

53 Spencer Realty LLC v Fidelity Natl. Tit. Ins. Co.

2021 NY Slip Op 31380(U)

April 22, 2021

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 22nd day of April, 2021.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

53 SPENCER REALTY LLC,

Plaintiff,

DECISION / ORDER

- against -

Index No. 520249/16
Mot. Seq. # 15

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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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

409, 411-486

Opposing Affidavits (Affirmations) _____

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Upon the foregoing papers, defendant Fidelity National Title Insurance Company (Fidelity) moves (in motion sequence [mot. seq.] 15) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and for judgment on its counterclaims.

Background

The 2006 Sale of the Property

By a March 20, 2006 deed, defendant Congregation B'Nei Meir Moshe (Congregation) conveyed the property at 53 Spencer Street in Brooklyn (Property) to plaintiff 53 Spencer Realty LLC (53 Spencer) for \$1.15 million (2006 Sale). The 2006 deed was executed by defendant Emanuel Schwartz (Schwartz) as President of the Congregation. In connection with the 2006 Sale, 53 Spencer borrowed \$862,500.00 from Washington Mutual Bank (Wamu), which loan was secured by a mortgage on the Property.

Defendant Fidelity issued an American Land Title Association (ALTA) Owner's Policy to 53 Spencer, with an effective date of March 20, 2006, to insure 53 Spencer's fee interest in the Property. Fidelity also issued a Mortgage Loan Policy to Wamu to insure its mortgage. A court order approving the 2006 Sale, as is required for property owned by a religious corporation, was allegedly provided to Fidelity. Schwartz allegedly fabricated this "court order" by cutting and pasting from a June 2, 2005 order, which had granted the Congregation permission to mortgage the Property. The court file, index number 3843/2006 has the petition, but no RJI and no court order. It includes documents indicating that the Congregation was planning to sell the property and purchase another, and was not planning to dissolve, not that this property was used as a synagogue. The property is listed as a six-family and has no commercial space.

On July 3, 2006, Schwartz allegedly filed a change of address form with the NYS

Department of State, Division of Corporations, in which he falsely claimed to be a member of 53 Spencer, a limited liability company (LLC), and requested that its records be amended to list his home address, 108 Wallabout Street #1-B in Brooklyn, NY for service of process upon 53 Spencer.

The 2009 Foreclosure Action

53 Spencer later defaulted in paying the Wamu mortgage, which was by then in the inventory of Wamu's successor in interest, JP Morgan Chase Bank, N.A. (Chase). After 53 Spencer's default, Chase commenced a foreclosure action under Kings County index No. 4534/09 (2009 Foreclosure Action). Service of process in the 2009 Foreclosure Action was effectuated upon 53 Spencer by service on the Secretary of State, who sent the papers to Schwartz's home address. 53 Spencer answered the complaint by counsel with an answer with counterclaims dated May 22, 2009 and verified by counsel. It is not known who retained the attorney to answer the complaint. Chase subsequently assigned the Wamu mortgage to 53 Spencer Holdings LLC (Spencer Holdings) and this entity was substituted as plaintiff in the Foreclosure Action.

Meanwhile, on or about August 15, 2010, during the pendency of the 2009 Foreclosure Action, Schwartz (claiming authority to do so) executed a deed on behalf of 53 Spencer conveying the Property to Island Properties NYC LLC (Island Properties).

Chase's successor in interest, Spencer Holdings, ultimately obtained a judgment of foreclosure, a foreclosure auction was held, and the Property was transferred to Spencer Holdings by a June 5, 2013 Referee's deed, which was recorded on July 12, 2013. The

merger of the deed and mortgage resulted in the cancellation of the Wamu mortgage. The deed to Island Properties became void after the Referee's deed was recorded.

