ORIGINAL

**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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**ROOSEVELT PROPERTIES, INC.,**

**Plaintiff,**

**-against-**

**PETER PEKICH d/b/a MEDCOR HOLDING CO., THE COUNTY OF NASSAU, APEX MORTGAGE CORP., HARRISON VICKERS AND WATERMAN LLC, RECORD & RETURN TITLE AGENCY INC. and OLD REPUBLIC NATIONAL TITLE INSURANCE,**

**Defendants.**

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**TRIAL/IAS PART: 10**

**NASSAU COUNTY**

**Index No: 607697-18**
**Motion Seq. Nos. 3 and 4**
**Submission Date: 12/11/18**

**Papers Read on these Motions:**

**Affirmation in Support and Exhibits (Mot. Seq. 3).....x**
**Affirmation in Support and Exhibits (Mot. Seq. 4).....x**
**Affirmation in Opposition and Exhibits.....x**
**Memorandum of Law in Opposition.....x**
**Reply Affirmation.....x**

This matter is before the court on the motions to dismiss filed by defendants Record & Return Title Agency Inc. ("Record & Return") and Old Republic National Title Insurance ("Old Republic"). For the following reasons, the motions are granted in part and denied in part.

BACKGROUND

A. Relief Sought

Old Republic moves to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(1) and (a)(7) based on documentary evidence and failure to state a cause of action. Record & Return moves

to dismiss pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7), and CPLR § 214(4) and (6) based on documentary evidence, statute of limitations, and failure to state a cause of action. Plaintiff Roosevelt Properties, Inc. ("Plaintiff" or "Roosevelt Properties") opposes both motions. Defendants Peter Pekich d/b/a Medcor Holding Co. ("Pekich"), County of Nassau ("County"), Apex Mortgage Corp. ("Apex"), and Harrison Vickers and Waterman LLC ("HVW") have taken no position on the motions.

B. The Parties' History

The Amended Verified Complaint, *see* Roberts Affm. at Ex. A, alleges as follows:

Roosevelt Properties is a domestic business corporation with a principal place of business in Nassau County and is the owner of record of commercial premises located at 509 Babylon Turnpike, Freeport, New York (the "Property"). Roosevelt Properties uses the Property to store equipment and conduct its business as a construction trade supplier of excavation, foundation, and drilling support services. Roosevelt Properties also owns property located at 501 Babylon Turnpike, Freeport, New York (School District 9, Section 55, Block 281, Lots 193 to 195) (the "Adjacent Property"), which consists of an empty series of lots adjacent to the Property.

Pekich is an individual residing in Nassau. Apex is a foreign company conducting business in New York State as a commercial lender or real property owner. HVW is a domestic limited liability company conducting business in New York State as a commercial lender or real property owner. Record & Return is a domestic company conducting business in New York State as a title company. Old Republic is a domestic company conducting business in New York State as an insurance company. The County of Nassau, through its treasurer, issues tax deeds for unpaid taxes pursuant to applicable law.

In May 2013, Apex sold the Property and the Adjacent Property to Plaintiff pursuant to a written contract. Title closed on July 15, 2013, for total consideration of $395,000.00. HVW extended funds to Plaintiff to acquire the Property and the Adjacent Property from Apex, and Plaintiff retained Record & Return and Old Republic in connection with the closing. However, Roosevelt Properties' interest in the Property and the Adjacent Property was not properly recorded in the deed between Apex as grantor and Roosevelt Properties as grantee.

Record & Return and Old Republic entered into a contract with Roosevelt Properties to "research the [Property and Adjacent Property], obtain abstract of title, attend a closing and record a deed to 501 Babylon Turnpike, Freeport, New York and 509 Babylon Turnpike, Freeport, New York, and to provide title insurance for same." Am. Compl. ¶ 86. Record & Return and Old Republic failed to acknowledge or understand that the Property and Adjacent Property "were and are dealt with as one property by the various municipalities having jurisdiction over same." Am. Compl. ¶ 87.

