JP v. Old Republic National Title Insurance Company

Superior Court of Connecticut.

JP Morgan Chase Bank v. Old Republic National Title Insurance Company

CV126029085S

-- March 11, 2014

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (# 130) PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT (# 135)

Introduction and Summary of Facts

On July 24, 2012, the plaintiff, JP Morgan Chase Bank, filed the two-count complaint in this action against the defendant, Old Republic National Title Insurance Company. This case now comes before the court in two motions, defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment. In the complaint, the plaintiff alleges the following facts. On or about July 18, 2006, Washington Mutual Bank agreed to provide mortgage loan refinancing for an original principal amount of $500,000 to a borrower named Shanaz Kapadwala (hereinafter referred to as the Subject Mortgage Note), secured by property situated at 83 Dunn Avenue, Stamford, Connecticut. The plaintiff has been the holder and servicer of the Subject Mortgage Note at all relevant times. The closing on the Subject Mortgage Note took place on July 18, 2006, and was handled by an attorney named Mohin Kapadwala (Attorney Kapadwala). At all relevant times, the defendant provided Letters of Protection to lenders which promised indemnification for actual loss if the closing of the Subject Mortgage Note was conducted by an approved attorney and a title insurance binder or commitment for the issuance of a title policy was received by the lender. On or about July 6, 2006, the defendant issued a Letter of Protection naming Attorney Kapadwala as the Issuing Agent or Approved Attorney to induce Washington Mutual Bank to advance the monies funding the Subject Mortgage Note.

The prevailing industry custom, manner, and practice of closing mortgage loans, such as the Subject Mortgage Note, which the court accepts for the purpose of deciding the issues presented in the subject motions, was for the lender to forward funds for the acquisition of the title insurance binder and policy to the Issuing Agent or Approved Attorney named by the Title Company in the Letter of Protection. Attorney Kapadwala, as the Issuing Agent or Approved Attorney, was responsible for carrying out one or more of the following functions: searching or causing a search of the land records title to be done; issuing a title binder which identified those liens which required release in order to enable the refinancing lender (Washington Mutual Bank) the security of a first mortgage position; presiding over closing; paying off said liens which required release; forwarding the necessary premiums to the title insurer; and securing the issuance of a policy consistent with the promise identified in the title binder.[1] In material reliance upon the defendant's issuance of the Letter of Protection, Washington Mutual Bank advanced its monies funding the Subject Mortgage Note conditioned upon the performance of the aforementioned title agent functions, including the securing of a first mortgage lien position for said Subject Mortgage Note.

Attorney Kapadwala presided over and conducted the closing of the Subject Mortgage Note on July 18, 2006, and disbursed Washington Mutual Bank's funding monies. Attorney Kapadwala prepared a HUD–1 Settlement Statement which reported paying off prior encumbrances otherwise interfering with the intended status of providing Washington Mutual Bank with a secured first mortgage position. In accordance with the latter's closing instructions, Attorney Kapadwala prepared and provided Washington Mutual Bank with a title binder and policy identifying that the Subject Mortgage Loan would be recorded in first priority mortgage priority position. Attorney Kapadwala was acting within the actual or colorable scope of his authority as the Issuing Agent or Approved Attorney when he presided over and conducted the closing of the Subject Mortgage

Loan and disbursed Washington Mutual Bank's monies. Attorney Kapadwala knowingly failed to pay off the prior encumbrances, misappropriated Washington Mutual Bank's monies, and did not record Washington Mutual Bank's Subject Mortgage Loan in a first mortgage position. Attorney Kapadwala did not advise Washington Mutual Bank that he was misappropriating its monies and that the recording of the Subject Mortgage Loan would not be in a first mortgage position. There is no material dispute between the parties as to the above actions and omissions by Attorney Kapadwala.