The 2013 Quiet Title Action

On or about August 26, 2013, the Congregation commenced an action under Kings County index No. 505015/2013 to quiet title to the Property (2013 Quiet Title Action) based on its claim that the 2006 Sale of the Property to 53 Spencer was consummated by Schwartz without authority and was not conducted in accordance with the NYS Not-for-Profit Corporations Law (N-PCL) and Religious Corporations Law (RCL). Specifically, the complaint in the 2013 Quiet Title Action alleged that the 2006 Sale of the Property was never approved by the court or the New York State Attorney General, nor was it approved by the Congregation, and that the documents purporting to indicate such approval were forged by Schwartz.¹

53 Spencer was served with the summons and complaint in the 2013 Quiet Title Action by service on September 2, 2013 upon the Secretary of State, which forwarded the papers to Schwartz's home address. 53 Spencer alleges that Schwartz provided his address to the Secretary of State in 2006 for the purpose of diverting all papers served upon 53 Spencer to himself. 53 Spencer failed to timely answer the complaint in the 2013 Quiet Title Action and claims that it was unaware of the 2013 Quiet Title Action.

On March 3, 2016, following nearly three years of litigation, the Congregation

¹ There is no record of the court approving the 2006 Sale of the Property to 53 Spencer in the County Clerk's minutes, and the Attorney General's office issued a letter to the Congregation's counsel stating that it did not approve the 2006 Sale of the Property. An application was filed with the court, and an index number (3843/06) was purchased, but no RJI was filed or order issued.

plaintiff and the answering defendants, including the tenants residing at the property, executed a Stipulation of Settlement, which resolved the 2013 Quiet Title Action and was “so ordered” by the court on March 11, 2016. Under the so-ordered stipulation, title to the Property reverted back to the Congregation in exchange for a \$1.4 million payment to Spencer Holdings, the title holder and former mortgagor. The so-ordered stipulation also declared that the 2006 Sale of the Property, the 2010 sale of the Property to Island Properties and the 2013 Referee’s deed were all null and void. Schwartz executed the so-ordered stipulation of behalf of the Congregation. It is not known if this is the same person who signed the deed from the Congregation to 53 Spencer. Simultaneously with the stipulation, the court issued a separate order authorizing a new conveyance of the Property from Congregation to Spencer Fifty Three LLC (Spencer Fifty Three).

On June 15, 2016, three months after the settlement of the quiet title action, 53 Spencer attempted to file an answer with counterclaims, which the court rejected. 53 Spencer then commenced a third-party action against Fidelity, Spencer Fifty Three, Schwartz, the Congregation, and others under the index number of the disposed 2013 Quiet Title Action. By a November 13, 2016 order, 53 Spencer’s third-party complaint was dismissed without prejudice to 53 Spencer filing a new plenary action.

The Instant Action

Two days later, on November 15, 2016, 53 Spencer commenced the instant action by filing a summons and complaint asserting, with regard to movant Fidelity, the third and fourth causes of action, for breach of the title policy and unjust enrichment, respectively.

The third cause of action alleges that 53 Spencer purchased a title insurance policy from Fidelity, which insured it against all claims which might affect title to the Property from the date it acquired title on March 20, 2006, and that 53 Spencer suffered a loss “upon recording of the deed . . . which transferred the property back to defendant [Congregation]” (complaint, ¶¶ 53-56). These allegations apparently refer to the court’s March 2016 so-ordered stipulation in the Quiet Title Action, which declared that the 2006 deed from the Congregation to 53 Spencer is a nullity because it was based on a fraudulent “court order” fabricated by Schwartz. The complaint further alleges that 53 Spencer notified Fidelity of its loss in April 2016, and that Fidelity refused to honor its contractual obligation to defend, insure or reimburse it for its claim (*id.* ¶¶ 56-57). The complaint alleges that Fidelity is in breach of its contract and its insurance policy, and that Fidelity should be compelled to defend, insure, or reimburse 53 Spencer for the loss of the Property (*id.* ¶¶ 57-59).

