

| |
|--|
| Fidelity Natl. Title Ins. Co. v Heights Abstract LTD |
| 2017 NY Slip Op 33171(U) |
| November 29, 2017 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 60503/2017 |
| Judge: Terry Jane Ruderman |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
FIDELITY NATIONAL TITLE INSURANCE
COMPANY,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 1
Index No. 60503/2017

HEIGHTS ABSTRACT LTD., RICHARD SENEY,
RICHARD SENEY GENERAL CONTRACTING,
INC., and RICHARD SENEY REAL ESTATE, LLC,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion for an order dismissing the complaint pursuant to CPLR 3211(a)(7):

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion, Affirmation, Exhibits A - F, Affidavit, Exhibits A - E, and Memorandum of Law | 1 |
| Affirmation in Opposition, Exhibits 1 - 3, Affidavit, Exhibits A - E, and Memorandum of Law | 2 |

In this action brought by Fidelity National Title Insurance Company ("Fidelity"), to recoup amounts paid on a title insurance policy claim, defendants Richard Seney, Richard Seney General Contracting, Inc., and Richard Seney Real Estate, LLC (the "Seney defendants") move to dismiss the action as barred by the statute of limitations and, as to the claim for legal fees, pursuant to the doctrine of collateral estoppel. Fidelity opposes. Defendant Heights Abstract,

Ltd., has not taken a position on this motion

According to Fidelity's complaint: on or about November 30, 2001, Richard Seney General Contracting, Inc. ("Seney Contracting") obtained title to the property known as 173 Aqueduct Place, a/k/a 162-164 Fulton Street, in Greenburgh, New York.

On or about July 27, 2007, Seney Contracting obtained a \$100,000 loan from Hudson Valley Bank, which Fidelity alleges was secured by a mortgage against the property; Seney asserts that the loan was pursuant to a line of credit and was not secured by a mortgage.

On or about July 15, 2008, Seney Contracting purportedly transferred the property to the newly-formed Richard Seney Real Estate LLC ("Seney Real Estate"); however, the deed incorrectly identified the transferor as Richard Seney Contracting *LLC*, rather than the correct transferor, Richard Seney Contracting *Inc.* On the same date, Seney Real Estate obtained a \$680,000 loan from Connecticut Community Bank, N.A. ("CCB") secured by a mortgage on the property. In connection with this transaction, Fidelity's authorized agent, defendant Heights Abstract Ltd., issued to CCB a Loan Policy of Title Insurance.

Seney Contracting defaulted on the Hudson Valley Bank loan, and on or about February 25, 2011, Hudson Valley Bank obtained a default judgment against Seney and Seney Contracting in the amount of \$122,090.87.

Seney Real Estate defaulted on the CCB loan. In the course of preparing to commence a foreclosure action, CCB discovered that the deed to Seney Real Estate was not executed by Seney Real Estate, and that the only signature was by Richard Seney for Richard Seney Contracting *LLC* as transferor. CCB made a claim under its title insurance policy with Fidelity.

CCB commenced the foreclosure action against Seney Real Estate, and Hudson Valley Bank filed an answer with a counterclaim asserting priority over the CCB mortgage and to

declare the CCB mortgage void on account of a fraudulent transfer.

Hudson Valley Bank also sued Seney, Seney Contracting and Seney Real Estate on the ground that the July 15, 2008 deed to Seney Real Estate was a fraudulent conveyance.

Under the terms of its title insurance policy, Fidelity settled CCB's title claim and resolved Hudson Valley Bank's counterclaim in the CCB foreclosure by payment of \$25,000.

Fidelity claims that it expended \$87,135.79 in attorney's fees and costs due to the Seney defendants' fraudulent conduct and their breach of the provision in the CCB mortgage documents promising to protect and preserve the priority of the CCB mortgage; as against defendant Heights Abstract Ltd. it claims negligence and violation of its obligations under the Agency Agreement with Fidelity, by failing to adequately scrutinize the deed to Seney Real Estate to verify that it correctly identified the participants and was a bona fide transaction, supported by adequate consideration. The complaint's causes of action against the Seney defendants are unjust enrichment and indemnification; against Heights Abstract, it claims breach of contract and indemnification.

This motion, brought by the Seney defendants, argues that the causes of action against them for unjust enrichment and indemnification are barred by the statute of limitations, and, to the extent Fidelity claims entitlement to an award for legal fees, they seek dismissal under the doctrine of collateral estoppel.

Analysis

Defendants contend that Fidelity is in effect suing for fraudulent conveyance, which claim is untimely because the complained-of conveyance occurred nine years after the property transfer, and two years after Fidelity should have discovered the fraud. However, Fidelity's pleaded claims are for common law indemnification and unjust enrichment.

“A cause of action for indemnification accrues when the injured party . . . has been paid (*Loscalzo v Lupinacci*, 275 AD2d 349, 350 [2d Dept 2000], citing *McDermott v City of New York*, 50 NY2d 211, 219 [1980]). The basis for Fidelity’s indemnification claim against the Seney defendants is the loss payment it made in 2015. Therefore, this cause of action, in a complaint filed on July 14, 2017, is not barred by the statute of limitations.

The statute of limitations on an unjust enrichment cause of action may be six years or three years, depending on whether the plaintiff is seeking monetary, as opposed to equitable, relief (*see Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]). Fidelity argues that the Seney defendants were not unjustly enriched until November 2015, when Fidelity paid Hudson Valley Bank in order to provide CCB with the first priority mortgage security interest in the property, as Seney Real Estate agreed to provide when it granted CCB a mortgage interest in the property. Therefore, this cause of action, too, is timely.

The argument that the doctrine of collateral estoppel bars Fidelity from seeking to recover for legal fees it incurred must also be rejected. “The doctrine of collateral estoppel, a narrower species of *res judicata*, 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 or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The fact that CCB, Fidelity’s insured, recovered attorney’s fees incurred in the context of the foreclosure action, does not preclude another party from seeking to recoup attorney’s fees for different work not covered by the foreclosure action award of fees; Fidelity’s privity with CCB is irrelevant here.

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss the complaint is denied in its entirety; and

it is further

ORDERED that all parties are directed to appear in the Preliminary Conference Part on Monday, January 22, 2018 at 9:30 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 29, 2017


HON. TERRY JANE RUDERMAN, J.S.C.