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Faith Assembly v Titledge Edge of N.Y. Abstract, LLC
2015 NY Slip Op 50375(U)
Decided on March 17, 2015
Supreme Court, Queens County
Hart, J.
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Decided on March 17, 2015

Supreme Court, Queens County

Faith Assembly a/k/a FAITH ASSEMBLYx Index CHURCH, Plaintiffs,

against

Titledge Edge of New York Abstract, LLC, JONATHAN BOXMAN, STEWART TITLE INSURANCE COMPANY, et al., Defendants.

28579/2009

Duane A. Hart, J.

The following numbered papers read on this motion by defendant Stewart Title Insurance Company (Stewart Title) pursuant to CPLR 2221 for leave to renew its motion, made pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint insofar as asserted against it, and upon renewal to vacate the decision and order dated August 2, 2010, and entered on August 13, 2010, and to dismiss the complaint insofar as asserted against it with prejudice.

Papers

Numbered

Notice of Motion - Affidavits - Exhibits ..... 1 - 7

Answering Affidavits - Exhibits ..... 8 - 10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff religious corporation operates the Faith Assembly Church in Richmond Hill, Queens. In June 2006, plaintiff borrowed $2.2 million from CMAC, LP, in part to perform renovations to the church and open a daycare center. The loan was secured by a mortgage on the [*2]church premises. At closing on June 27, 2006, plaintiff and CMAC, LP, executed an escrow agreement with the

defendant Titledge of New York Abstract, LLC (Titledge). Pursuant to the terms of the escrow agreement, approximately $640,000.00 of the loan proceeds was to be deposited in escrow with Titledge, and sums from these proceeds were to be periodically released to plaintiff to reimburse it for, among other things, the cost of certain interior work and establishing the daycare center. The escrow agreement stated that it was made between plaintiff, CMAC, LP, and "Titledge, an authorized agent" for the defendant Stewart Title. Plaintiff commenced this action in October 2009 against several parties, including defendants Titledge and Stewart Title, alleging that Titledge's principal, defendant Jonathan Boxman, had misappropriated more than $400,000 of the loan proceeds which had been deposited into escrow. Plaintiff asserted five causes of action (the second, fifth, eleventh, fourteenth and seventeenth) seeking to hold defendant Stewart Title liable on the theory that Titledge had entered into the escrow agreement as Stewart Title's agent, and that Stewart Title was thus responsible for the alleged misconduct of Titledge and Boxman. Plaintiff also asserted a sixth cause of action (twenty-fifth) against defendant Stewart Title alleging that it owed the plaintiff a fiduciary duty which it had breached by failing to advise plaintiff that Boxman had misappropriate escrow funds.

Defendant Stewart Title, through prior counsel, previously moved in December 2009, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against it, on the grounds

that, among other things, defendant Titledge was not authorized under the express terms of the agency underwriting agreement to enter into the escrow transaction on behalf of Stewart Title. Defendant Stewart Title argued, among other things, that the instant complaint was insufficient to establish a claim based upon apparent authority. Defendant Stewart Title contended the complaint failed to allege any words or deeds by it to plaintiff from which an inference could be made that defendant Titledge had the authority to do anything more than issue a policy of title insurance on Stewart Title's behalf. Defendant Stewart Title cited the case, *HAS Residential Mtge. Servs. of Texas, Inc. v Stewart Tit. Guar. Co.* (7 AD3d 426 [1st Dept 2004]), in support of such contention.

By memorandum decision and order dated August 2, 2010 and entered on August 13, 2010, the motion was denied. The court determined, among other things, that the *HAS Residential* case was distinguishable from this case because it contained no mention of clauses in the underwriting agreement pertaining to escrow funds. In addition, the court noted the appellate case "may not even concern escrowed funds."

Defendant Stewart moved for leave to reargue its motion to dismiss the complaint, asserting that the court misapprehended the law and the facts in denying its motion to dismiss the complaint. By order dated March 9, 2011 and entered March 17, 2011, the court granted that branch of defendant Stewart's motion which was for

leave to reargue and, upon reargument, adhered to its prior determination denying the motion to dismiss the complaint insofar as asserted against it.

Defendant Stewart Title appealed from the order entered March 17, 2011. The Appellate Division, Second Department, by opinion and order dated March 27, 2013, modified the order, on the law, by deleting the provision thereof which, upon reargument, adhered to so much of the determination in the order entered August 13, 2010, as denied that branch of the motion of the defendant Stewart Title Insurance Company which was pursuant to CPLR 3211(a)(7) to dismiss the 25th cause of action, and substituted therefor a provision, upon reargument, vacating so much of the order entered August 13, 2010, as denied that branch of the motion, and thereupon granting that branch of the motion, and affirmed the order as modified (*see Faith Assembly v Titledge of New York Abstract, LLC*, 106 AD3d 47 [2d Dept 2013]). The Appellate Division, Second Department, held, in the opinion by Justice Thomas A. Dickerson, that the language of the underwriting agreement between defendants Stewart Title and Titledge "[did] not utterly refute plaintiff's allegations that Titledge was authorized to act as Stewart's agent in entering into the escrow agreement and holding the escrow funds, and in fact did so" (106 AD3d at 60). The Appellate Court, in reaching such holding, cited *HSA Residential* (7 AD3d 426), using the introductory signal "cf." and a parenthetical explaining "plaintiff's allegations that the title insurer

defendants are responsible as principals for the master settlement agent's diversion of mortgage funds advanced by plaintiff is contradicted by the language of the underwriting agreements."