In September 2017, Fidelity filed a pre-answer dismissal motion. By a December 14, 2017 decision and order, the court dismissed all causes of action against Fidelity except the third cause of action for breach of the title policy. In the decision regarding the third cause of action for breach of the title policy, this court held that “[h]ere, as the policy contains no specific exclusion from coverage in the event the deed conveying the property to plaintiff was fraudulent, a complaint alleging that the title company wrongfully disclaimed coverage does state a cause of action for breach of contract.”

The court notes that by order dated September 7, 2017, the motions of defendants Spencer Fifty Three LLC, Waldman, and Franczoz were granted, and the complaint was

dismissed as against them. Emmanuel Schwartz also moved to dismiss, on the grounds that he was not properly served. The court ordered a traverse hearing on October 31, 2017, but the plaintiff failed to appear for the hearing on January 2, 2018, and the judge who oversaw the referees dismissed the entire action. A Stipulation of Discontinuance with regard to defendant Schwartz was E-Filed (Doc 207) on January 18, 2018. Plaintiff then moved by order to show cause to restore the action to active status. A stipulation was submitted to be so-ordered which resolved this motion (Seq. 6) and restored the action “with respect to defendant Fidelity only.” It was so-ordered on February 1, 2018. Therefore, the only defendant remaining in this action is Fidelity. It does not appear that defendant Congregation was ever served, and it did not answer, but the stipulation executed by plaintiff’s attorney clearly abandoned any claims as against it.

On February 28, 2018, Fidelity answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that plaintiff’s claims are barred by the express terms of the title policy. Thereafter, discovery ensued.

In September 2019, while discovery was still pending, 53 Spencer moved for summary judgment on its third cause of action alleging that Fidelity breached the title policy by disclaiming coverage. On February 4, 2020, Fidelity cross-moved for summary judgment dismissing the third cause of action and contemporaneously moved for leave to amend its answer to include two additional 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 discovery.

By an August 5, 2020 decision and order, the court granted Fidelity's motion for leave to amend its answer to add two additional affirmative defenses and two counterclaims against 53 Spencer for fraudulent inducement (to the extent that it seeks rescission of the title policy) and rescission of the title policy and denied the parties' summary judgment motion and cross motion regarding the third cause of action as premature in light of the simultaneous motion to amend, with leave to renew.

Fidelity's Summary Judgment Motion

Fidelity now moves for summary judgment dismissing 53 Spencer's third and only remaining cause of action against it, for breach of the title policy, and for summary judgment on its two counterclaims for fraud in the inducement and rescission of the title policy.

Fidelity argues that: (1) the title policy terminated, at the latest, on June 5, 2013, when 53 Spencer lost title to the Property to foreclosure and a Referee's deed was delivered to (successor mortgagor) 53 Spencer Holdings; (2) "the alleged title defect occurred after the Policy date, and defects incurred post-Policy are not covered under the plain language of the Policy"; (3) "the Policy excludes coverage for claims . . . that were created, suffered, assumed or agreed to by the Insured"; (4) 53 Spencer's failure to provide timely notice of the claim prejudiced Fidelity and terminated any coverage; (5) the title policy was procured by fraud, and thus, should be rescinded; (6) 53 Spencer's bad faith precludes coverage; (7) 53 Spencer's purported representative lacks capacity to bring this action; and (8) 53 Spencer's claim is barred by res judicata and collateral estoppel.

