

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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WILMINGTON SAVINGS FUND SOCIETY,
FSBM DOING BUSINESS AS CHRISTIANA
TRUST, NOT IN ITS INDIVIDUAL CAPACITY,
BUT SOLELY AS TRUSTEE FOR BCAT
2015-13BBT and SELENE FINANCE, LP

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 50708/2017

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,

Defendant.

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PAGONES, J.D., A.J.S.C.

Defendant moves for an order, pursuant to CPLR 3212. granting it summary judgment and dismissing plaintiffs' complaint in its entirety. Plaintiffs cross-move for an order, pursuant to CPLR 3212, granting them summary judgment declaring that defendant owes them insurance coverage for the underlying property loss of February 1, 2016 and awarding them compensatory damages in the amount of at least Fifty-Five Thousand Dollars (\$55,000.00), plus prejudgment interest. Additionally, plaintiffs seek a protective order controlling the production of plaintiffs' proprietary information and confidential business records. Further, plaintiffs also seek to compel defendant to comply with their discovery demands within fourteen (14) days.

The following papers were read:
Notice of Motion-Affirmation-Exhibits A-G-Affidavit- 1-17

Exhibits 1-6-Memorandum of Law	
Notice of Cross-Motion-Affidavit-Exhibits A-D-	
Affirmation-Exhibits E-F-Memorandum of Law	18-28
Reply Affirmation	29

Upon the foregoing papers, the motion and cross-motion are decided as follows:

By way of background, the complaint states that on or about February 14, 2002, Robert and Michelle Jornov obtained a mortgage from Wells Fargo Home Mortgage, Inc. in the principal amount of One Hundred Sixty-Eight Thousand Three Hundred Fifty-Eight Dollars (\$168,358.00) for the purchase or refinance of a property. On June 5, 2003, the borrowers obtained an additional mortgage concerning the property from Wells Fargo Home Mortgage in the principal amount of Five Thousand Six Hundred Forty-Nine Dollars and Two Cents (\$5,649.02). On March 16, 2007, the borrowers obtained a third mortgage loan concerning the property from Wells Fargo Bank, N.A. principal amount of Forty-Six Thousand One Hundred Ninety-One Dollars and Fifty-Five Cents (\$46,191.55).

On March 16, 2007, the borrowers entered into a consolidation, extension and modification agreement where the aforementioned Wells Fargo Home Mortgage and Wells Fargo Bank mortgage loans were consolidated into a single lien against the property in the principal amount of Two Hundred Ten Thousand Dollars (\$210,000.00) with Wells Fargo Bank as the mortgagee of record. On or about April 3, 2010, the borrowers entered into a modification agreement concerning the Jornov Mortgage Loan that

resulted in a new principal balance of Two Hundred Eight Thousand Five Hundred Forty-Two Dollars and Twenty Cents (\$208,542.20). Ultimately, Wells Fargo Bank commenced foreclosure proceeding concerning the Jornov Mortgage Loan in the Supreme Court of New York, Dutchess County. A judgment of foreclosure and sale was entered against the property or about February 27, 2015. On October 29, 2015, the duly appointed Referee conducted a foreclosure sale of the property. Wells Fargo Bank was the highest bidder at the sale with a bid of One Hundred Ninety-Four Thousand Dollars (\$194,000.00). Thereafter, Wells Fargo Bank assigned its winning bid to plaintiff Wilmington for One Hundred Ninety-Four Thousand Dollars (\$194,000.00). On the basis of the assignment, plaintiff Wilmington received a Referee's Deed for the property that was recorded in the Dutchess County Clerk's Office on or about February 23, 2016. At all times relevant, plaintiff Selene Finance, LP was the authorized mortgage loan servicer of Wilmington on the Jornov Mortgage Loan and was and remains its attorney-in-fact to the property.

Defendant allegedly issued a policy of insurance effective August 25, 2015 through August 25, 2016 for the property to the borrowers. Further, the complaint states that the policy expressly named plaintiff Selene Finance, LP and its successor and/or assigns as the insured mortgagee under the policy.

