

**Riverdale Osborne Towers Hous. Assoc. LLC v
Commonwealth Land Titles Ins. Co.**

2011 NY Slip Op 33840(U)

June 13, 2011

Sup Ct, New York County

Docket Number: 651377/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C.

PART 10

Index Number : 651377/2010
RIVERDALE OSBORNE TOWERS
VS.
COMMONWEALTH LAND TITLE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

This motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

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NYS SUPREME COURT - CIVIL

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: June 13, 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE
[] SUBMIT ORDER/ JUDG. [] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

-----X
RIVERDALE OSBORNE TOWERS HOUSING
ASSOCIATES LLC,

Plaintiff,

Decision/Order

-against-

Index# 651377/10
Seq. No.: 001

COMMONWEALTH LAND TITLES INSURANCE
COMPANY and LIBERTY TITLE AGENCY LLC,

Defendants.

-----X
Recitation, as required by CPLR §2219(a) of the papers considered in the review of this
(these) motion(s):

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NUMBERED

PAPERS		
Def's N/M, ER affirm., exhs		1
Def's Memo in Supp. (sep. back)	MOTION SUPPORT OFFICE	2
Pltf's Opp w/ DMG affirm., RAK affid., exhs	NYS SUPREME COURT - CIVIL	3
Pltf's Opp Memo (sep. back)		4
Def's SL affid.		5
Def's Further Supp w/ ER affirm, exhs		6

Gische, J.

Upon the aforementioned papers the decision and order of the court is as follows:

This is a breach of contract and fraud action arising from allegations, brought by plaintiff Riverdale Osborne Towers Housing Associates, LLC. ("Riverdale" or "Plaintiff"), that a title insurer, Liberty Title Agency LLC. ("Liberty"), misappropriated funds held in escrow. Plaintiff claims that defendant Commonwealth Land Titles Insurance Company ("Commonwealth") is liable to it under a principal-agent relationship. Presently before the court is Commonwealth's motion, pursuant to CPLR 3211, to dismiss the complaint against it based on the theories of actual authority, apparent authority and negligent

supervision. Riverdale opposes the motion to dismiss. Liberty has not answered the complaint nor does it take any position on this motion.

Facts and Arguments Presented

Commonwealth is engaged in the business of insuring title to real estate. Liberty was a Commonwealth agent pursuant to a January 7, 2001 agreement. That agreement provided that:

“PRINCIPAL [Commonwealth] appoints AGENT [Liberty] its agent solely for the purpose of issuing, on PRINCIPAL'S forms, title insurance commitments, policies and endorsements on real estate located in the State of New York.”

The agency agreement also specifically provided, under the caption “Additional Terms and Conditions” that:

“Notwithstanding any provision herein, AGENT'S [Liberty's] authority under this Agreement is expressly limited to the issuance of title insurance commitments, policies and endorsements and the collections of Premiums as set forth herein. Without limitation AGENT is not authorized and shall not purport to: . . .

d) Engage in any business in the name of PRINCIPAL except as specifically authorized herein; . . .

f) Receive in the name of PRINCIPAL any funds, including escrow and settlement funds; . . .

l) Issue any commitment, policy or endorsement which insures against or over any matter by reason of an escrow deposit, indemnity agreement, letter of credit, or bond.”

Riverdale engaged Commonwealth, through its agent Liberty, to provide title insurance for real property located in the Brownsville neighborhood of Brooklyn and Commonwealth issued a policy thereto. In the policy, Liberty was identified as

Commonwealth's "authorized officer or agent" on several signature lines for Liberty. On that basis, plaintiff alleges that at all times after issuance of the policy, it acted under the reasonable belief that Liberty was authorized to act for Commonwealth in all matters relevant to the acquisition of clear title to the Property including post-closing transactions. The plaintiff further alleges that at the closing of the Property purchase, Liberty appeared as Commonwealth's agent and participated in collecting documents for filing and received the proceeds of building loans and equity to allow it to disburse funds pursuant to a schedule. However, the plaintiff does not allege that Liberty or Commonwealth failed to distribute those moneys properly or acted in an improper manner with respect to that agreement.

The plaintiff further alleges that at the closing, Liberty also executed two receipt and deposit agreements in which it agreed to disburse monies to pay off certain liens and encumbrances on the Property. Commonwealth claims that it is not a party to those agreements because Liberty is not identified as Commonwealth's agent. In both of them its signature line reads only "Liberty Title Agency, LLC." The word "Commonwealth" appears only on the front page of each, where that word is handwritten into an underlined space near the top left hand portion of each form beside the word "underwriter." Plaintiff does not allege that Liberty or Commonwealth breached those agreements or otherwise did anything improper with respect to them.

