SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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SCOTT SESKIN and JEANETTE SESKIN, Index No.: 160058/2017

Plaintiffs,

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant,

----------x

David B. Cohen, J.

This is an action to obtain declaratory relief with respect to the rights and obligations of the parties under a title insurance policy. Defendant First American Title Insurance Company (First American) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

BACKGROUND

On or about May 30, 2017, plaintiffs Scott and Jeanette Seskin (plaintiffs) purchased a home, located at Two Beach Plum Walk, Fire Island, New York (the Premises). When plaintiffs purchased the Premises, they also purchased a title insurance policy from First American, bearing policy number 50068360007981 (the Policy).

As alleged in the amended complaint, the Premises is a residential home built, like much of Fire Island, on wooden pylons. The Premises is accessed via a wooden walkway (the Walkway) connected to an elevated boardwalk known as Hillaire Walk. As the Premises is approximately 10 feet above-ground, it is not otherwise accessible, except via the Walkway.

The original walkway to the Premises was a stairway connected to the elevated boardwalk known as Beach Plum Walk (the Stairway). In or about September 2017, plaintiffs learned that the Stairway had been knocked down in a storm in 2012 and, rather than repair the

Stairway, the prior owner elected to build the Walkway. In addition, plaintiffs were informed by their neighbor that the Walkway encroached on his property, and plaintiffs were directed to remove the Walkway. Plaintiffs hired a surveyor, who confirmed that the Walkway was built over approximately four feet of the neighboring plot.

Plaintiffs allege that without the Walkway they have no access to the Premises because the public road abutting the Premises – Beach Plum Walk – is elevated ten-feet above ground level. Also, the portion of their property that abuts Beach Plum Walk is presently blocked by wooden beams and a handrail that were installed by the municipality, making access to the Premises impossible.

On October 11, 2017, plaintiffs filed a claim with First American, seeking coverage for the removal of the Walkway and for building a new stairway to the Premises on Beach Plum Walk. On November 10, 2017, First American denied coverage for the claim. This action followed, seeking a determination of coverage pursuant to Covered Risks 11, 12, 15 and 18 of the Policy, discussed below.

The Policy

First American issued the Policy to plaintiffs on May 30, 2017, which covers the Premises. The Policy contains the following relevant provisions, in pertinent part:

> "This Policy insures You against actual loss . . . resulting from the Covered Risks set forth below, if the Land is an improved residential lot on which there is located a one-to-four family residence . . ."

(notice of motion, exhibit E, at 58, the Policy). The Covered Risks are defined, in pertinent part, as follows:

> "11. You do not have both actual vehicular and pedestrian access to and from the Land . . . based upon a legal right.

> "12. You are forced to correct or remove a violation existing at Policy Date of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B, provided that such violation of the covenant, condition or restriction is not excepted in Schedule B.
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> * * *
>
> "15. The cost of the forced removal of Your structures, or any part of them . . . because any portion was built without obtaining a building permit from the proper government office.
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> * * *
>
> "18. You are forced to remove Your structures, or any part of them . . . because they encroach onto Your neighbor's land."

(*id.* at 58-59).

"Land" is defined as "the land . . . and any improvements on the land which are real property" (*id.* at 61).

The Policy also contains "Schedule B – Owner's Policy Exemptions From Coverage" (Schedule B), which states that "[t]his policy does not insure against loss or damage . . . which arise by reason of . . . [s]urvey exceptions set forth herein" (*id.*, Schedule B, the Policy).

Further, the Policy contains a "Survey Reading," dated July 5, 2016, which states, in pertinent part:

> "Survey made by James B. Behrendt dated July 5, 2016 shows . . .
>
> "10 foot wide Right of Way/Burma Walk abuts northerly property line.
>
> "Access walk traverses Northerly property line and extends onto Hillaire Walk.
>
> "Variations between fences, walks and record lines of title"

(*id.*, Survey Reading, the Policy).

Plaintiff's Notice of Claim Letter

On October 11, 2017, via letter, plaintiffs notified First American of the above-mentioned issues regarding the Walkway and access to the Premises (the Notice). Plaintiffs stated that the Premises is "legally inaccessible until a walkway is constructed on our property to it from Beach Plum Walk" (notice of motion, exhibit G, the Notice). Plaintiffs then sought coverage under the Policy for damages resulting from (1) the removal of the Walkway, (2) the construction of a new walkway, and (3) the loss of use of the Premises.

First American's Denial Letter

By letter dated November 9, 2017 (the Denial Letter), First American acknowledged receipt of the Notice, and responded as follows:

> "[First American] has determined that your claim is denied because it does not fall within a Covered Risk insured by the Policy and the Policy contains express exceptions concerning this matter.
>
> * * *
>
> "While Covered Risk 11 provides coverage if 'You do not have actual . . . pedestrian access to and from the Land . . . based upon a legal right' . . . [b]ecause the Property abuts Beach Plum Walk, you have a legal right of access. The Policy's access coverage merely insures the Insured can access the Property to and from the public way. Here you merely need to cross from Beach Plum Walk to the beginning of the Property.
>
> "Finally, as to any claim for reimbursement for costs associated with removal of the [Walkway] reference is made to Schedule B . . . Survey exceptions . . . . Thus, to the extent that the [Walkway] encroaches onto the neighbor's property, this matter was expressly excepted from coverage based upon the above Policy exceptions"

(notice of motion, exhibit H at 2-3, the Denial Letter).

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded upon documentary evidence. A motion to dismiss a complaint pursuant to 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim's Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action. "In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]; citing *Leon*, 84 NY2d at 87-88). In addition, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the

criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

First American's Motion to Dismiss the Complaint

First American moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint because the complaint fails to state a claim against it, based on documentary evidence. Specifically, it argues that the title claims plaintiffs make are not covered by the Policy or are expressly exempted from coverage.

1. *Access to the Land based upon a legal right (Covered Risk 11)*

Initially, First American argues that plaintiffs do not have a right to recover under Covered Risk 11 of the Policy because plaintiffs have legal access to the land, even though they are unable to access the Premises itself. Specifically, First American argues that plaintiffs are not legally barred from the land because they can access it from Beach Plum Walk. It also argues that plaintiffs are not legally barred from entering the Premises because they can legally build a new stairway to it.

In opposition, plaintiffs argue that they do not have legal access to the land or the Premises. In support of this position, plaintiffs submit the affidavit of James B. Behrendt, the land surveyor who made the survey report referenced in the Policy. Behrendt states that access to the land from public walkways is limited to a four-foot wide section of land adjacent to Beach Plum Walk, an elevated boardwalk. However, pursuant to the Property Maintenance Code of New York, that four-foot wide section of boardwalk "is now protected by a handrail installed by the Town of Brookhaven, due to the steep drop from the boardwalk to the property below, which is approximately greater than 10 feet" (Behrendt affidavit, at 3). According to Behrendt, the

handrail cannot be removed unilaterally, which effectively prevents legal access to the land and the Premises.

First American does not address Behrendt's affidavit with respect to this issue. Rather, it merely reiterates that plaintiffs' claim that they lack legal access to the Premises itself is outside the scope of Covered Risk 11 because Covered Risk 11 only governs legal access to the land itself, and not to a house built thereon.

This argument is unpersuasive. Covered Risk 11 provides coverage under the Policy where "[y]ou do not have both actual vehicular and pedestrian access to and from the Land . . . based upon a legal right" (notice of motion, exhibit E at 58, the Policy). However, the term "Land" in the Policy is a defined term and includes not only the metes and bounds of the land, but also "any improvements on the land which are real property" (*id.* at 61).

As the Premises is a real property improvement located on the land, and it is alleged that plaintiffs do not have legal access thereto, plaintiffs have sufficiently pleaded a cognizable claim for recovery pursuant to Covered Risk 11.

