SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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CHICAGO INSURANCE TITLE COMPANY,

Plaintiff, Decision and order

- against - Index No. 507480/18

BROOKWOOD TITLE AGENCY LLC, & MENDEL ZILBERBERG, mot # 1

Defendants, August 24, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint pursuant to CPLR §3211. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff, a title insurance company brought an action against the defendant Brookwood Title Agency LLC, a policy issuing agent and defendant Mendel Zilberberg based upon an alleged personal guaranty. The facts which support these allegations are as follows: In 2003 an individual, Esther Tischler owned property located at 4316 17th Avenue in Kings County. On January 3, 2004, Esther's sister Jeanette Tischler, the guardian ad litem for Esther deeded the property to their brother Harold Tischler. Harold obtained a loan for $650,000 and granted the lender, Approved Funding Corp., [hereinafter 'Approved'] a mortgage in the property. Title insurance was

obtained from Brookwood underwritten by the plaintiff herein insuring the mortgage. On November 22, 2011 the Supreme Court of Kings County issued an order cancelling the mortgage and voiding the conveyance of the property and restoring the property to Esther. Upon the cancellation of the mortgage the plaintiff satisfied its obligations to Approved and tendered the policy limits to Approved.

The plaintiff instituted this lawsuit alleging three causes of action. First that Brookwood breached its duty, as agent of the plaintiff, by failing to discover that Jeanette had no authority to transfer the deed of the property to Harold. Second, the complaint alleges an action against Zilberberg for breach of a personal guaranty and lastly against both defendants seeking indemnification.

The defendants have now moved seeking to dismiss the complaint. First, the defendants argue the agency relationship between the parties terminated in 2010 thus these allegations are time barred. Moreover, the defendants assert that in any event the breach of contract, even if valid is barred by the statute of limitations since the alleged breach occurred in 2006. Zilberberg seeks to dismiss the guaranty claim on the

grounds no such guarantee exists. Lastly, the defendants seek to dismiss the indemnification claims.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the plaintiff can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

Pursuant to CPLR §231(2) the statute of limitations for a breach of contract claim is six years. Moreover, the statute of limitations begins to run when a cause of action accrues (CPLR §203(a) which means "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (see, Aetna Life & Casualty Company v. Nelson, 67 NY2d 169, 501 NYS2d 313 [1986]). It is well settled that a breach of contract cause of action commences when the breach occurs even if the party is unaware of the breach (Ely-Cruikshank Co., v. Bank of Montreal, 81 NY2d 399, 599 NYS2d 501 [1993]). While this rule has been described as

"harsh in result" (Pittson Co., v. Sedgwick James of New York Inc., 971 F.Supp 915 [District of New Jersey 1997]), nevertheless, New York does not subscribe to the discovery rule of other states (id). Indeed, the dissent in Ely-Cruickshank argued this very position, namely that the statute of limitations should be extended in cases where the breach and the harm do not occur at the same time. Further, older cases that seemed to espouse such a position cited by the dissent (see, Ryan Ready Mixed Concrete Corp., v. Coons, 25 AD2d 530, 267 NYS2d 627 [2d Dept., 1966]) cannot control this litigation. The argument that Ely-Cruickshank (supra) only controls where the ability to commence the lawsuit was known but not where, as here, the knowledge did not even exist is "a distinction without a difference, in light of the clear holdings of the Court of Appeals" (T & N PLC v. Fred S. James & Co., of New York Inc., 29 F3d 57 [2d Cir. 1994]). The Appellate Division likewise has instructed courts not to follow Ryan Ready (see, St. George Hotel Associates v. Shurkin, 12 AD3d 359, 786 NYS2d 56 [2d Dept., 2004]). Thus, the breach of contract claim is no longer viable and consequently the motion seeking to dismiss the first cause of action is granted.

Concerning the motion seeking to dismiss the guaranty cause of action, the defendant Zilberberg asserts the language of the

guaranty never contemplated indemnification for the specific harm alleged here. The defendant notes the guaranty serves to "guarantee the full and faithful performance of the obligations of Agent under the…contract" and that the defendant "hereby agree to fully indemnify…from any and all loss resulting from delinquent remittances and any escrow shortage in the escrow accounts of Agent" (see, Personal Guaranty). Thus, defendant argues by its very terms the guaranty only indemnifies for delinquent remittances or escrow shortages, both not relevant in this case, and that indemnification is unavailable for the claim sought here. However, at this stage of the litigation, before any discovery, the guaranty could be read to include indemnification as a guaranty for the full and faithful performance of the obligations and in addition indemnification for two other issues, namely delinquent remittances and escrow shortages. While it is true that the first clause does not contain the language of indemnification, such language may be implied by the express guaranty itself. Indeed, how else to interpret a guaranty regarding performance if indemnification does not follow. Thus, there are factual issues concerning the scope of the indemnification clause and consequently the motion seeking to dismiss the second cause of action is denied.

Likewise, the motion seeking to dismiss the third cause of action is denied as well. The indemnification cause of action, in contrast to the breach of contract cause of action, only accrues when the loss is incurred (McDermott v. City of New York, 50 NY2d 211, 428 NYS2d 623 [1980]). Therefore, by definition the indemnification is distinct from any other claims including the breach of contract claim. Consequently, at this stage of the litigation the indemnification claim is valid and thus, the motion seeking to dismiss that claim is denied as well.

So ordered.

ENTER:

DATED: August 24, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC