Batra v Electronic Land Servs., Inc.

[*1] Batra v Electronic Land Servs., Inc. 2013 NY Slip Op 51644(U) Decided on October 7, 2013 Supreme Court, Westchester County Connolly, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 7, 2013
Supreme Court, Westchester County

Ravi Batra and Ranju Batra, Plaintiffs,

against

Electronic Land Services, Inc., THOROUGHBRED TITLE SERVICES, LLC, HOULIHAN/LAWRENCE, INC., and COMMONWEALTH LAND TITLE INSURANCE COMPANY, Defendants.

52629/2011

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Francesca E. Connolly, J.

The following documents were read in connection with the plaintiffs' motion for a default judgment (Sequence No. 1), the defendant Houlihan/Lawrence Inc.'s cross motion to dismiss, or in the alternative, to compel the plaintiffs to accept service of a late answer (Sequence No. 2), the defendant Thoroughbred Title Services, LLC's cross motion to dismiss, or in the alternative, to compel the plaintiffs to accept service of a late answer (Sequence No. 3), the defendant Electronic Land Services, Inc.'s cross motion to dismiss, or in the alternative, to compel the plaintiffs to accept service of a late answer (Sequence No. 4), and the defendant Commonwealth Land Title Insurance Company's cross motion to dismiss, or in the alternative, to compel the plaintiffs to accept service of a late answer (Sequence No. 5):

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The plaintiffs allegedly purchased certain real property located in New Rochelle in April 2005, which, unbeknownst to them, had been re-zoned after they had entered into the contract to purchase the property, but before the closing. The plaintiffs also contend that the metes and bounds description in the deed that they received from their predecessor in interest omits an additional tract of land that was owned by one of the prior owners in the chain of title. The plaintiffs allege that, as [*2]a result the zoning change and the omission of this additional tract, they were unable to develop the property in the manner they had intended. The plaintiffs brought this suit to recover damages against (1) Commonwealth Land Title Insurance Company (hereinafter Commonwealth), the insurance company that issued the plaintiffs' title insurance policy, (2) Electronic Land Services, Inc., (hereinafter Electronic Land Services), who acted as Commonwealth's agent, (3) Thoroughbred Title Services, LLC, (hereinafter Thoroughbred), and (4) Houlihan/Lawrence, Inc., (hereinafter Houlihan/Lawrence).

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs commenced this action on July 14, 2011 by e-filing a summons with notice on the New York State Electronic Filing system (hereinafter NYSCEF).

All of the defendants appeared and/or filed a demand for a complaint. Specifically, Commonwealth filed a demand for a complaint on October 14, 2011, Electronic Land Services filed a notice of appearance and demand for a complaint on October 20, 2011, Thoroughbred filed a notice of appearance and demand for a complaint on October 24, 2011, and Houlihan/Lawrence filed a notice of appearance on October 26, 2011. These appearances were made through the NYSCEF e-filing system.

The verified complaint

On May 9, 2012, the plaintiffs filed a verified complaint through the NYSCEF system. The "Confirmation Notice," which is a document that is automatically generated by NYSCEF when a document is uploaded, indicates that, on May 9, 2012, at 6:44 PM, "[a] n e-mail notification regarding this filing [was] sent" to e-mail addresses corresponding to the e-mail addresses of the defendants' respective attorneys who had appeared and previously filed documents in this action.

The allegations in the complaint arise from the plaintiffs' purchase of certain residential property located at 11 Echo Bay Drive, New Rochelle. The complaint alleges that Electronic Land Services, a title insurance agency, was authorized to act as Commonwealth's agent in the subject real estate transaction. The plaintiffs allege that Thoroughbred, also a title agency, was established by Houlihan/Lawrence, and "essentially took over the operations of defendant [Electronic Land Services]."

The property, which was purchased from the "Kail Revocable Trust" (hereinafter Kail), is approximately 14,000 square feet in size and, at the time of sale, contained a residential structure (which may or may not still be in existence). The plaintiffs entered into a contract to purchase the property in April 2005, and ultimately closed on July 15, 2005. The plaintiffs intended to demolish the existing house and construct a new home on the property. According to the complaint, unbeknownst to the plaintiffs, the City of

New Rochelle amended its zoning code on May 19, 2005, increasing the minimum lot size necessary for new construction in the zone where the subject property is located from 7,500 square feet to 15,000 square feet. The plaintiffs contend that because [*3] of this change, they could not tear down and reconstruct the house on the subject property, as they intended. The plaintiffs allege that Ted Dacey, an employee of Electronic Land Services, was on notice of their desire to demolish and reconstruct the existing structure.

