2016 NY Slip Op 50276(U)

WENIG SALTIEL LLP, Plaintiff,

v.

SPECIALIZED LOAN SERVICING, LLC, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2005-4, ASSURANT FIELD ASSET SERVICES A/K/A FIELD ASSET SERVICES, LLC, Defendant.

003825/15.

Civil Court of the City of New York, Richmond County.

Decided March 4, 2016.

Wenig Saltiel, 26 Court Street Suite 1200, Brooklyn, NY 11242, Plaintiff

Knuckles, Komosinski & Elliott, 565 Taxter Road Suite 590, Elmsford, NY 10523, Defendant.

PHILIP S. STRANIERE, J.

Plaintiff, Wenig Saltiel LLP, commenced this civil action against defendants, Specialized Loan Servicing, LLC (Specialized), Deutsche Bank National Trust Company as Trustee for GSAA Home Equity Trust 2005-4 (Deutsche), Assurant Field Asset Services a/k/a Field Asset Services, LLC (Assurant), alleging that owing to certain representations either fraudulently or negligently made by defendants, plaintiff was induced to purchase the real property 88 Cortlandt Street, Staten Island, New York for $225,000.00 at a price plaintiff asserts is in excess of its value and to incur additional expenses owing to conditions concealed by defendants which required repairs of $6,500.00. Plaintiffs also allege that defendants violated New York Insurance Law §2502(a)(2).

Currently before the court is the motion by defendants Specialized and Deutsche to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(1) and (a)(7). Plaintiff has opposed the motion. Defendants have filed a reply. Defendant Assurant, appeared on the return and took no position in regard to the motion.

Defendant Assurant filed an answer. Rather than answer plaintiff's complaint, defendants Specialized and Deutsch filed this motion to dismiss.

Relevant Documents:

1. Limited Power of Attorney

Dated: October 9, 2014

Principal: Deutsche Bank National Trust Company

Agent: Specialized Loan Servicing, LLC

Recorded: November 28, 2014 Richmond County Clerk

2. Contract of Sale

Dated: October 24, 2014

Seller: Specialized Loan Servicing, LLC

Buyer: Wenig Saltiel, LLP

3. Addendum to Purchase Agreement

Dated: October 14, 2014

Seller: Specialized Loan Servicing, LLC

Buyer: Wenig Saltiel, LLP

4. Referee's Deed

Dated: October 31, 2014

Hand Notation—"Conveyed and Delivered November 6, 2014"

Seller: David J. Gold, Esq. as Referee

Buyer: Deutsche Bank National Trust Company, As Trustee for GSAA Home EquityTrust, 2005-4

Recorded: November 28, 2014 Richmond County Clerk

5. Bargain and Sale Deed

Dated: November 11, 2014

Hand Notation—"Conveyed and Delivered November 17, 2014"

Seller: Deutsche Bank National Trust Company, As Trustee for GSAA Home EquityTrust 2005-4, Asset Backed Certificates,

Series 2005-4

Buyer: Wenig Saltiel, LLP

Recorded: November 28, 2014 Richmond County Clerk

Background:

Plaintiff purchased the premises 88 Cortlandt Street from Deutsche by deed dated November 11, 2014, which was delivered on November 17, 2014 and recorded with the county clerk on November 28, 2014. Defendant Deutsche had successfully foreclosed its mortgage and acquired title by a referee's deed dated October 31, 2014, which was delivered on November 6, 2014 and recorded with the county clerk on November 28, 2014. Both deeds were recorded on November 28, 2014, the same date that a Limited Power of Attorney dated October 9, 2014 from Deutsch to Specialized was recorded with the county clerk.

Plaintiff alleges that the contract of sale was entered into not with Deutsche but with Specialized and the contract did not disclose that Specialized was acting pursuant to a power of attorney. Plaintiff argues that because the deed is from Deutsche and not from Specialized with whom it contracted for the purchase, any terms of the contract regarding limiting warranties and representations concerning the properties condition are not available to Deutsche to be asserted as a defense in this litigation. It also argues that neither Specialized nor Deutsche were in title when the contract was made and questions the ability of either entity to enter into a contract of sale.

