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380 Kings Highway, LLC v Fidelity Natl. Tit. Ins. Co.
2011 NY Slip Op 52223(U)
Decided on December 13, 2011
Supreme Court, Kings County
Schack, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through December 16, 2011; it will not be published in the printed Official Reports.

Decided on December 13, 2011

Supreme Court, Kings County

380 Kings Highway, LLC, Plaintiff,

against

Fidelity National Title Insurance Company, Defendant.

25242/10

Plaintiff

Tsyngauz & Associates, P.C.
by Michael Treybich, Esq.
NY NY

Defendant

The Law Division of Fidelity National Title Group, Inc,
by Ethan Steward, Esq.
NY NY

Arthur M. Schack, J.

The issue before the Court is whether defendant, FIDELITY NATIONAL TITLE INSURANCE COMPANY (FIDELITY), under the terms of a title insurance policy issued to plaintiff, 380 KINGS HIGHWAY LLC (KINGS HIGHWAY), has a duty to indemnify plaintiff KINGS HIGHWAY for $117,206.25 with interest from August 23, 2010, for plaintiff's payment of an "emergency repair lien," pursuant to New York City Administrative Code § 27-2144. Defendant FIDELITY claims that the subject emergency repair lien is expressly excluded from coverage. Plaintiff KINGS HIGHWAY claims that the subject title insurance policy, an "AMERICAN LAND TITLE ASSOCIATION [ALTA] OWNER'S POLICY (6/17/06) With New York Coverage Endorsement [the Endorsement] Appended," covers the subject emergency repair lien, because the Endorsement was approved by the New York State Insurance Department, after [*2]its drafting by the Title Insurance Rate Service Association, Inc. (TIRSA), of which plaintiff FIDELITY is a member [exhibit 9 of cross-motion], and incorporation by reference into TIRSA's New York Title Insurance Rate Manual at page 86.

Defendant FIDELITY moves for dismissal of plaintiff KINGS HIGHWAY's complaint, pursuant to CPLR Rules 3211 (a) (1) and (7), because the subject emergency repair lien is excluded from coverage. Plaintiff KINGS HIGHWAY cross-moves for summary judgment, pursuant to CPLR Rule 3212, for $117,206.25 with interest from August 23, 2010, for plaintiff's payment of the subject emergency repair lien, which plaintiff avers is covered by the Endorsement to the Title Insurance Policy. The Court finds that plaintiff KINGS HIGHWAY is correct. The Endorsement is incorporated by reference into the Title Insurance Policy. Thus, it overrides the emergency repair lien exclusion. Therefore, as will be explained, defendant's instant motion is denied and plaintiff's instant cross-motion is granted.

Background

Plaintiff is the owner of real property at 380 Kings Highway, Brooklyn, New York (Block 6678, Lot 65, County of Kings). Plaintiff purchased 50% of the premises on July 31, 2008 and the remaining 50% on February 12, 2009. At the February 12, 2009 title closing, defendant's agent, Lighthouse Land Services, Inc., issued to plaintiff a marked-up Title Report for the premises [exhibit 1 of cross-motion] and Title Insurance Policy Number 2730632-77126334[exhibit C of motion and exhibit 2 of cross-motion], with a policy coverage limit of $500,000.00.

It states at the top of the subject title insurance policy "AMERICAN LAND TITLE ASSOCIATION OWNER'S POLICY (6/17/06) With New York Coverage Endorsement Appended"and in the bottom right corner of each page of the policy that contains standard boilerplate language, "ALTA Owner's Policy (6/17/06) w/ New York coverage Endorsement Appended [sic]."