Further, the complaint alleges that a prior deed for the property dated 1955 included an additional 1,155 square foot parcel, and that the defendants' failure to research the title history of the property precluded the plaintiffs from obtaining title to a lot in excess of 15,000 square feet. The plaintiffs contend that deeds for the property issued in 1974, 1979, and 1992 included this additional tract of land, however, the property was truncated to its current 14,000 square foot size by deeds issued in 1997, 2004, and the deed in the instant case issued from Kail to the plaintiffs in 2005. The complaint alleges: "[H]ad the defendants issued a correct [metes and bounds description] in their title report, pre-closing, the operative deed" for the transfer of the property from Kail to the plaintiffs "would have properly described a lot larger than 15,000 square feet" (verified complaint at 11-12). The plaintiffs claim that Eric Swarthout, an employee of Electronic Land Services admitted to them that the metes and bounds from Kail's deed was copied into a schedule of the metes and bounds used for their deed.

The plaintiffs assert two causes of action, the first for breach of contract and the second for fraud. The plaintiffs contend that they contracted with the defendants to conduct an independent investigation of the property's title and the defendants failed to do so, resulting in a deed with an inadequate metes and bounds description. With respect to the cause of action alleging fraud, the plaintiffs contend that the defendants knew that the title report was not based on an independent investigation of the chain of title, yet nevertheless, fraudulently and intentionally represented to them that it was. The fraud cause of action additionally alleges that the defendants failed to notify the plaintiffs of the zoning change.

The complaint annexes a number of exhibits, including the Commonwealth "Owner's Policy of Title Insurance" issued to the plaintiffs for the real property transaction at issue (see Exhibit 2 to verified complaint [hereinafter the "policy"]). The policy states that it provides insurance against: "[L]oss or damage . . . sustained or incurred by the insured by reason of:1.Title to the estate or interest described in Schedule A being vested other than as stated therein;2.Any defect in or lien or encumbrance on the title;3.Unmarketability of the title;4.Lack of a right of access to and from the land."

(see id.). Schedule A of the policy contains a metes and bounds description of the property, which it is undisputed is identical to the metes and bounds description contained in the Kail deed that preceded the plaintiffs' deed in the chain of title. The policy's coverage is subject to (1) certain enumerated "Exclusions from Coverage," and (2) "the Exceptions from Coverage contained in Schedule B and the Conditions and Stipulations." The policy sets forth the following relevant [*4]exclusions from coverage: "The following matters are expressly excluded from the coverage of the policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:1. (a)Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land . . . or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in public records at Date of Policy.(b)Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation

affecting the land has been recorded in the public records at Date of Policy."

(see id. [Exclusions from Coverage § 1(a)-(b)]). The Conditions and Stipulations to the policy (which are defined as "Exceptions from Coverage") state, in pertinent part: "Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such a claim, shall be restricted to this policy" (see id. [Conditions and Stipulations § 15 (b)]).

The plaintiffs seek damages of $1.2 million representing the purchase price of the property plus $1.5 million representing costs and expenses they incurred relating to tax payments, mortgage payments, maintenance, repair, upkeep, utility payments, professional fees paid to zoning attorneys and architects, and diminution in the value of the property. The complaint seeks damages of $1 million "for pain and suffering in having to engage professionals, including lawyers and architects . . . and grief in dealings with neighbors" (verified complaint at 36). The complaint further seeks punitive damages, costs and attorneys' fees.

The defendants' answers

The complaint went unanswered until April 25, 2013, when Commonwealth filed a verified answer. On April 25, 2013, the following day, separate answers were filed on behalf of the remaining defendants.

The plaintiffs' rejection of the defendants' answers [*5]

The plaintiffs filed Notices of Rejection to each of the defendants' answers on the ground that they were untimely filed.

The plaintiffs' motion for a default judgment

Thereafter, on April 26, 2013, the plaintiffs moved (Sequence No. 1) for a default judgment against all defendants based upon their failure to timely answer the complaint. The plaintiffs relied on the verified complaint as proof of the merits of the action, and further submitted the affidavit of the plaintiff Ravi Batra re-asserting the allegations set forth in the complaint.

The defendants' oppositions and cross motions

Each of the defendants opposed the plaintiffs' motion for a default judgment and cross-moved for various relief.

Houlihan/Lawrence opposed the motion and cross-moved (Sequence No. 2), pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it, or, in the alternative, pursuant to CPLR 3012 (d), to compel the plaintiff to accept service of its late answer. In an affirmation, Houlihan/Lawrence's attorney affirmed that his firm did not learn that the plaintiffs had filed the verified complaint until he was contacted by Commonwealth's counsel. A search of his firm's computer records yielded no indication that they had ever received notice that the complaint had been filed. Houlihan/Lawrence noted that the complaint itself was untimely in that it was filed more than six months after Houlihan/Lawrence filed its notice of appearance in response to the plaintiffs' summons with notice. With respect to the merits of the action, Houlihan/Lawrence's attorney affirmed that, as its general counsel, he has personal knowledge of Houlihan/Lawrence's business, and that it does not own or control, nor is it in any way related to, Thoroughbred or Electronic Land Services.

Thoroughbred opposed the motion and cross-moved (Sequence No. 3), pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it, or, in the alternative, pursuant to CPLR 3012 (d), to compel the plaintiff to accept service of its late answer. Thoroughbred's attorney affirms that he first learned that the plaintiffs filed the verified complaint on April 26, 2013 when he received Commonwealth's answer. Thoroughbred's attorney searched his e-mail archives and found no notification

that the verified complaint had been filed. On the merits, Thoroughbred argues that the complaint should be dismissed insofar as asserted against it because, contrary to the plaintiffs' allegations, Thoroughbred has no relationship to Electronic Land Services. In support, Thoroughbred submits the affidavit from its President, Robert T. Dacey, who attests to the fact that Thoroughbred has no equity or business interest in Electronic Land Services, has never acted as an agent of Commonwealth, and that Thoroughbred was not in existence when the plaintiffs bought the subject property. To support this claim, Thoroughbred submits documentary evidence, including Thoroughbred's articles of organization dated July 10, 2008. In a memorandum of law, Thoroughbred argues that the policy at issue did not include a zoning endorsement, and therefore, all of the plaintiffs' claims, which were merged into the policy, are without merit. Thoroughbred also [*6]argues that the plaintiffs' second cause of action for fraud should be dismissed as barred by the statute of limitations.

Electronic Land Services opposed the motion and cross-moved (Sequence No. 4), pursuant to CPLR 3211, to dismiss the complaint insofar as asserted against it, or, in the alternative, pursuant to CPLR 3012 (d), to compel the plaintiff to accept service of its late answer. Electronic Land Services' attorney (who is also attorney of record for Thoroughbred) affirms that he did not learn of the verified complaint until Commonwealth filed its answer on April 26, 2013, and he again affirms that he never received an e-mail notice that the complaint was filed. The president of Electronic Land Services, Robert T. Dacey (apparently the same Robert T. Dacey who is president of Thoroughbred), submitted an affidavit averring that Electronic Land Services was Commonwealth's agent at the closing, and that the plaintiffs never informed him of their plans for the reuse, rehabilitation, remodeling, or renovation of the property. Dacey again avers that Thoroughbred and Electronic Land Services are unrelated. In a memorandum of law, Electronic Land Services makes similar arguments to Thoroughbred, specifically, that the policy at issue did not include a zoning endorsement, and that the fraud claims are barred by the statute of limitations.

Commonwealth opposed the motion and cross-moved (Sequence No. 5), pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint insofar as asserted against it, or in the alternative, pursuant to CPLR 3012 (d), to compel the plaintiff to accept service of its late answer. Commonwealth's attorney affirms that he never received an e-mail notification that the plaintiffs had filed the verified complaint, and that he only discovered that the complaint had been filed by happenstance. Upon discovering that the complaint was filed, he immediately filed an answer. In an accompanying memorandum of law, Commonwealth argues that its default should be excused in that it has a reasonable excuse and a meritorious defense based upon the terms of the policy. Commonwealth argues that the policy makes no representations regarding the sufficiency of the property described in Schedule A, and that the policy specifically excludes coverage for zoning and regulatory matters. Further, Commonwealth contends that the plaintiffs fail to plead their allegation of fraud with specificity, and that the plaintiffs fail to allege that any representation made to them was false.

The plaintiffs' opposition/reply

In reply, the plaintiffs contend that the defendants have not offered a reasonable excuse for their default, offering an e-mail printout indicating that the NYSCEF system e-mailed each of the defendants' attorneys. The plaintiffs also argue that the defendants' claims that the complaint itself was untimely filed is not an excuse for the untimeliness of their answers. Further, the plaintiffs argue that the complaint, viewed in the light most favorable to them, states causes of action for breach of contract and fraud. [*7]

The defendants' replies

The defendants submit replies, which include affidavits and affirmations further attesting to their claims that their attorneys did not receive an e-mail notice from

NYSCEF when the plaintiffs electronically filed the complaint.

DISCUSSION/ANALYSIS

I.The Plaintiffs' Motion for a Default Judgment is Denied

"To successfully oppose a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for its delay and the existence of a potentially meritorious defense" (see Wassertheil v Elburg, LLC, 94 AD3d 753, 753 [2d Dept 2012]).

Under the somewhat novel circumstances of this case, the Court finds that the defendants' claims that they did not receive an electronic notice from the NYSCEF system when the complaint was filed constitutes a reasonable excuse for their failure to timely answer the complaint. When each of the defendants appeared in the case by filing either a notice of appearance or a demand for a complaint in response to the plaintiffs' summons with notice, the defendants' attorneys each consented to e-filing, enabling service to be made by any party on all other parties to the action simply by uploading a document to the NYSCEF system. The NYSCEF User Manual states: "[T]he act of filing an interlocutory document in the NYSCEF system results in service upon all NYSCEF participants in the case" (New York State Courts Electronic Filing [NYSCEF] System: User Manual for Supreme Court and Court of Claims Cases, § VIII at 29, available at https://iapps.courts.state.ny.us/nyscef/forms/NYSCEF_User_Manual.pdf [accessed Sept. 9, 2013]). Further, the NYSCEF regulations state, in pertinent part:

"Where parties to an action have consented to e-filing, a party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically. Upon receipt of an interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action. Such notification shall provide the title of the document received, the date received, and the names of those appearing on the list of e-mail service addresses to whom that notification is being sent. Each party receiving the notification shall be responsible for accessing the NYSCEF site to obtain a copy of the document received. . . . [T]he electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein; however, such service will not be effective if the filing party learns that the notification did not reach the address of the person to be served."

(22 NYCRR § 202.5-b [f] [2] [ii] [emphasis added]).

Despite the fact that the NYSCEF system should have electronically notified each of the [*8]defendants' attorneys that the complaint had been filed, the attorneys for all four defendants deny receiving such notice. Notably, each of the defendants had appeared in the case and timely filed an appearance, and it strikes this Court as highly unusual that these defendants would not also diligently answer the complaint if they had received notice of its filing. Considering the relative recency of the implementation of the NYSCEF system, the additional fact that all four defendants appear to have been equally affected and that none claim to have received notice, strongly evidences some form of an error in the electronic notice system. Although this purported technical failure of the NYSCEF system is not explainable, the Court credits the claims of the defendants' attorneys—who are officers of the court—that they did not receive the NYSCEF notice, and finds that the failure to receive such e-mail notice constitutes a reasonable excuse.

Further, as discussed in the analysis which follows, the defendants have meritorious defenses to the action. Accordingly, the motion for a default judgment is denied.

II.The Defendants' Motions to Dismiss the Complaint are Granted

A. Breach of contract

Viewing the allegations in the complaint in the light most favorable to the plaintiffs (see Signature Bank v Holtz Rubenstein Reminick, LLP, 109 AD3d 465 [2d Dept 2013]), the complaint fails to state a cause of action for breach of contract against Commonwealth or Electronic Land Services (Commonwealth's agent), with respect to the title insurance policy.

"[A] policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title" (L. Smirlock Realty Corp. v Title Guarantee Co., 52 NY2d 179, 188 [1981]). "Since the title insurer's liability to its insured is based, in essence, on contract law, that liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy" (Nastasi v County of Suffolk, 106 AD3d 1064, 1065 [2d Dept 2013]).

