

L. Smirlock Realty Corp., Respondent-Appellant, v. Title Guarantee Company, Appellant-Respondent

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

63 N.Y.2d 955; 473 N.E.2d 234; 483 N.Y.S.2d 984; 1984 N.Y. LEXIS 4732

**October 10, 1984, Argued
November 13, 1984, Decided**

PRIOR HISTORY: Cross Appeals, by plaintiff by permission of the Court of Appeals and by defendant as of right, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 28, 1983, which (1) modified, and, as modified, affirmed a judgment, dated May 4, 1982, of the Supreme Court at Special Term (John S. Lockman, J.), entered in Nassau County, awarding plaintiff the sum of \$ 265,000 with interest from February 22, 1973, the sum of \$ 1,500 with interest from September 30, 1972, the sum of \$ 3,142 with interest from December 31, 1972; the sum of \$ 8,950 with interest from December 31, 1973; and the sum of \$ 8,085 with interest from November 15, 1974, and awarding defendant, by way of setoff, the sum of \$ 93,708.68 with interest, and the additional sum of \$ 907.73, (2) affirmed an order of said court, dated May 20, 1982, modifying the May 4, 1982 judgment by deleting the setoffs, and (3) affirmed a judgment of said court, dated June 1, 1982, awarding plaintiff the sum of \$ 2,563.25. The modification of the May 4, 1982 judgment consisted of deleting therefrom the words "the sum of \$ 265,000, with interest from Feb 22, 1973" and substituting therefor the words "the sum of \$ 593,850, with interest from April 14, 1972", and of deleting therefrom the words "the interest on said sums amounting to \$ 165,831.40", and adding thereto a provision awarding defendant a setoff in the amount of \$ 32,500 with interest from November 13, 1978.

Plaintiff commenced the instant action to recover on a title insurance policy; plaintiff sought damages based on the insurer's failure to discover the condemnation of certain roadbed property, which resulted in a partial denial of access to plaintiff's property. Following the determination that defendant could not avoid its obligation under the title policy existing between it and plaintiff, the matter was remitted for a trial on the issue of damages (see *Smirlock Realty Corp. v Title Guar. Co.*, 52 NY2d 179, modfg 70 AD2d 455). After a trial into the many and complex issues raised by the parties, a damage award was rendered in plaintiff's favor; both parties appealed to the Appellate Division, which modified the decision of Supreme Court in an opinion concluding, generally, that the proper measure of damages was the difference in the value of the property with and without access from the two condemned streets, and that interest on the award should be computed from the date on which plaintiff began to suffer any damages or loss as a result of the defect in title, which was the date plaintiff's lessee made its last rent payment in April, 1972.

DISPOSITION: Order modified, with costs to plaintiff, in accordance with the memorandum herein and, as so modified, affirmed.

HEADNOTES

Insurance -- Title Insurance -- Interest on Award

In an action on a title insurance policy based on defendant insurer's failure to discover the condemnation of two streets having access to plaintiff's property, an order of the Appellate Division, which modified a judgment awarding damages to plaintiff, by increasing the amount of the award, should be modified by awarding plaintiff interest from May 14, 1969, the date plaintiff purchased the property, rather than from April 14, 1972, the date plaintiff received its final rental payment from a third party. As to the legal issues presented, except as to the date from which interest should run, there should be an affirmance for the reasons stated in the opinion at the Appellate Division. Issues of fact with respect to which the determinations of Supreme Court were affirmed by the Appellate Division are beyond the reach of review of the Court of Appeals, there being evidence in the record for the support of such determinations; as to issues of fact with respect to which the lower courts differed, the determinations of the Appellate Division more nearly comport with the weight of the evidence. However, with respect to plaintiff's right to interest on the sum representing the difference in the property's value with and without access from the two condemned streets, defendant's liability for a defect in the

title against which the policy insured accrued, and plaintiff's cause of action existed, at the time plaintiff acquired the defective title and the policy was issued, i.e., May 14, 1969.

COUNSEL: *Michael Permut, John J. Boyle and Samuel Kirschenbaum* for appellant-respondent.

Jeffrey G. Stark for respondent-appellant.

Richard Gyory and Herbert B. Ruskin for New York State Land Title Association, Inc., *amicus curiae*.

JUDGES: Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Simons and Kaye concur; Judge Meyer taking no part.

OPINION

[*957] [**234] [***984] **OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be modified, with costs to plaintiff, to delete therefrom the words "the sum of \$ 593,850, with interest from April 14, 1972" and to substitute therefor the words "the sum of \$ 593,850, with interest from May 14, 1969", and, as so modified, affirmed.

As to the legal issues presented, we affirm, except as to the date from which interest should run on the sum of \$ 593,850, for the reasons stated in the carefully considered and fully articulated opinion of Justice David T. Gibbons at the Appellate Division. Issues of fact with respect to which the determinations of Supreme Court were affirmed by the Appellate Division are beyond the reach of our review, [*958] there being evidence in the record for the support of such determinations. As to the issues of fact with respect to which the Appellate Division differed with Supreme Court, we conclude that the determinations of the Appellate Division more nearly comport with the weight of the evidence.

We do not agree, however, with the conclusion of the Appellate Division that interest on the sum of \$ 593,850 (determined to be the difference in value of the property with access via St. George Place and Jeanette Avenue and its value without such access) should run from April 14, 1972. Defendant's liability for a defect in the title against which the policy insured [***985] accrued, and plaintiff's cause of action existed, [**235] at the time plaintiff acquired the defective title and the policy was issued, May 14, 1969. Its right to interest on the \$ 593,850 accordingly ran from that date (*CPLR 5001, subd [b]*).

Order modified, with costs to plaintiff, in accordance with the memorandum herein and, as so modified, affirmed.