Plaintiff's damage claim arises because plaintiff asserts that when it inspected the property there were signs on the exterior of the building indicating that the premises had been "winterized." Plaintiff alleges that it relied on these signs on the building in deciding to purchase the premises. Plaintiff contends after going into possession it learned that the premises had not been properly winterized leading to plaintiff having to correct damage to the building because of broken pipes. There is no allegation or evidence that plaintiff ever inspected the interior of the premises before closing of title.

The original foreclosure action was commenced in December 2010 in Supreme Court, Richmond County, (Index No.131783/10) with OneWest Bank, FSB, as the plaintiff. The caption was amended to reflect the assignment of the loan to Deutsche in November 2011. The original mortgagor was Joel Pontuck who borrowed $303,335.00 in March 2005.

Issues Presented:

A. With Whom Did Plaintiff Contract?

Plaintiff during argument of the motion asserted that because the contract and the "real estate purchase addendum" both were prepared by and were with Specialized listed as the "seller," it believed Specialized was the owner of the property and that it only learned that Deutsche was the record owner when the deed was delivered on November 17, 2014.

Examination of the contract of sale, does give some basis for plaintiff's belief. The seller on the contract and the addendum is Specialized without any indication that it is acting as an agent for any other entity. What makes the contract particularly interesting is that the "contract" is hand dated October 24, 2014 while the "real estate purchase addendum" is dated ten days earlier, October 14, 2014, the date typed into the preamble. Generally an addendum to a contract is either prepared at the same time of the original agreement or shortly thereafter when attorneys review a standard form

contract and amend the original writing to protect their respective client's interests. There is no explanation as to why the addendum is dated before the contract. Both documents appear to be standard forms prepared by Specialized. The parties on both documents are Specialized and Wenig Saltiel. Further, a review of both documents discloses that there are no changes to either of them made either by hand or by typing in some new language. This calls into question what was the ability of the plaintiff to negotiate the terms or whether it was a "take or leave" offering.

But it gets better than that. Both the "contract" and the "addendum" on the signature page were apparently signed by plaintiff on a third date, October 17, 2014. There is no date next to the seller's signature on either document. Section 2 of the addendum, "Effective Date" notifies the plaintiff that the date of the Seller's execution is the effective date." Since there is no indication as to when the seller signed either document, the court must conclude that the effective date is the date appearing in the preamble to both the contract and the addendum.

Section 17 of the "contract" provides:

> Complete Agreement. This contract is the entire and only agreement between the Buyer and the Seller. This contract replaces and cancels any previous agreements between the Buyer and the Seller or their respective agents. This contract can only be modified by subsequent addendum in writing signed by both Buyer and Seller or their respective attorneys.

While Section 42 of the "addendum" states in bold print and capitalized:

> Effect of Addendum. This real purchase addendum amends and supplements the contract and if applicable, escrow instructions. In the event there is any conflict between the addendum and this contract, escrow instructions, notice or other documents attached and part of the agreement the terms of this addendum shall take precedence and prevail, except as otherwise provided by applicable law.

If Section 17 is to be given its plain meaning, then the only agreement between the parties is the "contract" of October 24, 2014 as the "addendum" is dated either seven or ten days before the "contract" making the "addendum" a nullity as it by its terms was prepared before the "contract" which by the contract terms replaces any previous agreements between the parties. As we learned in Contract Law 101, any ambiguity in a contract is to be presumed against the drafter. Here the contract is a form created by Specialized and used to convey properties it either owns or managed on behalf of third parties.

However, what undercuts plaintiff's allegation of "confusion" is the fact that the signature block on both the contract and the addendum discloses that the seller is "Specialized Loan Servicing LLC, As Attorney-In-Fact." It should be noted that plaintiff is a law firm with considerable experience and expertise in real estate matters, so it is safe to conclude its members did not recently "fall off the turnip truck" into the world of legal terms and their meaning. Although the opening paragraph of the contract and addendum do not indicate that Specialized is an agent, the signature block at a

minimum should have triggered an inquiry by plaintiff as to whether the description of the seller in the preamble or that in the signature block was correct.