With respect to the plaintiffs' claim that these defendants failed to discover an additional tract of land that was contained in the deeds of previous owners, the insurance policy in this case provides coverage in the event of "loss or damage . . . sustained or incurred by the insured by reason of . . . title to the estate or interest described in Schedule A being vested other than as stated therein" (see Exhibit 2 to verified complaint). Schedule A is an identical metes and bounds description to the description contained in the deed of the plaintiffs' predecessor in interest, Kail. The policy further provides coverage for undisclosed liens or encumbrances to the title described in Schedule A. Thus, the policy, by its express terms, insures against a loss incurred by virtue of the property described in Schedule A being diminished by an undisclosed encumbrance or should it later come to light that Kail did not have title to the property described therein. Critically, however, the policy does not provide coverage for the plaintiffs' alleged failure to receive a deed to property that is greater than that which is described in Schedule A. Thus, the allegation in the complaint that copying of the metes and bounds description from the previous Kail deed into the Schedule A of the policy was [*9]improper, simply does not state a cause of action to recover under the policy, since "[a] grantor cannot convey title to property which he or she does not possess" (Matter of New Cr. Bluebelt, Phase 4, 79 AD3d 888, 891 [2d Dept 2010]). The plaintiffs' claim that the defendants' failure to discover this additional tract of land precluded them from receiving a deed describing this additional tract of land is not actionable since it assumes a legal impossibility, to wit: that the plaintiffs' predecessor could have conveyed property it did not own (see Thompson v Simpson, 128 NY 270, 285 [1891] ["The title and estate which passes under a grant or conveyance, is commensurate only with that existing in the grantor"]). Accordingly, the plaintiffs could not obtain a deed from Kail conveying title to property that Kail did not possess, and the failure to discover that additional tract of land is not a basis for recovery under the policy.

Morever, to the extent that the plaintiffs allege a breach of contract based upon a failure to disclose the zoning change affecting the use of their property, the title insurance policy specifically excludes coverage for losses arising "by reason of . . . [a]ny law, ordinance or governmental regulation (including, but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land" (see Exhibit 2 to verified complaint [Exclusions from Coverage § 1(a) (i)]). Accordingly, since the claim for loss clearly falls within the exclusions from coverage in the policy, the complaint does not state a cause of action to recover based upon the change in zoning (see Property Hackers, LLC v Stewart Tit. Ins. Co., 96 AD3d 818, 819 [2d Dept 2012]).

B. Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). "Where . . . a cause of action is based upon misrepresentation, the circumstances constituting the wrong shall be stated in detail'" (Signature Bank v Holtz Rubenstein Reminick, LLP, 109 AD3d at 465, quoting CPLR 3016 [b]).

Moreover, in order to plead a cause of action for fraud based upon a failure to disclose a material fact, the complaint must allege that the defendants had a duty to disclose the concealed information (see E.B. v. Liberation Publs., Inc., 7 AD3d 566, 567 [2d Dept 2004]; see also Barrett v Freifeld, 64 AD3d 736, 739 [2d Dept 2009]).

Viewing the complaint in the light most favorable to the plaintiff, and accepting the factual allegations as true, the complaint fails to state a cause of action for fraud, since, as discussed above, the defendants had no duty to disclose the existence of property which the plaintiffs' grantor did not own (see Matter of New Cr. Bluebelt, Phase 4, 79 AD3d at 891 ["[a] grantor cannot convey title to property which he or she does not possess"]).

CONCLUSION[*10]

Accordingly, the complaint fails to state a cause of action against Commonwealth and its agent, Electronic Land Services, and must be dismissed insofar as asserted against them pursuant to CPLR 3211(a) (7). Since the alleged basis for Thoroughbred's liability was that it was a successor company to Electronic Land Services, the complaint fails to state a cause of action against Throroughbred. Additionally, since the basis for Houlihan/Lawrence's liability was its alleged affiliation with Thoroughbred, the complaint fails to state against of action against Houlihan/Lawrence.

In light of the foregoing, the Court need not reach the branches of the defendants' motions which seek, in the alternative, to compel the plaintiffs to accept service of their late answers.

Based upon the foregoing, it is hereby

ORDERED that the plaintiffs' motion for a default judgment against each of the defendants is denied; and it is further,

ORDERED that the branches of the defendants' separate motions (Sequence Nos. 2-5) which are to dismiss the complaint pursuant to CPLR 3211(a) (7) are granted, and the action is dismissed in its entirety; and it is further,

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York

October 7, 2013

HON. FRANCESCA E. CONNOLLY, J.S.C.