

<b>Bergwijn v Big Queens Rehab Inc.</b>
2017 NY Slip Op 31227(U)
June 1, 2017
Supreme Court, Kings County
Docket Number: 505174/16
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of June, 2017.

P R E S E N T:

HON. GENINE D. EDWARDS,  
Justice.

-----X

ROBERTO BERGWIJN,  
  
Plaintiff,

- against-

Index No. 505174/16

BIG QUEENS REHAB INC., JOSEPH S. DEGAETANO  
and OLD REPUBLIC NATIONAL TITLE COMPANY,

Defendants.

-----X

The following papers numbered 1 to 12 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

<u>Papers Numbered</u>		
<u>1-3</u>	<u>4-5</u>	<u>8-10</u>
<u>5</u>	<u>6</u>	<u>11</u>
<u>6</u>	<u>7</u>	<u>12</u>

Upon the foregoing papers, defendant, Joseph S. DeGaetano (DeGaetano), moves for an order, pursuant to CPLR 3211 (a) (5), dismissing all claims and cross-claims as time-barred under CPLR 214 (6).

Plaintiff, Robert Bergwijn (Bergwijn), cross-moves for an order, pursuant to CPLR 3211 (a) (7), dismissing DeGaetano's counterclaim for an award of attorney's fees and the imposition of sanctions, pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (Part 130).

Defendant, Old Republic National Title Insurance Company s/h/a Old Republic National Title Company (Old Republic), cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint.

DeGaetano's motion to dismiss the complaint and Old Republic's cross-claims and Bergwijn's cross-motion to dismiss the counterclaim were erroneously filed as pre-answer motions, pursuant to CPLR 3211 (a), rather than for summary judgment under CPLR 3212. These procedural irregularities are excused, pursuant to CPLR 2001,<sup>1</sup> and the motion and cross-motion are converted to a motion and cross-motion for summary judgment, pursuant to CPLR 3211 (c).<sup>2</sup> The parties are hereby notified and are provided a reasonable opportunity to supplement the record by submitting evidence that could be considered on a summary judgment motion.

### ***Background***

Bergwijn commenced this action on April 5, 2016, regarding his January 9, 2012 purchase of the residential real property at 115 Miller Avenue in Brooklyn (Property) from defendant, Big Queens Rehab Inc. (Big Queens). In connection with the sale of the Property, DeGaetano was Bergwijn's attorney and Old Republic issued Owner's Policy Of Title Insurance No. OX-08524493 (Title Policy).

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<sup>1</sup> See *Wan Li Situ v MTA Bus Company*, 130 AD3d 807, 808 (2015).

<sup>2</sup> CPLR 3211 (c) provides, in relevant part, that "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment . . ."

The complaint alleges that Big Queens and DeGaetano “advised Plaintiff that he did not need an inspection of the house” and, in reliance on that advice, Bergwijn did not have the Property inspected (complaint at ¶¶ 14-15 and 18). Allegedly: (1) Bergwijn was not informed of Environmental Control Board (ECB) violations against the Property; (2) there was an illegal basement and a hidden bathroom at the Property; (3) the neighbor had an easement to use the common driveway at the Property; and (4) DeGaetano “encouraged” Bergwijn “to sign the closing documents without explaining what they meant” (*id.* at ¶¶ 19-22). The complaint further alleges that the ECB violations “had been converted into Judgments totaling \$66,000.00 [which] predate the Plaintiff’s purchase of the Property” and “the Title Policy from Defendant Old Republic . . . did not alert Plaintiff to any of the liens, judgments or violations . . .” (*id.* at ¶¶ 25 and 26).

The complaint asserts three causes of action against all of the defendants for: (1) breach of the contract of sale;<sup>3</sup> (2) misrepresentation; and (3) unjust enrichment.