On the other hand, if, upon reviewing both documents "bells and whistles" went off at plaintiff's law office and plaintiff searched the county clerk's records as of the date of the contract to see if there was a power of attorney, no information would have been forthcoming because the Limited Power of Attorney between Deutsche and Specialized was not recorded until November 28, 2014, after title had been conveyed. In fact, the Limited Power of Attorney was filed the same date as both the referee's deed to Deutsche and the deed from Deutsch to plaintiff were recorded. The county clerk records disclose that the Limited Power was actually recorded after the other two documents as it has a higher land document number. Whether that affects the validity of title is not an issue before the court.

Also the deed from Deutsche to plaintiff is signed by Specialized on behalf of Deutsche pursuant to the Limited Power. The time to question the legal status of Specialized and Deutsche was at the closing and not during subsequent litigation. The court will leave to another day the issue of whether in New York, a "trust" can be a party to an action or must litigation be in the name of a "trustee."

Plaintiff also contends that on the date of the contract, October 24, 2014, neither Specialized nor Deutsche had any authority to enter into a contract because neither entity was in title. The referee's deed conveying title to Deutsche was not delivered until November 6, 2014, two weeks after the date of the contract.

Common sense tells you, "you can't sell something you don't own." This is not the first time that an entity contracts to sell real property it does not own on the date of contract. This process often occurs in new construction situations. In those transactions, the contract vendor makes an affirmative representation that it is not yet in title but anticipated acquiring title and will be in title when the property is conveyed to the contract vendee. No such representation was made to plaintiff in the Specialized offer to sell.

In these anticipated acquisition transactions if defendant as the seller, was unable to convey title to the property as agreed to in the contract, it would be in breach and at a minimum would be required to return the plaintiff's deposit, if not be responsible for other damages allowed under the terms of the contract.

The seller in Section 7 of the contract agrees to "transfer ownership of the property to the Buyer by Bargain and Sale Deed with Covenant against Grantor's Acts." Plaintiff obtained exactly what plaintiff contracted for, title to 88 Cortlandt Street. What difference does it make from whom plaintiff obtained title? Plaintiff received ownership for the sale price set forth in the contract, $225,000.00. Who the actual seller was and how that seller obtained title is irrelevant absent a showing that title is somehow encumbered making it "uninsurable."

This becomes the classic real property transaction where the contract terms merge into the deed and all rights not specifically designated as "surviving" closing, terminate on the transfer of title.

Based on the foregoing it is clear that the plaintiff knew or should have known that Specialized was not the owner of record. It is also apparent that plaintiff obtained what plaintiff bargained for, ownership of the property it contracted to purchase. Any claims based on plaintiff being deceived because of the fraudulent or negligent representations of the defendants regarding ownership of the property at the time of contract are dismissed.

B. Did Defendants Make Any Warranties Which Survived Closing?

The essential theme of the plaintiff's damage claim is that the defendants represented that the premises had been properly "winterized;" that in actuality it had not; and that the plaintiff relied on those representations as a material fact in agreeing to purchase the property. Plaintiff asserts that the representations were either fraudulently or negligently made.

A review of the allegations of the complaint leads to the conclusion that both the cause of action for fraud and that for negligent misrepresentation are properly pled. The fraud and misrepresentation allegations are stated with sufficient particularity to comply with CPLR §3016(b).

Defendants assert that any representations contained in the "contract" or "addendum" merged in the deed and did not survive closing of title. As noted above, based on how the parties dated the agreements, the entire "addendum" is irrelevant because it is dated before the date of the "contract" and a nullity. This requires that the court only examine the agreement dated October 24, 2014 to determine what representations were made and which, if any, survive closing.

