

DeMaio v World Sav. Bank

2018 NY Slip Op 32817(U)

October 24, 2018

Supreme Court, Suffolk County

Docket Number: 31159/2012

Judge: Jr., Paul J. Baisley

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Short Form Order

SUPREME COURT - STATE OF NEW YORK I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
JAMES P. DeMAIO,

Plaintiff,

-against-

WORLD SAVINGS BANK, WELLS FARGO
HOME MORTGAGE and STEPHEN ZANGRE,

Defendants.

-----X
JAMES P. DeMAIO,

Third-Party Plaintiff,

-against-

FIDELITY NATIONAL TITLE COMPANY,

Third-Party Defendant.

-----X

INDEX NO.: 31159/2012

MOTION DATE: 12/7/17

MOTION SEQ. NO.: 004 MG

005 MOT D

006 MG

007 MD

**PLAINTIFF/THIRD-PARTY
PLAINTIFF'S ATTORNEY:**

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Smithtown, New York 11787

DEFENDANT'S ATTORNEY:

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Attorneys for Wells Fargo
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**THIRD-PARTY DEFENDANT'S
ATTORNEYS:**

Taroff & Taitz, LLP
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One Corporate Drive, Suite 102
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Upon all of the papers submitted regarding motion sequence no. 004 for a protective order, cross-motion sequence no. 005 to, *inter alia*, compel, motion sequence no. 006 to dismiss and cross-motion sequence no. 007 for sanctions¹, it is,

ORDERED that the following motions and cross-motions are consolidated for purposes of this determination and, as so consolidated, are decided as set forth hereinafter; and it is further

ORDERED that the motion (motion sequence no. 004) of non-party Fidelity National Title Insurance Company ("Fidelity") for an order pursuant to CPLR §3103 granting Fidelity a protective order and directing plaintiff to pay the costs of Fidelity for the search and production

¹The Court declines to consider the purported "sur-reply" affidavit of Shae Smith dated April 26, 2018 served on behalf of defendant Wells Fargo on May 4, 2018, months after the submission date of the motions and cross motions. The court did not authorize the submission of a sur-reply, which was grossly untimely in any event.

of electronically stored information in accordance with CPLR R. 3122(d) is granted as set forth hereinafter; and it is further

ORDERED that the cross-motion (motion sequence no. 005) of plaintiff James P. DeMaio for an order denying, in its entirety, the motion of Fidelity National Title Company (“Fidelity”) for a protective order pursuant to CPLR §3103 and to compel plaintiff to pay the costs of Fidelity National Title Company for the search and production of “electronically stored information” in accordance with CPLR R. 3122(d), and pursuant to CPLR Rules 3120, 3122, 3122-a and 3124 and §3126, directing main action defendant Wells Fargo Bank, NA (s/h/a Wells Fargo Home Mortgage) (“Wells Fargo”) (1) to fully comply with plaintiff’s Notice for Discovery and Inspection dated September 7, 2016; (2) to furnish to plaintiff’s attorney each and every item of disclosure set forth and demanded in items 1, 2, 3, 4 and 5 of Schedule “A” of that Notice; (3) to require and direct Fidelity National Law Group (“FNLG”) to permit plaintiff’s attorney to personally inspect and to copy the complete and entire “agent’s file” delivered by Fidelity employee Gamble A. Herman to the New York office of Fidelity National Law Group on or about August 5, 2013, as evidenced in the copy of the “Memo” (addressed to Edward Tobin, Esq.) which was contained in Wells Fargo’s disclosure response in the compact disc served upon plaintiff on or about October 6, 2016, as Bates stamped page DEM000001; (4) striking the answer, defenses and counterclaims of the defendant Wells Fargo in the event of its failure and refusal to fully comply with any of the foregoing directions; (5) pursuant to CPLR Rules 3120, 3122, 3122-a and 3124, ordering and directing third-party defendant Fidelity National Title Company to fully comply with, and furnish to plaintiff’s attorney, each and every item of disclosure set forth and demanded in items 1 and 2 of plaintiff’s duly served Subpoena Duces Tecum (“Subpoena”) dated February 24, 2017, by granting plaintiff’s attorney physical access to Fidelity’s offices at its business premises located at 25 Commerce Drive, Riverhead, NY, 11901, and to permit said attorney to personally inspect and make copies of the entire contents of the “Central Title File” for Fidelity Title # 06-7404-66260-SUFF, either by hard copy file of and for said Title number, or, the entire contents of such Central Title file stored and maintained by Fidelity on its office computer in said premises in an “electronic repository” pursuant to CPLR R. 3120(1)(i) and (ii); (6) pursuant to CPLR §3103 and CPLR Rules 3122 and 3124, ordering and directing third-party defendant Fidelity National Title Company to furnish the following to plaintiff/third-party plaintiff’s attorney, on or before the date fixed by the court: All correspondence, letters, communications, e-mails and any settlement agreements, by and between defendant Wells Fargo and Fidelity National Title Insurance Company in regard to any claim for payment and indemnity made by Wells Fargo under the Fidelity mortgage title insurance policy (Fidelity Title #06-7404-66260-SUFF) for the Zangre mortgage transaction, together with proofs of any payment(s) made by Fidelity in settlement of such claim; (7) disqualifying Fidelity National Law Group from hereafter representing defendant Wells Fargo Bank, N.A. in this action based upon that law firm’s conflict of interest in having appeared for and representing Fidelity in this action in regard to plaintiff’s subpoena dated February 24, 2017, while, at the same time, representing defendant Wells Fargo in this action and, by virtue of the facts that Wells Fargo has