At the closing, Roosevelt Properties was presented with a deed containing both addresses of the property sold by Apex: 501 and 509 Babylon Turnpike, Freeport, New York. However, Record & Return and/or Old Republic unilaterally deleted the address of 501 Babylon Turnpike from the deed executed by Apex, then filed and recorded the deed without advising the parties that the address of the Adjacent Property was deleted from the deed. The Schedule "A" description of the property appended to the recorded deed was prepared by Record & Return and/or Old Republic and failed to include the Adjacent Property. Am. Compl. ¶¶ 102-103.

On December 16, 2016, Pekich commenced a summary proceeding against Roosevelt Properties in the matter of *Peter Pekich d/b/a Medcor Holding Co. v. Max Bowen and Roosevelt Properties, Inc.*, Nassau County District Court Index No. LT-003507-17/NA (the "Summary Proceeding"). Pekich alleged that Roosevelt Properties' rights of possession with respect to the Adjacent Property were terminated upon the alleged execution of a tax deed dated August 10, 2016 by the Nassau County Treasurer (the "Tax Deed"). Pekich did not properly notice interested parties, as is required by applicable local law, thus rendering the Tax Deed invalid. While Pekich claims he served a Notice to Redeem upon Plaintiff by certified mail, return receipt requested, in January 2016, the notice was mailed to the Adjacent Property and returned as undeliverable. Pekich failed to send additional or properly addressed notices. The records of the Clerk of Nassau County and the Town of Hempstead list Roosevelt Properties' address of 501 Babylon Turnpike "as being included in the address of 509 Babylon Turnpike, Freeport, New York." Am. Compl. ¶ 28. However, Roosevelt Properties was not served with a Notice to Redeem at the Property.

The Amended Complaint asserts the following eleven causes of action: 1) declaratory judgment, 2) permanent injunction, 3) quiet title, 4) breach of contract against Apex, 5) deed

reformation/correction against Apex, 6) breach of contract against Record & Return and Old Republic, 7) negligence against Record & Return and Old Republic, 8) scrivener's error/deed reformation, 9) tortious interference against Record & Return and Old Republic, 10) reformation of title policy against Record & Return and Old Republic, and 11) indemnification/estoppel against Record & Return and Old Republic.

C. The Parties' Positions

Old Republic argues that dismissal is appropriate based on documentary evidence and Plaintiff's failure to state a claim. Old Republic submits Title Insurance Policy Number OX-08948469 issued by Old Republic to Plaintiff (the "Title Policy"), Roberts Affm. at Ex. B, along with the deed dated July 15, 2013, and recorded on August 9, 2013, which only conveyed the Property (509 Babylon Turnpike) to Plaintiff (the "Deed"), Roberts Affm. at Ex. C. Schedule A to the Title Policy contains a description of the land referred to in the policy as follows:

PREMISES KNOWN AS:

| | | |
|---|---|---|
| 1. | Address | 111 Park Avenue, Roosevelt |
| | District | 8 |
| | S/B/L | 55/446/130 |
| 2. | Address | 509 Babylon Turnpike, Freeport |
| | District | 9 |
| | S/B/L | 55/281/188-192 |

Old Republic argues that the Title Policy and Deed demonstrate that 1) Old Republic only insured title to the Property and did not insure title to the Adjacent Property, and 2) Plaintiff only acquired title to the Property on July 15, 2013, and did not acquire title to the Adjacent Property. It further asserts that Plaintiff's claims against Old Republic sounding in negligence and breach of contract based on the failure to include the Adjacent Property in the Deed and Title Policy are outside of Old Republic's obligations under the Title Policy. Old Republic did not prepare the contract of sale or Deed, and Plaintiff's relationship with Old Republic is defined and limited by the terms of the Title Policy. Additionally, Plaintiff fails to state a claim for tortious interference with contract, as Plaintiff fails to allege the circumstances under which Old Republic allegedly became aware of the purchase agreement with Apex, or that Old Republic intentionally procured a breach of the purchase agreement. Plaintiff's only allegation is that Old Republic deleted an address from

the Deed; however, deeds also contain an attached metes and bounds description and applicable tax map identifier.

Old Republic further argues that Plaintiff fails to state a claim for reformation of the Title Policy, as he merely alleges that the purchase agreement between Plaintiff and Apex provided that Old Republic and its agent, Record & Return, should have searched title for the Adjacent Property in addition to the Property, and should have issued title insurance for both properties. Plaintiff's relief is predicated on his ultimate success in establishing ownership, and Plaintiff is not entitled to reformation of the Title Policy in the absence of an allegation that Plaintiff or its counsel applied for a title search and title insurance policy that would cover the Adjacent Property. Further, Plaintiff's claim for indemnification should be dismissed, as the Title Policy only obligates the parties regarding the Property, not the Adjacent Property, and no basis for implied indemnification exists, as Plaintiff has not made any payment with respect to a wrong committed by Old Republic.

Record & Return alleges that Plaintiff's claims against it are barred by the three-year statute of limitations for actions to recover damages for an injury to property and actions to recover damages for malpractice pursuant to CPLR § 214(4) and (6). Plaintiff's claims arise out of title services Record & Return provided, which included recording the Deed in 2013, and are time-barred regardless of whether they are styled in contract or tort. Record & Return joins in Old Republic's arguments in support of dismissal. Additionally, Record & Return asserts that Plaintiff fails to state a claim for tortious interference in the absence of allegations that it knew of the existence of a valid contract between Plaintiff and Apex that included the Adjacent Property, intentionally procured a breach, or any actual breach occurred and damages resulted from the breach. Record & Return avers that a "side agreement" ordinarily would not be provided to a title company and Plaintiff's real estate attorney only provided the necessary information to conduct title work.

Record & Return also asserts that Plaintiff fails to state a claim for reformation because Record & Return did not issue the Title Policy, Plaintiff has not established its ownership of the Adjacent Property, and the Deed and Title Policy both contain the same Schedule A description and thus "manifest[ ] the true intention of the parties to sell/purchase 509 Babylon only." Hardin Affm. ¶ 29. Record & Return references prior deeds for the Property and Adjacent Property and alleges that while these properties are adjoining, they are separate parcels. *See* Hardin Affm. ¶¶ 10-12; Ex.

D-E. Plaintiff's indemnification claim must also be dismissed in the absence of any basis for common-law or contractual indemnification. Finally, the Title Policy and Deed constitute documentary evidence that the subject transaction only involved the Property.

Plaintiff opposes the motions filed by Old Republic and Record & Return (collectively, the "Moving Defendants") and alleges that the Adjacent Property is an empty series of lots with no improvements or mailbox that is adjacent to and subservient to the Property and "in equity is owned by Plaintiff." Pl. Affm. ¶ 6. Plaintiff submits a Department of Buildings Occupancy Certificate and Department of Buildings Certificate of Completion that list the address of the Adjacent Property as being included in the address of the Property. *See* Pl. Ex. C. Plaintiff alleges that at the closing, it was presented with a deed containing addresses for both the Property and Adjacent Property, and Apex executed the deed in favor of Plaintiff for the transfer of the Property and Adjacent Property. *See* Pl. Ex. D. Record & Return and/or Old Republic deleted the address of the Adjacent Property from the deed executed by Apex and recorded that Deed without advising the parties of the deletion of the address of the Adjacent Property. *See* Pl. Ex. E. Plaintiff also provides New York State Forms RP-5217 and TP-584, which it claims reflect the parties' intention to transfer the Adjacent Property along with the Property. *See* Pl. Ex. F.

Plaintiff argues that the Moving Defendants' motions for dismissal based on documentary evidence are premature in the absence of discovery and illogical given that the Moving Defendants rely on the omission of the Adjacent Property from the Deed and Title Policy when that negligent or mistaken omission is the wrong Plaintiff is attempting to address in this action. Additionally, while Record & Return purports to submit prior deeds distinguishing between the subject parcels, Record & Return has only submitted notices of pendency, which are not the type of documentary evidence contemplated by CPLR § 3211(a)(1). Further, Plaintiff's claims are not time-barred by the statute of limitations set forth in CPLR § 214(4) and (6) as it has not alleged malpractice claims or injury to property claims. Rather, Plaintiff asserts the following claims against Record & Return: breach of contract, negligence, reformation of the deed, tortious interference, reformation of the title policy, and indemnification/estoppel.