Section 8 of the contract in regard to "Personal Property and Fixtures" provides:

> Consequently, this property is being sold "As Is". The Seller does not make any warranties, statements, claims or representations about the condition or value of any of the property included in this sale.

Section 9 of the contract, "Final Inspection of the Property" in bold, capitalized type provides:

> There are no implied warranties covering this property. There is no implied warranty of habitability or of good workmanlike construction. There are absolutely no implied warranties on any kind covering this property.

Section 25 "Survive Closing" provides:

> Seller shall have no liability after the closing for any obligations, statements, or representations of Seller set forth in the contract unless it is accompanied by a statement that it shall survive closing.

Based on the foregoing, it would seem that defendants have a viable argument that there are no representations concerning the condition of the premises which survive closing.

Plaintiff argues on the contrary, the representation as to the "winterization" of the premises is not part of the contract. In fact, the term winterization is not used anywhere in the document. It was a representation posted on the building. Plaintiff contends winterization is not an implied warranty; it is an "express" warranty as to the condition of the premises. The winterization notice is dated January 28, 2014 so it was done for the winter of 2013-14. There is a second winterization notice dated September 28, 2014. As this contract and transaction took place in the Fall of 2014, the winterization and any damages arising from the failure to do it properly would have to have occurred during 2014 before the contract was entered into.

Also Section 15 of the contract provides that "(a)t the closing and funding the Seller will transfer the property in its current `as is' condition." Because the winterization sign was on the exterior of the premises, winterization is part of the "as is" condition on the date of contract and lasts until the closing of title.

What makes it more likely that this is a warranty that survives closing is the fact that the contract provided at Section 9 "there is no inspection right by the Buyer in this transaction." Because there is no right to inspect, the Buyer had no ability to discover whether the premises was properly winterized or winterized at all. It had to rely on the sign posted on the building. Any clauses in this regard in the "addendum" are irrelevant because the "addendum" is dated before the contract and as pointed out above cannot be considered.

The question must be asked is whether in spite of the contract language limiting or restricting entirely any inspection, the plaintiff actually did either inspect the property interior or had an opportunity to do so and failed to avail itself of that chance. Neither side addressed this issue in its motion papers.

A question of fact exists as to whether the property was actually winterized; what, if any, is the standard of care accepted in the real estate industry for winterization of real property; did the defendants breach that standard of care; did the plaintiff have the opportunity to inspect the property prior to contract or closing of title; did the posting of a sign on the property visible to the general public create an express warranty as to the condition of the premises which survived closing and was it reasonable for plaintiff to rely on a sign on the property that the building had been winterized.

The above being said, a review of the plaintiff's complaint discloses only causes of action for fraud or negligent misrepresentation of the condition as inducing the plaintiff to purchase the property and negligence in actually winterizing the premises by Specialized, Deutsche or Assurant. As noted above, the plaintiff has not established either fraud or negligent misrepresentation in the inducement. And although the court has raised the issue of whether the posting on the premises that the building was "winterized" created an express warranty which was breached, the plaintiff has not alleged a cause of action in that regard. Reading the context of plaintiff's complaint and reviewing the exhibits submitted with this motion, plaintiff has in fact articulated this as a valid issue to be addressed.

C. Does Real Property Actions and Proceedings Law (RPAPL) §1307 Apply?

RPAPL §1307 imposes a statutory duty on the plaintiff in a mortgage foreclosure to maintain residential real property. Pursuant to this law, once Deutsche obtained a judgment of foreclosure and sale on June 27, 2014, it became responsible for the maintenance of the property until ownership of the property is transferred through the closing of title in foreclosure and the deed is recorded. The statute applies either if the property is vacant or if occupied by tenants and abandoned by the original mortgagor.

Neither party has produced any documentation as to whether the property was vacant or occupied. Presumably because the premise was "winterized" it may be concluded it was abandoned. This means between the date of the judgment of foreclosure and sale and the recording of the deed transferring title, Deutsche, as the plaintiff in the foreclosure was responsible for maintaining the property. As the deed from the referee to Deutsche was not recorded until the same date as the deed to plaintiff was recorded, November 28, 2014, Deutsche was responsible for maintenance of the property until that date.

