SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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FLUSHING SAVINGS BANK, FSB,

Plaintiff,

-against-

LEADING INSURANCE SERVICES, INC.,

Defendant.

---x

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 5194-11
Motion Seq. No. 3
Submission Date: 11/23/12

The following papers have been read on this motion:

Amended Notice of Motion, Amended Affirmation in Support and Exhibits x
Eng Affidavit in Support.....x
Baldasare Affidavit in Support.....x
Baquet Affirmation in Support and Exhibit.....x
Affirmation in Opposition and Exhibits.....x
Reply Affirmation.....x

This matter is before the Court for decision on the motion filed by Plaintiff Flushing Savings Bank, FSB ("FSB" or "Plaintiff") on September 14, 2011 which was submitted on November 23, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order granting partial summary judgment to Plaintiff and scheduling a hearing to determine Plaintiff's damages.

Defendants Leading Insurance Services, Inc. ("LIS") and Leading Insurance Group

Insurance Co., Ltd. ("LIG") (collectively "Leading Defendants") oppose Plaintiff's motion. [1]

B. The Parties' History

The Amended Complaint (Ex. G to Baquet Aff. in Supp.) alleges as follows: [2]

FSB is a banking corporation with an office located in Hyde Park, New York. LIG is a foreign insurance company domiciled in Korea and LIS is a foreign corporation authorized to do business in New York.

W&X Evergreen, LLC ("W&X") is obligor and FSB is obligee with respect to a promissory note ("Note") dated April 21, 2008 in the original amount of $2,337,500.00 (Ex. A to Am. Compl.). The Note is secured by a mortgage ("Mortgage") dated April 21, 2008, made by W&X as mortgagor to FSB as mortgagee in the original principal amount of $2,337,500.00 (*id.* at Ex. B). The Mortgage is a first lien on the premises ("Premises") located at 747 Evergreen Avenue, Brooklyn, New York.

As required under the Mortgage, in or about June of 2010, W&X obtained an all-risk insurance policy ("Policy") from LIG, relevant portions of which are annexed (Ex. C to Am. Compl.). The Policy became effective on June 23, 2010 and was to remain in effect until June 23, 2011. The Policy covers, *inter alia*, damage or destruction to the Premises caused by fire. The Policy lists FSB as first mortgagee and loss payee.

The Policy contains a New York standard mortgage clause which provides, in pertinent part, as follows:

> [The insurer] will pay for covered loss of or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear...If [the insurer denies the insured's] claim because of [the insured's] acts or because [the insured] failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder: (1) pays any premium due under this Coverage Part at [the insurer's] request if [the insured] has failed to do so; (2) submits a signed, sworn

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[1] As discussed *infra*, there is a related action ("Related Action") pending in the Supreme Court of Kings County *titled W&X Evergreen, LLC v. Leading Insurance Group Insurance Co., Ltd., United Aline Services, Inc. a/k/a United Aline Co., Ltd., Flushing Savings Bank, FSB, and Empire State Certified Development Corporation*, Kings County Index # 29281-10. Defendants oppose Plaintiff's motion on the grounds that, in light of the Court's recent denial of Plaintiff's motion to consolidate the above-captioned action ("Instant Action") with the Related Action in Nassau County, granting Plaintiff's motion would subject Leading to the possibility of inconsistent findings. The Related Action was filed prior to the Instant Action.

[2] Pursuant to a stipulation dated September 1, 2011, the parties agreed that Plaintiff could file the Amended Complaint which amended the caption to reflect that LIG is now a party defendant.

> proof of loss within 60 days after receiving notice from [the insurer] that the [insured] has failed to do so; and (3) has notified [the insurer] of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

On or about July 1, 2010, a fire ("Fire") occurred at the Premises which resulted in a total loss. Thereafter, W&X filed a claim with the Leading Defendants and sought loss payment under the Policy.

