DOCKET NO. CV-17 6024608	:	SUPERIOR COURT
FIDELITY NATIONAL TITLE INSURANCE COMPANY	:	JUDICIAL DISTRICT OF ANSONIA- OF MILFORD
VS.	:	AT MILFORD
ROBERT VONTELL, JR., ET. AL.	:	AUGUST 2019

MEMORANDUM OF DECISION
ON THE PLAINTIFF'S MOTION TO STRIKE
THE VONTELLS' SPECIAL DEFENSES

STATEMENT OF THE CASE

The operative amended complaint in this action is dated April 2, 2019 and was filed by the plaintiff Fidelity National Title Insurance Company ("Fidelity") against the defendants, Robert J. Vontell, Jr. and Bonnie Anne Vontell (together as the Vontells) and the defendant, Robert C. Agatston. The amended complaint asserts one count against the Vontells for unjust enrichment, and three counts against Agatston for "indemnification."[1] The amended complaint makes the following allegations against the Vontells.

On March 2, 2000, the Vontells purchased 14 Massachusetts Avenue, Fairfield, Connecticut (Massachusetts Avenue property). The Vontells executed and delivered a mortgage to Wachovia Bank, N.A. (Wachovia) securing a loan in the amount of $151,500, which was subsequently recorded in the Fairfield Land Records and assigned to Wells Fargo Bank, N.A. (Wells Fargo). On January 23, 2006, the Vontells executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc., as a nominee for Fremont Investment & Loan (Fremont),

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[1]Specifically, the counts against Agatston involve claims characterized as "indemnity grounded on negligence under subrogation rights," "indemnity grounded on breach of [an] agency agreement" and "indemnity grounded on breach of an agreement under subrogation rights."

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securing a loan for $308,000 (Fremont mortgage) and it was recorded in the Fairfield Land Records. The Fremont mortgage was assigned to U.S. Bank, N.A. (U.S. Bank) on February 24, 2012, and recorded May 22, 2012, in the Fairfield Land Records. The proceeds of the Fremont mortgage were intended to be used to pay off Wells Fargo's mortgage so that the Fremont mortgage would have first priority.

On January 25, 2006, in connection with the Fremont mortgage, a loan policy of title insurance was issued to Fremont from Fidelity (the policy). This policy insured the Fremont mortgage as a first mortgage encumbrance on the Massachusetts Avenue property. Because the funds from the Fremont mortgage were not ultimately used to pay off Wells Fargo's mortgage, the latter mortgage retained first priority position. Fremont submitted a claim under the title insurance policy. Fidelity was contractually required under the policy to accept the claim and paid about $ 115,000 to Wells Fargo. Upon making this payment, Wells Fargo subordinated its mortgage to the Fremont mortgage, so that the Fremont mortgage acquired first priority on the Massachusetts Avenue property.

According to Fidelity's complaint, the Vontells had an obligation to pay the amounts due under Wells Fargo's mortgage from the proceeds of the refinancing loan from Fremont so that Fremont would have a first lien position on the Massachusetts Avenue property. Fidelity alleges that because the Vontells did not make the required payment, the Vontells were unjustly enriched by Fidelity's settlement payment to Wells Fargo on the debt owed by them.

The Vontells filed a revised answer and special defenses on November 20, 2018. In the Vontells' answer, they allege the following special defenses: (1) laches; (2) unclean hands; (3) estoppel; (4) contract for a benefit of a third party.

On January 22, 2019, Fidelity moved to strike the Vontells' four special defenses. The Vontells filed a brief opposing Fidelity's motion to strike on February 25, 2019. Fidelity filed a reply brief on March 13, 2019. The court heard oral argument on this matter on May 6, 2019.[2] For the following reasons, Fidelity's motion to strike is granted.

DISCUSSION

"A motion to strike shall be used whenever any party wishes to contest . . . (5) the legal sufficiency of any answer to any complaint, counterclaim or cross complaint, or any part of that answer including any special defense contained therein." Practice Book § 10-39 (a). "Generally speaking, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway. . . . Whether facts must be specially pleaded [however] depends on the nature of those facts in relation to the contested issues." (Citations omitted; internal quotation marks omitted.) *Almada* v. *Wausau Business Ins. Co.*, 274 Conn. 449, 456, 876 A.2d 535 (2005). "In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015). "On the other hand, the total absence of any factual allegations specific to the dispute renders [the special defense] legally insufficient." (Internal quotation

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[2] During oral argument at short calendar on May 6, 2019, the Vontells withdrew their third special defense of estoppel. Therefore, this memorandum only discusses the first, second, and fourth special defenses.

marks omitted.) *Smith* v. *Jackson*, Superior Court, judicial district of Waterbury, Docket No. CV-14-6024411-S (August 21, 2015, *Roraback, J.*) (60 Conn. L. Rptr. 864, 865).

