SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED J.S.C. *Justice* **PART** 43

Index Number : 155983/2013
CUSUMANO, CHARLES
vs.
CHICAGO TITLE INSURANCE
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/18/16

_____, J.S.C.

1. **CHECK ONE:** ..... [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** [ ] **GRANTED** [X] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**
3. **CHECK IF APPROPRIATE:** ..... [ ] **SETTLE ORDER** [ ] **SUBMIT ORDER**
[ ] **DO NOT POST** [ ] **FIDUCIARY APPOINTMENT** [ ] **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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CHARLES CUSUMANO and CHRISTINE SOARES,

Plaintiffs,

Index No. 155983/13

-against-

CHICAGO TITLE INSURANCE COMPANY,

Defendant.

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Robert R. Reed, J.:

This action is brought to recover damages allegedly sustained by Charles Cusumano and Christine Soares under a tile insurance policy issued by defendant Chicago Title Insurance Company (Chicago Title), concerning land which plaintiffs own. Chicago Title moves for summary judgment dismissing the complaint (mot. seq. no. 002), while plaintiffs move for partial summary judgment on the issue of liability, and setting a date for a trial of damages (mot. seq. no. 003).

I. Background

In 2007, plaintiffs purchased a single family home on a 1.5-acre lot, located at 200 Judson Avenue, Dobbs Ferry, New York (200 Judson). At that time, Chicago Title issued a title insurance policy (Policy) to plaintiffs insuring plaintiffs' fee simple title to the land, along with certain exceptions and exclusions. The Policy indemnifies plaintiffs from any event

which negatively impacts plaintiffs' title to the land, so as to cause them actual monetary loss.

In the Policy, Schedule A, the land is described as:

> ALL that certain piece or parcel of land, lying and being in the Village of Dobbs Ferry, town of Greenburgh, County of Westchester and State of New York, being designated as Parcel A as shown on a certain map entitled "Survey of Property prepared for Polsen & Gutfleich/Sorrow dated December 20, 2001 and last revised September 2003 and prepared by Roley Land Surveyors, LLP, Filed in the Westchester County Clerk's Office on November 12, 2004 as Map No. 27541 (2004 Subdivision Map) . . . ."

Moss aff, exhibit 1. This same language is used to describe 200 Judson in the deed conveying the premises to plaintiffs in 2007 (2007 Deed), which language is then followed by a description of the metes and bounds of the property. Defendant's notice of motion, exhibit N.

As applicable to this case, the Policy contains an exception in Schedule B for "sewer easement" (1959 Easement). The exception states, as pertinent, that the policy "does not insure against loss or damage . . . which may arise by reason of: . . . Sewer easement in Liber 5928 page 377 **Affects Southerly 15 feet of premises as shown on survey herein** . . . ." Affirmation of Elliot, exhibit H. That is, the Policy excepts the 1959 Easement.

The 1959 Sewer Easement itself is a grant by Joseph R. Lhowe (Lhowe), and Daltech Enterprises, Inc. (Daltech), prior owners of 200 Judson and adjoining lots (apparently including 198 Judson),

to Leroy M. Rout (Rout), then and now owner of 87 Beechdale Road, another property adjacent to 200 Judson, his "heirs, successors, and assigns the permanent right and easement to enter and construct and maintain a sanitary sewer, water main, and appurtenances[1] with right of access for such purposes upon" Lhowe and Daltech's property (which apparently includes both 200 Judson and 198 Judson) (*id.* at 1), "being a fifteen (15) foot strip of land" on the properties, which is then described in detail. *Id.* at 2.

In return, Rout "agrees that he will, at his own expense, install and maintain said sanitary sewer and water main in good order, repair and condition." He further agrees "that in consideration for the right and easement" given to him by Lhowe and Daltech, Lhowe and Daltech:

> "shall have the permanent right to access and use of the said trench right of way, to construct and maintain sanitary sewers, water mains, and appurtenances, wherever deemed necessary by them or either of them, and after each entry thereon the said Leroy M. Rout shall restore the said land to the same order and condition as it was immediately prior to each such entry, insofar as practicable."

Id. at 2-3.

From the description in the 1959 Easement, the sewer line passes through 87 Beechdale Road, into 200 Judson, where it

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[1]The sewer and water lines run together on the various properties. Only the sewer line is involved in the present dispute.

conjoins with 198 Judson, and continues through 198 Judson and into the main line on the street adjacent to 198 Judson. Thus, 200 Judson and 198 Judson share the line through their properties, so that sewage emanating from 200 Judson passes through 198 Judson before passing into the main sewer line. No one disputes that this line is functional.