By letter dated November 8, 2010 ("Disclaimer Letter"), counsel for the Leading Defendants notified W&X that LIG disclaimed and rescinded coverage to W&X under the Policy for the loss caused by the Fire. In the Disclaimer Letter, the Leading Defendants asserted that 1) based on their investigation ("Investigation"), the Premises were not protected by an operational fire sprinkler system ("Sprinkler System"); 2) W&X had made a material misrepresentation on their insurance application ("Application") by representing that the Premises were protected by a Sprinkler System; 3) the Policy contained a Protective Safeguards Endorsement that required W&X to main a Sprinkler System at the Premises; 4) W&X failed to comply with the terms of the Policy by failing to maintain the Sprinkler System; and 5) the basis for their disclaimer of rescission and coverage to W&X under the Policy was that W&X had made a material misrepresentation on its Application or had failed to comply with certain terms of the Policy.

On November 5, 2010, FSB, through counsel, sent a letter to counsel for the Leading Defendants which advised them, *inter alia*, that FSB claimed entitlement to proceeds under the Policy as first mortgagee with respect to the Premises. The Leading Defendants have never demanded that FSB pay any premium due under the Policy. In addition, upon information and belief, W&X has timely paid all premiums due under the Policy. The Leading Defendants have never demanded that FSB submit a signed, sworn proof of loss to the Leading Defendants. And, at all times prior to and since the Fire, FSB has never been aware of any change in ownership or occupancy at the Premises, or any substantial change in risk relating to the Premises or W&X.

On November 17, 2010, counsel for the Leading Defendant sent a letter to FSB's prior counsel in which the Leading Defendants stated that they were investigating FSB's entitlement to coverage under the Policy in light of the facts discovered during the Investigation. On December 17, 2010, FSB's prior counsel responded by letter in which he demanded that the Leading Defendants make loss payment to FSB as soon as possible. The parties have exchanged

subsequent communication reflecting FSB's position that it is entitled to loss payment and the Leading Defendants' refusal to make that payment.

The Amended Complaint contains four (4) causes of action: 1) request for a declaratory judgment that FSB is entitled to coverage under the Policy in the entire outstanding amount of which Mortgage which, as of March 21, 2011, was $2,281,907.91, 2) request for a judgment of specific performance directing the Leading Defendants to provide coverage to FSB under the Policy, 3) breach of contract with respect to the Policy by virtue of the Leading Defendants' refusal to remit loss payment to FSB, and 4) breach of the implied covenant of good faith and fair dealing.

In their Answer (Ex. H to Baquet Aff. in Supp.), the Leading Defendants assert, *inter alia*, that 1) under the Policy, Plaintiff is entitled to, at most, the replacement cost of the Premises, not the full amount of the Mortgage (¶ 45); and 2) the Policy does not constitute a valid contract due to W&X's material misrepresentations to the Leading Defendants (¶ 63). They also assert twenty five (25) affirmative defenses, including the claim that Plaintiff was aware of the misrepresentations made by W&X in the Application and, therefore, is not entitled to recover insurance proceedings from Defendants (Eighteenth Affirmative Defense).

Plaintiff provides Affidavits in Support of Richard Eng ("Eng") and Joseph Baldasare ("Baldasare"), Vice Presidents of FSB, who affirm the truth of the allegations in the Complaint. Eng also affirms that he observed the Premises shortly after the Fire which had been destroyed, resulting in a total loss to the Premises. The outstanding amount of the Mortgage at that time was clearly less than the maximum face value of the Policy. Thus, Eng submits, pursuant to the Policy, FSB is entitled to payment from Defendants in the total amount outstanding on the Mortgage.

Baldasare affirms, *inter alia*, that 1) as mortgagee, FSB would have been aware of any change ownership in the Premises and, as reflected by the ACRIS documentation provided, there has been no such change from the date of the Note and Mortgage through the date of the Fire and W&X continues to own the Premises to date; 2) FSB was never aware of any change in occupancy at the Premises, or any change in risk relating to the Premises or W&X; 3) in determining whether to extend a mortgage to W&X, FSB obtained appraisals and inspections of the Premises in March of 2008 which reflected a Sprinkler System at the Premises; 4) FSB never

knew, or had reason to know, that the Sprinkler System at the Premises was not in working order, assuming the truth of that assertion; and 5) notwithstanding FSB's satisfaction of its conditions to loss payment, the Leading Defendants persist in their refusal to remit payment to FSB.