made or submitted a claim for payment or indemnity to Fidelity to enforce its Fidelity mortgage title insurance policy in regard to the claims made and the relief being sought against Wells Fargo in this action, and that Fidelity National Law Group has acted in and for the conflicting interests of third-party defendant Fidelity National Title Company in its representation of Wells Fargo in this main action; (8) pursuant to CPLR §3103 and CPLR Rule 3124, ordering and directing third-party defendant Fidelity National Title Company to furnish to plaintiff/third-party plaintiff's attorney all correspondence, letters, communications, e-mails and any rejection notifications or settlement agreements by and between defendant Stephen Zangre and Fidelity National Title Insurance Company in regard to any claim for payment and indemnity made by Stephen Zangre under the Fidelity fee title insurance policy (Fidelity Title #06-7404-66260-SUFF) for the October 11, 2006, Zangre purchase transaction, together with proofs of any payment(s) made by Fidelity in settlement of such claim, on or before the date faxed by the court; and (9) for such other and further relief as the court deems just, proper and equitable, is determined as set forth hereinafter; and it is further

ORDERED that the motion (motion sequence no. 006) of third-party defendant Fidelity National Title Insurance Company for an order pursuant to CPLR R. §3211 and CPLR §213(8) dismissing the third-party complaint with costs is granted; and it is further

ORDERED that the cross-motion (motion sequence no. 007) of defendant Wells Fargo Bank, M.A., formerly known as World Savings Bank, FSB, for an order sanctioning counsel for plaintiff for filing a meritless and frivolous motion to delay the litigation and harass is denied.

Plaintiff James P. DeMaio commenced this action to vacate a purchase money mortgage granted to defendant World Savings Bank, FSB ("World Savings Bank") by defendant Stephen Zangre ("Zangre") encumbering certain real property in Ronkonkoma, New York, title to which is now held by plaintiff as a result of an underlying action commenced in this court (the "underlying action").² Defendant Wells Fargo Bank, N.A. ("Wells Fargo"), successor in interest to World Savings Bank, has asserted counterclaims for equitable subrogation and for an equitable lien predicated on prior mortgages encumbering the property that were allegedly paid from the proceeds of the World Saving Bank mortgage loan to Zangre at the time he purported to purchase the property from Robert and Anna Capozello (the "Capozellos"), nonparties herein, who had previously acquired title to the property from plaintiff pursuant to a deed which was subsequently determined by the court in the underlying action to be a mortgage.