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<sup>3</sup> Allegedly, defendants breached paragraph 10 of the contract of sale, which allegedly provides:

“Governmental Violations and Orders. (a) Seller shall comply with all notices of violations of law or municipal ordinances, order or requirements noted or issued as of the date of closing by any government department having authority as to lands, housing, buildings, fire, health, environmental and labor conditions affecting the Premises. The Premises shall be conveyed free of them at Closing. Seller shall furnish Purchaser with any authorizations necessary to make the searches that could disclose these matters, (b) (delete if inapplicable) All obligations affecting the Premises pursuant to the Administrative Code of the City of New York incurred prior to Closing and payable in money shall be discharged by Seller at or prior to Closing. IN THE EVENT SELLER FAILS TO REMOVE VIOLATIONS PRIOR TO CLOSING THEN SELLER AT SELLER[']S OPTION MAY GIVE PURCHASER A REASONABLE CREDIT DETERMINED BY SELLER, AND PURCHASER SHALL ACCEPT SUBJECT TO SAID VIOLATIONS.”

Old Republic answered the complaint, denying the material allegations therein and asserting several affirmative defenses, including the statute of limitations. Old Republic also asserted two cross-claims against Big Queens and DeGaetano for contribution and indemnification.

DeGaetano answered the complaint, denying the material allegations therein and asserting several affirmative defenses, including: (1) lack of personal jurisdiction; (2) the statute of limitations; (3) waiver; (4) estoppel; and (5) lack of standing. DeGaetano also asserted a counterclaim against Bergwijn seeking the imposition of sanctions and an award of attorney's fees and costs, pursuant to Part 130, because "[a]ll causes of action against Defendant attempt to circumvent the legal malpractice statute of limitations which had expired prior to the commencement of this action" (DeGaetano answer at ¶ 23).

Bergwijn answered DeGaetano's counterclaim, denying the allegations therein.

DeGaetano now moves for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint and Old Republic's cross-claims on the ground that they are time-barred. DeGaetano asserts that he was the real estate attorney who represented Bergwijn when he purchased the Property on January 9, 2012, and that the relationship "was purely one of legal representation and was governed by the retainer agreement executed by the parties on November 17, 2011."<sup>4</sup>

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<sup>4</sup> See ¶¶ 8-9 of the August 11, 2016 affirmation of John A. Weber IV, Esq., submitted in support of DeGaetano's dismissal motion (Weber Affirmation).

DeGaetano contends that all three causes of action in the complaint are “contractual in nature” and are thus governed by the three-year statute of limitations in CPLR 214 (6). DeGaetano argues that this action is time-barred since it was commenced about four years and three months after the January 9, 2012 closing. DeGaetano also contends that Old Republic’s cross-claims are subject to dismissal because “[a]sserting a claim through a third party is not an allowable method of circumventing a statute of limitations . . .”<sup>5</sup>

Bergwijn opposes DeGaetano’s dismissal motion and cross-moves for an order dismissing DeGaetano’s counterclaim for Part 130 sanctions. Bergwijn argues that his causes of action for breach of contract, misrepresentation and unjust enrichment are not “listed” in CPLR 214 (6) and denies that his claims “sound in malpractice.”<sup>6</sup> Bergwijn contends that his actual claim is that Big Queens and DeGaetano “acted in concert to encourage [him] to sign the Contract and purchase the subject Property despite knowing the Property was subject to numerous violations . . .”<sup>7</sup> Bergwijn asserts that his claims “go[] well beyond malpractice” and that they are for “intentional misrepresentation” and unjust enrichment, both of which have a six-year statute of limitations.<sup>8</sup> Bergwijn also asserts that

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<sup>5</sup> Weber Affirmation at ¶ 19.

<sup>6</sup> See ¶¶ 13-14 of the October 26, 2016 affirmation of Quenten E. Gilliam, Esq., submitted in opposition to DeGaetano’s dismissal motion and in support of Bergwijn’s cross motion (Gilliam Cross-Moving Affirmation).

<sup>7</sup> Gilliam Cross-Moving Affirmation at ¶ 15.

<sup>8</sup> *Id.* at ¶ 16.

dismissal of DeGaetano's counterclaim for Part 130 sanctions is warranted because the complaint states a timely cause of action.

DeGaetano, in reply, argues that "Plaintiff is alleging some type of civil conspiracy [and] that Defendant had something to gain from the transaction" although "[t]he only benefit that Defendant received . . . was a legal fee for the representation in the transaction."<sup>9</sup> DeGaetano argues that he cannot be held liable for breach of contract because "the retainer agreement . . . makes no promises, either express or implied, as to the results to be obtained or the exercise of care in performing [his] duties thereunder."<sup>10</sup>

Old Republic cross-moves for summary judgment dismissing the complaint on the ground that "Plaintiff's claims are governed and barred by the express terms and conditions of the [Title Policy]."<sup>11</sup> Old Republic asserts that Bergwijn's allegation regarding disclosure of an easement for the common driveway at the Property are barred because it was disclosed and excepted from coverage under Schedule B (item 2) of the Title Policy.<sup>12</sup> Regarding ECB violations on the Property, Old Republic argues that it cannot be held liable because the Title

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<sup>9</sup> See ¶¶ 6-7 of the November 15, 2016 reply affirmation of John A. Weber IV, Esq., submitted in further support of DeGaetano's dismissal motion and in opposition to Bergwijn's cross motion (Weber Reply Affirmation).

<sup>10</sup> Weber Reply Affirmation at ¶ 12.

<sup>11</sup> See ¶ 14 of the January 6, 2017 affirmation of Bruce N. Roberts, Esq., submitted in support of Old Republic's cross motion for summary judgment (Roberts Cross-Moving Affirmation).

<sup>12</sup> See Roberts Cross-Moving Affirmation, Exhibit D (Schedule B, item 2) and ¶ 9 of the January 6, 2017 affidavit of Donna M. Sullivan (Sullivan Affidavit).

Policy commitment included a municipal records search of ECB violations and the Title Policy, Schedule B (item 42), expressly states that “[a]ll municipal departmental searches are for information only. They are NOT insurable items, and this company assumes no liability for the accuracy of same.”<sup>13</sup> In addition, Old Republic argued that the ECB violations are either ineffective because they did not properly identify the Property owner or extinguished.

Bergwijn submits an attorney affirmation in opposition to Old Republic’s cross-motion for summary judgment. Bergwijn’s counsel concedes that the common driveway easement “was clearly excepted” under the Title Policy and states that “the wrongful conduct with respect to the easement falls on the Defendants Big Queens Rehab and Defendant DeGaetano, not Defendant Old Republic.”<sup>14</sup> Regarding the ECB violations, Bergwijn’s counsel contends that “Old Republic’s argument that it cannot be liable for any information regarding a municipal search is not supported by the evidence [because] Old Republic fails to point to any specific language or provision which supports this claim.”<sup>15</sup> Bergwijn’s counsel also challenges Old Republic’s contention that the ECB violations were either ineffective or extinguished because he claims that Bergwijn was unable to refinance his mortgage in 2015 based on the existence of those ECB violations.

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<sup>13</sup> See Roberts Cross-Moving Affirmation, Exhibit C (Schedule B, item 42) and Sullivan Affidavit at ¶ 21.

<sup>14</sup> See ¶ 8 of the February 9, 2017 affirmation of Quenten E. Gilliam, Esq., submitted in opposition to Old Republic’s cross motion for summary judgment (Gilliam Opposition Affirmation).

<sup>15</sup> Gilliam Opposition Affirmation at ¶ 18.



Even if Old Republic is not liable, Bergwijn's counsel asserts that "the Court should issue a declaratory judgment that all the liens . . . are hereby forever extinguished."<sup>16</sup>

Bergwijn's counsel also asserts that "the parties have not engaged in discovery yet."<sup>17</sup>

Old Republic, in reply, contends that Bergwijn's opposition based solely on an attorney affirmation is insufficient to defeat summary judgment. Old Republic also asserts that Bergwijn's request for a declaratory judgment should be disregarded because such relief was not requested in the complaint or by motion.