The deeds conveying 200 Judson to plaintiffs' grantors, Charles and Joan Polsen (Polsens) describe the property "[t]ogether with the benefits and subject to the burdens of a certain Easement Agreement described in Liber 5928 [at] 377." Affirmation of Elliot, exhibit O. The 2007 Deed conveying 200 Judson from the Polsens to plaintiffs does not contain this language (*id.*, exhibit P), but, clearly conveys the same land as is the subject of the prior deed granted to the Polsens.

The description of 200 Judson in the 2007 Deed states, by its terms, that it is based on "a certain map" prepared by Riley Land Surveyors, LLP, which was "[f]iled in the Westchester County Clerk's Office on November 12, 2004 as Map 27451" (2004 Map). Elliot affirmation, exhibit G.

The 2004 Map contains the words "[a]ccuracy and completeness of subsurface features is not certified" on its left side.[2]

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[2]Several copies of the map are presented to the court by Chicago Title, sealed in plastic. The court has opened, and referred to the copy of the 2004 Map contained in Chicago Title's opposition to plaintiffs' motion, exhibit G.

However, the 2004 Map contains dotted lines, purported to be the location of the existing lines, which show the sewer line as running directly from under the house on 200 Judson to the private road that is part of 200 Judson, and then to the main sewer line on Beechdale Road. The 2004 Map therefore conflicts with the 1959 Easement, which shows the sewer lines being shared with 198 Judson and 87 Beechdale Road, before attaching to the main lines. The parties do not dispute that the lines as shown on the 2004 Map are wrong, and that the lines shown on the 1959 Easement are correct.

In 2007, in connection with their purchase of the property, plaintiffs had a survey made of the property by Kulhanek & Plan Land Surveyors, P.C. (Kulhanek) (2007 Kulhanek Survey). Elliot affirmation, exhibit N. The 2007 Kulhanek Survey indicates its complete reliance on the 2004 Map with regard to the location of any sewer lines. The 2007 Kulhanek Survey also states, at the bottom of the page, "THE EXISTENCE OF RIGHT OF WAYS AND/OR EASEMENTS OF RECORD, IF ANY, NOT SHOWN ARE NOT GUARANTEED." *Id.*

In September 2011, the owner of 198 Judson, John Ashe (Ashe) complained of a sewage leak on his property to the Dobbs Ferry Department of Health (DOH). The DOH, after conducting a dye test to determine where the sewage was coming from, identified 200 Judson and 87 Beechwood as sources. The DOH issued an Appearance Ticket to plaintiffs for violation of the Village's Property

Maintenance Code for failing to maintain the sewer, and directed plaintiffs to cease using the line, and to vacate the residence. Cusumano aff, exhibit 3.

Ashe, made aware that his line was shared with 200 Judson and 87 Beechdale Road, notified these property owners of the leak. However, Ashe refused to allow plaintiffs or Rout to enter 198 Judson to make repairs. Ashe prepared a temporary License Agreement compelling plaintiffs, as licensees, to "relocat[e] the said sewer lines from [Ashe's] property to the filed easement area located on [plaintiff's] property (driveway area) . . . ."[3] Cusumano aff, exhibit 4. Plaintiffs claim that by "easement," Ashe was referring not to the 1959 Easement, of which he apparently had no notice, but to the 2004 Map.

In response to Ashe's demands, plaintiffs' then-attorney presented Ashe with a copy of the 1959 Easement, upon which Ashe relented, and allowed plaintiffs and Rout to enter 198 Judson to make repairs, and ceased his demand that plaintiffs relocate the line. Plaintiffs were reimbursed for their share of the repair costs under their homeowner's insurance policy.

Plaintiffs, now aware that the lines as indicated on the 2004 Map were not as shown, hired a contractor, Ameriscan GPR

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[3]Apparently, Ashe was building a basketball court when an excavation machine broke the sewer line. Plaintiffs claim that Ashe wanted the concessions to allow him to build the basketball court.

(Ameriscan), to use ground-penetrating radar to locate the sewer and water lines on 200 Judson. Ameriscan discovered that the line is not completely within the bounds of 200 Judson, and does not connect directly to the main line, as plaintiffs thought, but that it passes through 198 Judson on its way to the main line. According to the Ameriscan report, the lines as depicted on the 2004 Map simply do not exist.

Plaintiffs made a claim based on the Policy, insisting that Chicago Title must pay for the sewer line to be moved to the location as set forth in the 2004 Map, even though the 2004 Map has been shown to be wrong. Plaintiffs claim that the actual location of the sewer line affects their clear title to the property, and renders it unmarketable, because "the actual state of the property is in direct contradiction with the publicly filed [2004 Map], because the Plaintiffs have no legal right to access, maintain or repair the sewer and water lines, and because the Property's sewer line is an illegally conjoined line." Plaintiffs' memo of law in support of plaintiffs' motion, at 9.

Plaintiffs also maintain that the present location of the sewer line violates the Westchester County Sanitary Code, which requires each home to have direct access from its sewer lines to the main sewer line, allegedly affecting plaintiffs' title to the land.

Chicago Title denies plaintiffs' claim, based on the facts

that (1) that the 1959 Easement was excepted from coverage under the Policy; (2) the Policy did not guarantee the accuracy of the 2004 Map or the 2007 Kulhanek Survey; and (3) the alleged violations of village regulations are not covered under Exclusion 1 of the Policy, because "any such violations post-date the Title Policy, and were not matters recorded in the Public Records as of the date of the Title Policy." Elliott affirmation in support of defendant's motion, at 12. In opposition to Chicago Title's motion, and in support of their own motion, plaintiffs argue that they are entitled to coverage under four provisions in the Policy: sections 2, 2 (c), 3, and 4 of the Policy.

II. Discussion

Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he '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.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v*

Rozbruch, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

"[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 Guar. Co.*, 52 NY2d 179, 188 (1981). "The title insurer's liability to its insured is essentially based on contract law, and liability is governed and limited by the agreements, terms, conditions and provisions contained in the title insurance policy [interior quotation marks and citations omitted]." *Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 950, 951 (2d Dept 2013). Title insurance "insures against loss by reason of defective titles and encumbrances and insure[s] the correctiveness of searches for all instruments, liens or charges affecting the title to such property [interior quotation marks and citation omitted]." *A. Gugliotta Dev. Co., Inc. v First Am. Tit. Ins. Co. of N.Y.*, 112 AD3d559, 560 (2d Dept 2013).

It is well settled that "[i]nsurance policies are to be afforded their plain and ordinary meaning and interpreted in accordance with the reasonable expectations of the insured party." *Oppenheimer AMT-Free Muns. v ACA Fin. Guar. Corp.*, 110

AD3d 280, 284 (1st Dept 2013). As such, "[e]xclusions from policy obligations must be in clear and unmistakable language" (*id.*), and, if any of the terms of the policy are ambiguous, "any ambiguity must be construed in favor of the insured and against the insurer." *Id.*, citing *White v Continental Cas. Co.*, 9 NY3d 264 (2007). An exclusion, especially, "'must be specific and clear in order to be enforced . . . [citation omitted].'" *A. Gugliotta Dev., Inc. v First Am. Tit. Ins. Co. of N.Y.*, 112 AD3d at 560.

Plaintiffs move for partial summary judgment based on specific contract sections. First, plaintiffs appeal based on section 2 of the Policy, which reads, as stated by plaintiffs, that Chicago Title "insures . . . against loss or damage . . . sustained or incurred by the Insured by reason of . . . any defect in . . . or encumbrance on the Title." Section 2 continues, "[t]his Covered Risk includes but is not limited to insurance against loss from . . .

> 2. (c) [a]ny encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term 'encroachment' includes encroachments of existing improvements located on the Land onto adjoining land, and encroachment onto the Land of existing improvements located on adjoining land."

Plaintiffs note that "Title" in the Policy is defined as "[t]he estate of interest described in Schedule A," as previously quoted to refer to, and rely on, the 2004 Map. "Land" is defined

as "[t]he land as described in Schedule A, *and affixed improvements* that by law constitute real property [emphasis supplied by plaintiffs]." Memo in support of plaintiffs' motion, at 12. Therefore, the 2004 Map is incorporated by reference into the Policy. Plaintiffs also make claims under section 3, which provides that the Covered Risk includes insurance against loss from "[u]nmarketable title," and section 4, loss from "[n]o right of access to and from the land."

As plaintiffs point out, the 2004 Map is completely erroneous as regards to the actual location of the sewer lines. They conclude that "[t]hese features [i.e., the actual lines] were not included or disclosed in the description of title contained in the Policy and totally contradict the title actually described by the Policy" (Memo in support of plaintiffs' motion, at 14), so as to constitute a defect in title requiring recompense from Chicago Title.

Chicago Title's position is that the Policy "specifically identifies the 1959 Easement as a matter excepted from coverage. Hence, any loss or damage arising by reason of the existence of this easement is not recoverable under the Title Policy." Defendant's memo in opp to plaintiffs' motion, at 15.

Chicago Title's dependance on the 1959 Easement is initially problematic, because the easement, by its terms, does not seem to work in the manner in which either Chicago Title or plaintiffs

believe that it does. The 1959 Easement is an agreement between the owner of 87 Beechwood, Rout, and the then-owners of both 200 and 198 Judson, Lhowe and Daltech. These parties granted to Rout "and to his heirs, successors and assigns" the permanent right to access the entire length of the easement, which extends over the properties of both 200 and 198 Judson. It granted the right to Lhowe and Daltech to enter the easement and make repairs "wherever deemed necessary *by them or either of them* . . . [emphasis added]." 1959 Easement at 3. Strangely, the 1959 Easement does not give this right to Lhowe and Daltech's "heirs, successors and assigns," although it clearly could have done so. Thus, the 1959 Easement appears to be limited in its grant to Lhowe and Daltech's lifetimes, or perhaps their time of residence in their property.[4] As a result, the 1959 Easement does not give the current owners of 200 Judson reciprocal right to access and maintain the sewer lines off of their property.

The 1959 Easement is silent as to the rights of the present owners of 200 Judson to enter either 198 Judson or 87 Beechwood to make repairs.[5] However, the entire length of the easement, as

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[4]Which of these two readings of the 1959 Easement was meant to apply is irrelevant to the present matter.

[5]Lhowe and Daltech evidently made no provision in the 1959 Easement, or any other document, for the relationship between the owners of 198 and 200 Judson with regard to the sewer line, since, at the time the 1959 Easement was entered, the two properties were owned as one, and there was no need for Lhowe and Daltech to create an easement for the benefit of themselves.

it lies across both 198 and 200 Judson, clearly must remain accessible to Rout, and his heirs, successors and assigns, to allow Rout to maintain the line, *for the benefit of Rout*.[6] As such, the 1959 Easement is, and will remain, a legitimate burden on both 200 and 198 Judson in perpetuity.

Plaintiffs' entire claim is based on the fact that the 1959 Easement burdens their property, negatively affecting their title to 200 Judson. Yet, the Policy excepts the 1959 Easement from coverage. No claims can be brought stemming from the existence of the 1959 Easement. This fact forecloses any claim plaintiffs might have, irrespective of their numerous arguments against Chicago Title's refusal to honor their claim. It does not matter that the 1959 Easement might make their title unmarketable; that the 2004 Map contains errors; or whether or not the 2004 Map guaranteed its contents to be true. Plaintiffs have no claim under the Policy. The 1959 Easement, strange as it may be, is not ambiguous, and can be read in no other way.

In any event, plaintiffs have no right to rely on the 2004 Map as to the proper location of the sewer line. Although plaintiffs vociferously claim that the disclaimer language on the

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[6]This does not mean that the owners of 198 and 200 Judson must maintain the sewer lines for Rout. They need only allow Rout access to those lines. The 1959 Easement clarifies that, "after each entry [to 198 and 200 Judson to make repairs] the said LEROY M. ROUT shall restore the said land to the same order and condition as it was in immediately prior to each such entry, insofar as practicable." 1959 Easement, at 3.

2004 Map is completely illegible, that is not the case. This court has reviewed the 2004 Map, and finds the printed disclaimer a bit fuzzy, but otherwise perfectly legible.[7]

Further, while plaintiffs provide affidavits wherein both claim that they could not, and did not, read the disclaimer language, because it was so obscured, both plaintiffs admitted in their depositions that they had read the disclaimer language -- and understood it to mean that the map did not guaranty the placement of the sewer lines. This court is not required to give any weight to affidavits which clearly contradict previously produced deposition testimony. *See Harty v Lenci*, 294 AD2d 296, 298 (1st Dept 2002) ("[a] party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"). Plaintiffs have no basis to rely on the 2004 Map for the placement of the sewer lines.

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant Chicago Title Insurance Company for summary judgment dismissing the complaint (mot. seq. no. 002) is granted; and it is further

ORDERED that the complaint is dismissed, with costs and

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[7]Of course, the language is not legible on the greatly reduced version of the 2004 Map produced by plaintiffs.

disbursements to Chicago Title Insurance Company, as taxed by the Clerk of the Court, upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion brought by plaintiffs Charles Cusumano and Christine Soares for partial summary judgment on the complaint (mot. seq. no. 003) is denied.

Dated: May 17, 2016

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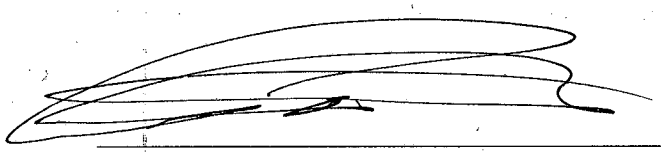

J.S.C.