

<b>Fidelity Natl. Tit. Ins. Co. v DaSilva</b>
2022 NY Slip Op 32111(U)
July 6, 2022
Supreme Court, New York County
Docket Number: Index No. 156474/2020
Judge: Lori Sattler
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

<b>PRESENT: <u>HON. LORI SATTLER</u></b> <div style="text-align: right;"><i>Justice</i></div> <p>-----X</p> <p>FIDELITY NATIONAL TITLE INSURANCE COMPANY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>ERNANI DASILVA, HERITAGE TITLES, JOSEPH MURO, MELISSA MURO</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%;"><b>PART</b></td> <td style="width: 50%; text-align: right;"><b>02TR</b></td> </tr> <tr> <td><b>INDEX NO.</b></td> <td style="text-align: right;"><u>156474/2020</u></td> </tr> <tr> <td><b>MOTION DATE</b></td> <td style="text-align: right;"><u>04/06/2022, 04/06/2022</u></td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td style="text-align: right;"><u>005 006</u></td> </tr> </table> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>	<b>PART</b>	<b>02TR</b>	<b>INDEX NO.</b>	<u>156474/2020</u>	<b>MOTION DATE</b>	<u>04/06/2022, 04/06/2022</u>	<b>MOTION SEQ. NO.</b>	<u>005 006</u>
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The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 113, 114, 115, 116, 117, 118, 119, 129, 136, 138, 148, 149, 150, 151, 152, 154

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 120, 121, 122, 123, 124, 125, 126, 127, 131, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 153, 155, 156

were read on this motion to/for DISMISSAL.

In this action for common law indemnification, defendants Heritage Titles, Joseph Muro, and Melissa Muro (collectively “Heritage”) move for dismissal in Motion Sequence 005 pursuant to CPLR 3211. Defendant Ernani DaSilva (“DaSilva”) moves for dismissal in Motion Sequence 006 pursuant to CPLR 3211. The motions of Heritage and DaSilva (collectively “Defendants”) are hereby consolidated for disposition. Plaintiff Fidelity National Title Insurance Company (“Plaintiff”) opposes both motions.

## BACKGROUND

This action arises out of a series of mortgages that encumbered the property located at 29 Ford Drive South, Massapequa, New York (“the Property”). In 2003, then-owner of the Property Linda Alioglu-DaSilva (“Linda”) executed a mortgage with Fremont Investment & Loan (“the

Fremont Mortgage”) for \$165,000. The Fremont Mortgage was recorded with the Nassau County Clerk on June 23, 2003. In 2004, Linda executed a mortgage with Ameriquist Mortgage Company (“the Ameriquist Mortgage”) for \$244,000. This mortgage was recorded with the Nassau County Clerk on November 3, 2004. A Satisfaction of Mortgage for the Fremont Mortgage was recorded with the Nassau County Clerk’s Office on December 28, 2004. However, the satisfaction’s endorsement cover page erroneously referenced the recording information for the Ameriquist Mortgage rather than that of the Fremont Mortgage.

Linda died in 2005, at which time ownership of the Property passed to her husband, DaSilva. In 2010, DaSilva executed a Home Equity Conversion Mortgage (“the Reverse Mortgage”) with Bank of America. Bank of America purchased a Lender Policy of Insurance (“the Policy”) from Plaintiff as part of its issuance of the Reverse Mortgage.

A title search on the Property was performed in connection with the issuance of the Reverse Mortgage. Defendants maintain that Bank of America contracted with Rochester Equity Partners, Inc. d/b/a WebTitle Agency, Cascade Settlement Agency and Customized Lenders Services (“WebTitle”) to obtain the title search (NYSCEF Doc. Nos. 82, “Somer Affirmation”, and 99, “Borofsky Affirmation”). Heritage maintains that it was subcontracted by WebTitle, after which time it performed a title search in relation to the Property (Somer Affirmation ¶ 41). It is undisputed that Heritage did not identify the Ameriquist Mortgage as encumbering the Property in the title search. As a result, the Ameriquist Mortgage was not excepted from coverage under the Policy.