The winterization notices produced as exhibits by the plaintiff are dated January 28, 2014, before the judgment of foreclosure and sale and September 28, 2014, after that date. If the notices were posted at the behest of the defendants, it could mean that the defendants had assumed responsibility for the maintenance of the premises even before the date triggered in RPAPL §1307.

A question of fact exists as whether the defendants were in compliance with the statute and the New York property maintenance code sections set forth in RPAPL §1307(5) until the date of transfer of title to plaintiff. The parties will address this issue and whether a third party purchasing the property from the mortgagee can assert the protections of this statute as the basis of a damage claim.

D. Is There A Negligence Cause of Action Against Assurant?

It is alleged that defendant Assurant winterized the premises in January 2014 and September 2014. Plaintiff asserts because when it went into possession of the premises in November 2014, it found broken pipes and water damage, defendant Assurant breached its duty to competently winterize the property. The question arises as to whether plaintiff has standing to assert a negligence claim against any of the defendants on this theory.

Plaintiff produced two winterization notices allegedly posted by the defendants. One from January 2014 and the second from September 2014. Because title passed in November 2014, a question arises as to when the pipes would have frozen and broken between September and November 2014. Did the temperature even drop below freezing before November 17, 2014, the date of delivery of the deed to plaintiff? If not, was the damage done in the winter of 2014 after the January 2014 winterization?

It must be asked whether Assurant had any duty to plaintiff. It had no contractual obligation with plaintiff. Assurant was either hired by Specialized or Deutsche or by an agent for them to secure the property for the benefit of the mortgagee or perhaps for the benefit of any tenants or the City of New York under the obligation created by RPAPL §1307. No evidence has been presented on this issue.

Based on the facts of this case, Assurant had no duty to the plaintiff. It had no contractual obligation to plaintiff. If the plaintiff prevails on a claim against either Specialized or Deutsche, Deutsche as the owner of the property would have a cause of action against Assurant for failing to properly winterize the premises. Plaintiff has no cause of action against Assurant.

E. Insurance Law §2502(a) Claim.

Plaintiff alleges that the defendants required him to use defendants' title insurance company and that such a contract clause violated New York Insurance Law §2502(a) which provides:

> (1) No person, firm or corporation engaged in the business of financing the purchase of real or personal property, lending money on security thereof, or servicing a mortgage thereon, and none of its trustees, directors, officers, agents or other employees, shall require as a condition precedent to financing any such purchase or making of such loan or renewing or extending any such loan or mortgage or performing any other act in connection therewith, that the person, firm or corporation for whom the transaction is undertaken negotiate any policy of insurance or renewal thereof covering such property through a particular insurance company, agent or broker.
>
> (2) State chartered banking institutions and federally chartered banking institutions shall not extend credit, lease or sell property of any kind, or furnish any services, or fix or vary the consideration for any of the foregoing, on the condition or requirement that the customer obtain insurance from such institution, its affiliate or subsidiary, or a particular insurer, agent or broker.... This prohibition shall not prevent a state chartered banking institution or federally chartered banking institution from informing a customer that insurance is required in order to obtain a loan or credit, that loan or credit approval is contingent upon the customer's procurement of acceptable insurance, or that insurance is available from such institution; provided, however, that the state chartered banking institution or the federally chartered banking institution shall also inform the customer in writing that his or her choices of insurance provider shall not affect the institution's credit decision or credit terms in any way. Such disclosure shall be given prior to or at the time any such institution or person selling insurance on the premises thereof solicits the purchase of any insurance from a customer who has applied for a loan or extension of credit.

