

(Table, Text in WESTLAW), Unreported Disposition

(Cite as: 19 Misc.3d 1143(A), 2008 WL 2346135 (N.Y.Sup.))

CNOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.

Susan ANKARI and Joan Waldman, Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, Defendant.

No. 109169/06.

May 30, 2008.

Doyle & Broumand, Bronx, attorneys for Ankari & Waldman ([Michael Doyle](#), of counsel).

Adam Leitman Bailey, PC (Richard Wechter, of counsel), New York, attorney for Fidelity National Title Insurance Company.

[EDWARD H. LEHNER](#), J.

*1 Before the court is a motion for summary judgment by defendant Fidelity National Insurance Company (Fidelity) seeking dismissal of the complaint, and a cross-motion by plaintiffs Susan Ankari and Joan Waldman for a declaration that Fidelity must defend and indemnify them in the companion case entitled *First American Title Insurance Company of New York v. Susan Ankari and Joan Waldman*, Index No. 116833/05) (the Other Action).

In January 2000, plaintiffs purchased property located in Suffolk County at 563 Dune Road, Westhampton Beach (the Property) from non-party Nancy Porush (Porush) for \$850,000. In connection with this purchase, they obtained a title insurance policy from Fidelity (the Policy). Prior to this conveyance, Porush's ex-husband, Daniel Porush (Mr. Porush), was brought up on several federal criminal charges of money laundering and fraud, and he had transferred to his wife, without consideration, title to the property located in Nassau County at 100 Rodeo Drive, Oyster Bay Cove (the Other Property), which he had held jointly with his wife.

In June 1998, non-party Thomas Roth (Roth), an investor allegedly defrauded by Mr. Porush's company, sued Mr. and Mrs. Porush to set aside the aforesaid conveyance (the Roth Action). The Other Property was later sold to non-parties David and Esther Schwartz (Mr. and Mrs. Schwartz), who purchased a policy of title insurance from the First American Title Insurance Company of New York (First American). In July 1999, Mr. and Mrs. Schwartz were joined in the Roth Action. In March 2001, the Appellate Division, Second Department, granted summary judgment to Roth against Porush and Mr. and Mrs. Schwartz ([281 A.D.2d 612](#)). As the title insurer of Mr. and Mrs. Schwartz, First American then paid Roth \$700,000. First American was then substituted in place of Mr. and Mrs. Schwartz as their subrogee and as a party defendant in the Roth Action, and it cross-claimed against Porush. On January 8, 2002, the Su-

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preme Court, County of Nassau, entered a judgment in favor of First American against Porush in the amount of \$700,000. During the pendency of the Roth Action, on May 23, 2001 plaintiffs conveyed the Property to non-party Jacobi Family Properties, Inc. for \$1,750,000.

The Other Action was then commenced against plaintiffs in December 2005, First American asserting causes of action for fraudulent conveyance pursuant to [Debtor and Creditor Law §§ 273, 273-a and 276](#). By decision of even date herewith, that action has been dismissed. Ankari and Waldman commenced the instant action in June 2006, seeking a judgment declaring that Fidelity was obligated to defend and indemnify them in the Other Action.

“The 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.” [Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 \[1985\]](#). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial of the action ([Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 \[1986\]](#)).

*2 It is well settled that “the duty to defend is broader than the duty to indemnify (and that) an insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy” ([Fitzpatrick v. American](#)

[Honda Motor Co., 78 N.Y.2d 61, 65 \[1991\]](#)). “The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer ... [and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions” ([Seaboard Surety Company v. The Gillette Company, 64 N.Y.2d 304, 310 \[1984\]](#))

The liability of the title insurer to its insured is governed and limited by the terms and conditions contained in the policy ([Citibank, N.A. v. Commonwealth Land Title Insurance Company, 228 A.D.2d 635 \[2d Dept 1996\]](#)). “[T]he title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from coverage” (*id.*, quoting 5A Warren's Weed, New York Real Property, Title Insurance, § 1.03[6] [4th ed], at 15). Here, there is no claim of any defect in the title to the Property. Rather, the claim is that Fidelity was negligent in the title search in failing to discover the action and lis pendens filed by Roth, which omission they claim directly led to the initiation of the Other Action against them, which has caused them to incur expenses for attorneys' fees.

Fidelity correctly contends that it had no duty to search outside the chain of title for the Property, specifically regarding the subject lis pendens which concerned property located in Nassau County. Assuming however, arguendo, that it had breached some duty by failing to find the lis pendens, its Commitment of Title Insurance, quoted below, merged with the Policy, thus foreclos-

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ing any claim arising from its alleged negligent search.

As recognized by plaintiffs in their reply memorandum of law, “[t]he contract for a title search is distinct from the contract of insurance; liability for a negligent search arises from the former” (*L. Smirlock Realty Corp. v. Title Guaranty Company*, 70 A.D.2d 455, 465 [2d Dept 1979], mod. on other grounds, 52 N.Y.2d 179 [1981]). In that case, the Court of Appeals stated (p. 188) that “a policy of title insurance is a contract by which the title company agrees to indemnify the insured for loss occasioned by a defect in title.”“ Under the contract for searching titles, the defendant may be liable for any damages which its negligence may have imposed upon the plaintiff, (but under) the contract of insurance no question of negligence in searching can arise.” (*Citibank, N.A. v. Chicago Title Insurance Company*, 214 A.D.2d 212, 216 [1st Dept], *lv dismissed* 87 N.Y.2d 896 [1995], quoting *Trenton Potteries Co. v. Title Guar. & Trust Co.*, 176 N.Y. 65, 75 [1903]).“In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective.... The doctrine of skill or negligence has no application to a contract of title insurance” (*Id.* at p. 216, quoting *Maggio v. Abstract Tit. & Mtge. Corp.*, 277 App.Div. 940, 941 [4th Dept 1950]). Where the certificate of title has merged in the subsequently issued title insurance policy, any action for damages arising out of the search, whether sounding in tort or contract, is foreclosed (*L. Smirlock Realty Corp. v. Title Guaranty Company*, *supra*). As noted by Fidelity, its Commitment for Title Insurance provides, in relevant part, as follows:

*3 this commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligation hereunder shall cease and terminate within six (6) months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the company

The policy attached to plaintiff's instant complaint is dated December 23, 1999. Under the quoted Commitment, Fidelity cannot, upon issuance of the Policy, be held liable thereunder for any claims of negligence in conducting the title search (*Citibank N.A. v. Chicago Title Insurance Company*, *supra*). Thus, there being no alleged defect in the title to the Property, Fidelity is not required to defend or indemnify plaintiffs in the Other Action.

In view of the foregoing, this court need not address Fidelity's alternate grounds for dismissal based on the termination of any obligation pursuant to section 2 of the Conditions and Stipulations portion of the Policy and on the assertions of fraud allegedly committed by plaintiffs under the above-noted sections of the Debtor and Creditor Law.

Therefore, Fidelity's motion for summary judgment is granted, and plaintiffs' cross-motion is denied, and it is declared that defendant has no obligation to defend or indemnify plaintiffs in the Other Action. The Clerk shall enter judgment accordingly.

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