Interestingly, defendant FIDELITY did not submit to the Court the Endorsement as part of its exhibit C of the motion, the title insurance policy. However, plaintiff submitted to the Court, in exhibit 9 of its cross-motion, relevant portions of TIRSA's Title Insurance Rate Manual, Fourth

Reprint: May 1, 2007, Fourth Revision: March 3, 2010, with "all changes approved by the Superintendent of Insurance up to and including March 3, 2010." TIRSA is licensed by the Superintendent of Insurance of the State of New York as a rate service organization and statistical agent of the New York State Insurance Department [NYSID], pursuant to Article 23 of the Insurance Law and under the direct supervision of the Superintendent of Insurance, TIRSA develops, maintains, amends updates and submits to the Superintendent of Insurance for approval, the Title Insurance Rate Manual and all changes thereto. (*In re Coordinated Title Ins. Cases*, 3 Misc 3d 1102 [A] [Sup Ct, Nassau County 2004]).

The "ALTA Owner's Policy (6/16/06) with Standard New York Endorsement" was approved by NYSID on May 1, 2007 [exhibit 9 of cross-motion, page 25, § 1] and the "Standard New York Endorsement (Owner's Policy) (for ALTA 6/17/06)" was approved by NYSID on November 1, 2008 [exhibit 9 of cross-motion, page 25, § 2]. The Endorsement [exhibit 9 of [*3]cross-motion, page 86], states, in relevant portions:

1. The following is ***added as a Covered Risk***:

"11. ***Any statutory lien*** for services, labor of materials ***furnished prior to the date hereof,*** and which has now gained or ***which may hereafter gain priority over the estate or interest of the insured*** as shown in Schedule A of this policy" . . .

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. ***To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement this endorsement controls.*** Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements. [***Emphasis added***]

In the subject title insurance policy, it states in Schedule B, "Exceptions," that "you are not insured against loss, costs, attorneys fees and expenses resulting from" various circumstances. It states, in Exception 6, that "Emergency Repair Liens pursuant to the Administrative Code of the City of New York ***may have and not been filed with the County. No Liability is assumed for same.***" [***Emphasis added***]

The services, labor and materials for the emergency repair lien were furnished, pursuant to New York City Administrative Code § 27-2125, "Power to order or cause correction of violations," which states, in relevant part:

a. Whenever the department determines that because of any violation of this chapter or other applicable law, any dwelling or part of its premises is dangerous to human life and safety or detrimental to health, it may

(1) correct such conditions

The services, labor and materials for the emergency repair lien were furnished on or before August 5, 2008, the "completion date" [exhibit 3 of cross-motion] and the Title Policy is dated

February 12, 2009. Therefore, the services labor and materials of the emergency repair lien were "furnished prior to the date" of the Title Policy, as per the Endorsement, which added "statutory liens" prior to the date of the Title Policy as Covered Risk Number 11 of the Title Insurance Policy. Moreover, defendant FIDELITY had notice of the work order for services, labor and materials that were provided on or before August 8, 2008 by the New York City Department of Housing Preservation and Development [HPD], in the Emergency Repair Search portion of FIDELITY'S Title Report [exhibits 1 and 10 of cross-motion].

On January 4, 2010, an emergency repair lien, pursuant to New York City Administrative Code § 27-2144, for $117,206.25, attached to the premises for demolition work performed at the premises in July 2008 [exhibit D of motion and exhibits 3, 4 and 11 of cross-motion]. New York City Administrative Code § 27-114, "Lien on premises," provides, in pertinent part:

a. There shall be filed in the office of the department a record of all work caused to be performed by or on behalf of the department . . . [*4]

b. All expenses incurred by the department for the repair or the elimination of any dangerous or unlawful conditions therein, pursuant to this chapter or any other applicable provision of law, ***shall constitute a lien upon the premises when such charge is due and payable, which, notwithstanding any other provision of law, shall be the due and payable date for such charge provided on the second statement of account containing such charge. Such lien shall have a priority over all other liens and encumbrances on the premises except for the lien of taxes and assessments***. However, no lien created pursuant to this chapter shall be enforced against a subsequent purchaser in good faith or mortgagee in good faith unless the requirements of subdivision a of this section are satisfied; this limitation shall only apply to transactions occurring after the date such record should have been entered pursuant to subdivision a and the date such entry was made.