Specifically, Fidelity contends that “[c]overage under the Policy automatically terminated [under paragraph 2 of the Conditions and Stipulations of the title policy] once Plaintiff ceased to hold an insurable interest in the Property insured by the Policy[,]” since the Property was transferred to Island Properties on August 15, 2010 and “lost to foreclosure on June 5, 2013 following Plaintiff’s admitted failure to repay its mortgage debt.” Fidelity relies on paragraph 2 of the Conditions and Stipulations of the title policy, which provides, in relevant part, that “[coverage] in favor of an insured [shall continue for] only so long as the insured retains an estate or interest in the land” Fidelity notes that “title to the Property was transferred *four* times after March 20, 2006, punctuating with a settlement and order entered in [the 2013 Quiet Title Action] that permitted the title to be restored to Plaintiff’s grantor, and then conveyed to a new third-party”

Fidelity also asserts that, even if the title policy coverage had not terminated, 53 Spencer is not entitled to coverage under policy provisions excluding coverage for: (1) alleged defects arising after the date of the title policy, since “the alleged loss of title in 2016 occurred a full ten years after the date of the Policy, and a full three years after title was lost to foreclosure” (*see* Exclusion 3 [d]); (2) 53 Spencer’s “role in creating its own damage when it lost title to foreclosure . . . due to its admitted failure to repay its mortgage” (*see* Exclusion 3 [a]); and (3) 53 Spencer’s “failure to timely notify Fidelity about any putative basis for a title claim until after an adjudication of that interest had been safely concluded [in the 2013 Quiet Title Action]” (*see* Paragraph 3).

Fidelity contends that “the demonstrable fraud perpetrated when title to this Property was acquired, and throughout the years that followed, also precludes policy

coverage.” Fidelity submits an affidavit from Catherine Remler Michaud (Michaud), an Assistant Vice President and Senior Claims Counsel at Fidelity, who attested that prior to issuing the title policy to 53 Spencer, it issued a Title Commitment that required 53 Spencer to provide specific information, such as proof of formation and proof that the party executing the instrument on behalf of the organization was authorized. Michaud attests that Fidelity received several documents purporting to demonstrate that Rivka Kellner was 53 Spencer’s sole member and was authorized to act on its behalf. According to Michaud, Fidelity relied on these documents in agreeing to issue the title policy in 2006, and was not aware “that these representations were false when made, as the evidentiary record now demonstrates that Kellner was not a member or owner of 53 Spencer Realty at any time [and] that she was not authorized to consummate this transaction on behalf of 53 Spencer”² Michaud attests that “[h]ad Fidelity known that any materially false statements had been made by or on behalf of a party seeking a title insurance policy, Fidelity would not have agreed to insure the transaction.”

Fidelity further asserts that Rivka Kellner diverted the Property’s rental revenue to herself by funneling cash payments to “Ester Heilbrun,” an alias that she testified to having used. Thus, according to Fidelity, 53 Spencer admittedly failed to pay the Wamu mortgage and allowed the mortgage to be foreclosed upon, and Rivka Kellner diverted rental income from the Property to herself during the pendency of the 2009 Foreclosure

² According to 53 Spencer’s responses to interrogatories, Rivka Kellner’s deposition testimony, and 53 Spencer’s public filings: (1) 53 Spencer was organized on August 2, 2004, as a LLC by Gita Brull, whose married name was Gitta Kellner (Brull); (2) Brull was the sole owner, organizer and member of 53 Spencer from the date of its formation in 2004 until her death in December 2017; and (3) Brull was Rivka Kellner’s mother.

Action. Based on these facts, Fidelity claims that coverage under the title policy was excluded under Exclusion 3 (a), which provides, in relevant part, that Fidelity will not pay for loss or damage that arise by reason of “defects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed or agreed to by the insured claimant.”

Fidelity also argues that 53 Spencer’s “failure to provide notice of any of the matters about which it now complains until [2016] after the Quiet Title Action had been conclusively resolved also precludes coverage pursuant to Paragraph 3 of the Conditions and Stipulations.”³ However, Michaud attests (Doc 471) that “Fidelity received a written title claim, dated September 16, 2013, (Doc 483) from Joel Horowitz . . . ostensibly on behalf of 53 Spencer Realty,”⁴ and that Fidelity denied the claim by an October 3, 2013 letter “on the basis that, among other things, [53 Spencer] no longer held an insurable interest in the Property.”