At the time of the transfer to Zangre, the property was encumbered by a mortgage in the principal amount of \$187,000.00 given by the Capozellos to Delta Funding Corporation, a portion of the proceeds of which had been used to satisfy a \$105,000.00 mortgage given by

² *James P. DeMaio v. Robert Capozello, Anna Capozello, Stephen Zangre, Anthony Oliveri and Joseph Pappalardo*, Index No. 28320/2005.

plaintiff to Green Point Savings Bank and a \$35,000.00 mortgage given by plaintiff to Delta Funding Corporation.

On February 27, 2017, plaintiff's attorney served a judicial subpoena duces tecum dated February 24, 2017 on non-party Fidelity National Title Insurance Company ("Fidelity"), which had issued title insurance policies to both World Savings Bank and Zangre in connection with Zangre's purchase of the subject property from the Capozellos in 2006. The submissions reflect that Fidelity complied with plaintiff's subpoena to the extent of producing all of the hard-copy records requested therein, but demanded that plaintiff defray in advance its costs for the search and production of electronically stored information ("ESI") requested by Fidelity. Plaintiff's attorney refused to pay Fidelity's invoice in the amount of \$1,000.00 and Fidelity thereafter interposed its instant motion for a protective order pursuant to CPLR §3103 and for an order directing plaintiff to pay Fidelity the costs for the search and production of ESI in accordance with CPLR R. 3122(d).

Plaintiff responded to Fidelity's motion by serving Fidelity with a third-party summons and complaint asserting causes of action for fraud and falsification of records in connection with the closing of title on the Capozello-to-Zangre sale of the property. Plaintiff also then cross-moved for, *inter alia*, an order denying Fidelity's motion for a protective order on the ground that Fidelity is now a party and thus not entitled to avail itself of the benefits of CPLR R. 3122(d), and for an order compelling Fidelity, as a party, to provide plaintiff with the documents previously demanded in the previously served non-party subpoena.

Fidelity thereupon moved to dismiss the third-party complaint, alleging that plaintiff's interposition of the third-party complaint against it is a misuse of third-party practice and was done solely to avoid having to defray the expenses of Fidelity as a non-party in responding to plaintiff's subpoena duces tecum. Fidelity further alleges that plaintiff/third-party plaintiff's claims are time-barred and fail to state a cause of action against Fidelity.

In light of the foregoing, the court deems it appropriate to first determine Fidelity's motion to dismiss the third-party action before addressing the remaining motion and cross-motions.

Plaintiff's third-party complaint is predicated on his allegation that Fidelity's omission of exceptions 14 and 15 in the title reports it issued in connection with the purchase of the subject property by Zangre, and its alleged withholding of documents in connection therewith, constitutes insurance fraud and falsification of records under the Penal Law (§§176.25 and 175.05 and 175.10). The exceptions read as follows:

14. Notice of pendency filed on November 22, 2005, Index No. 05-28320, in action entitled "James P. DeMaio, plaintiff(s), vs. Robert Capozello", defendants.

Nature of action: for fraud and deceit by defendant for the determination of plaintiff's claim to subject premises. Plaintiff's attorney: Robert A. Bruno. This action must be discontinued, the notice of pendency must be canceled of record and the judgment, if any must be vacated by order of the court.

15. Proof is required that the appeal filed 3/17/06 in Action #05-28320 pursuant to appellate [sic] rules was not perfected in a timely manner."

The submissions reflect that exceptions 14 and 15 were omitted from both the Zangre and the World Savings Bank title reports upon the closing of the transaction, the latter pursuant to this handwritten notation in the margin: "omit - see stip. of disc. and affirmation from Lark Shlimbaum³ [attached] to [report]." Plaintiff alleges that "[the] basis for the elimination/omitting of Exception 14 in the transaction title reports made by third-party defendant [Fidelity] on or before October 11, 2006 was knowingly false" and that Fidelity's act of withholding documentary evidence of its fraud and falsification of records constitutes additional acts of fraud.