I

First Special Defense: Laches

The defendant sets forth the following additional factual allegations to support their first special defense of laches. Around 2005, the Vontells owned investment properties, including the Massachusetts Avenue property and a property known as 204 Olivia Street in Derby, Connecticut (Olivia Street property). Around the same time that the Vontells secured the mortgage on the Massachusetts Avenue property, they also took out another loan with Wachovia secured by a mortgage on the Olivia Street property for $101,000 (Olivia Street mortgage). In December 2005, the Vontells approached Pequot Financial Group, Inc. (Pequot) about refinancing the Wachovia mortgage. Pequot contacted Fremont to accomplish this refinancing. The Vontells retained Agatston as their attorney for the refinancing and he also served as Fidelity's title insurance agent. The Vontells allege that Pequot gave Fremont and Agatson the wrong loan number for the Massachusetts Avenue mortgage. Rather than receiving the loan number for the Massachusetts Avenue mortgage, they received the loan number for the Olivia Street mortgage. Because Agatson used the wrong loan number, the loan proceeds intended to be used to pay off the Massachusetts Avenue mortgage were mistakenly used to pay off the Olivia Street mortgage.[3]

[3]The court notes that according to the Vontells' special defense, the original principal balance on the Massachusetts Avenue mortgage was $151,000, and the original principal balance on the Olivia Street mortgage was $101,000. The amount of the refinancing loan advanced by Fremont was $308,000, and these funds were mistakenly used to pay off the Olivia Street mortgage, rather than the Massachusetts Avenue mortgage. The pleadings do not reflect what happened to the extra balance of Fremont's advance after the Olivia Street mortgage was satisfied.

According to the Vontells, Agatston closed the Fremont mortgage and disbursed funds violating the closing instructions because he did not verify that Fremont would be in the first lien position. Agatston realized the mistake with the loan numbers about eighteen months later in July 2007, when he inquired as to why Wells Fargo still had not released the mortgage on the Massachusetts Avenue property. Agatston sent a letter dated November 30, 2007 to the Vontells relating to the unreleased mortgage on the Massachusetts Avenue property. The Vontells responded that it was Agatston's problem to figure out. The Vontells allege that Agatston did not tell them that the mortgage on the Massachusetts Avenue property was not paid off because the wrong loan number was used. The Vontells continued to make the monthly payments on this mortgage until December 2011. In August 2012, the Vontells quit claimed their interest in the Olivia Street property.

In April 2013, the Vontells were interested in selling the Massachusetts Avenue property, and their attorney for that sale discovered that the Massachusetts Avenue mortgage (assigned to Wells Fargo Bank, N.A.) and the Fremont mortgage were both still on the property. The Vontells were informed by Fidelity that under these circumstances the title insurance policy would protect the rights of the insured lender, Fremont, and not the owners of the property, the Vontells.

In support of their laches defense, the Vontells allege that Fidelity knew of the mistake with the loan numbers as far back as 2007 because of a letter written from Agatston to the Vontells and the fact that Fidelity had legal counsel involved at the time the letter was written. The Vontells allege that because Fidelity knew as early as July 2007 that the Massachusetts Avenue mortgage was not paid off, its ten-year wait in bringing a claim against them was an inexcusable delay. The Vontells also argue that they were prejudiced because they cannot bring

claims against Agatston and the broker because the claims would be barred by the statute of limitations. The court rejects the Vontells' arguments.

"The defense of laches, if proven, bars a plaintiff from seeking equitable relief. . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the [opposing party] . . . as where, for example, the [opposing party] is led to change his position with respect to the matter in question." (Internal quotation marks omitted.) *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 341-42, 179 A.3d 201 (2018) (appendix). "Laches consists of an inexcusable delay which prejudices the defendant. . . . We have said on other occasions that [t]he defense of laches does not apply unless there is an unreasonable, inexcusable, and prejudicial delay in bringing suit. . . . Delay alone is not sufficient to bar a right; the delay in bringing suit must be unduly prejudicial. . . . The defense of laches has, however, only limited applicability. Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory period." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398-99, 119 A.3d 462 (2015).