Fidelity also contends that dismissal of the third cause of action for breach of the title policy is warranted under the doctrines of res judicata and/or collateral estoppel because 53 Spencer “improperly seeks to relitigate a claim that was or could have been

³ Paragraph 3 of the Conditions and Stipulations requires an insured to give prompt written notice of a claim when an insured knows of “any claim of title or interest which is adverse to the title . . . and which might cause loss or damage for which the Company may be liable”

⁴ Joel Horowitz represented (Doc 360) in the foreclosure action that he was the managing member of 53 Spencer Holdings LLC, and seems to have confused Fidelity and its attorneys as to which entity he was involved with, although at Rivka Kellner’s EBT (Doc 349), Fidelity asked many questions about her “nephew Joel Horowitz.” Ms. Kellner denied that he is her nephew. There are also inferences in the EBT that Spencer Holdings was attempting to purchase title insurance at the time of the referee’s deed to it. Nonetheless, it is worth noting that on the date of his claim letter, Spencer Holdings having been sued in the quiet title action along with plaintiff here, 53 Spencer, 53 Spencer still had time to answer the complaint in the quiet title action filed by Congregation. If Fidelity thought Joel Horowitz was making a claim on behalf of 53 Spencer, it should have perhaps provided a defense. This might have prevented a lot of the ensuing litigation.

litigated in the [2013 Quiet Title Action].” Fidelity asserts that the court ultimately ordered the disposition of the Property in 2016, and “[i]f Plaintiff disagreed with this decision, it should have moved to vacate its default or taken an appeal [in the 2013 Quiet Title Action].”

Fidelity argues that “Plaintiff’s fraudulent and bad faith conduct not only precludes a viable claim under the Policy, but also supports entry of summary judgment in favor of Fidelity on its counterclaims for fraud in the inducement and rescission.”

53 Spencer’s Opposition

53 Spencer, in opposition, argues that “[t]he bulk of defendant’s motion is again 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 further claims that this court has already ruled that “[t]he policy contains no specific exclusion from coverage in the event the deed conveying the property to plaintiff was fraudulent”

53 Spencer contends that “defendant’s reliance on the transfer of the deed to Island [Properties] on 8/15/10 is unavailing . . .” since the March 11, 2016, so-ordered stipulation in the 2013 Quiet Title Action declared that the deed to Island Properties was null and void. 53 Spencer similarly argues that coverage under the title policy did not terminate in 2013 when title was conveyed pursuant to the Referee’s deed, since this court subsequently declared that the Referee’s deed was null and void.

53 Spencer argues that the 2009 Foreclosure Action is “irrelevant,” since this “case is based simply on the fact that plaintiff NEVER obtained good title to the property

because the 2006 sale of the property to Plaintiff was, in fact, based on a fraudulent court order . . .” and “what happened seven years later is not relevant to this case.”

53 Spencer also asserts that Fidelity “has waived any defense based on the notion that it disclaimed coverage . . .” because it failed to plead “noncoverage” as an affirmative defense. 53 Spencer claims that Fidelity’s third affirmative defense, which asserts that plaintiff’s claims are barred by the express terms of the policy is insufficient.

Finally, 53 Spencer asserts that “[p]laintiff had no chance to litigate in the [2013 Quiet Title Action] because [it] was not properly served” and “the judgment against [it] was issued on default.” 53 Spencer contends that it is not bound by collateral estoppel or res judicata because it did not participate in the 2013 Quiet Title Action, since Schwartz diverted service of all papers upon 53 Spencer to himself.

Fidelity’s Reply

Fidelity, in reply, contends that 53 Spencer has failed to identify any provision of the title policy that was breached. Fidelity asserts that 53 Spencer “does not dispute (or even address) any of the *four* Policy provisions that unambiguously preclude coverage here” Fidelity notes that 53 Spencer “does not deny or refute any of the facts evidencing its decade-long fraud, beginning with the fraud that induced Fidelity to issue the Policy in the first place.” Fidelity argues that “[b]ecause the law precludes coverage for a claim under a policy that was fraudulently procured . . . summary judgment should be entered dismissing Plaintiff’s breach of contract claim . . . and granting a final judgment in favor of Fidelity on its counterclaims for fraud in the inducement and rescission of the Policy.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]).

