

Petermark II LLC v Old Republic Na. Tit. Ins. Co.
2019 NY Slip Op 30376(U)
February 13, 2019
Supreme Court, Kings County
Docket Number: 516450/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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PETERMARK II LLC & ADVILL CAPITAL LLC,
Plaintiffs,

Decision and order

- against -

Index No. 516450/18

ms # 292

OLD REPUBLIC NATIONAL TITLE
INSURANCE COMPANY,

Defendants,

February 13, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has cross-moved seeking summary judgement. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In May 2015 Amir Meiri a member of Martin Development and Management LLC was indicted for fraudulently inducing homeowners to transfer title of their properties. Indeed, on December 2, 2015 Olive and Vincent Holmes instituted an action against Meiri and Martin Development and Management LLC and the plaintiffs who held a mortgage on the property located at 644 Chauncy Street in Kings County alleging fraud and a rescission of the deed transfer to the mortgagors. Approximately six months later the plaintiffs herein instituted a foreclosure action, however, a motion for summary judgement was denied on the grounds the Holmes matter required resolution prior to any foreclosure determination. On April 10, 2018 Meiri pled guilty to various charges and forfeited

the above noted premises to the Federal Government. A Consent Preliminary Order of Forfeiture as to Specific Property states that any third party with an interest in the property may file a petition claiming any rights and that a final determination concerning the property will not be adjudicated until all such claims have been resolved. Thus, the defendant who issued a title insurance policy to the plaintiffs insuring them against any defect in title filed a petition for remission/mitigation on behalf of the plaintiffs identifying the plaintiffs as bona fide lenders and seeking to retain the lien on the property. The defendant is awaiting a determination regarding that request.

The plaintiff has filed the instant lawsuit seeking payment under the title insurance policy on the grounds a defect in title has occurred. Further, the complaint alleges the defendant acted in bad faith by failing to move to dismiss the action filed by the Holmes'. The defendant has now moved seeking to dismiss the action on the grounds it has no merit. Specifically, the defendant argues the lawsuit is entirely premature since there has been no determination regarding plaintiff's lien. Thus demanding payment at this juncture is merely an unwillingness to wait pending a determination whether the plaintiff maintains a valid lien or can establish an equitable lien. If true, argues the defendant, then the plaintiff will not have suffered any loss rendering the lawsuit moot. The plaintiff counters the unique

facts of this case demand a summary determination in its favor.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

There is no dispute that the defendant has the right to defend title and to pursue those rights until a final determination is reached. The plaintiff asserts that "the determination of the State Court Action does not in any way affect the failure of title" (see, Affirmation in Opposition and in Support of Cross Motion, ¶ 5). The plaintiff further argues that regardless whether the Holmes' are successful in their

lawsuit "there is a failure of title" (id at ¶ 6). However, the contract between the parties in this case expressly permits the defendant to pursue litigation in this regard until a final determination has been reached. That contract right necessarily means the plaintiff cannot pursue these claims, even if valid, until the defendant has exhausted all available avenues. Thus, the court does not take a position regarding the ultimate success or likelihood of success of defendant as it pursues its claims. Rather, the court acknowledges the defendant has the right to pursue those claims. Considering that unmistakable right the plaintiff's lawsuit is indeed premature. Consequently, plaintiff's motion for summary judgement is denied and the defendant's motion seeking to dismiss the complaint is granted.

So ordered.

ENTER:



DATED: February 13, 2019
 Brooklyn NY

Hon. Leon Ruchelsman
 JSC

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