

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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YOUNG HEE LOWE,

Plaintiff,

Index No.: 105975/07
Motion Seq. No. 010

DECISION and ORDER

-against-

MADISON 79 ASSOCIATES, INC., and
DOUGLAS ELLIMAN RESIDENTIAL GROUP,
Defendants.

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MADISON 79 ASSOCIATES, INC.,
Third-Party Plaintiff,

-against-

FIDELITY NATIONAL TITLE INSURANCE
COMPANY and CHICAGO TITLE INSURANCE
COMPANY, successors in interest to Title Guarantee
Company, Security and Guaranty Company, and
American Title Insurance Company,
Third-Party Defendants.

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APPEARANCES:

Plaintiff Lowe

Schwartz, Lichtenberg, LLP
By: Barry E. Lichtenberg, Esq.
405 Lexington Ave., 7th fl
New York NY 10174

Defendant/T.P. Plaintiff Madison 79

Gartner & Bloom, P.C.
By: Arthur P. Xanthos, Esq.
Stephanie Dodge, Esq.
801 Second Ave., 15th fl
New York NY 10017

T.P. Defendants Fidelity & Chicago

The Fidelity National Law Group
By: Eric Rosenberg, Esq.
350 Fifth Ave., ste 3000
New York NY 10118

**E-filed papers considered on review of this motion to reargue:
Papers**

Notice of Motion, Affs., Exhibits, Memorandum of Law
Aff. in Opposition, Exhibits, Aff. of Service
Memorandum of Law in Reply, Aff. of Service
Transcript of Oral Argument

E-filing Document Nos.

117 through 117-2
120 through 121
122, 122-1
123

PAUL G. FEINMAN, J.:

In a case involving the encroachment of a foundation wall onto a neighboring property,

third-party defendants Fidelity National Title Insurance Company and Chicago Title Insurance Company (Title Insurers) move, pursuant to CPLR 2221 (d), for reargument of this court's decision, dated July 2, 2011 (July 2011 Decision).

Background

Among other things, the July 2011 Decision granted defendant/third-party plaintiff Madison 79 Associates, Inc.'s (Madison 79) motion for summary judgment on its third-party claims against Title Insurers to provide coverage and defense to Madison 79, and denied Title Insurers' motion to dismiss these claims. Title Insurers point to a typographical error in the July 2011 and contend that this error caused the court to misapprehend the applicability of an exception to the title insurance policy at issue.

Specifically, the court wrote,

On July 1, 1963, Fidelity and Chicago's predecessor issued title insurance, Policy No. 01-1601, to Madison 79 for the property located at 50 East 79th Street. The policy provides that:

Title to any property beyond the lines of the premises, or title within or rights or easements in any abutting streets, roads, avenues, lanes, or waterways, or the right to maintain therein vaults, tunnels, or any structure or improvement, unless this policy specifically provides that such rights or easements are insured (Policy no. 01-1601, at 1).

Fidelity and Chicago argue that the policy's fifth exclusion precludes coverage under these circumstances. The fifth exclusion provides:

Title to any property beyond the lines of the premises, or title within or rights or easements in any abutting streets, roads, avenues, lanes, or waterways, or the right to maintain therein vaults, tunnels, or any structure or improvement, unless this policy specifically provides that such rights or easements are insured (id. at 2).

(July 2011 Decision, at 5 [internal footnote omitted]).

The repetition in the court's July 2011 Decision is the language from the fifth exclusion.

The court inadvertently omitted the actual coverage language in the subject policy, which states:

American Title Insurance Company, in consideration of the payment of its charges for the examination of title and its premium for insurance, insures the within named insured against all loss or damage not exceeding the amount of insurance stated herein and in addition the costs and expenses of defending the title, estate or interest insured, which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A or affecting the interest of the insured therein as herein set forth, or by reason of unmarketability of the title of the insured to or in the premises, or by reason of liens or incumbrances affecting title at the date hereof, or by reason of any statutory lien for labor or material furnished prior to the date hereof which has now gained or which may hereafter gain priority over the interest insured hereby or by reason of a lack of access to and from the premises, excepting all loss and damage by reason of the estates, interests, defects, objections, liens, encumbrances, and other matters set forth in Schedule B, or by the conditions of this policy hereby incorporated into this contract, the loss and the amount to be ascertained in the manner provided in said conditions and to be payable upon compliance by the insured with the stipulations and conditions, and not otherwise”

(Policy no. 01-1601, at 1).

Discussion

A motion to reargue is properly based on “matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion,” not including “any matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]). Here, the court grants Title Insurers’ motion to reargue, and amends the July 2011 decision to substitute the coverage language that was mistakenly omitted. However, Title Insurers are incorrect that this omission affected the court’s analysis regarding the applicability subject policy’s fifth exception. Thus, the amendment does not alter the court’s determination with respect to Madison 79’s motion for summary judgment against Title Insurers, or Title Insurers’ motion for summary judgment dismissing Madison 79’s third-party complaint.

Conclusion

Based on the foregoing it is,

ORDERED that the motion of third-party defendants Fidelity National Title Insurance Company and Chicago Title Insurance Company for leave to reargue the motion for partial summary judgment is granted; and it is further

ORDERED that, upon reargument, the court amends its Decision and Order, dated July 2, 2011, to delete the paragraph on the fifth page that reads:

On July 1, 1963, Fidelity and Chicago's predecessor issued title insurance, Policy No. 01-1601, to Madison 79 for the property located at 50 East 79th Street. The policy provides that:

Title to any property beyond the lines of the premises, or title within or rights or easements in any abutting streets, roads, avenues, lanes, or waterways, or the right to maintain therein vaults, tunnels, or any structure or improvement, unless this policy specifically provides that such rights or easements are insured

(Policy no. 01-1601, at 1);

and it is further

ORDERED that the deleted paragraph is replaced with the following:

On July 1, 1963, Fidelity and Chicago's predecessor issued title insurance, Policy No. 01-1601, to Madison 79 for the property located at 50 East 79th Street. The policy provides that:

American Title Insurance Company, in consideration of the payment of its charges for the examination of title and its premium for insurance, insures the within named insured against all loss or damage not exceeding the amount of insurance stated herein and in addition the costs and expenses of defending the title, estate or interest insured, which the insured shall sustain by reason of any defect or defects of title affecting the premises described in Schedule A or affecting the interest of the insured therein as herein set forth, or by reason of unmarketability of the title of the insured to or in the premises, or by reason of liens or incumbrances affecting title at the date hereof, or by reason of any statutory lien for labor or material furnished prior to the date hereof which has

now gained or which may hereafter gain priority over the interest insured hereby or by reason of a lack of access to and from the premises, excepting all loss and damage by reason of the estates, interests, defects, objections, liens, encumbrances, and other matters set forth in Schedule B, or by the conditions of this policy hereby incorporated into this contract, the loss and the amount to be ascertained in the manner provided in said conditions and to be payable upon compliance by the insured with the stipulations and conditions, and not otherwise”

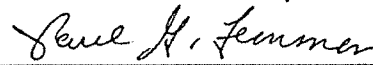
(Policy no. 01-1601, at 1);

and it is further

ORDERED that the court adheres to the remainder of its Decision and Order, dated July 2, 2011.

Dated: February 7, 2011

New York, New York



J.S.C.