c. ***A notice thereof, stating the amount due and the nature of the charge, shall be sent by the department of finance in accordance with section 11-129 of the administrative code, and such charge shall be due and payable, notwithstanding any other provision of law, on the due and payable date provided on the second statement of account containing such charge.*** [***Emphasis added***]

According to New York City Department of Finance [DOF] records, the charges for the services, labor and materials for the emergency repair lien were transmitted from HPD to DOF on June 19, 2009 [exhibit 4 of cross-motion]. The charges that became the emergency repair lien first appeared on DOF's statement of account for the premises, due on October 1, 2009 [exhibit 11 of cross-motion]. The charge appeared for the second time on DOF's statement of account for the premises, due on January 4, 2010. Thus, pursuant to New York City Administrative Code § 27-2144 (b) and (c), the services, labor and materials for emergency repairs performed on behalf of HPD, on or before August 8, 2008, at the subject premises, became the emergency repair lien that attached to the premises on January 4, 2010.

Plaintiff's counsel, on August 23, 2010, gave notice to defendant of the emergency repair lien, calling it "a statutory lien" and stated "our client makes a claim for $117,206.25 together with

interest thereon from January 4, 2010 [exhibit 5 of cross-motion]." Defendant's claims attorney, in a letter dated October 8, 2010 to plaintiff's counsel, disclaimed coverage, citing Exception 6 of Schedule B [exhibit 6 of cross-motion]. Plaintiff commenced the instant action by filing the instant summons and complaint with the Kings County Clerk, on October 13, 2010.

[*5]***Summary Judgment Standard***

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty,* 43 AD2d 968, 969 [2nd Dept 1974]).

CPLR Rule 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. (*Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (*Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Fotiatis v Cambridge Hall Tenants Corp.*, 70 AD3d 631, 632 [2d Dept 2010]).

Motion to dismiss standards

"When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Milstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994])." (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Further, the Court, in *Morris v Morris* (306 AD2d 449, 451 [2d Dept 2003]), instructed that:

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]. The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory [*see Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2000]. However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference [*see Doria v Masucci*, 230 AD2d 764 [2000]. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of

action, not whether [he or] she has stated one [*see Meyer v Guinta*, 262 AD2d [*6] 463, 464 [1999]. Likewise, to succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]).

(*See Euell v Incorporated Village of Hempstead*, 57 AD3d 837 [2d Dept 2008]; *GuideOne Speciality Ins. Co. v Admiral Ins. Co.*, 57 AD3d 611 [2d Dept 2008]; *Ruffino v New York City Transit Authority*, 55 AD3d 817 [2d Dept 2008]; *Katz v Katz*, 55 AD3d 680 [2d Dept 2008]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; *NCJ Cleaners, LLC v ALM Media, Inc.*, 48 AD3d 766 [2d Dept 2008])

Discussion

In the instant action, plaintiff KINGS HIGHWAY makes the necessary *prima facie* showing of entitlement to summary judgment and defendant FIDELITY is unable to present material issues of fact. Defendant KINGS HIGHWAY, in its motion to dismiss, fails to show that the facts as presented by plaintiff KINGS HIGHWAY do not fit into any cognizable legal theory.

Plaintiff KINGS HIGHWAY argues that since the services, labor and materials constituting the emergency repair lien were furnished prior to the date of the Title Policy, the emergency repair lien gained priority over the estate or interest of plaintiff after the date of the Title Policy, because the Endorsement added to the Title Policy as a covered risk, "***Any statutory lien*** for services, labor of materials ***furnished prior to the date hereof,*** and which has now gained or ***which may hereafter gain priority over the estate or interest of the insured*** as shown in Schedule A of this policy." Meanwhile, defendant FIDELITY argues that Exception 6 of Schedule B to the Title Policy applies, which states "Emergency Repair Liens pursuant to the Administrative Code of the City of New York may have and not been filed with the County. No Liability is assumed for same."