On or about February 1, 2016, the dwelling located on the property sustained damage as a result of a burst water pipe. Defendant adjusted the claim and issued an insurance proceeds

check in the amount of approximately Fifty-Five Thousand Dollars (\$55,000.00) made payable to the borrowers and plaintiff Selene. Defendant subsequently stopped payment on the insurance proceeds.

Plaintiffs allege that the stop payment on the check was done without legal justification. Plaintiffs state that "Pursuant to the terms of the controlling mortgage, note and policy, and by virtue of its acquisition of title to the Property, Plaintiff continues to have the exclusive right to receive any and all insurance proceeds concerning the Property that are payable under the Policy."

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (see *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a *prima facie* case, the burden of going forward shifts to the opponents of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendant maintains that it is entitled to summary judgment as a matter of law as: (1) the applicable policy of insurance did not insure plaintiff Wilmington in its capacity as third-party

purchaser/new owner of the property after the foreclosure sale; and, (2) to the extent that plaintiff may argue that it was insured as a mortgagee under the policy, this argument fails as neither plaintiff preserved their insurable interest in the property after the foreclosure sale.

The evidence as submitted by the defendant establishes, as a matter of law, that Wells Fargo was the mortgagee at the time of the foreclosure sale, it then conveyed its bid to a third-party purchaser, plaintiff Wilmington, and the Referee conveyed said property to plaintiff Wilmington. Defendant's policy of insurance never insured plaintiff Wilmington as the new owner of the property at any time. The Court concurs with the defendant; in order for plaintiffs to be able to maintain a suit for breach of an insurance contract, there must be a policy in effect at the time of loss, which insured them as their interest appeared. Here, as plaintiffs are not a named insured or additional insured on the face of policy with the foreclosed upon policy holders Michelle and Robert Jornov, they are not entitled to coverage (see generally *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 AD3d 198 [1st Dept 2004]).

Additionally, to the extent that plaintiffs allege that they were the mortgagees on the property either before or after the foreclosure sale and loss, they are not entitled to recover under the policy. Their insurable interest was extinguished after they obtained title. Plaintiffs' failure to obtain a deficiency judgment within the prescribed time after title passed to them in

foreclosure defeats any right they may have as mortgagees (see RPAPL §1371; *Cohen v. New York Prop. Ins. Underwriting Assn.*, 160 AD2d 287 [1st Dept 1990]). Accordingly, as the mortgage debt was deemed satisfied by the foreclosure sale, and the plaintiffs failed to seek a deficiency judgment, summary judgment is warranted.

Since defendant has made a *prima facie* showing of entitlement to judgment as a matter of law (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]), plaintiffs must show that genuine triable issues of material fact exist in order to defeat defendant's motion (*id.*).

In opposition and in support of their cross-motion, plaintiffs maintain that as of the February 1, 2016 loss, plaintiff Wilmington was the legal owner of the subject mortgage loan and plaintiff Selene was its attorney in fact. Plaintiffs maintain that as Wilmington was the equitable owner as of the date of loss, it is entitled to the insurance proceeds. Even assuming *arguendo* that plaintiff Wilmington was the mortgagee on the date of foreclosure and subsequent loss, it is undisputed that plaintiffs never filed for deficiency judgment so as to preserve their insurable interest in any debt that may have remained after the foreclosure sale as they were required to do by RPAPL §1371. As a mortgagee, Wilmington only had an insurable interest to the extent that a debt remained and was properly preserved. Plaintiffs' failure to file for a deficiency judgment

within ninety (90) days after the delivery of the deed renders their claim fatally flawed (see RPAPL §1371[2]).

Accordingly, plaintiffs fail to raise an issue of fact in opposition to the defendant's motion. Therefore, defendant's motion for summary judgment is granted in its entirety. Plaintiffs' cross-motion is denied as academic. Plaintiffs' complaint is dismissed.

The foregoing constitutes the decision and order of the Court. This decision and order has been filed electronically.

Dated: November 27, 2018
Poughkeepsie, New York

ENTER


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