In addressing the Vontells' unjust enrichment claim, the court concludes that Fidelity correctly focuses on when Fidelity had a duty to act and to whom this duty was owed. On the basis of the facts presented here, Fidelity owed a contractual duty to Fremont, not the Vontells, under the title insurance policy. Assuming *arguendo* that Fidelity acquired knowledge about the mistaken payment in 2007, the Vontells have not pointed to anything under the terms of the insurance policy (or to anything else) obligating Fidelity to assert a claim or to institute suit

against them. Put differently, any requirement or obligation to act on Fidelity's part was premised on its title insurance policy with Fremont, and the Vontells have pointed to nothing under this policy requiring Fidelity to act against them sooner than it did, particularly in the absence of any claim, request or direction from Fremont pursuant to the terms of the policy. In short, the Vontells have not sufficiently alleged or explained how Fidelity had an *equitable* obligation to act sooner as they allege without Fidelity having an explicit *legal* obligation to act sooner under the title insurance policy. Furthermore, the Vontells' claim of prejudice appears questionable because according to the allegations of this special defense, they received the total benefit of a $308,000 advance from Fremont that was used to pay off the $101,000 Olivia Street mortgage (apparently without questioning how the transaction generated what appears to have involved a windfall (see n. 3)), and they also knew in 2007 that there was an issue with the Wachovia mortgage when they told Agatston that it was his problem to figure out. Cf. *Vanliner Ins. Co.* v. *Fay*, 98 Conn. App. 125, 138, 907 A.2d 1220 (2006) (defendant knew he submitted application late and did not timely inform plaintiff of mistake). Therefore, the motion to strike the first special defense is granted.

II

Second Special Defense: Unclean Hands

In their second special defense of unclean hands, the Vontells allege that Fidelity chose to resolve its claim with Fremont before it was officially determined whether Fremont had priority over the Wachovia mortgage. The Vontells also allege that Wells Fargo did not have a pre-existing obligation to use the proceeds given to them by Fidelity to pay off the Massachusetts mortgage. The Vontells allege that Fidelity's conduct was unfair, inequitable, and dishonest and

would be considered wrongful by fair-minded people. The court disagrees.

"The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation." *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn, App. 401, 407, 867 A.2d 841 (2005). "Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001).

In the present case, the Vontells have utterly failed to articulate any facts to support a claim that Fidelity engaged in any dishonest behavior or any wilful misconduct in honoring its obligations under the title insurance policy, and in negotiating and resolving the mortgage priority dispute on the Massachusetts Avenue property which was not of its making. Therefore, the motion to strike the second special defense is granted.

III

Fourth Special Defense: Third Party Donee Beneficiary Contract

In the fourth special defense, the Vontells allege that they are third party beneficiaries of the contract between Fidelity and either Wells Fargo or Fremont because the Vontells were

intended to benefit from Fidelity's payment to Wells Fargo. The Vontells further contend that because they are third party beneficiaries, they cannot be held liable for unjust enrichment for the payments made by Fidelity pursuant to the insurance contract. The court agrees with Fidelity that based on the Vontells' factual allegations and the applicable law, this third party beneficiary claim is without merit.

"The law regarding the creation of contract rights in third parties in Connecticut is . . . well settled. . . . [T]he ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party [beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties. . . . Although we explained that it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed third party beneficiary . . . we emphasized that the only way a contract could create a direct obligation between a promisor and a third party beneficiary would have to be, under our rule, because the parties to the contract so intended." *Gazo* v. *Stamford*, 255 Conn. 245, 261, 765 A.2d 505 (2001).

The court agrees with Fidelity that the Vontells have not alleged with any sufficient specificity that Fidelity either with Fremont or Wells Fargo intended for the Vontells to be third party beneficiaries to any contract. More particularly, the Vontells have not pointed to any express or implied intent of Fidelity with anyone under either contract to authorize the Vontells to receive a double benefit as a result of the contract's execution. To explain further, the Vontells have not sufficiently explained how the parties to either the title insurance policy or the

settlement agreement contemplated that the Vontells would receive the benefit of the settlement payment made under the title insurance policy and also for them to retain the benefit of the misapplied mortgage pay off causing the settlement payment itself. The Vontells have not explained how or why Fidelity would have expressly or implicitly intended for such a bizarre agreement contrary to its own interests. The court concludes that the motion to strike the fourth special defense must be granted as a matter of law.

CONCLUSION

For these reasons, Fidelity's motion to strike the Vontells' first, second, and fourth special defenses is granted. The Vontells have withdrawn the third special defense alleging estoppel.

Dated this 29th day of August 2019.

STEVENS, J.