Fidelity has failed to satisfy its burden of establishing that 53 Spencer’s third cause of action for breach of the title policy is precluded by the provisions of the title policy or the law. Fidelity argues that coverage under the title policy terminated, pursuant to paragraph 2 of the Conditions and Stipulations in the title policy, when Schwartz sold the Property to Island Properties on August 15, 2010, or, at the latest, on June 5, 2013, when the Property was transferred to 53 Spencer Holdings pursuant to the Referee’s deed, because 53 Spencer no longer had an insurable interest in the Property. However, the March 11, 2016, so-ordered stipulation in the 2013 Quiet Title Action declared that both of those deeds were null and void, along with the 2006 deed transferring the Property to 53 Spencer, and therefore, 53 Spencer’s insurable interest in the Property did not terminate.

Similarly unavailing is Fidelity’s contention that 53 Spencer’s third cause of action for breach of the title policy is precluded by Exclusion 3 (d) in the title policy, which provides that coverage is unavailable for any alleged defects that arose “subsequent to

Date of Policy.” Fidelity also argues that Exclusion 3 (a) excludes claims that were created, suffered, assumed, or agreed to by the insured. Fidelity contends that 52 Spencer’s “post-Policy failure to repay its mortgage loan is the primary reason that it does not hold title today, regardless of what may have occurred when the Property was purchased [in 2006].” Fidelity’s references to the 2009 Foreclosure are unpersuasive because the alleged title defect and 53 Spencer’s alleged loss took place three years earlier, on March 20, 2006, when Schwartz presented a forged court order in connection with the Congregation’s improper sale of the Property to 53 Spencer.

Contrary to Fidelity’s assertion, 53 Spencer is not precluded from asserting the third cause of action, for breach of the title policy, under the doctrines of res judicata or collateral estoppel. 53 Spencer was deprived of an opportunity to litigate its breach of contract claim against Fidelity in the 2013 Quiet Title Action because Schwartz diverted process of all papers to himself. Fidelity’s remaining arguments for summary judgment dismissing the third cause of action for breach of the title policy have been considered by the court and do not warrant dismissal.

Turning to the other branch of the motion, Fidelity is not entitled to summary judgment on its counterclaims for fraudulent inducement or for rescission of the title policy because there are clearly triable issues of fact, including 53 Spencer’s knowledge of Kellner’s alleged fraud. “The elements of a cause of action sounding in fraudulent inducement are representation of a material existing fact, falsity, scienter, deception and injury” (*Dalessio v Kressler*, 6 AD3d 57, 61 [2004]). While Fidelity claims that it was

“induced through fraud to insure an ownership interest that was obtained through fraud[,]” it asserts that “*Kellner* repeatedly misrepresented herself to be Plaintiff’s organizer, member, officer or agent . . .” and “[s]he signed virtually every transactional document under those false pretenses, submitted phony corporate documents to conceal her fraud, and executed the closing documents under the auspices of authority that she did not possess” (emphasis added). Thus, Fidelity claims that Kellner, rather than 53 Spencer, fraudulently induced it to issue the title policy. While Fidelity argues that “there can be no genuine dispute that [53 Spencer], through Brull as sole member, knew about the false statements her daughter Kellner had, made to Fidelity and others[,]” Fidelity fails to provide any evidence to support that conclusory assertion. Consequently, Fidelity is not entitled to summary judgment rescinding the title policy because it failed to prove that 53 Spencer had knowledge of Kellner’s actions, which is the basis of movant’s claim of fraud in the inducement.

Accordingly, it is

ORDERED that Fidelity’s summary judgment motion (mot. seq. 15) is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.