SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 3
NASSAU COUNTY

CHICAGO TITLE INSURANCE COMPANY,

Plaintiff,

-against-

SUMMIT ABSTRACT LLC., JCC REALTY HOLDING INC., MICHAEL GARGER, SERJIO D. REIS, BRIAN S. OFSIE and ROBERT JAYNE,

Defendants.

ORIGINAL RETURN DATE: 03/10/10
SUBMISSION DATE: 06/04/10
Index No. 20393/08

MOTION SEQUENCE #1, 2

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Affirmation in Reply.....	3
Reply Affirmation.....	4

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Summit Abstract LLC. ("Summit") and Michael Garger, Serjio D. Reis, Brian S. Ofsie and Robert Jayne (collectively the "Guarantors") and dismissing the affirmative defenses and for a default judgment pursuant to CPLR 3215 against defendant JCC Realty Holding Inc. ("JCC"). Defendants Summit and the Guarantors oppose the motion and cross move for summary judgment dismissing plaintiff's compliant as being time barred.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez*

v. Prospect Hosp., 68 NY2d 320 [1986]).

Plaintiff commenced this action to recover damages, including attorney's fees and costs, it allegedly sustained as a result of defendant Summit's alleged negligent failure to record a deed, breach of fiduciary duty and duty of loyalty, breach of contract and violation of the duty of care. The action was brought against the Guarantors for breach of the guarantees. Plaintiff and defendant Summit entered into an Issuing Agency Agreement (the "Agreement") on November 27, 2002, whereby defendant Summit agreed to act as plaintiff's agent.

It is alleged that defendant Summit, as agent for plaintiff, attended a closing on August 4, 2005, where Henry Ikezi Trezevant acquired title from JCC to premises known as 102 West 132nd Street, New York, New York. On that date plaintiff issued its Title Insurance Policy. It is alleged that the deed was not recorded until after a lis pendens had been filed against the property. Plaintiff submits that Summit, as agent, was responsible for timely recording the deed.

The lis pendens was filed on or about August 14, 2005 in an action commenced by Mark Dittmar ("Dittmar") seeking specific performance of a contract of sale between JCC and Dittmar (Pl's Ex. C, ¶17) . Plaintiff paid the sum of $30,000.00 to settle the specific performance action and clear title.

Plaintiff has demonstrated a *prima facie* entitlement to judgment as a matter of law. In light of this showing, the burden shifts to defendants as the parties opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

Defendant Summit contends that plaintiff's claim for negligence is time barred in that this action was commenced more than three years after the filing of the lis pendens. Plaintiff's argument that this action was commenced within three years of discovering defendants' negligence is unavailing. The Court of Appeals has held:

> "As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run (*see,* CPLR 203[a]; *see also, Aetna Life & Cas. Co. v. Nelson,* 67 N.Y.2d 169, 175, 501 N.Y.S.2d 313, 492 N.E.2d 386). We see no reason to depart from the settled and reliable limitations period applicable to actions involving claims of professional negligence" (*Ackerman v. Price Waterhouse,* 84 NY2d 525, 541 [1994]). (Emphasis added.)

It is the contention of the Guarantors that the causes of action herein are not among the enumerated items listed in the Personal Guaranty for which the Guarantors agreed to indemnify and save harmless Summit. The Personal Guaranty, however, states in the last whereas clause that "Guarantors have agreed to guarantee the performance of Agent pursuant to the terms of the

Contract by the execution and delivery of this Guaranty."

Counsel for defendants Summit and the Guarantors acknowledges that: "In accordance with custom and the title policy, Summit as agent was also responsible for duly recording the deed and mortgage in a timely manner" (MacDonnell Aff. ¶6). It is also admitted that the deed and mortgage were not recorded until after the filing of the lis pendens. Michael Garger, the President of Summit, avers that according to the standards within the industry, documents to be recorded are delivered to the County Clerk once every seven to ten days and that in August 2005 it took the County Clerk several months thereafter to record the instrument.

Defendants Summit's and Guarantors' argument rests on the premise that *assuming arguendo* that the deed was delivered on the date of the closing, it still would not have been recorded prior to the filing of the lis pendens. Based upon this premise, these defendants reach the conclusion that any delay in the recordation of the deed is not the proximate cause of plaintiff's damages. Accordingly, this court finds that a triable issue of fact exists as to whether the deed was timely submitted for recording.

Based upon all of the foregoing, plaintiff's motion for summary judgment is denied and defendants' cross motion to dismiss is granted only to the extent of dismissing as time barred the first cause of action for negligence and the fourth cause of action for violation of the duty of care.

The unopposed motion by plaintiff for an order directing the Clerk to enter a default judgment in favor of plaintiff and against defendant JCC in the sum of $30,000.00, with interest from August 4, 2005, is granted, it appearing from a review of the documentation presented that all necessary parties have been served with notice of this application, and further that the relief requested is appropriate.

Submit Clerk's judgment, together with Bill of Costs.

This decision constitutes the order of the court.

Dated: 8-4-10

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

AUG 06 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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