Defendant Stewart Title then moved before the Appellate Division, Second Department, for leave to reargue the appeal from the order entered on March 17, 2011, or in the alternative, for leave to appeal to the Court of Appeals from the opinion and order of the Appellate Court. By decision and order on motion dated October 13, 2013, the motion was denied, with costs, by the Appellate Division, Second Department.

Defendant Stewart Title now moves for leave to renew the prior motion to dismiss pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint insofar as asserted against it, and upon renewal to vacate the decision and order dated August 2, 2010, and entered on August 13, 2010, and to dismiss the complaint insofar as asserted against it. In support of the instant motion, it offers, as new evidence, a copy of the order entered June 20, 2003 and judgment entered May 28, 2003, in the *HSA Residential* action (New York County Sup Ct, Index No. 602772/2001) (which were affirmed by the Appellate Division, First Department in *HSA Residential* [7 AD3d 426]), the transcript of the court proceedings referred to in the June 20, 2003 order, the Stewart Title underwriting agreement at issue in *HSA Residential* and an affidavit of defendant Jonathan Boxman. Defendant Stewart Title argues that such evidence warrants a change

in the prior determination of the motion to dismiss the complaint herein insofar as asserted against it. According to defendant Stewart Title, this evidence shows that the underwriting agreements in this case and in the *HSA Residential* case (New York County, Supreme Court, Index No. 602772/2001) are identical and is factually on point, and therefore the holding of the Appellate Division, First Department in *HSA Residential* (7 AD3d 426), binds this court.

CPLR 2221 states that a motion for leave to renew "shall be based upon new facts not [*3]offered on the prior motion that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]). Although a court of original jurisdiction may entertain a motion for leave to renew based on new facts even after an appellate court has affirmed the original order, on a post-appeal motion to renew, " the movant bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court' in order to imbue the appellate decision with a degree of certainty' (*Derby v Bitan*, 112 AD3d 881, 882 [2d Dept 2013], quoting *Levitt v County of Suffolk*, 166 AD2d 421, 423 [2d Dept 1990]; *see Specialized Realty Servs., LLC v Town of Tuxedo*, 106 AD3d [987,] 988 [2d Dept 2013]; *Abrams v Berelson*, 94 AD3d 782, 784 [2d Dept 2012]; *Andrews v New York City Hous. Auth.*, 90 AD3d 962, 963 [2d Dept 2011])" (*Davi v Occhino*, 116 AD3d 651 [2d Dept 2014]). Further, a post-appeal motion to renew " is not a second chance freely

given to parties who have not exercised due diligence in making their first factual presentation' (*Renna v Gullo*, 19 AD3d 472, 472 [2d Dept 2005], quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 [1st Dept 1996])" (*Andrews v New York City Hous. Auth.*, 90 AD3d at 963).

This motion was made on July 31, 2014, one year and four months after the March 27, 2013 Appellate Division order, and ten months after the October 10, 2013 denial of reargument by the Second Department. Such motion is not made with the due diligence required by case law. The record on appeal in the *HSA Residential* case is a public record, and therefore was readily available to defendant Stewart Title at the time it made its original motion to dismiss the complaint in this action (*see Elder v Elder*, 21 AD3d 1055 [2d Dept 2005] [materials which were matters of public record available at the time of the original motion cannot serve as a proper basis for a motion to renew]). Moreover, defendant Stewart Title was a party to the *HSA Residential* action (New York County, Supreme Court, Index No. 602772/2001), and therefore had the knowledge of the details of the underwriting agreement at issue in *HSA Residential*. It therefore could have submitted the underwriting agreement in *HSA Residential*, and the lower court ruling, as part of its original motion, particularly since it advanced the argument that *HSA Residential* was relevant on the issue of whether the complaint herein should be dismissed insofar as asserted against it. The recent "discovery" of the purported new evidence of the Supreme Court order and judgment in

the *HSA Residential* action, the transcript of the court proceedings, the Stewart Title underwriting agreement at issue in *HSA Residential*, stems from defendant Stewart Title's change of counsel in 2014. The failure by defendant Stewart Title's prior counsel to produce such evidence does not constitute a reasonable justification for the failure to present such items on the prior motion (*see Konecky v Horowitz*, 177 AD2d 685 [2d Dept 1991] ["it is virtually conceded that this material could have been produced in a prior application, and the

alleged negligence of the appellants' prior counsel is essentially the only reason why this material was in fact not timely produced" [177 AD2d at 686]). In addition, plaintiff has failed to make any claim it attempted to obtain the affidavit of defendant Boxman in support of the prior [*4]motion. Under such circumstances, the motion by defendant Stewart Title for leave to renew its prior motion to dismiss the complaint insofar as asserted against it is denied.

Dated: March 17, 2015

J.S.C.

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