In 2014, the Ameriquist Mortgage was assigned to Wilmington Savings Fund Society, FSB (“Wilmington Savings”). In 2016, Wilmington Savings filed a foreclosure action on the Ameriquist Mortgage (“Ameriquist Foreclosure”) in the Supreme Court of New York, Nassau

County. Bank of America was named as a defendant in the Ameriquest Foreclosure along with DaSilva and the administrator of Linda's estate. Bank of America's servicer submitted a claim to Plaintiff under the Policy, causing Plaintiff to retain counsel to defend the action in the Ameriquest Foreclosure on behalf of Bank of America's servicer. Summary judgment was entered in Wilmington Savings' favor on January 26, 2018. The court in the foreclosure action established the Ameriquest Mortgage as having a first lien position against the Property, with priority over the Reverse Mortgage. Plaintiff subsequently fulfilled its obligations under the Policy and resolved the claim by paying Bank of America's servicer approximately \$294,000 to satisfy the Ameriquest Mortgage. Wilmington Savings then sold the Property. Plaintiff subsequently commenced the present action in 2020 seeking common law indemnification against Heritage and DaSilva seeking \$354,574.27 in damages, which constitutes the amount Plaintiff paid on the Policy plus legal fees, costs, and expenses incurred on the Ameriquest Foreclosure.

## DISCUSSION

### **Documentary Evidence**

Heritage and DaSilva both argue that they are entitled to dismissal of Plaintiff's common law indemnification claims against them because of documentary evidence that purports to demonstrate that they did not proximately cause Plaintiff's damages. CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." Dismissal under 3211(a)(1) is warranted "where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also 511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d

144, 152 [2002])). “Factual affidavits . . . do not constitute documentary evidence within the meaning” of CPLR 3211(a)(1) (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014])).

Here, Plaintiff alleges that it is entitled to common law indemnification against Heritage and DaSilva because it was entirely without fault with respect to the damages it incurred by having to pay the claim on the Ameriquest Foreclosure and that defendants’ actions were responsible for that loss. In response, Heritage argues that its actions did not cause Plaintiff’s loss. In support of this position, it presents documentation of the relevant mortgages on the Property; an email by Kevin Masters, an employee of WebTitle; a 2011 letter from the Nassau County Clerk’s Office; and a screenshot of title search results on the Nassau County Clerk Website. Heritage argues that these documents, as explained by the affidavit of Joseph Muro, demonstrate that a clerical error on the part of the Nassau County Clerk’s Office caused the Ameriquest Mortgage to be erroneously marked as “satisfied” on the Property’s title search results. Further, Heritage maintains that it followed the accepted standards for conducting the title search by merely examining the search results for mortgages marked as “satisfied” because this denotation “obviate[d] the need to review the document itself” (NYSCEF Doc. No. 83 ¶ 7).

Da Silva also argues that documentary evidence shows that he was not the wrongdoer responsible for Plaintiff’s damages. Rather, DaSilva maintains that Plaintiff sustained its loss due to the failure of other parties that either caused the Fremont Mortgage satisfaction to be prepared incorrectly or failed to discover that the Ameriquest Mortgage was not satisfied (Borofsky Affidavit ¶¶ 18-19).

The Court finds that the documents presented by Heritage and DaSilva do not “utterly refute[ ]” Plaintiff’s factual allegations or establish a defense against indemnification as a matter

of law (*Goshen* at 326). Heritage's documents merely purport to demonstrate that it adhered to industry standards in conducting the title search for the Property, an assertion that fails to establish that Heritage engaged in no wrongdoing that contributed to Plaintiff's loss. DaSilva's argument that other parties are responsible for the failure to identify the encumbrance of the Ameriquet Mortgage on the Property does not address the basis for Plaintiff's indemnification cause of action against him, namely that he failed to repay the amount owed under the Ameriquet Mortgage (NYSCEF Doc. No. 100 ¶¶ 35-40). The branches of Defendants' motions seeking dismissal under CPLR 3211(a)(1) are accordingly denied.

### **Statute of Limitations**

Heritage and DaSilva argue for dismissal pursuant to CPLR 3211(a)(5) because Plaintiff commenced this action after the statute of limitations expired. Defendants maintain that the statute of limitations on Plaintiff's indemnification claims accrued in 2010 at the time of the title search and expired in 2016. In relevant part, CPLR 3211(a)(5) permits a defendant to move for dismissal where "the cause of action may not be maintained because of . . . statute of limitations." The statute of limitations for an action with no limitation prescribed by law and for an action based on mistake is six years (CPLR 213[1], [6]).