In opposition, Leading Defendants' counsel submits that, while the Leading Defendants believe that FSB is entitled to loss payment under the Policy regardless of the validity of the Leading Defendants' defenses to coverage against W&X's claim for coverage, the Court should deny the motion in light of Plaintiff's "fail[ure] to recognize the significance of W&X's claim against Leading for the same insurance proceeds" (Havkins Aff. in Opp. at ¶ 4). In the Related Action, W&X has asserted causes of action for a declaratory judgment and breach of contract based on its position that W&X is entitled to $3.24 million in coverage for the loss of its buildings. Leading Defendants' counsel provides a copy of the complaint in the Related Action ("Related Complaint") (Ex. C to Hawkins Aff. in Opp.). In the Related Complaint, W&X is seeking to recover $3,240,000 in insurance coverage for the loss of buildings in the Fire. W&X alleges that it submitted a claim to LIG which has refused to pay the claim. Thus, "FSB and W&X are each seeking insurance proceeds for the same loss that the other believes it is entitled to" (*id.* at ¶ 4).

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment on the issue of Defendants' liability by establishing that the Premises is covered by the Policy, the conditions to FSB's entitlement to payment thereunder have been satisfied and Defendants have improperly failed to remit payment to Plaintiff. Plaintiff contends that the Leading Defendants are required to remit loss payment to FSB before they may pay W&X under the circumstances of this Action, and irrespective of whether W&X made material misrepresentations on its Application.

The Leading Defendants contend that, in light of the Court's recent denial of Plaintiff's motion to consolidate the Instant Action with the Related Action in Nassau County, awarding summary judgment to FSB would subject the Leading Defendants to the possibility of inconsistent findings in that the Court may conclude that FSB is the rightful loss payee, while the Court in the Related Action may determine that W&X has a superior right to payment. Given that FSB and W&X are asserting that their claims have priority, complete relief can only be obtained if all parties are bound by the outcome of a dispositive motion, which cannot occur in the Instant Action in light of the fact that W&X is not a party in the Instant Action. Even if the Court were to agree with FSB's interpretation of the Policy and conclude that FSB has superior

rights to coverage, that determination would not be binding on the Court in the Related Action. Thus, in light of the absence of W&X in the Instant Action, an award of summary judgment in the Instant Action exposes the Leading Defendants to the possibility of inconsistent verdicts.

In reply, Plaintiff contends that the Leading Defendants are obligated to first pay the amount due on the Mortgage to FSB, the Mortgagee. Thus, even if W&X is successful in the Related Action, W&X will be entitled to, at most, the difference between the amount paid to the named mortgagees and the value of the Policy. Accordingly, Plaintiff argues, it is appropriate for the Court to grants its motion for partial summary judgment.

RULING OF THE COURT

A. Summary Judgment Standards

Pursuant to CPLR § 3212(e), summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct 1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2) that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Collateral Estoppel

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. *Maybaum*, 933 N.Y.S.2d at 47, citing *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999), quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine applies if the issue in the second action is identical to an issue that was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in

the earlier action. *Id.* at 48, quoting *Parker*, 93 N.Y.2d at 349.

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion in light of its concerns regarding the possibility that granting partial summary judgment to Plaintiff in the Instant Action, in which W&X is not a named party and has not litigated the relevant issues, creates the possibility of a decision in the Related Action that is inconsistent with the Court's decision regarding the distribution of the proceeds from the Policy. While the Court appreciates Plaintiff's argument that Plaintiff is entitled to be paid first, prior to W&X, and therefore is entitled to judgment now, there exists the possibility that the Court in the Related Action will have a different view of the manner in which the insurance proceeds should be distributed, and will issue a decision that reflects a different view of the parties' rights and obligations. In light of these concerns, the Court denies Plaintiff's motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on January 27, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
January 24, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 30 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE