

**53 Spencer Realty LLC v Fidelity Natl. Title Ins. Co.**

2020 NY Slip Op 32579(U)

August 5, 2020

Supreme Court, Kings County

Docket Number: 520249/16

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5<sup>th</sup> day of August, 2020.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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53 SPENCER REALTY LLC,

Plaintiff,

- against -

FIDELITY NATIONAL TITLE INSURANCE COMPANY,  
SPENCER FIFTY THREE LLC, EMMANUEL  
SCHWARTZ, ABRAHAM FRANCOZ, LAZAR  
WALDMAN and CONGREGATION B'NEI MEIR  
MOSHE,

Defendants.

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**DECISION / ORDER**

Index No. 520249/16  
Mot. Seq. # 8, 13, 14

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>252-266</u>	<u>314-382</u>	<u>383-387</u>
Opposing Affidavits (Affirmations) _____	<u>316-382</u>	<u>389</u>	<u>388</u>
Reply Affidavits (Affirmations) _____	<u>389</u>	<u>393</u>	<u>394</u>

Upon the foregoing papers, plaintiff 53 Spencer Realty LLC (53 Spencer) moves (in motion sequence [mot. seq.] 8) for an order, pursuant to CPLR 3212, granting it summary judgment on its third cause of action, which alleges that Fidelity National Title Insurance Company (Fidelity) breached its title insurance contract.

Defendant Fidelity cross-moves (in mot. seq. 13) for an order, pursuant to CPLR

3212, granting it summary judgment dismissing the complaint. Defendant Fidelity also moves, (in mot. seq. 14) for an order, pursuant to CPLR 3025 (b), granting it leave to file an amended answer with counterclaims.

To be clear, concurrently with its summary judgment cross motion, Fidelity filed a motion for leave to amend its answer to include two affirmative defenses and two counterclaims against 53 Spencer, for fraud in the inducement and rescission of the title policy, based on allegedly fraudulent conduct revealed during Rivka Kellner's recent deposition in December 2019,<sup>1</sup> and other recent discovery. Fidelity asserts that it recently "learned in discovery that Plaintiff's purchase of the title insurance was fraudulent from the start" because 53 Spencer presented materially false and fraudulent information to both Wamu (Washington Mutual, before Chase took over as holder of its mortgages) and Fidelity, including "doctored versions of its formation documents – which falsely reflect that [Rivka] Kellner was a member of [53 Spencer] who was authorized to consummate those transactions on its behalf . . ."

Fidelity asserts that recent discovery also revealed that Rivka Kellner acted in concert with others "to enable her nephew Joel Horowitz to acquire title of the subject property by purchasing the [Wamu/Chase] note and mortgage . . . and to complete the foreclosure action that had been commenced following 53 Spencer's failure to repay the

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<sup>1</sup> Rivka Kellner, who was subpoenaed on April 4, 2019, refused to appear for scheduled depositions three times. After Fidelity sought court intervention twice, the court ordered that Rivka Kellner be deposed before a judicial hearing officer, which deposition was completed on December 3, 2019.

mortgage loan.” Fidelity asserts that discovery has revealed that “Rivka Kellner appeared at the foreclosure sale to facilitate the transition of title to her nephew’s entity, [53 Spencer Holdings], and then collaborated with her husband and nephew to make title insurance claims on behalf of 53 Spencer (owner’s policy) and her nephew’s entity (lender’s policy) . . . that were designed to unjustly enrich them at the expense of Fidelity.” Fidelity argues that leave to amend should be freely granted, because the amendment will not result in prejudice or surprise to plaintiff. Fidelity contends that:

“Plaintiff cannot be prejudiced or surprised by the proposed amendment because it is limited in scope, it is predicated upon Plaintiff’s own fraudulent conduct about which it is well aware, it is directly related to the title policy for which relief is sought, and it will not delay this proceeding further as no additional discovery is required to establish these claims and defenses.”

Fidelity also states that “[t]his is especially true given the history of Plaintiff’s deliberately ‘belated responses to [Fidelity’s] discovery demands’” (quoting *Briarpatch Ltd. L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [2009]).

### **53 Spencer’s Opposition**

53 Spencer, in opposition, argues that Fidelity’s motion to amend should be denied because it is not supported by an affidavit of merit or other evidentiary proof, and Fidelity cannot “correct this deficiency by way of a reply affidavit.”

53 Spencer further argues that “the bulk of defendant’s motion seems devoted to a litany of complaints against one Rivka Kellner, who is not a party to this case, and which allegations are totally irrelevant to the instant motion.” 53 Spencer asserts that if Rivka

Kellner was not a member of 53 Spencer, as Fidelity contends, “then all acts by Kellner – no matter how fraudulent – cannot be attributed to the plaintiff and are utterly irrelevant.” 53 Spencer suggests that Fidelity’s allegations regarding Rivka Kellner “could become third[-]party claims in this action against Kellner, but they cannot be defenses or counterclaims against plaintiff.” 53 Spencer contends that “[t]o attribute possible wrongdoing by a nonparty, who, defendant concedes, did not act on behalf of plaintiff, would cause surprise and prejudice to plaintiff.”

### **Fidelity’s Reply**

Fidelity, in reply, asserts that its motion to amend is not deficient because “CPLR 3025 (b) does *not* require motions to amend pleadings to be accompanied by an affidavit of merit or evidence of any kind.” Fidelity asserts that CPLR 3025 (b) only requires that the motion be “accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” Fidelity asserts that its “moving submission provided the Court with more than ample comfort that the proffered amendment is not devoid of merit (and, on the contrary, is both compelling and meritorious).”

In response to 53 Spencer’s assertion that its proposed amendment is “irrelevant” because the allegations include the wrongdoing of nonparty Rivka Kellner, Fidelity contends that “the proposed fraud in the inducement and rescission claims against plaintiff remain valid, meritorious, and compelling – and most appropriate for *this* Court to decide.” Fidelity argues that “neither the low standard of relevance, nor the liberal standard for

amended pleadings, require any consideration of whether non-parties contributed to the demonstrable wrongdoing that was committed by a tortfeasor already before the Court.” Fidelity further contends that “the allegations involving this particular non-party are uniquely probative of the fraud in the inducement and rescission claims against plaintiff because Kellner induced Fidelity to issue the policy here to Plaintiff by falsifying her authority to close the transaction.” Fidelity notes that “Plaintiff’s only remaining claim against Fidelity seeks damages under a title policy that was procured through the fraudulent acts and bad faith detailed in Fidelity’s cross motion.”

Finally, Fidelity notes that 53 Spencer makes the conclusory claim that the amended answer would cause it surprise and prejudice and “offers no cogent explanation for its objection.” Fidelity notes that 53 Spencer delayed its discovery of the alleged wrongdoing for more than a year, and that “[g]iven the abuse and delay that have come to define plaintiff’s litigation strategy, it is difficult to understand how an amendment that seeks to conform the pleading to the evidentiary record would ‘complicate’ a case in which Plaintiff conducted no discovery of its own.”

### *Conclusions of Law*

“In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Mials v Millington*, 149 AD3d 1064, 1066 [2017] [quoting *Markowits v Friedman*, 144 AD3d 993, 995 (2016)]; see also CPLR 3025 [b]).

Here, in the absence of any cognizable prejudice to 53 Spencer, Fidelity is entitled to an order granting it leave to amend its answer to assert two affirmative defenses and two counterclaims against 53 Spencer for fraud in the inducement (to the extent that it seeks rescission of the title policy) and rescission of the title insurance policy, based on evidence that Fidelity recently obtained during discovery. Rivka Kellner's deposition testimony and 53 Spencer's responses to Fidelity's interrogatories indicate that Rivka Kellner falsely held herself out as the sole member of 53 Spencer and may have obtained the title policy on 53 Spencer's behalf without authority. This provides sufficient support for Fidelity's affirmative defenses and counterclaims against 53 Spencer for fraudulent inducement and rescission, and 53 Spencer has failed to establish that the proposed amendments are palpably insufficient or patently devoid of merit. However, Fidelity's proposed amended answer does not specifically allege the basis of its claim for monetary damages that Fidelity suffered as a result of 53 Spencer's alleged fraud, as required by CPLR 3016, and also does not allege any basis for an award of punitive damages.

While Fidelity also urges the court to grant it summary judgment on its counterclaims for fraud and rescission,<sup>2</sup> to do so is not possible. Plaintiff has not as yet had an opportunity to reply to these counterclaims, nor has plaintiff had an opportunity to properly oppose such a motion, even if no further discovery is requested. Therefore, the

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<sup>2</sup> Carucci affirmation, E-File Doc 384 at ¶¶11-12.

court declines to address plaintiff's motion for summary judgment or defendant's cross-motion for summary judgment at this time.

Accordingly, it is

**ORDERED** that Fidelity's motion (in mot. seq. 14) for leave to amend its answer to add two affirmative defenses and two counterclaims against 53 Spencer, for fraud in the inducement and rescission of the title policy, is granted. Fidelity's proposed amended answer as contained in E-File Doc # 387 must be changed however, to remove the demand for (unexplained) monetary damages and punitive damages contained in ¶¶ 37 and 38 and in (iii) in the wherefore clause, and then shall be E-Filed as "Amended Answer with Counterclaims" within 20 days. It then shall be deemed served. 53 Spencer shall reply to Fidelity's amended answer within 30 days after it is electronically filed; and it is further

**ORDERED** that 53 Spencer's summary judgment motion (in mot. seq. 8) and Fidelity's summary judgment cross motion (in mot. seq. 13), both of which involve the plaintiff's third cause of action, for breach of the title policy, are denied, with leave to renew; and it is further

**ORDERED** that the parties shall complete and submit a request for a compliance conference in the Central Compliance Part (CCP) within 30 days after service of 53 Spencer's reply to Fidelity's amended answer, and shall prepare a proposed schedule for discovery, if any, that is required regarding Fidelity's counterclaims, or stipulate that no



further discovery is required.<sup>3</sup> A Note of Issue shall be filed on or before December 4, 2020.

This constitutes the decision and order of the court.

E N T E R :



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Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER  
JSC

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<sup>3</sup> Refer to CCP “updated Kings County Discovery Part Instructions” for details.