SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

EDGE CAPITAL IV, LLC,

Plaintiff(s),

MOTION DATE: 2/3/11
INDEX NO.: 19072/10
SEQ. NO. 1

-against-

USAA CASUALTY INSURANCE COMPANY,

Defendant(s)

The defendant's motion, pursuant to CPLR 3211(a)(1), (3),(5),(7) and (10), to dismiss the plaintiff's October 7, 2010 complaint (see defendant's Exhibit A) is determined as hereinafter provided.

On or about May 31, 2007 the plaintiff loaned a non-party, Elias A. Groisman, $200,000.00 and as collateral received a mortgage against property located at 1082 46th Avenue in Corona, Queens together with an assignment of rents and leases and a security agreement. In accordance with the terms of the mortgage, Mr. Groisman, as mortgagor, obtained an insurance policy (see defendant's Exhibit N) with the defendant which named the plaintiff as a second mortgagee after another non-party, Saxon Mortgage Services, Inc. (hereinafter Saxon).

Mr. Groisman later filed a petition (Chapter 11) in bankruptcy which, inter alia, reported that on February 28, 2009 the premises had been damaged by fire. On or about August 26, 2009 pursuant to the policy the defendant paid $153,773.41 to Mr. Groisman and the first mortgagee, Saxon. The plaintiff, the second mortgagee, was, however, not listed as a payee (see 1/18/11 affirmation in opposition of Steven J. Goldstein, Esq., Exhibit B). On October 7, 2010 it filed this breach of contract action alleging, in sum, that on February 8, 2009 it was unaware of the claim, the defendant breached a duty to it by omitting it as a payee and that the proceeds were not used to repair the premises.

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268,275 [197]; Foley v D'Agostino, 21 AD2d 60,64-65 [1964]). In considering such a motion, the Court must `accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (Nonnon v City of New York, 9 NY3d 825,827 [2007] quoting Leon v Martinez, 84 NY2d 83,87-88 [1994]). `Whether a plaintiff can ultimately establish its allegations is not part of the calculus' (EBCI, Inc. v Goldman, Sachs & Co., 5 NY3d 11,19 [2005])' (Sokol v Leader, 74 AD3d 1180,1180-1181).

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the `documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' (Furtis Fin. Serv. v Fimat Futures USA, 290 AD2d 383,384 [2002])" (Fontannetta v John Doe 1, 73 AD3d 78,83-84).

Here, the January 18, 2011 affidavit of John Addario, a member of plaintiff, acknowledges that in or about "July, 2009", or approximately a month before the August 26, 2009 check was issued, the plaintiff was aware of the February 28, 2009 loss.

Moreover, the plaintiff's policy plainly states, in pertinent part, "[i]f more than one mortgage is named, the order of payment will be the same as the order of precedence of the mortgages" (see defendant's Exhibit N, p.10, para.15) and it is undisputed that the amount due to the first mortgagee exceeds the amount of coverage.

Nevertheless, the plaintiff, relying upon Syracuse Sav. Bank v Yorkshire Ins. Co., 301 NY 403, asserts that the defendant's failure to include it as a payee deprived the plaintiff of "the opportunity to help determine how the parties should apply the proceeds" since it reportedly "could have negotiated a share of the loss proceeds" (see plaintiff's memorandum in opposition, pp.15-16).

The Court of Appeals' holding in Syracuse Sav. Bank was merely

an application of "the established rule that a mortgagee clause in a standard insurance policy creates an independent and separate insurance coverage for the mortgagee's interest and that the owner-mortgager may not, through its actions or neglect, defeat the independent rights of the mortgagee" (USF&G v Annunziata, 67 NY2d 229,234; see Universal Underwriters Acceptance Corp v Peerless Insurance Co., 31 AD3d 749,750; Vilagy v Associated Mut. Ins. Co., 165 AD2d 616,618; Insurance Law §3404).

It does not, however, impose an additional duty upon the insurer where, as here, the plaintiff's insurable interest is extinguished by payment or otherwise (see 730 J&J, LLC v Fillmore Agency, Inc., 22 AD3d 741). "There can be no doubt that a first mortgage always has priority over a second mortgage to the full amount secured thereby" (Bank of Rockville Centre Trust Co. v Baldwin, 238 AD 354,357; see defendant's Exhibit N, p.10, para.15).

Accordingly, these branches of the defendant's motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the plaintiff's complaint are granted and those branches, pursuant to CPLR 3211(a)(3),(5) and (10), to dismiss are dismissed as academic.

Dated: APR 06 2011

A.J.S.C.
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