Thus, First American is not entitled to dismissal of that part of the amended complaint that alleges a defect in title covered by Covered Risk 11.

2. *Removal of a violation of a covenant, condition or restriction affecting the Land (Covered Risk 12)*

First American argues that plaintiffs are not entitled to coverage for the costs related to the removal of the encroaching Walkway pursuant to Covered Risk 12 of the Policy. Covered Risk 12 only provides coverage where an insured "is forced to correct or remove a violation . . . of any covenant, condition or restriction affecting the Land" (notice of motion, exhibit E at 58, the Policy). Specifically, First American argues that plaintiffs have not alleged the existence of a

covenant, condition or restriction, or that any such covenant, condition or restriction was violated.

In opposition, plaintiffs do not address this issue. A review of the amended complaint confirms that there is no alleged violation of a covenant, condition or restriction with respect to the land or the Premises.

Thus, First American is entitled to dismissal of that part of the amended complaint that seeks coverage pursuant to Covered Risk 12 of the Policy.

3. *Removal of the Walkway (Covered Risks 15 and 18)*

First American argues that plaintiffs are not entitled to coverage for the costs related to the removal of the Walkway pursuant to Covered Risk 15 and 18 of the Policy because Schedule B explicitly exempts from coverage "survey exceptions set forth herein" (*id.*, the Policy, Schedule B). Specifically, it argues, the Survey Reading was incorporated into the Policy, and the Survey Reading states that the Walkway "traverses northerly property line and extend[s] onto Hillaire Walk" (notice of motion, exhibit E, the Policy, the Survey Reading).

In opposition to this branch of First American's motion, plaintiffs argue that they are not in possession of Schedule B, and that it was not part of the Policy, as issued. Plaintiffs also argue that First American has not established that Schedule B specifically contemplated the Survey Reading and that, even if it did, there is no evidence that the Survey Reading constitutes a "survey exception set forth herein" as described in Schedule B (*id.* the Policy, Schedule B).

In reply, First American submits the affidavit of Vincent Morano, a vice president of The Judicial Title Insurance Agency, LLC, the agent authorized to issue First American's title insurance policies. Morano submits a copy of the Policy that includes Schedule B and states that "[t]he Schedule B Exceptions From [Coverage] includes the page that contains the heading

'Survey Reading'" (Moreno affidavit, ¶ 4). However, Morano is silent as to whether the Survey Reading constitutes a survey exception.

Here, plaintiffs raise issues as to whether Schedule B and the Survey Reading were included in the Policy and, if they were, whether the Survey Reading constitutes a survey exception as discussed in Schedule B. Accordingly, First American is not entitled to dismissal of that part of the complaint that seeks coverage under Covered Risks 15 and 18 of the Policy (*see Lawrence v Miller,* 11 NY3d 588, 596–97 [2008] ["Because questions which cannot be resolved on a motion to dismiss are present and because a full record has not been developed, dismissal of the [complaint] is not warranted at this time"]).

Finally, it is noted that, in his opposition papers, plaintiff seeks affirmative relief declaring coverage in his favor. However, plaintiff has not moved for any relief and the court need not address the issues raised on this point.

The court has considered the parties' remaining arguments and finds them to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant First American Title Insurance Company (First American) to dismiss the plaintiffs' complaint seeking a declaratory judgment that First American is obligated to provide coverage to plaintiffs for the demolition and reconstruction of a walkway at the premises known as 2 Beach Plum Walk, Fire Island, New York (the Premises) is granted with respect to Covered Risk 12, and a declaratory judgment shall be rendered in First American's favor as to Covered Risk 12, and the motion is otherwise denied; and it is further

ADJUDGED and **DECLARED** that First American is not obligated to provide coverage to plaintiffs pursuant to Covered Risk 12 with respect to the Premises; and it is further

ORDERED that First American is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, New York, New York on NOVEMBER 7, 2018, at 9:30 AM/~~PM~~.

Dated: 9-17-2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.