"The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim" (*Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007]). The statute of limitations for indemnity claims arising from Plaintiff's liability under the Policy accrued when Plaintiff paid the claim for the Ameriquet Foreclosure on October 22, 2018. Plaintiff commenced the present action on August 17, 2020, when it filed its first complaint. This action was timely commenced by Plaintiff and

therefore the Court denies the branches of Heritage and DaSilva's motions to dismiss pursuant to CPLR 3211(a)(5).

### **Failure to State a Cause of Action**

Defendants argue in their respective motions that Plaintiff fails to state a cause of action for common law indemnification, also known as equitable indemnification. A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) must be denied if, in the four corners of the pleadings, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; *511 W. 232nd Owners Corp.* at 152). When hearing a motion pursuant to CPLR 3211(a)(7), a court "accept[s] all factual allegations in the pleading as true" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 325 [1st Dept 2009]). "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *quoting Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003]).

Here, the Second Amended Complaint alleges that Plaintiff sustained its loss by fulfilling its obligations under the Policy to resolve the claim in the Ameriquest Foreclosure. According to Plaintiff's allegations in the Second Amended Complaint, Plaintiff did not commit any act of wrongdoing that caused it to sustain its loss. Rather, its loss arose due to its liability under the Policy because Heritage failed to identify the Ameriquest Mortgage while conducting the 2010 title search and because DaSilva defaulted on the Ameriquest Mortgage, resulting in the foreclosure proceedings. The Court finds that the facts alleged by Plaintiff in the Second

Amended Complaint are sufficient to state a claim for common law indemnification as against both Heritage and Da Silva. Accordingly, the branches of Heritage and DaSilva's motions to dismiss Plaintiff's common law indemnification claims for failure to state a cause of action under CPLR 3211(a)(7) are denied.

### **Essential Party Missing**

In their respective motions to dismiss, Defendants argue that they are entitled to dismissal because Plaintiff failed to join an essential party or parties. Defendants argue in their respective papers that WebTitle is an essential party because it ran the title search and had privity with Plaintiff and therefore caused Plaintiff's loss (Somer Affirmation ¶ 3, 43; Borofsky Affirmation ¶¶ 21-22). DaSilva further asserts that, in addition WebTitle, Bank of America, Champion Mortgage Company, Lee Jacobowitz, Esq., Debbie Thayer, and Mortgage Electronic Registration Systems ("MERS") are essential parties (Borofsky Affirmation ¶¶ 18, 21). According to DaSilva, Bank of America and its attorney Lee Jacobowitz contributed to Plaintiff's alleged damages because they "knew or should have known of the defective Fremont satisfaction" (*id.* at ¶ 24). As to MERS and its Vice President, Debbie Thayer, DaSilva alleges that Thayer "prepared the satisfaction incorrectly," causing the Nassau County Clerk records to erroneously show the Ameriquest Mortgage as satisfied (*id.* at ¶ 18).

CPLR 3211(a)(10) authorizes dismissal on the ground of nonjoinder of "a person who should be a party." According to CPLR 1001(a), necessary joinder of parties is required for "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." It is well-established that "joint tortfeasors are not necessary



parties to an action” (*Hasenzahl v 44th St. Dev. LLC*, 203 AD3d 602, 603 [1st Dept 2022]; *Weinstein v W.W.W. Assoc., LLC*, 178 AD3d 486, 487 [1st Dept 2019]).

Taken together with the facts alleged in Plaintiff’s complaint, Defendants’ papers at most show that the parties not joined in this action were joint tortfeasors responsible for Plaintiff’s loss along with Heritage and DaSilva. Because “joint tortfeasors are not necessary parties” to this action, the Court denies the branches of Defendants’ motions seeking dismissal under CPLR 3211(a)(10) (*Hasenzahl* at 603).


The Court has considered the remainder of Defendants’ arguments and finds them unpersuasive.

Accordingly, it is hereby:

ORDERED that the motion to dismiss of defendants Heritage Titles, Joseph Muro, and Melissa Muro is denied; and it is further

ORDERED that the motion to dismiss of defendant Ernani DaSilva is denied; and it is further

ORDERED that parties appear for a Preliminary Conference to be held via Microsoft Teams on August 2 at 12:00 PM.

<u>7/6/2022</u>			
DATE		LORI SATTLER, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		