

Vykhodets v Old Republic Natl. Tit. Ins. Co.
2011 NY Slip Op 33509(U)
December 19, 2011
Sup Ct, Richmond County
Docket Number: 101098/2011
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

VLADIMIR VYKHODETS and SVETLANA
VYKHODETS,

Plaintiff(s),

-against-

OLD REPUBLIC NATIONAL TITLE INSURANCE
COMPANY, LEONARD J. STRANDBERG AND
ASSOCIATES, CONSULTING ENGINEERS AND
LAND SURVEYORS, P.C.,

Defendant(s).

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 101098/2011

Motion No. 2270-001

The following papers numbered 1 to 3 were fully submitted on the 20th day of October, 2011.

	Papers Numbered
Defendant OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY's Notice of Motion, dated August 17, 2011, with Supporting Papers and Exhibits _____	1
Plaintiffs' Affirmation in Opposition, dated October 6, 2011, with Supporting Papers and Exhibits _____	2
Defendant OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY's Reply Affirmation, dated October 18, 2011 _____	3

Plaintiffs VLADIMIR VYKHODETS and SVETLANA VYKHODETS (collectively
“VYKHODETS”) commenced this action against OLD REPUBLIC NATIONAL INSURANCE
COMPANY (“OLD REPUBLIC”) for breach of contract, indemnification, and a declaratory
judgment. The dispute centers on a claim made by the VYKHODETS pursuant to an owner's policy

of title insurance issued to the VYKHODETS by OLD REPUBLIC in connection of their purchase of real property on Staten Island, New York which took place in 2001. OLD REPUBLIC moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first, second, and third causes of action of the VYKHODETS complaint.

The VYKHODETS allege that some time after they purchased the property they discovered that a portion of a garage located on an adjacent lot encroached upon their property. The VYKHODETS claim that they first learned of the encroachment in 2007. However, OLD REPUBLIC asserts that the VYKHODETS learned of the problem shortly after they purchased the residence in 2001 (see, Affidavit of Svetlana Vykhodets and Vladimir Vykhodets, dated March 14, 2008, attached as Exhibit “D” to Defendant’s Notice of Motion). The encroachment was originally determined to impair approximately 20 square feet of the VYKHODETS property. However, the impairment was later revised to approximately 46 square feet.

It is unquestioned that the first occasion that OLD REPUBLIC became aware of the claim was when it received correspondence from the VYKHODETS’ attorneys, dated August 6, 2007, which set forth that “a newer title search show that the Garage area is on the territory of the neighbor” (see Letter, dated August 6, 2007, attached as Exhibit “E” to Defendant’s Notice of Motion). OLD REPUBLIC acknowledged receipt of the claim and requested that the VYKHODETS provide certain information in order to support their claim of encroachment. OLD REPUBLIC initially denied the claim on its mistaken belief that the garage was constructed after the VYKHODETS purchased the property. However, after a number of requests by OLD REPUBLIC to the VYKHODETS for further information, OLD REPUBLIC reevaluated the claim and

determined that the VYKHODETS were correct that part of the neighbor's garage did, in fact, encroach on the VYKHODETS' property prior to the issuance of the subject policy.

OLD REPUBLIC, by letter dated April 25, 2008, notified the VYKHODETS that it was exercising its contractual right to settle the claim, as follows:

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS: TERMINATION OF LIABILITY
 In case of a claim under this policy, the Company shall have the following additional options:
 * * * * *
- (b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant:
- (i) to pay or otherwise settle with other parties for or in the name of an insured claim any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company is obligated to pay; or
 - (ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company is obligated to pay;

Upon the exercise by the company of either of the options provide for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

Pursuant to the terms of the policy, the liability of OLD REPUBLIC would be calculated, as follows:

The **lesser** of the amount of the insurance of the policy (\$315,000) **or** the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by the policy. In order to determine the amount of the reduction of value of the property, OLD REPUBLIC retained an appraiser who

opined that the value of the VYKHODETS property without the encroachment was \$315,000 and with the encroachment \$314,080. Accordingly, OLD REPUBLIC remitted the difference in the sum of \$920 to the VYKHODETS in order to settle the claim. The VYKHODETS disputed the offer and demanded a higher payment. However, the VYKHODETS did not provide OLD REPUBLIC with any evidence, documentary or otherwise, to support their claim that they were entitled to a greater amount.

Approximately six months after OLD REPUBLIC tendered the settlement payment to the VYKHODETS, the VYKHODETS, without notifying OLD REPUBLIC, commenced an action against their neighbors for damage to their property allegedly caused by the neighbors use of a backhoe in the construction and/excavation work in the vicinity of the subject garage. In this matter, the VYKHODETS claim that OLD REPUBLIC had an obligation to defend, represent and/or indemnify them in the property damage action. The VYKHODETS seek to recover attorneys' fees, costs, and other expenses in excess of \$50,000.

OLD REPUBLIC's Motion to Dismiss is based on the following:

1. The subject policy provides that OLD REPUBLIC may settle the claim by providing the VYKHODETS with the difference in the value of the property as insured and the value of the property subject to the encroachment; and
2. The VYKHODETS are barred from recovering legal fees and expenses in the property damage action because they did not properly notify or receive permission from OLD REPUBLIC to prosecute the claim.

With respect to the notice and prosecution of claims, the policy provides, as follows:

“3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matter for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own costs and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim covered by this policy adverse to the insured. The obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action. It shall not be liable for and will not pay any fees, cost or expenses incurred by the insured in the defense of those causes of action that allege matters not insured against by this policy.

In order to succeed on its motion to dismiss, OLD REPUBLIC must demonstrate that “the documentary evidence which forms the basis of the defense must resolve all factual issues as a matter of law and conclusively dispose of the plaintiff’s claim” (*Nisari v. Ramjohn*, 85 AD3d 987, 988 [2011]). ““As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court””(*Nisari, supra.*, 989, quoting, *White v. Continental Cas. Co.*, 9 NY3D 264, 267).

The terms of subject policy are clear and unambiguous. Upon its acceptance of the claim, OLD REPUBLIC was within its contractual right to tender the difference between the value of the

insured estate and its value as a result of the encroachment. Plaintiffs have not provided any evidence to contest the measure of the diminution in value of the property as determined the appraisals performed by OLD REPUBLIC. There is also no question that the VYKHODETS failed to provide OLD REPUBLIC with adequate prior notice that they were intending to prosecute an action for the property damage.

Accordingly, it is

ORDERED the motion of defendant OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first, second, and third causes of action of the Complaint of plaintiffs VLADIMIR VYKHODETS and SVETLANA VYKHODETS is granted.

ORDERED that the Clerk enter Judgment accordingly.

This shall constitute the decision and order of the Court.

Dated: December 19, 2011

E N T E R,

HON. PHILIP G. MINARDO