



Supreme Court, Appellate Division, First Department, New York.

# **BX THIRD AVENUE PARTNERS LLC v. FIDELITY NATIONAL TITLE INSURANCE COMPANY LLC**

**BX THIRD AVENUE PARTNERS, LLC, Plaintiff–Appellant, v. FIDELITY  
NATIONAL TITLE INSURANCE COMPANY, Defendant–Respondent, American  
Star Abstract, LLC, Defendant.**

**-- December 05, 2013**

SWEENY, J.P., DeGRASSE, MANZANET–DANIELS, CLARK, JJ.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant. Loeb & Loeb LLP, New York (Jonathan F. Hollis of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered January 8, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment against defendant Fidelity National Title Insurance Company on plaintiff's breach of contract claim, and denied plaintiff's motion for summary judgment dismissing Fidelity's first and second counterclaims, unanimously modified, on the law, to grant plaintiff's motion to dismiss the counterclaims, declare that Fidelity cannot avoid liability under the policy by virtue of its insured's alleged misrepresentation, and otherwise affirmed, without costs.

The court properly denied plaintiff's motion for summary judgment on the issue of Fidelity's liability under the subject title insurance policy. Plaintiff's only evidence of the value of the subject property, an unsworn appraisal, was insufficient to establish the value of the title (and, as a result, the extent of defendant's liability) within the meaning of the policy.

Nor did plaintiff establish, as a matter of law, that Fidelity is estopped from disclaiming title insurance coverage after providing a full defense for plaintiff in the underlying foreclosure action (see *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 28 AD3d 32, 36 [1st Dept 2006] ). Issues of fact exist as to whether plaintiff's managing member made a material misrepresentation inducing Fidelity to issue the policy, and whether Fidelity discovered the alleged misrepresentation when it conducted a coverage investigation after the conclusion of the foreclosure action. In any event, plaintiff did not establish that it was prejudiced by Fidelity's allegedly belated disclaimer. Thus, whether Fidelity is estopped from disclaiming coverage must be left to the trier of fact (see *206–208 Main St. Assoc., Inc. v. Arch Ins. Co.*, 106 AD3d 403, 407–408 [1st Dept 2013] ).

The motion court erred, however, in denying plaintiff's motion to dismiss Fidelity's counterclaims for a declaration and for the costs of defending the foreclosure action. Fidelity failed to raise a triable issue of fact as to whether plaintiff's alleged misrepresentation was material within the meaning of Section 3105(b)(1) of the Insurance Law. Indeed, in response to the motion, Fidelity failed to submit any evidence whatsoever concerning its underwriting practices, as was necessary to defeat the motion (see *Campese v. National Grange Mut. Ins. Co.*, 259 A.D.2d 957 [4th Dept 1999] ). Fidelity having failed to demonstrate that it would not have issued the title policy to plaintiff had the affidavit not represented “[t]here are not tenants” on the premises, plaintiff was entitled to dismissal of the counterclaims and a declaration that Fidelity cannot avoid liability under the policy by virtue of its insured's alleged misrepresentation.

We note, further, that Fidelity undertook the defense of the foreclosure action without a reservation of rights. Fidelity is therefore precluded from recouping defense costs from its own insured (see *Allstate Ins. Co. v. Oles*, 838 FSupp 46, 55 [ED N.Y.1993]; see generally 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, § 5.07 [16th ed 2013] ).

Copyright © 2013 FindLaw, a Thomson Reuters business. All rights reserved.