Ezring v Loduca
2012 NY Slip Op 33559(U)
December 13, 2012
Sup Ct, Queens County
Docket Number: 14279/2012
Judge: Sidney F. Strauss

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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DOUGLAS S. EZRING,

Plaintiff,

-against-

SALVATORE LODUCA, MORRIS HANDLER, ESQ., TRIAD ABSTRACT LIMITED, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendants.

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Index No.: 14279/2012

Motion Date: November 30, 2012

Cal. No.: 42
Seq. No.: 2

The following papers numbered 1 to 6 were read on the motion by the defendant First American Title Insurance Company ("First American"), seeking an order pursuant to CPLR 3211(a)(1)(5) and (7), dismissing plaintiff's complaint as against it.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Exhibits.....	4 - 5
Reply Affirmation.....	6

The underlying action seeks recovery pursuant to a policy plaintiff alleges First American, through its title agent, defendant Triad Abstract Limited, issued on or about July 26, 2006. Plaintiff alleges that it paid First American's title agent a mortgage insurance premium for the purposes of obtaining a mortgage insurance policy in connection with a loan plaintiff entered into with the defendant Salvatore Loduca. Subsequent to the closing for said loan, plaintiff alleges that defendant First American, in breach of contract, failed to issue the title insurance policy and that further, plaintiff should have been insured as the holder of a first mortgage as against the subject premises.

Defendant now moves for an order dismissing the complaint against it pursuant to CPLR 3211 (a) (1), (5), and (7). Initially, the Court notes that, in response to the defendant's motion, the plaintiff has filed an amended complaint which attempts to clarify the sixth, seventh and eighth

causes of action pled in the original complaint. The defendant does not oppose the service of the amended complaint, (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 [1st Dept 1998]), and/or it has elected to have the instant motion applied to the amended pleading. (*D'Addario v McNab*, 73 Misc 2d 59 [Sup Ct, Suffolk County 1973].) It is well settled that a motion to dismiss which is addressed to the merits will not be defeated by an amended pleading. (See, *Terrano v Fine*, 17 AD3d 449 [2d Dept 2005]; *Livadiotakis v Tzitzikalakis*, 302 AD2d 369 [2d Dept 2003].) Accordingly, all references herein are to the amended complaint dated November 23, 2012.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a) (1) 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 . . . " (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003], quoting *Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002].)

The sixth cause of action in plaintiff's complaint seeks relief pursuant to breach of contract. Defendant presents an unmarked-up title search wherein the language on its Schedule B expressly lists as "exceptions from coverage unless disposed of to [First American's] satisfaction prior to the closing or delivery of the policy," "3. Mortgages returned herein (2) . . . 5. . . . agreements of record, . . . 8. Mortgage . . . held by MIT Lending to be disposed of. 9. With regard to the mortgage referred to in exception 8, a Lis Pendens giving notice of the commencement of an action to foreclose same was filed on 11/18/05 . . .Said Lis Pendens must be cancelled and the action discontinued. 10. Mortgage . . . held by Indy Mac Bank, F.S.B. to be disposed of.". (See, *Ahl v Commonwealth*, 755 NYS2d 149 [4TH Dept. 2003].) Said search is the precursor to a title insurance commitment normally issued at closing, which in and of itself then constitutes a policy or contract of indemnity by the title insurer. (See, *Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179; Insurance Law § 1113 [a] [18]; § 6401 [b]; 5A Warren's Weed, New York Real Property, Title Insurance, § 4.01 [4th ed].)

In title insurance, the insurer issues its commitment with its list of requirements or conditions for the insured to meet for a policy to be issued insuring title as the commitment describes. Thus, under the usual facts, it comports with this rule of general insurance law to hold that, when the insured meets the last of the commitment's conditions, the insurer's acceptance of the insured's application is no longer conditional and the title insurance contract is consummated. In this instance no contract for plaintiff as first lienor could have existed because the plaintiff's application remained conditional upon the satisfaction of the prior loans against the premises. The issuance of a clean policy merely confirms the obligations and the exceptions already acknowledged by the title company. (*Goettler v Peters*, 225 AD2d 660 [2d Dept. 1996].)