Plaintiff contends that it has stated causes of action against the Moving Defendants. It points out that courts have routinely recognized negligence claims against title insurance companies based

on allegations that are independent of the insurance policy. Thus, Plaintiff asserts that its allegations that Old Republic negligently failed to include the Adjacent Property in the Deed were not contemplated by the Title Policy, as the Title Policy also fails to include the Adjacent Property. Plaintiff also claims that it has stated a tortious interference claim and a lack of evidence does not support dismissal at the pre-discovery stage of litigation. The Moving Defendants' allegations as to ordinary and customary procedures in real estate transactions have no bearing on the reformation claim. Finally, Plaintiff states that Old Republic's arguments regarding the indemnification claim rely on circular logic, namely, that "no basis for indemnification exists because the contract (the title policy) does not refer to the 501 Babylon property, thus no coverage can apply for any failure to include such property." Pl. Memo of Law at p. 8. Denial of Plaintiff's indemnification claim would be premature, as it is founded on the error in failing to include the Adjacent Property in the Deed and Title Policy.

On reply, Old Republic argues that Plaintiff's claim that it was not aware the Adjacent Property was not included in the July 2013 real estate transaction until it learned of the Summary Proceeding in 2016 is disingenuous, as Plaintiff has not made "any allegation showing indicia of ownership such as plaintiff's payment of real property taxes for the [Adjacent Property] from July 2013 to date," and Plaintiff failed to assert its alleged ownership of the Adjacent Property until five years after the closing. Roberts Reply Affm. ¶¶ 6-8. Additionally, Plaintiff's cases cited for the proposition that a title insurance company can be liable for negligence based on allegations independent of the title insurance contract are distinguishable, as those cases involved instances where a mortgage or deed was not timely recorded and the plaintiff incurred damages based on their loss of priority under the New York Recording Act. In those cases, the loss of priority was "inextricably linked" to the insurance provided under the title insurance policy; however here, Plaintiff's claims regarding Old Republic's alleged negligence in recording the Deed are not "inextricably linked" to any obligation under the Title Policy. Roberts Reply Affm. ¶¶ 12-13. Such omission is not the fault of Old Republic or its agent, Record & Return, as they merely relied upon an application for a title examination and title insurance policy that presumably was requested by Plaintiff's real estate attorney.

Further, Old Republic maintains that Plaintiff fails to allege the facts necessary to sustain a claim for tortious interference with contract. Plaintiff has overstated the scope of Old Republic's involvement in the subject real estate transaction, as Old Republic's sole role was to provide a title insurance policy based upon information provided by Plaintiff or its counsel. Plaintiff's reference to Department of Buildings records is unpersuasive, as the tax map identifier, a metes and bounds description, and possibly a reference to a prior deed are the controlling information to identify real property. The Property–not the Adjacent Property–is clearly identified in the Deed by the tax map identifier, a metes and bounds description, and a savings clause identifying the property according to a prior deed. Even if the Deed contained both addresses, the legal description of the Property would limit Plaintiff's ownership to only the Property and not the Adjacent Property.

RULING OF THE COURT

A. Motion to Dismiss Standard

A motion to dismiss pursuant to CPLR § 3211(a)(1) may only be granted where "the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law." *Karpovich v. City of N.Y.*, 162 A.D.3d 996, 997 (2d Dept. 2018), quoting *Mawere v. Landau*, 130 A.D.3d 986, 987 (2d Dept. 2015); citing *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Documentary evidence must be "unambiguous, authentic, and undeniable." *Karpovich*, 162 A.D.3d at 997, quoting *Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 996-97 (2d Dept. 2010); citing *Phillips v. Taco Bell Corp.*, 152 A.D.3d 806, 807 (2d Dept. 2017).

When seeking dismissal based on the statute of limitations pursuant to CPLR § 3211(a)(5), the defendant "bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired." *Campone v. Panos*, 142 A.D.3d 1126, 1127 (2d Dept. 2016), quoting *Stewart v. GDC Tower at Greystone*, 138 A.D.3d 729, 729 (2d Dept. 2016). Upon defendant doing so, the burden shifts to the plaintiff to raise an issue of fact as to "whether the statute of limitations was tolled or otherwise inapplicable or whether the plaintiff actually commenced the action within the applicable limitations period." *Campone*, 142 A.D.3d at 1127, quoting *Barry v. Cadman Towers*, 136 A.D.3d 951, 952 (2d Dept. 2016).

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court is required to "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Dismissal is warranted where the non-movant "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton*, 29 N.Y.3d at 142, citing, *inter alia*, *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 (1st Dept. 2014). When the court considers evidentiary material, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate." *Podesta v. Assumable Homes Dev. II Corp.*, 137 A.D.3d 767, 769 (2d Dept. 2016), quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

B. Breach of Contract

A title insurance policy insures "against loss by reason of defective titles and encumbrances and insur[es] the correctness of searches for all instruments, liens or charges affecting the title to such property." *Citibank v. Commonwealth Land Tit. Ins. Co.*, 228 A.D.2d 635, 636 (1st Dept. 1996), quoting Ins. Law § 1113(a)(18). A title insurer is liable for hidden defects as well as all matters affecting title within the policy coverage that are not excluded or specifically excepted from policy coverage. *Countrywide Home Loans, Inc. v. United Gen. Title Ins. Co.*, 109 A.D.3d 950, 951 (2d Dept. 2013). A title insurer's liability is founded in contract law and "liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy." *Id.*, quoting *Natasi v. Cty. of Suffolk*, 106 A.D.3d 1064, 1066 (2d Dept. 2013); citing *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 819 (2d Dept. 2012).

C. Negligence

It is well settled that a claim for negligence in searching title does not lie in an action on a title insurance policy. *Citibank, N.A. v. Chicago Title Ins. Co.*, 214 A.D.2d 212, 216 (1st Dept. 1995). However, the Appellate Division, Second Department has recognized negligence claims

against title insurers where such claims are "independent of the parties' contract for insurance." *Choudhary v. First Option Title Agency*, 107 A.D.3d 657, 658-59 (2d Dept. 2013) (negligence claim stated based on title insurer's failure to timely record the deed). *See also Surace v. Commonwealth Land Tit. Ins. Co.*, 62 A.D.3d 861, 862 (2d Dept. 2009) (negligence claim stated based on title insurer's negligent failure to timely record a mortgage); *Gem Servs. of N.Y., Inc. v. United Gen. Tit. Ins. Co.*, 28 A.D.3d 516, 516 (2d Dept. 2006).

Negligence claims are subject to a three-year statute of limitations. *Yabro v. Wells Fargo Bank, N.A.*, No. 153031/2014, 2014 WL 5830265 (N.Y. Cty. Nov. 7, 2014), *aff'd*, 140 A.D.3d 668 (1st Dept. 2016), citing CPLR § 214. A tort claim accrues at such time that "the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." *Union St. Tower, LLC v. First Am. Title Co.*, 161 A.D.3d 919, 920 (2d Dept. 2018), quoting *IDT Corp. v. Morgan Stanley Dean Witter*, 12 N.Y.3d 132, 140 (2009) (applying three-year statute of limitations under CPLR § 214(4) to negligence claims against title company for failure to record and failure to procure proper title insurance). Accrual time is measured from the date the actionable injury occurred, even if the party was not aware of the wrong or injury. *Yabro*, 140 A.D.3d at 668, quoting *Nothnagle Home Sec. Corp. v. Bruckner, Tillet, Rossi, Cahill & Assoc.*, 125 A.D.3d 1503, 1504 (4th Dept. 2015).

D. Reformation

"The purpose of reformation is to restate the intended terms of an agreement when the writing that memorializes the agreement is at variance with the intent of both parties." *Kaliontzakis v. Papadakos*, 69 A.D.3d 803, 804 (2d Dept. 2010), quoting *M.S.B. Dev. Co. v. Lopes*, 38 A.D.3d 723, 725 (2d Dept. 2007). Where the plaintiff seeks reformation based on mistake, he or she must demonstrate that "the contract was executed under mutual mistake or a unilateral mistake induced by the defendant's fraudulent misrepresentation." *Lopes*, 38 A.D.3d at 725. To reform a written instrument based on mutual mistake or fraud, the party seeking reformation must "demonstrate by clear and convincing evidence, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *11 King Ctr. Corp. v. City of Middletown*, 115 A.D.3d 785, 786-87 (2d Dept. 2014), quoting *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 (1978). Additionally, "reformation based upon a scrivener's error requires proof of a prior

agreement between the parties which when subsequently reduced to writing fails to accurately reflect the prior agreement." *U.S. Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 424 (1st Dept. 2012), citing *Harris v. Uhlendorf*, 24 N.Y.2d 463, 467 (1969).

An action to reform a deed based upon a mistake, including a scrivener's error, is subject to a six-year statute of limitations under CPLR § 213(6), which runs from the date the mistake was made. *Lopez v. Lopez*, 133 A.D.3d 722, 723 (2d Dept. 2014). However, an exception exists with respect to an individual who possesses real property under an instrument of title, in which case the statute of limitations for reformation does not run until he or she has notice of an adverse claim under the instrument or until his or her possession is otherwise disturbed. *Id.* at 723-24.

E. Tortious Interference with Contract

A claim for tortious interference with contract requires "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996), citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 (1956); *NBT Bankcorp v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 614 (1996).

G. Indemnification

A title insurer's indemnification obligation "is defined by the policy itself and limited to the loss in value of the title as a result of title defects against which the policy insures." *Brucha Mortg. Bankers Corp. v. Nations Title Ins. of N.Y., Inc.*, 275 A.D.2d 337, 337-38 (2d Dept. 2000), quoting *Citibank*, 214 A.D.2d at 221. A title insurance policy provides an entitlement to indemnification "only to the extent that its security is impaired and to the extent of the resulting loss which it sustains." *Brucha Mortg. Bankers Corp.*, 275 A.D.2d at 338, quoting *Diversified Mortg. Investors v. U.S. Life Tit. Ins. Co.*, 544 F.2d 571, 574, n.2 (2d Cir. 1976).

Common law or implied indemnification is a principle that "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." *Tiffany at Westbury Condo by its Bd. of Mgrs. v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1077 (2d Dept. 2007), quoting *17 Vista Fee Assoc. v. Teachers Ins. & Annuity Ass'n of Am.*, 259 A.D.2d 75, 79 (1st Dept. 1999). The party requesting indemnification "must have delegated

exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and must not have committed actual wrongdoing itself." *Marelli Dev. Corp.*, 40 A.D.3d at 1077, quoting *17 Vista Fee Assocs.*, 259 A.D.2d at 80 (noting that the classic case of implied indemnification "permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer").

H. Application of the Principles to the Instant Action

The Court grants in part and denies in part the Moving Defendants' motions to dismiss. The Court grants the Moving Defendants' motions to dismiss Plaintiff's breach of contract claim because the Title Policy only addresses the Property and does not include the Adjacent Property. As set forth above, the Title Policy insures against "Title being vested other than as stated in Schedule A," with Schedule A only describing real property located at 111 Park Ave., Roosevelt, NY, and 509 Babylon Turnpike, Freeport, NY. While Plaintiff alleges that it entered into a contract with the Moving Defendants to "research the [Property and Adjacent Property], obtain abstract of title, attend a closing, and record a deed to 501 Babylon Turnpike, Freeport, New York and 509 Babylon Turnpike, Freeport, New York, and to provide title insurance for same," Am. Compl. ¶ 86, the Moving Defendants' contract liability is limited to the Title Policy. Thus, it follows that the Moving Defendants' alleged deletion of the Adjacent Property from the Deed and/or failure to insure the Adjacent Property could not support a breach of contract claim based on a Title Policy that only covers the Property.

Additionally, the Court grants the Moving Defendants' motions to dismiss the tortious interference with contract claim. Plaintiff has failed to plausibly allege that the Moving Defendants intentionally procured Apex's breach of the contract of sale based solely on the allegation that the Moving Defendants deleted the Adjacent Property from the Deed. *See, e.g. Beecher v. Feldstein*, 8 A.D.3d 597, 598 (2d Dept. 2004) (liability for tortious interference with contract requires that the defendant "induce or intentionally procure a third party's breach of its contract with the plaintiff and not merely have knowledge of its existence").

However, the Court denies the Moving Defendants' motions to dismiss the negligence claim. First, the Court finds that Record & Return has not established, prima facie, that the three-year statute of limitations for negligence claims has expired. While the subject real estate transaction and

attendant deletion of the Adjacent Property from the Deed and/or Title Policy occurred in 2013, the Court liberally construes the Amended Complaint to allege that injury did not occur until Pekich asserted his alleged interest in the Adjacent Property in 2016. Second, Plaintiff's negligence claim is based on facts independent of the parties' contract for title insurance—namely, the Moving Defendants' deletion of the Adjacent Property from the Deed, preparation of a Schedule A to the Deed that omitted the Adjacent Property, and filing of an inaccurate Deed.

The Court disagrees with Old Republic's attempt to distinguish this matter from controlling Second Department case law permitting negligence claims against title insurers. Old Republic argues that those cases, which addressed the failure to timely record a deed or mortgage, involved a loss of priority that was "inextricably linked" to the title insurance at issue. Roberts Reply Affm. ¶¶ 10-13, citing *Surace*, 62 A.D.3d at 862; *Gem Servs. of N.Y., Inc.*, 28 A.D.3d at 516. The Court disagrees, and finds that this matter is factually analogous to the previously noted Second Department holdings because those negligence claims, like Plaintiff's here, were based on the title insurance company's failure to appropriately record a deed. *See also Podesta v. Assumable Homes Dev. II Corp.*, 137 A.D.3d 767, 769 (2d Dept. 2016) (upholding the negligence claim against the title company based on its abstract company's alteration of the property description attached to the partial release and deed and recording of that inaccurate deed).

The Court also denies the Moving Defendants' motion to dismiss Plaintiff's claims to reform the Deed and Title Policy. Plaintiff's reformation claim is governed by the six-year statute of limitations set forth in CPLR § 213(6), and Record & Return has not made a prima facie showing of untimeliness in light of the undisputed allegations that the Deed and Title Policy were executed in July 2013, less than six years prior to the commencement of this action in 2018. Further, Plaintiff has plausibly asserted claims to reform the Deed and Title Policy based on the Moving Defendants' deletion of the Adjacent Property from the Deed and failure to include the Adjacent Property in the Title Policy. The documentary evidence submitted–the Deed, Title Policy, and what Record & Return purports to be prior deeds but in actuality are notices of pendency, *see* Hardin Affm. at Exs. D-E–do not conclusively defeat Plaintiff's claims, nor does the question of whether the Property and Adjacent Property are treated as one parcel of land rather than two separate parcels. At this juncture, Plaintiff has stated causes of action for reformation based on the allegations that it entered into a

contract of sale with Apex to purchase both the Property and Adjacent Property, contracted with the Moving Defendants to obtain title insurance for both the Property and Adjacent Property, and the Deed and Title Policy do not accurately reflect those agreements in light of the Moving Defendants' deletion of the Adjacent Property from the Deed, failure to include the Adjacent Property in the Schedule "A" description in the Deed, and failure to include the Adjacent Property in the Title Policy. Such alleged conduct plausibly constitutes either scrivner's error or unilateral mistake such as to warrant reformation.

Finally, the Court denies the Moving Defendants' motions to dismiss the indemnification claim. The doctrine of implied indemnification is inapplicable here, as Plaintiff is not seeking to recover damages it paid to an injured party based on the wrong of the Moving Defendants. While there is no basis for contractual indemnification under the Title Policy, which, as noted, only insures the Property, Plaintiff is seeking to reform the Title Policy to include the Adjacent Property. Thus, dismissal of Plaintiff's indemnification claim is inappropriate at this time given the continuance of Plaintiff's claim to reform the Title Policy.

CONCLUSION

The Court grants in part and denies in part the motions to dismiss filed by defendants Old Republic and Record & Return. The Court grants the motions as to Plaintiff's claims for breach of contract and tortious interference with contract. The Court denies the motions as to Plaintiff's claims for negligence, reformation of the Deed and Title Policy, and indemnification.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for all parties to appear for a Preliminary Conference on February 14, 2019 at 9:30 a.m., as previously scheduled.

ENTER

DATED: Mineola, NY
February 5, 2019

HON. TIMOTHY S. DRISCOLL
J.S.C.