Thus, the Court must examine the language used in the subject Title Insurance Policy, a contract between the parties. (*Fieldston Prop. Owner's Assoc. Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]; *Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning (*see Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996], and the interpretations of such provisions is a question of law for the court (*see Bailey v Fish & Neave*, 8 NY3d 523 [2007]; *Chimart Assoc. v Paul*, 66 NY2d 570 [1986])." (*White v Continental Cas. Co.*, 9 NY2d 264, 267 [2007]). (*See Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]; *Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]; *Appleby v Chicago Title Ins. Co.*, 80 AD3d 546, 549 [2011]). Moreover, "[a] contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis a difference of opinion' (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg. denied* 46 NY2d 940 [1979])." (*Greenfield v Phillies Records*, 98 NY2d 562, 569 [2002]).

The Court of Appeals, in *County of Columbia v Continental Insurance Co.* (83 NY2d 618, 628 [1994]), instructed that "in construing an endorsement to an insurance policy, the [*7]endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." (*See Richner Communications, Inc. v Tower Ins. Co. of New York*, 72 AD3d 670, 671[2d Dept 2010]; *William Floyd School Dist. v Maxner*, 68 AD3d 982, 987 [2d Dept 2009]; *Penna v Federal Ins. Co.*, 28 AD3d 731, 731-732 [2d Dept 2006]).

Endorsements are "incorporated by reference into the policy regardless of whether the insured received actual delivery thereof (*see Hirshfeld v Maryland Cas. Co.*, 249 AD2d 274 [2d Dept 1998])." (*Ruiz v State Wide Insulation & Const. Corp.*, 269 AD2d 518, 519 [2d Dept 2000]). It is clear and unambiguous to the Court that the language of the Endorsement is incorporated by reference into the Title Policy issued by defendant FIDELITY to plaintiff KINGS HIGHWAY, on February 12, 2009. The Endorsement clearly states that an additional Covered Risk is added to the policy for "[***a***]***ny statutory lien*** for services, labor of materials ***furnished prior to the date hereof,*** and which has now gained or ***which may hereafter gain priority over the estate or interest of the insured*** as shown in Schedule A of this policy," that "[**t**]***his endorsement is issued as part of the policy***" and "[***t***]***o the extent a provision of the policy or a previous endorsement is inconsistent with an express provision f this endorsement this endorsement controls*** [***emphasis added***]." There is no ambiguity in the policy language when, as in the Endorsement at issue in the instant action, "the words in the paragraphs of the policy under examination have a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, and concerning which there is no reasonable basis for a difference of opinion." (*Breed v Insurance Co. of N. Am.* at 355).

Therefore, to the extent that Exclusion 6 of Schedule B is inconsistent with the Endorsement, the Endorsement controls. Under the Endorsement, the ALTA (6/17/06) New York Coverage Endorsement, appended to the Title Policy, the emergency repair lien at issue is covered by the subject title policy. Therefore, summary judgment for $117,206.25 together with interest from August 23, 2010, pursuant to CPLR § § 5001 and 5004, is awarded to plaintiff KINGS HIGHWAY and dismissal of plaintiff's complaint is denied to defendant FIDELITY.

Conclusion

Accordingly,it is

ORDERED, that the motion of defendant, FIDELITY NATIONAL TITLE INSURANCE COMPANY, for dismissal of the plaintiff 380 KINGS HIGHWAY, LLC's complaint, pursuant to CPLR Rules 3211 (a) (1) and (7), because the subject emergency repair lien is excluded from coverage, is denied; and it is further

ORDERED, that the cross-motion of plaintiff, 380 KINGS HIGHWAY, LLC, for summary judgment, pursuant to CPLR Rule 3212, for $117,206.25 with interest from August 23, 2010, for plaintiff's payment of the subject emergency repair lien, is granted.

This constitutes the Decision and Order of the Court.

ENTER [*8]

_____

HON. ARTHUR M. SCHACK

J. S. C.