Plaintiff is bound by the information in the title search delivered to the defendant Morris Handler, his attorney at the time of the transaction. A principal is bound by notice to or knowledge of his or her agent in all matters within the scope of the agency, notwithstanding the fact that such information is never actually communicated to the principal. (See, 64 NY Jur.2d Attorneys at Law § 123; *Smalls v Reliable Auto Service, Inc.*, 205 AD2d 523 [2d Dept.1994];

Parola v Lido Beach Hotel, Inc., 99 AD2d 465 [2d Dept. 1984]; *Farr v Newman*, 14 NY2d 183 [1964]; see generally, Restatement [Second] of Agency § 272, at 591.) This rule of imputed knowledge is based upon a presumption that an agent has discharged the duty to disclose to the principal all material facts coming to his or her knowledge with respect to the subject of the agency. (See, *Marine Midland Bank v Russo Produce Co.*, 50 N.Y.2d 31 [1980]; see also, *Smalls v Reliable Auto Service, Inc*., supra; *Parola v Lido Beach Hotel, Inc*., supra; *Farr v Newman*, supra.)

In this instance, plaintiff's attempt, through amending his complaint in response to First American's motion, fails to properly raise a question of fact to defeat said defendant's documentary evidence. Defendant has dispositively resolved any question as to whether plaintiff could have properly considered himself to be the holder of a first mortgage in the event of a closing, and further whether a policy could have been issued indicating plaintiff as first lienor..

Accordingly, the branch of defendant's motion seeking to dismiss plaintiff's sixth cause of action for breach of contract. pursuant to CPLR 3211 (a)(1) is granted.

As to the branch of defendant's motion seeking to dismiss plaintiff's eighth cause of action for negligence, pursuant to CPLR 3211(a)(5), same is granted inasmuch as the statute of limitations for such claims has already expired. It is undisputed that defendant Handler, as attorney and agent, had knowledge of the existence of the title search. Such knowledge is imputed to the principal, in this instance, the plaintiff. (See, *Fishof v Grajower*, 262 AD2d 118 [1st Dept. 1999] *Siegel v Faryniarz*, 9 Misc 2d 1035 [1957]; *Polhamus v Hines*, 128 Misc. 299[1926].) Personal knowledge of the principal is not required. Knowledge of the attorney-agent is sufficient. A principal is bound by notice to or knowledge of his agent in all matters within the scope of the agency, notwithstanding the fact that such information is never actually communicated to the principal. (see, *Christopher S. v Douglaston Club*, 275 AD2d 768 [2d Dept. 2000]; *Farr v Newman*, supra; see also, *Center v Hampton Affiliates*, 66 NY2d 782 [1985]; *Henry v Allen*, 151 NY 1 [1896]; see generally, Restatement [Second] of Agency § 272, at 591.) This rule of imputed knowledge is based upon a presumption that an agent has discharged the duty to disclose to the principal all material facts coming to his or her knowledge with respect to the subject of the agency (see, *Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31 [1980]; *Henry v Allen*, supra .) Plaintiff has not established a reasonable excuse for its failure to notify First American in a timely manner.

As to that branch of defendant's motion seeking to dismiss plaintiff's seventh cause of action, pursuant to CPLR 3211(a)(7), the court's determination is as follows:

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (See, *Parekh v Cain,* --- N.Y.S.2d ----, 2012 WL 2125829 [2d Dept.2012]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept. 2008]; see *Moore v Liberty Power Corp*., LLC, 72 AD3d 660[2d Dept. 2010], lv. denied 14 NY3d 713 [2010].) "However, bare legal conclusions, as well as factual

claims flatly contradicted by the record, are not entitled to any such consideration." (*Garner v China Natural Gas, Inc.*,71 AD3d 825 [2d Dept. 2010]; *Riback v Margulis*, 43 AD3d 1023 [2d Dept. 2007].) In light of this court's determinations with respect to plaintiff's sixth and eighth causes of action, plaintiff's seventh cause of action must be dismissed as well.

Accordingly, defendant's motion is granted in full. Plaintiff's action as against First American is dismissed.

Dated: December 13, 2012

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SIDNEY F. STRAUSS, J.S.C.