The contract of sale at Section 6 states:

Title. Seller has obtained a title search through Partners Abstract Corp.... Purchaser agrees to order their title search through Partners Abstract Corp., and in doing so Seller will pay for Purchaser's owners [sic] policy. A copy of the title search is attached hereto. Seller will not pay for a survey or an abstract of title. If Purchaser requires a survey, municipals [sic] searches or abstract, Purchaser will be responsible for the costs associated therewith. Seller will provide insurable title to Purchaser, not marketable title. In the event the Purchaser orders title through their own title company, the Seller will

not be obligated to clear title, provide title affidavits and/or any corporate documents to Purchaser's title company.

The Purchaser shall notify the Seller, in writing, upon receipt of the title search before closing of any objections to title. If there should appear any valid objections to title, the Seller shall have ninety (90) days within which to remove same. If in the opinion of the Seller the objections cannot be removed or are deemed to[sic] costly to do so, the Seller shall have the option of returning to the Purchaser the monies paid on account of this contract and the parties hereto shall be mutually released.

Plaintiff argues that Insurance Law §2502 applies because section (a)(2) specifically mentions being applicable to a banking institution that "sells property." Defendants contend that the statute only comes into play if the institution is providing financing for the purchase of the property.

The language of the statute is clear that the prohibition of requiring the purchase of insurance from a particular insurer applies when the banking institution sells property. It is not contingent on the customer seeking financing from the banking institution.

This requires analysis of the terms of the contract to determine if it requires the plaintiff to purchase title insurance from a particular company. The language of the contract does not require the plaintiff to purchase title insurance from any particular company. It gives the plaintiff the option to use the "title search" prepared by Partners Abstract. If the plaintiff ordered the title search from Partners Abstract, then defendants would pay for the premium for the owners' insurance policy.

Plaintiff could order its own title search and its own insurance. In that case, the Seller would not be obligated to clear any objections to title. If plaintiff's title company would deliver "insurable title" then the transaction would have to go forward. If the title is not insurable, then the defendants would not be fulfilling the terms of the contract and the transaction would be null and void with the defendants required to return the downpayment monies.

The court must question whether the language of the contract is contradictory. The first paragraph of Section 6 recites that if the plaintiff ordered title through its own title company, "seller will not be obligated to clear title." The second paragraph of Section 6 states: "If there should appear any valid objections to title, the Seller shall have ninety (90) days within which to remove same." If it is possible to read the two paragraphs together, the court should do so, and carry out the intentions of the parties. Because there is an implied covenant of good faith in all contracts, any interpretation of the contract terms should be made with an eye on having a valid enforceable agreement.

The language of the second paragraph that "Seller shall have ninety (90) days" to remove objections to title is a standard clause in almost every residential real estate contract drafted in Staten Island and appears in all preprinted New York Board of Title Underwriters Contracts. This being the case, along with the use of the word "shall" which in most cases means "must," defendants were required to clear any objections appearing in a title search irrespective of any other clause negating such an obligation.

In Section 7, the seller agrees to convey title using a bargain and sale deed with covenant against grantor's acts. The seller is only covenanting to clear objections arising while it was in title. Owing to the short period of time Deutsche was the owner and the fact both the deed into Deutsche and the

deed from Deutsche to plaintiff were recorded on the same date, there is very little chance that title became encumbered while Deutsche was the owner.

A seller cannot refuse to clear objections to title which arose while it was the owner and still deliver such a deed, unless those objections arose from a prior owner. The seller is not covenanting to clear objections that are in the chain of title prior to it becoming owner. Because the seller is the lender who acquired title through a referee's deed after a successful foreclosure, the likelihood of there being objections to title are slim. However, this gives rise to a conflict between the terms of the contract. In one respect, the seller is refusing to clear title objections while at the same time it is agreeing to give title a reputable title company would insure. How can a title company be "reputable" if it is willing to insure title without clearing objections?

Section 11 of the contract "Ownership" provides: "The Seller agrees to transfer title and the Buyer agrees to accept ownership of the property free of all claims and rights of others, ..." Agreeing to transfer title free of all claims in this Section while in Section 6 asserting the right not to clear objections to title is inconsistent. Section 11 is consistent with an intention to have the transaction move forward while Section 6 would negate that intent.