The discovery that the Subject Mortgage Loan was concealed did not come to light until a payment default occurred. The conduct of a title search, carried out in January 2009, identified the existence of senior liens reflecting unpaid balances totaling approximately $475,000, which was more than the fair market value of the property. The plaintiff stands in the shoes of Washington Mutual Bank and is entitled to prosecute for actual losses under the Letter of Protection. The Letter of Protection, issued by the defendant, promised indemnification for actual losses when loss came out of the failure of the Issuing Agent or Approved Attorney to comply with written closing instructions to the extent that they relate to enforceability and priority of the lien of said mortgage, or fraud or dishonesty of the Issuing Agent or Approved Attorney. In the first count of the complaint, the plaintiff claims indemnification under the Letter of Protection in that the misappropriation by Attorney Kapadwala of Washington Mutual Bank's monies and the failure to record the Subject Mortgage Loan in the first mortgage position was based upon Attorney Kapadwala's fraud or dishonesty and Attorney Kapadwala's failure to comply with written closing instructions.

In the second count of the complaint, the plaintiff alleges a breach of the title policy. The plaintiff alleges that Attorney Kapadwala prepared and provided Washington Mutual Bank, in accordance with the latter's closing instructions, a title binder and policy number MM 5921985 (hereinafter referred to as the subject policy) identifying that the Subject Mortgage Loan would be recorded in a first mortgage position. The subject policy insured the Subject Mortgage Loan would be recorded in first position on the property. On or about January 26, 2009, the plaintiff submitted a written claim under the title insurance policy to the defendant, based upon the existence of two unpaid liens on the property totaling $396,000 and $74,250, respectively. The failure to record the Subject Mortgage Loan in first mortgage position was a breach of the guarantees provided by the subject title policy. As to count one of the complaint, the plaintiff seeks monetary damages, interest under General Statutes § 37–3(a), attorneys fees and costs, and such other and further relief as the court may deem fair and equitable. As to count two of the complaint, the plaintiff seeks monetary damages and such other and further relief as the court may deem fair and equitable.

On July 31, 2013, the defendant filed a motion for summary judgment on the first count of the plaintiff's complaint on the ground that there is no genuine issue of material fact that the plaintiff did not give notice of suit to the defendant within the contracted to statute of limitations of one year from the closing, which would entitle the defendant to judgment as a matter of law. The defendant submitted a memorandum of law in support of its motion. On August 30, 2013, the plaintiff filed an objection to the defendant's motion for summary judgment on the first count of the complaint as well as a cross motion for summary judgment on both counts of the complaint. The plaintiff attached memoranda of law to both the objection and the cross motion for summary judgment. On October 4, 2013, the defendant submitted a reply memorandum to the plaintiff's objection as well as an objection memorandum to the plaintiff's cross motion for summary judgment. Finally, on November 13, 2013, the plaintiff submitted a reply memorandum to the defendant's objection to the cross motion for summary judgment. The matter was heard at the short calendar on November 18, 2013.

Applicable Law and Analysis

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . the moving party for summary judgment is held to a strict standard . of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) Grenier v. Commissioner of Transportation, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation, including affidavits." Heyman Associates No. 1 v. Insurance Co. of Pennsylvania, 231 Conn. 756, 796, 653 A.2d 122 (1995). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) Patel v. Flexo Converters U.S.A., Inc., 309 Conn. 52, 57, 68 A.3d 1162 (2013). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . Mere assertions of fact . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17–45]." (Internal quotation marks omitted.) Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 11, 938 A.2d 576 (2008).

Because this case deals with a motion for summary judgment on one count and a cross motion for summary judgment on both counts, it will be handled in a slightly different manner. "Typically, the court would address each motion separately and place the burden of proof on the movant in its respective motion. [Zielinski v.

Kotsoris, 279 Conn. 312, 318–19, 901 A.2d 1207 (2006).] In the present case, however, neither the plaintiff nor the defendant have differentiated between the grounds for their respective motions for summary judgment and their grounds for objection to the opposing party's motion. Under these circumstances, the court will analyze the motions for summary judgment together, engaging in an analysis of whether either party has met the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle [it] to a judgment as a matter of law." (Internal quotation marks omitted.) Travelers Property Casualty Co. of America v. Continental Casualty Co., Superior Court, judicial district of New London, Docket No. CV–08–4008325–S (May 27, 2010, Cosgrove, J.); see also Travelers Casualty & Surety Co. v. Netherlands Ins. Co., Superior Court, judicial district of Hartford, Docket No. CV–09–4045937–S (May 13, 2011, Wagner, J.T.R.). Here, the motion and cross motion on the first count will be analyzed in line with the Travelers Property decision, and the plaintiff's cross motion on the second count will be analyzed as a standard motion for summary judgment. Each count will be addressed in turn.