The elements of a cause of action for fraud are an intentional misrepresentation or concealment of a material fact, falsity of the representation, plaintiff's justifiable reliance on the misrepresentation, and damages resulting therefrom (*Robertson v Wells*, 95 AD3d 862 [2d Dept 2012]). Here, plaintiff's third-party complaint fails to state a cause of action for fraud against Fidelity as there is no allegation of any representation to plaintiff by Fidelity on which plaintiff could reasonably have relied to his detriment. Plaintiff was not in privity with Fidelity; he is not the beneficiary of the title insurance policies; and Fidelity's issuance of the title insurance policies to Zangre and Wells Fargo did not in itself result in any injury to plaintiff. As there is no viable cause of action for fraud, Fidelity's alleged concealment of documents purportedly evidencing the fraud also fails to state a cause of action (*E.B. v Liberation Publications, Inc.*, 7 AD3d 566 [2d Dept 2004]).

Moreover, plaintiff's purported fraud claims are untimely. A cause of action for fraud must be commenced within six years from the date the cause of action accrued or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it (CPLR §213(8)). The submissions and the court's records reflect that plaintiff had actual knowledge that Fidelity had issued policies of title insurance in favor of both World Savings Bank and Zangre in 2006, notwithstanding the fact that the underlying action – in which title to the subject property was expressly in issue – had not been discontinued. If, as alleged by plaintiff, Fidelity, acting in concert with Zangre and Wells Fargo, acted with fraudulent (and even criminal) intent in issuing the policies, plaintiff's causes of action sounding in fraud are time-barred.

³ The attorney who represented the Capozellos in the sale of the property to Zangre as well as in the underlying action.

The recent disavowal by plaintiff's attorney that the third-party claims sound in fraud and instead state causes of action for tortious interference with title, tortious interference with economic relations, aiding and abetting a fraudulent conveyance, and slander of title is disingenuous and belied by the plain language of the third-party complaint.

In light of the foregoing, the court finds that plaintiff's third-party action cannot be maintained and accordingly grants Fidelity's motion to dismiss the third-party complaint and denies so much of plaintiff's cross-motion as seeks to compel disclosure from Fidelity as a purported third-party.

The court now considers non-party Fidelity's motion for a protective order with respect to plaintiff's subpoena duces tecum. Pursuant to CPLR R. 3122(d), "The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." Nothing in the statute requires that the expenses be paid in advance of production, however, particularly where, as here, the non-party has not identified how many documents are responsive to plaintiff's demand or established any factual basis for determining that the actual cost of producing the ESI is \$1,000.000. In light of the foregoing, Fidelity's motion is granted only to the extent that upon production by Fidelity within 20 days of the date of entry of this order of the ESI demanded by plaintiff, plaintiff is directed to pay Fidelity the reasonable costs of the production as evidenced by an invoice detailing the services performed and the amount of time spent therefor and the manner of computing the costs of the production.

Plaintiff's cross-motion also seeks in substantial part to compel disclosure from Wells Fargo. Although plaintiff concedes that Wells Fargo produced 1,770 pages of documents in its October 6, 2016 response to plaintiff's notice for discovery and inspection dated September 7, 2016, he argues that the response was deficient in several respects. In particular, plaintiff complains that Wells Fargo has failed to produce the "stipulation of discontinuance" of the underlying action referenced in the margin of the Fidelity title report at exception 14, and rejects Wells Fargo's assertion that the stipulation "does not exist."

Plaintiff's counsel already knows the stipulation does not exist, as he acknowledges that he never signed such a document as plaintiff's attorney of record. Accordingly, Wells Fargo cannot be penalized for not producing a non-existent document. As to the "Aff of Lark Schlimbaum" referenced in the marginal note, the court notes that both the Fidelity and Wells Fargo document productions contain the June 5, 2006 correspondence of Lark Shlimbaum addressing Fidelity's "reluctance to insure title" which, though not sworn to or affirmed, appears likely to be the "Aff" referred to in the report (page nos. FNTIC 000359-000360 and DEM 000361-000362, respectively).

Plaintiff notes, appropriately, that Wells Fargo's unexplained redaction of page DEM00002 is improper, and as the court was not given a copy of the purported "privilege log"

that was subsequently provided to plaintiff, it cannot make a determination that any asserted privilege is applicable. Accordingly, Wells Fargo is directed to produce an unredacted copy of page DEM00002 to plaintiff or provide the court with an redacted copy for an in-camera inspection.