Taking all of these clauses together, it becomes apparent that the clause in paragraph one of Section 6, in which the seller states it "will not be obligated to clear" title, is unenforceable as it contradicts the clear language of paragraph two of Section 6, as well as Sections 7 and 11. It only makes sense if it applies to objections to title which arose before defendants went into title and arose in the chain of title and somehow survived the foreclosure.

Contrary to plaintiff's contention that it was "forced" to purchase title insurance from the defendants' designated company in violation of the Insurance Law, the contract clearly gave the plaintiff the option of ordering its own title search and insurance. It just would have to pay for the owner's policy. On the other hand, there is no requirement that a purchaser buy an owner's insurance for themselves. Not buying title insurance may be a really stupid thing to do, but there is no legal obligation to do so.

Even if there was a violation of Insurance Law §2502, as noted by counsel for each party, that statute does not provide a remedy. Unlike other consumer protection laws which either create a private right of action or authorize the attorney general or perhaps the commissioner of insurance to seek redress for a violation none exists in this law. This being the case, it would seem that an aggrieved party would have to commence an action for a deceptive business practice pursuant to General Business Law (GBL) §349. An aggrieved party who prevails on such a statutory claim is entitled actual damages and punitive damages three times the actual damages not to exceed $1,000.00.

However, because it is clear the contract did not require the plaintiff to use the title company designated by the defendants, but only gave the plaintiff a financial incentive to do so, payment of the owner's policy premium, plaintiff has no viable claim under New York State law.

F. Is There A Claim Under Federal Law?

The federal government has also sought to protect purchasers of real property from having to acquire title insurance coverage from a company designated by the seller.

12 USCA §2608, "Title Companies; Liability of Seller" provides:

> (a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular company.
>
> (b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

Although this statute, unlike the New York Insurance Law, actually provides some relief for an aggrieved purchaser, a review of the contract in this transaction leads to the conclusion that the federal law is not applicable. First, the plaintiff paid cash for the property, so no federally related mortgage loan was involved. Second, the reference to a particular title company was not a requirement of the contract, the plaintiff had the opportunity to reject the seller's company and use its own.

As noted in *Hopkins v Horizon Management Services, Inc.*, 515 F. Supp 2d 649 (2011), which also involved a transaction where Deutsche Bank was the seller, "an economic incentive to purchase title insurance [from a particular title insurance company] is not the same as a direct or indirect requirement to purchase title insurance [from a particular title insurance company]."

The inclusion of this clause in the contract by the seller raises the question of whether the willingness of the seller to pay for the owner's title insurance in order to encourage the buyer to use the company designated by the seller when the premium in New York is fixed by statute or regulation and is therefore the same no matter from whom it is purchased, creates an indirect condition of the sale in violation of the federal regulations. This remains an issue to be addressed at some future date.

There is no federal cause of action against the defendants.

Conclusion:

Defendants' motion is granted to the following extent.

Plaintiff's cause of action for fraud and negligent misrepresentation concerning ownership of the property against Specialized and Deutsche is dismissed.

Plaintiff's cause of action for fraud and negligent misrepresentation in regard to the condition of the property against Specialized and Deutsche is dismissed.

Plaintiff's cause of action for negligence against Assurant is dismissed.

Plaintiff's cause of action for negligence in hiring against Specialized and Deutsche is dismissed.

Plaintiff's cause of action based on Insurance Law §2502 is dismissed.

However, pursuant to CPLR §2001, the court has determined that the facts of the case have disclosed other potential causes of action that exist on behalf of the plaintiff which were not properly pled.

The plaintiff will file and serve an amended complaint on or before March 31, 2016 including but not limited to the following causes of action:

1. Whether the posting of the sign on the building created an express warranty which the plaintiff could reasonably rely upon and which survived closing.

2. Whether the protections of RPAPL §1307 run to good faith purchasers of property bought from a lender who is successful at a foreclosure sale.

Defendant will either file and serve an answer or a motion to dismiss by April 29, 2016.

The foregoing constitutes the decision and order of the court.