The plaintiff alleges that in addition to the foregoing undisputed agreements, Liberty executed an agreement with the plaintiff to hold an additional \$1,324,198.88 in escrow ("Escrow Fund") for the payment of certain disputed liens on the Property and for accounts payable that may have otherwise resulted in liens on the Property.

Commonwealth claims that the only parties to the agreement identified by that document are Liberty and the Plaintiff. Furthermore, Commonwealth claims that nowhere is Liberty identified or listed as Commonwealth's agent. Its signature line reads: "Liberty Title Agency" with no indication or qualification that it is only acting as agent for Commonwealth or anyone else. It is in connection with that Escrow Fund alone that plaintiff alleges Liberty, and through it, Commonwealth, committed wrongdoing.

Plaintiff claims that Liberty distributed monies from the foregoing separate funds to pay off the relevant liens and debts against the property. Plaintiff alleges that Liberty did so in its capacity and in conjunction with its role as Commonwealth's agent. Plaintiff further argues that Liberty was invested or cloaked with apparent authority to act as Commonwealth's agent, as it is customary in real estate closings for the title insurer to take escrow deposits. However, Plaintiff alleges that Liberty purportedly failed to pay out, or even return, \$115,300 of the monies deposited in the Escrow Fund, ceased taking phone calls, and ultimately went out of business.

After Liberty went out of business, plaintiff contacted Commonwealth and requested that it return the \$115,300 that Liberty had not disbursed or returned. A Commonwealth officer explained, in correspondence to plaintiff, that although Liberty was not Commonwealth's agent for the performance of escrow and other services incidental to a pending real estate transaction, Commonwealth did recognize plaintiff's claim to coverage of four encumbrances on the Property that were not excepted from the plaintiff's Commonwealth title insurance policy, totaling \$11,526.64, and offered to pay those amounts, but disclaimed all other claims.

As a consequence of the foregoing, plaintiff asserts four claims against Commonwealth. In the first claim, the plaintiff alleges that Commonwealth is liable for Liberty's alleged wrongful detention of \$115,300 from the Escrow Fund because Liberty acted as Commonwealth's agent, with actual authority to do so, in connection with its handling of the Escrow Fund. In the second claim, plaintiff alleges that Commonwealth never notified plaintiff that any of Liberty's services were outside the scope of its agency for Commonwealth and, therefore, Liberty had apparent authority to act as Commonwealth's agent in regard to the Escrow Fund. In its third claim, plaintiff asserts that Commonwealth is liable for Liberty's defalcation because Liberty's actions in becoming escrow agent for the Escrow Fund were within the scope of Liberty's authority for Commonwealth and furthered Commonwealth's business. Plaintiff's fourth claim is based on allegations that Commonwealth breached its alleged duty to supervise its purported agent (Liberty) in its handling of the Escrow Fund.

Commonwealth argues that it is entitled to dismissal, pursuant to CPLR 3211, as plaintiff does not allege facts which support its allegations that Liberty was acting as Commonwealth's agent in collecting plaintiff's escrow deposit. Commonwealth submits its contract with Liberty, which, while authorizing Liberty to act as Commonwealth's agent with respect to selling title insurance, expressly states that Liberty is not authorized to "[receive in the name of [Commonwealth] any funds including escrow and settlement funds." Commonwealth argues that plaintiff has not plead facts which show that Commonwealth is liable on a theory of apparent authority, as plaintiff has not alleged that Commonwealth communicated anything to plaintiff as to its involvement in the escrow arrangement.

Discussion

In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the challenged pleadings a liberal construction, take the allegations as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83 [1994]; Morone v. Morone, 50 N.Y.2d 481 [1980]; Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]). In deciding Commonwealth's motion to dismiss, the court must consider whether, accepting all Plaintiff's facts, that they support the claims asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]). Where the party whose pleadings are being challenged submits affidavits and/or other evidentiary materials in opposition to the motion, they may be considered to remedy any defects in the pleading (Leon v. Martinez, 84 N.Y.2d 83, 88 [1994]). Thus, in order to prevail on a CPLR 3211 motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim." (Fernandez v. Cigna Property and Casualty Insurance Company, 188 A.D.2d 700, 702 [1992]; Vanderminden v. Vanderminden, 226 A.D.2d 1037 [1996]; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 A.D.2d 248. [1995])

Applying these legal principals to the facts of this case, the court's decision is as follows:

Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with

the principal's manifestations to the agent, that the principal wishes the agent so to act. Restatement (Third) Of Agency §2.01 (2006). A person manifests assent or intention through written or spoken words or other conduct. Id at §1.03. See also Ojeni v. Lieber, 304 A.D.2d 484, 759 NYS2d 453 (1st Dept. 2003) (principal's objective manifestation, expressed to the agent, of consent to the agency is required.) Therefore "an agent's power to bind his principal is co-extensive with the principal's grant of authority." Ford v. Unity Hospital, 32 N.Y.2d 464, 472 (1973). It follows that where an agent's authority is spelled out in a written agency agreement delineating the scope of the agency, the terms of the agreement will determine that issue. See Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546 (1997) (court looks to terms of agency agreement to determined agency's scope). Further, "one who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority." Ford v. Unity Hospital, 32 N.Y.2d at 472.

Pursuant to the agency agreement between Liberty and Commonwealth, Liberty is Commonwealth's agent "solely for the purpose of issuing, on [Commonwealth's] forms, title insurance commitment, policies and endorsements on real estate..." That agreement expressly limits Liberty's authority to those matters delineated under the heading "Additional Terms and Conditions." That latter section states that Liberty "is not authorized and shall not purport to . . . (d) [e]ngage in any business in the name of [Commonwealth] except as expressly authorized herein" or (f) [r]eceive in the name of [Commonwealth] any funds, including escrow and settlement funds." Based on the foregoing, the plaintiff has not pleaded facts sufficient to support a cause of action against Commonwealth based upon claims that Liberty acted as Commonwealth's

agent in connection with the Escrow Fund arrangement. Although an agreement between Commonwealth and Liberty did indeed exist, the agency agreement establishes that Liberty was not authorized to act as Commonwealth's agent. Furthermore, Liberty's actual authority extended only to the extent that the agency agreement allowed. Thus the motion to dismiss actions one and three against is granted.

Apparent Authority

"[T]he words or conduct of a putative agent are insufficient to create apparent authority" (M Entertainment, Inc. v. Leydier, 71 AD3d 517, 520 [1st Dept 2010], citing Ford v. University Hosp., 32 NY2d 464, 473 [1973]). The Court of Appeals, in Ford, made clear that apparent authority only arises through misrepresentations made by the principal to a third party:

"The mere creation of an agency for some purpose does not automatically invest the agent with apparent authority to bind the principal without limitation. An agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority. Upon failure to properly determine the scope of authority, and in the face of the agent's misrepresentations, apparent authority is not automatically available to the injured third party to bind the principal. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal – not the agent."

(Ford, 32 NY2d at 472-3 [internal quotation marks and citation omitted]; DeGliomini v. Commonwealth, Index No. 105810/10 [S. Ct. N.Y. Co.]). Here Plaintiff does not allege that Commonwealth made any misrepresentations to it, only that Commonwealth's

purported agent, Liberty, did. There are no facts that Plaintiff or Commonwealth were ever in direct contact or that Commonwealth made any representations to Plaintiff about Liberty being its agent. Based on the foregoing, the plaintiff has failed to allege facts by which it could recover under a theory of apparent authority, thus the second cause of action against Commonwealth is dismissed.

Negligent Supervision of an Agent

It has been stated by the Court of Appeals that a principal is not liable for a loss caused to another by reason of deceitful conduct of an agent unless the deceitful conduct was authorized or apparently authorized. Bowers v. Merchants Mutual Insurance Co., 248 A.D.2d 1005 (1998). See Eng v. Sichenza, 21 Misc.3d.111(A) (2005) (title insurance company not liable for negligent supervision of title agent where agent's acts were not within scope of its agency). Thus, the fourth cause of action, for Commonwealth's alleged negligent supervision of Liberty with respect to the Escrow Fund, is dismissed because plaintiff has failed to establish that Liberty was acting as Commonwealth's agent with respect to the disputed escrow account.

Conclusion

In accordance with the foregoing, it is hereby:

Ordered that Commonwealth Land Titles Insurance Company's motion to dismiss the complaint against it is granted and the complaint is dismissed in its entirety as against Commonwealth Land Titles Insurance Company, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

Ordered that the clerk is directed to enter judgment accordingly in favor of Commonwealth Land Titles Insurance Company; and it is further

Ordered that the action is severed and continued against the remaining defendant (Liberty Title Agency, LLC); and it is further

Ordered that counsel for defendant Commonwealth Land Titles Insurance Company shall serve a copy of this order with notice of entry within (20) days of entry on plaintiff and defendant Liberty Title Agency, LLC; and it is further

Ordered that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, NY
June 13, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.