### *Discussion*

#### *Old Republic's Cross-Motion For Summary Judgment*

##### *(1)*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, therefore, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party, as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be

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<sup>16</sup> *Id.* at ¶ 25.

<sup>17</sup> *Id.* at ¶ 26.

granted where the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citing *Zuckerman*, 49 NY2d at 562]).

“The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [1989]; see also *Zuckerman*, 49 NY2d at 562).

In determining whether to grant summary judgment, the court must evaluate whether the issues of fact raised by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins.*

Co., 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

(2)

Old Republic is entitled to summary judgment dismissing the claims asserted against it. Old Republic satisfied its burden of demonstrating, through competent evidence, that Bergwijn’s claims regarding the common driveway easement and searches regarding the ECB violations were specifically excluded under the plain terms of the Title Policy. Bergwijn failed to oppose Old Republic’s cross-motion for summary judgment with competent evidence demonstrating factual issues requiring a trial. Bergwijn’s submission of an attorney affirmation alone to oppose Old Republic’s cross-motion for summary judgment was entirely insufficient (*see Zuckerman*, 49 NY2d at 563 *Garnham & Han Real Estate Brokers*, 148 AD2d at 494-495). In addition, Bergwijn’s counsel’s bald assertion that there has been no discovery is insufficient to defeat summary judgment. Finally, Bergwijn’s request for a declaratory judgment that all liens against the property are extinguished is

improper, since no such request for relief was included in the complaint.<sup>18</sup> Accordingly, it is

**ORDERED** that the branch of DeGaetano's motion for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint as time-barred is converted to a motion for summary judgment, pursuant to CPLR 3211 (c); and it is further

**ORDERED** that Bergwijn's cross-motion for an order, pursuant to CPLR 3211 (a) (7), dismissing DeGaetano's counterclaim for Part 130 sanctions is converted to a cross-motion for summary judgment, pursuant to CPLR 3211 (c); and it is further

**ORDERED** that: (a) Bergwijn shall serve and file papers in opposition to DeGaetano's motion for summary judgment within 45 days of service of a copy of this interim decision and order with notice of entry; (b) DeGaetano shall serve and file papers in opposition to Bergwijn's cross-motion for summary judgment within 45 days of service of a copy of this interim decision and order with notice of entry; (c) DeGaetano shall serve and file reply papers in further support of his motion for summary judgment within 45 days of receipt of opposition papers; and (d) Bergwijn shall serve and file reply papers in further support of his cross-motion for summary judgment within 45 days of receipt of opposition papers. The Court will subsequently set and notify the parties of the new return date of DeGaetano's motion and Bergwijn's cross-motion for summary judgment; and it is further

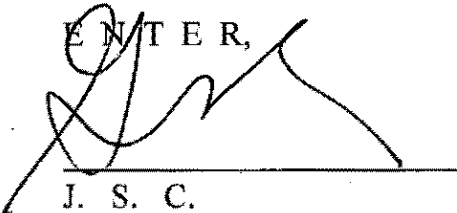
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<sup>18</sup> Granting Old Republic's cross-motion for summary judgment dismissing the complaint moots Old Republic's cross-claims for contribution and indemnification. Consequently, that branch of DeGaetano's motion seeking to dismiss Old Republic's cross-claims is rendered moot.

**ORDERED** that Old Republic's cross-motion for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it is granted; and it is further

**ORDERED** that the branch of DeGaetano's motion for an order, pursuant to CPLR 3211 (a) (5), dismissing Old Republic's cross-claims is denied as moot.

This constitutes the decision, order and judgment of the court.

ENTER,  
  
\_\_\_\_\_  
J. S. C.

**HON. GENINE D. EDWARDS**

Nancy T. Sunshine

**NANCY T. SUNSHINE**  
Clerk

KINGS COUNTY CLERK  
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