

Sultana v Bank of America Corp.

2013 NY Slip Op 32120(U)

August 30, 2013

Sup Ct, New York County

Docket Number: 650794/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 12

Index Number : 650794/2010
SULTANA, NAHIDA
vs.
BANK OF AMERICA CORPORATION,
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 650794/10
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for S/O
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 8/30/13

[Signature], J.S.C.
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
NAHILDA SULTANA, ABUL KALAMAZAO
and EJP CONTRACTING CORP.,

Plaintiffs,

-against-

BANK OF AMERICA CORPORATION, its
affiliates, subsidiaries and agents, including but not
limited to BAC HOME LOANS SERVICING LP,
and TOWER INSURANCE COMPANY OF NEW
YORK STATE FARM FIRE AND CASUALTY
COMPANY,

Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiffs:

Craig Blumberg, Esq.
Law Office of Craig A. Blumberg
15 Maiden Lane, 20th fl.
New York, NY 10038
212-346-0808

For defendants:

Suzanne M. Berger, Esq.
Omar Shakoor, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, New York 10104
212-541-2000

By notice of motion , defendants Bank of America N.A. (BANA), as successor by merger to BAC Home Loans Servicing, L.P., moves pursuant to CPLR 3212 for an order granting summary judgment to BANA and dismissing plaintiffs' complaint. Only plaintiff EJP Contracting Corp. opposes, as by stipulation dated July 30, 2013, plaintiff homeowners Sultana and Kalamazao (homeowners) discontinued their action with prejudice. (NYSCEF 98).

I. FACTUAL BACKGROUND

On June 24, 2005, the homeowners entered into a consolidation, extension and modification agreement in connection with their mortgage loan for a three-family residence located at 37-45 87th Street, Jackson Heights, New York. (NYSCEF 63). On or about November

5, 2008, Tower issued them an insurance policy covering the property. (*Id.*). The policy lists the mortgagee, Country Wide Home Loans, and its successors as additional insureds. (*Id.*). The policy's Mortgagee clause provides as follows:

If the mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages. If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

- a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
- b. Pays any premium due under this policy on demand if you have neglected to pay the premium; and
- c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

(NYSCEF 89). BANA is the current servicer of the homeowners' mortgage loan and a successor in interest to Country Wide Home Loans. (*Id.*).

On or about March 20, 2009, while the policy was in effect, the homeowners suffered a fire loss at the property, and EJP agreed to perform repairs for the amount the homeowners expected to receive from the policy. (*Id.*). However, in May of 2009, Tower denied the homeowners' claim because they had misrepresented the property as a one- or two-family residence when applying for the policy. (*Id.*). EJP subsequently filed a mechanic's lien on the property in the amount of \$226,696.70. (*Id.*).

On or about September 25, 2009, BANA notified Tower by letter of its interest as a mortgage loan servicer in the property and in any proceeds, that "any payment for damage to the above mentioned property should include [the servicer]," and that if Tower denied coverage to the homeowners, the letter was to serve as notice of its claim under the mortgagee clause. On or

about February 18, 2010, Tower, in response, fruitlessly asked whether BANA intended to pursue the policy on behalf of the mortgagee. Meanwhile, the homeowners continued to make their mortgage payments to BANA. (NYSCEF 73).

On February 4, 2010, the homeowners filed a lawsuit challenging Tower's denial of coverage. (*Id.*). In lieu of answering, BANA moved to dismiss the homeowners' complaint. (*Id.*). In a decision dated October 17, 2011, the justice previously presiding in this part denied the motion, finding that the complaint sufficiently alleged privity between BANA and the policy. (NYSCEF 68).

Tower, a co-defendant here, then moved to dismiss the homeowners' complaint, asserting that homeowners lacked standing to enforce the mortgagee clause. (*Id.*). In a decision dated February 27, 2012 (NYSCEF 67), the previously assigned justice observed that as the mortgagee clause "gives rise to a separate insurance of the mortgagee's interest, independent of the mortgagor's right to recovery," parties that do not have direct or third party beneficiary status in relation to the clause do not have standing to sue for breach, and thus, as plaintiffs were not third-party beneficiaries of the mortgagee clause of the policy, they had no standing to sue Tower for breaching the clause. (NYSCEF 63).

Plaintiff filed the instant action on July 6, 2010, alleging that BANA had breached the mortgagee clause of the policy by failing to comply with Tower's request for information and failing to use the insurance proceeds to pay EJP for the repairs it had performed. (*Id.*, Exh. 1).

II. CONTENTIONS

Defendants contend that the February 2012 decision is dispositive as the court found that as plaintiffs are not third party beneficiaries of the mortgagee clause of the insurance contract, they lack standing to sue for a breach of that clause. And, even if plaintiffs had standing, they

assert that BANA cannot be compelled to file a claim under the policy. (*Id.*).

In opposition, plaintiff maintains that the October 17 decision is dispositive, and observe that as the court found that there was privity between BANA and Tower, and said nothing about plaintiffs' standing to sue BANA in the February decision, plaintiffs have standing to sue BANA under the mortgagee clause of the policy. (*Id.*). They also argue that the court rejected in its October 17 decision BANA's argument that it cannot be compelled to make a claim under the policy, and that the homeowners' misrepresentation does not affect the mortgagee's right to recover under it. NYSCEF 89).

In their reply, defendants deny that the previously assigned justice found in the October 17 decision that plaintiffs had standing to sue BANA, but only found that the complaint sufficiently alleged privity between BANA and the policy to survive a motion to dismiss, which constitutes an insufficient basis for law of the case here. (NYSCEF 94), and that the justice conclusively held in his February 2012 decision that the mortgagee clause did not confer upon plaintiffs the capacity to sue as third party beneficiaries. (*Id.*).

III. ANALYSIS

Where the parties had a "full and fair" opportunity to litigate the initial determination," the determination becomes the law of the case "in the course of a single litigation *before* final judgment." (*People v Evans*, 94 NY2d 499, 502 [2000]). Thus "once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation." (*Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385 [1st Dept 1983]).

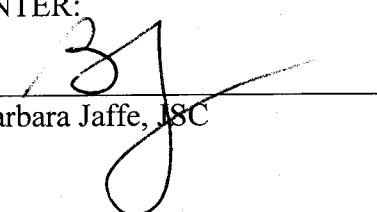
As the previously assigned justice held that plaintiffs do not have standing to sue as third-party beneficiaries of the mortgagee clause in the policy, the law of the case prohibits me from

finding otherwise.

Accordingly, it is hereby

ORDERED, that defendant Bank of America Corporation's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: August 30, 2013
New York, New York