I

INDEMNIFICATION UNDER THE LETTER OF PROTECTION

The defendant moves for summary judgment on the first count, arguing that there is no genuine issue of material fact that the plaintiff did not give notice of suit to the defendant within the contracted to statute of limitations of one year from the closing, which would entitle the defendant to judgment as a matter of law. The plaintiff objects to that motion and has filed its own cross motion for summary judgment on that count, arguing that General Statutes § 52–595 tolls the statute of limitations because discovery of the cause of action was fraudulently concealed from the plaintiff. Further, the plaintiff argues that it is entitled to full indemnification from the defendant under the Letter of Protection at closing because Attorney Kapadwala was an agent of the defendant. In response, the defendant argues that the statute of limitations was not tolled by fraudulent concealment because Attorney Kapadwala was not an agent for the purposes of the closing and because § 52–595 is inapplicable to contractual limitations like the one contained in the Letter of Protection. In its reply, the plaintiff contends that Attorney Kapadwala's duties as an agent of the defendant extended to the closing and that § 52–595 is applicable to contractual statutes of limitation.

Whether General Statutes § 52–595 Is Applicable to the Present Case

General Statutes § 52–595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence." Thus, in order for the plaintiff to use § 52–595 to toll the contracted to statute of limitations, it must show that the cause of action was fraudulently concealed by the defendant and that it filed suit within one year of discovering that cause of action.

The threshold issue is whether § 52–595 even applies to the facts as they are agreed to by the parties. The defendant contends that the statute only applies to legislatively imposed statutes of limitations, and that this contractual statute of limitations is outside of its scope. Connecticut case law, on the other hand, suggests that there is no such limitation. In Connell v. Colwell, 214 Conn. 242, 246 n.4, 571 A.2d 116 (1990), the Supreme Court reasoned that "the exception contained in § 52–595 constitutes a clear and unambiguous general exception to any statute of limitations that does not specifically preclude its application." (Emphasis added.) Given the lack of authority presented by the defendant and the language of Connell, this court concludes that § 52–595 is applicable to both legislative and contractual statutes of limitations. As a result, § 52–595 can be used by the plaintiff in this matter to assert a claim of fraudulent concealment.

Whether Defendant May Be Liable To Plaintiff For Actions of Attorney Kapadwala

It is perhaps most significant to the outcome of this case that the court make a determination as to whether or not there is an issue of fact as to the agency status of Attorney Kapadwala at the closing. "Agency is defined as the fiduciary relationship which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . Thus, the three elements required to show the existence of an agency relationship include: (1) the manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." (Citations omitted; internal quotation marks omitted.) Beckenstein v. Potter & Carrier, Inc., 191 Conn. 120, 132–33, 464 A.2d 6 (1983).

The defendant argues that Attorney Kapadwala was not the defendant's agent for closing purposes, but instead only the agent for the purpose of issuing title policies. As a result, the defendant contends that anything known to Kapadwala concerning his closing fraud cannot be imputed to the defendant. In support of its argument, the defendant cites Paragraph I of the Agreement, which outlines the duties of a policy issuing agent. The defendant also cites Section VII of the Agreement, which states that the agent (Attorney Kapadwala) is responsible for losses due to fraud or dishonesty, intentional or negligent failure to comply with the Agreement's terms, and improper closing or attempted closing.

A closer look at the Agreement and the Letter of Protection reveals that there is actually no issue of fact that Attorney Kapadwala was the agent of the defendant at the closing. As the defendant indicated, Section VII of

the Agreement states that the agent is responsible for losses stemming from improper closing or attempted closing. It stands to reason that, if the defendant did not appoint Attorney Kapadwala to act as its agent at the closing, it would have no reason to include that language in the Agreement at all. Moreover, the Letter of Protection, attached to the defendant's motion for summary judgment, agrees to indemnify the insured for any fraud or dishonesty in Attorney Kapadwala's handling of the funds and documents in connection with the closing. The defendant argues that the Letter of Protection did not enlarge the scope of Attorney Kapadwala's agency or change the terms of the Agreement. In response, the plaintiff argues that there is no logical reason for the defendant to agree to indemnify the lender for losses emanating from Attorney Kapadwala's mishandling of closing documents and funds if Attorney Kapadwala was not, in fact, the defendant's closing agent. Further, there is no explanation as to why the defendant would agree to indemnify the lender for Attorney Kapadwala's possible fraud or dishonesty at closing if Attorney Kapadwala was simply the defendant's policy issuing agent.

After reading the plain language of the Agreement as well as the Letter of Protection, and after analyzing the undisputed facts, the court concludes that there is no issue of fact that Attorney Kapadwala was the defendant's agent for both the issuing of the policy as well as the closing.

Whether the Defendant May Be Accountable For Attorney Kapadwala's Conduct

"[T]o prove fraudulent concealment, the [plaintiff is] required to show: (1) a defendant's actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) that defendant's intentional concealment of these facts from the [plaintiff]; and (3) that defendant's concealment of the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." Bartone v. Robert L. Day Co., 232 Conn. 527, 533, 656 A.2d 221 (1995).

The defendant argues that, even if the court were to determine that Attorney Kapadwala was the defendant's agent for the purposes of the closing, the tolling provisions of § 52–595 require a defendant to have actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiff's cause of action. The defendant thus contends that fraudulent concealment has not been proved because the plaintiff has not demonstrated actual awareness and cannot rely on imputed knowledge.

The defendant is correct in asserting that the plaintiff must show actual awareness as well as intentional concealment for the purpose of obtaining delay in the filing of the complaint. See Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 105, 912 A.2d 1019 (2007). The defendant is also correct in asserting that it may not have had literal knowledge of Attorney Kapadwala's fraudulent concealment. The problem with the defendant's reasoning is that, as discussed earlier, Attorney Kapadwala acted as an agent of the defendant at closing, and any fraudulent activity undertaken by or known to Attorney Kapadwala passes to the defendant. "A basic principle of agency is that a corporation can act only through the authorized acts of its corporate directors, officers, and other employees and agents. Thus, the acts of the corporation's agents are attributed to the corporation itself." (Internal quotation marks omitted.) Harp v. King, 266 Conn. 747, 776–77, 835 A.2d 953 (2003). If the defendant can only act through the authorized acts of its agents, logic dictates that it can only have actual knowledge through the knowledge its agents pick up while undertaking those authorized acts. Here, Attorney Kapadwala was authorized to conduct the closing. When he subsequently perpetuated a fraud, any knowledge of that fraud became the knowledge of the defendant.

The defendant points out that the statute and subsequent case law calls for actual knowledge as opposed to imputed knowledge, but it has overlooked the fact that courts do not see a significant difference between the two concepts. "[I]mputed knowledge is for all legal purposes the same in effect as actual knowledge." (Internal quotation marks omitted.) Weissman v. Volino, 84 Conn. 326, 330, 80 A. 81 (1911) (quoting Beach v. Osborne, 74 Conn. 405, 413, 50 A. 1019 (1902)). In the present case, knowledge of Attorney Kapadwala's fraud and deceit in relation to the closing is undisputed to have been imputed to the defendant. Once that knowledge was imputed, the defendant had actual knowledge of what its agent, in this case Attorney Kapadwala, learned. If imputed and actual knowledge are legally the same, as the above-mentioned courts recognize, then there is no issue of fact that Attorney Kapadwala's knowledge of the fraud and deceit can also be attributed to the defendant itself. The defendant does not dispute that Attorney Kapadwala submitted a fraudulent HUD–1 Statement, or that the fraudulent statement intentionally concealed the deceit at closing with the intent to hinder discovery by the plaintiff, which are the second and third prongs of the fraudulent concealment test. The defendant only disputes Attorney Kapadwala's status and the applicability of § 52–595. As a result, the plaintiff has proved that there are no issues of fact relating to the defendant's fraudulent concealment, which tolls the statute of limitations provided by § 52–595.

Whether Agency Relationship Ceased as a Result of the Agent's Fraud

The defendant argues for the applicability of the "adverse interest" exception to the general rule imputing the knowledge and conduct of agents to their principals. "When an agent, by his self-serving conduct, so abandons his principal's interests as to act adversely to those interests, or worse, to act in fraud of his principal, it can fairly be said that, pro tanto, the agency really cease[s] . When that occurs . the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf." (Citation

omitted; internal quotation marks omitted.) Reider v. Arthur Andersen, LLP, 47 Conn.Sup. 202, 210, 784 A.2d 464 (2001) (citing Resnik v. Morganstern, 100 Conn. 38, 42, 122 A. 910 (1923)). The defendant specifically contends that the failure to advise the defendant that the prior mortgages had not been satisfied or released, along with falsifying the HUD–1 Statement by indicating that the mortgages had been paid off properly when the funds were actually converted to Attorney Kapadwala for his own use, were not only adverse to the defendant's interests, but also in fraud of the defendant. Under this rationale, the agency relationship between Attorney Kapadwala and the defendant would cease to exist, and the defendant would not be liable for Attorney Kapadwala's actions.

The defendant's analysis of the adverse interest exception is not necessarily incorrect, but its contention that it saves the defendant from having to indemnify the plaintiff is a miscalculation of the present situation. The problem with the defendant's reasoning is that permitting it to rely on the adverse interest exception with respect to Attorney Kapadwala's actions at closing would render the Letter of Protection meaningless. The Letter of Protection specifically promises to reimburse the lender for losses arising from "(1) Failure of the Issuing Agent or Approved Attorney to comply with [the lender's] written closing instructions to the extent that they relate to (i) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of such documents and disbursement of funds necessary to establish such status of title or lien . or (2) Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling [the lender's] funds or documents in connection with such closing." The undisputed allegations as to Attorney Kapadwala's conduct at closing mirror the indemnification language in the Letter of Protection. As the plaintiff points out, permitting the defendant to use the adverse interest exception to escape liability would be relieving it of the obligations it imposed on itself in the Letter of Protection. In essence, this would greatly prejudice the plaintiff, the party the Letter of Protection was intended to benefit the most.

On the evidence presented, there is no genuine issue of material fact surrounding the application of § 52–595 to the present case, the agency status of Attorney Kapadwala at closing, and the imputation of Attorney Kapadwala's actions to the defendant. As a result, the plaintiff's cross motion for summary judgment is granted, and the plaintiff is entitled to full indemnification from the defendant under the Letter of Protection.

II. BREACH OF THE TITLE POLICY

In addition to the cross motion for summary judgment on indemnification, the plaintiff also moves for summary judgment as to the second count of the complaint and damages under the title policy. The plaintiff argues that the defendant admitted to insuring the first lien status of the mortgage on the Property in favor of Washington Mutual, its successors, and/or assigns. The plaintiff contends that it is insured against any defect, lien, or encumbrance on the title of the subject property and/or the priority of any lien or encumbrance over the lien of the insured mortgage. The plaintiff concludes that, because Attorney Kapadwala, the defendant's agent, failed to record the plaintiff's mortgage in first lien position, as insured by the title policy, the defendant is thus responsible for any defects in title and liable for any damages. In response, the defendant argues the plaintiff is not entitled to judgment because the defendant complied with the terms and conditions of the title policy. The defendant has attached the affidavit of Elizabeth McGinnity, Senior Claims Counsel for the defendant. According to McGinnity, the defendant wrote a check for the amount that the plaintiff's own counsel valued the property at ($362,000). The plaintiff then failed to both dispute the amount and to provide a release from the actual mortgagee of record. As a result, the $362,000 check was never issued to the plaintiff. The defendant contends that this affidavit demonstrates that the defendant did all that it was required to do under the terms and conditions of the title policy, and that the plaintiff is thus not entitled to summary judgment on this count.

It is readily apparent that there are no facts in dispute with respect to the second count of the complaint. The defendant has admitted that the fair market value of the subject property is $362,000, and every indication in the record is that the defendant was prepared to pay that sum but never did. The defendant attributes the failure to pay on the plaintiff's failure to provide a release from the actual mortgagee of record, and while this is true, it does not relieve the defendant of liability. Because there is no genuine issue of material fact that the defendant failed to record the plaintiff's mortgage in first lien position, as guaranteed in the title policy, the plaintiff is entitled to damages for breach of the title policy. The plaintiff's cross motion for summary judgment is thus granted on the second count of the complaint.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment as to the first count of the plaintiff's complaint is denied, and the plaintiff's cross motion for summary judgment as to the first and second counts of the complaint is granted.

SOMMER, J.

FOOTNOTES

1. FN1. These will hereinafter be referred to as the title agent functions.

Sommer, Mary E., J.