Plaintiff also complains that Wells Fargo produced no documents in response to plaintiff's demand no. 5 for:

Complete copies of any and all correspondence, letters, communications, e-mails and any settlement agreements, by and between Defendant Wells Fargo and Fidelity National Title Insurance Company in regard to any claim under the mortgage title insurance policy for the Zangre mortgage transaction, together with any proofs of any payment(s) made by Fidelity in settlement of such claim.

In a supplemental response dated December 13, 2016, Wells Fargo again produced no documents, and offered the following additional objections:

Wells Fargo objects to this demand as overly broad and unduly burdensome, including the phrases "Zangre mortgage transaction," and "in regard to any claims." Wells Fargo additionally objects to this demand as irrelevant to the claims and defenses asserted in this action, which involve the knowledge that World Savings Bank did or did not have, and the information in possession of World Savings Bank at the time [Zangre] gave the mortgage at issue in this dispute to World Savings Bank. This demand is not reasonably tailored to lead to the discovery of admissible evidence and seeks information protected by the attorney-client privilege and work product doctrines. Finally, Wells Fargo objects to this demand because it requests information that is in the custody or control of third-parties and is equally accessible to Plaintiff as it is to Wells Fargo.

Wells Fargo has offered no support for its conclusory statement that plaintiff's demand no. 5 seeks documents that are irrelevant to the claims and defenses in this action. Whether Fidelity made a demand for payment to Wells Fargo in settlement of any claim under the title policy Fidelity issued to Wells Fargo is particularly relevant to Wells Fargo's counterclaims for equitable subrogation and an equitable lien. Moreover, Wells Fargo has offered no explanation for its assertion that the documents sought by plaintiff, as a category, fall within the attorney-client privilege and work-product doctrines.

It is well established that a party asserting the attorney-client privilege must show that the information sought to be protected was a confidential communication between an attorney and the client which was made in the context of providing legal advice or services (*All Waste Systems, Inc. v Gulf Insurance Co.*, 295 AD2d 379 [2d Dept 2002]). "Documents which are 'not primarily of a legal character but [express] substantial nonlegal concerns' are not privileged

[citations omitted]. . . . However, “[s]o long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters” [*Bertalo’s Restaurant, Inc. v Exchange Insurance Co.*, 240 AD2d 452 [2d Dept 1997]].

Furthermore, “[t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business [citations omitted]. Merely because an investigation was undertaken by attorneys will not cloak the reports and communications with privilege because the reports, although prepared by attorneys, are prepared as part of the ‘regular business’ of the insurance company. Therefore, those communications which occurred before the date that the [insurer] had reasonable grounds to reject the claim are not immune from discovery” (*Bertalo’s*, *supra*, 240 AD2d at 454; see also *Landmark Ins. Co v Beau Rivage Restaurant, Inc.*, 121 AD2d 98 [2d Dept 1986]).

Wells Fargo has failed to establish the applicability of any privilege with respect to the documents sought by plaintiff in his demand no. 5. Accordingly, Wells Fargo is directed to provide a full, complete and substantive response to plaintiff’s demand within 20 days of the date of entry of this order, and to provide a detailed privilege log of any specific documents claimed to be exempt from disclosure based upon a privilege or as work product for litigation (*Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845, 846 [2d Dept 2018]).

So much of plaintiff’s cross-motion as seeks an order disqualifying Fidelity National Law Group as attorney of record for Wells Fargo is denied. Although the submissions reflect that Fidelity National Law Group initially undertook to represent its affiliate Fidelity National Title Insurance Company in connection with plaintiff’s subpoena duces tecum, Fidelity is now represented by separate, outside counsel. Plaintiff’s submissions fail to establish an impermissible conflict of interest that would warrant disqualification of Wells Fargo’s attorney.

The motion of Wells Fargo for an order sanctioning plaintiff’s counsel for filing a meritless and frivolous motion in order to delay the litigation and harass is denied. Wells Fargo has failed to establish that plaintiff’s motion to compel discovery is frivolous as contemplated by 22 NYCRR §130-1.1.

Any additional requests for relief by any party not specifically addressed herein are denied.

The parties are reminded that this matter is scheduled for a compliance conference before the undersigned on November 8, 2018 at 9:30 a.m.

Dated: October 24, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.