § 350. The motion is also granted as to the claims pursuant to that statute.

Defendant also contends that the three-year statute of limitations applicable to violations of the General Business Law began to run on September 19, 2005, when plaintiff alleges to have been damaged, and that the claim is untimely. Plaintiff asserts a continuing wrong which stayed the running of the statute of limitations. In view of the fact that the Court has determined that the complaint fails to state a cause of action under §§ 249 and 250, it is unnecessary to rule on the matter of the expiration of the statute of limitations.

This constitutes the Decision and Order of the Court.

Dated: September 12, 2011


J.S.C.

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