APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

Ash Dev., LLC v. Fidelity Natl. Title Ins. Co.

2026 NY Slip Op 02091 · No. 2023-11754, 2023-11755, 2024-09520 · Decided April 8, 2026

SUMMARY

The Appellate Division, Second Department, held that a title insurer was not obligated to defend or indemnify Ash Development, LLC in an underlying adverse possession action because the title policy's exception for claims arising from the rights of persons in possession applied. The court also upheld the denial of attorneys' fees incurred in a related easement action, finding no conflict of interest requiring reimbursement. The judgment was modified to include the required declaratory provision stating the insurer's lack of obligations.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Judicial Department
WRITING FOR THE COURT	Colleen D. Duffy, J.P.; William G. Ford, J.; Donna-Marie E. Golia, J.; Susan Quirk, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	April 8, 2026
DOCKET	2023-11754, 2023-11755, 2024-09520
DISPOSITION	other
PROCEDURAL POSTURE	The plaintiff appealed from an order granting the defendant's converted motion for summary judgment, a judgment dismissing the complaint, and an order that, upon reargument, adhered to the prior determination and denied renewal.
STANDARD OF REVIEW	The court reviewed the summary judgment determination de novo and reviewed the appeal from the order dated October 19, 2023, under CPLR 5501(a)(1) because the issues were brought up for review on the appeal from the judgment.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Ash Development, LLC v. Fidelity National Title Insurance Company

TOPICS

duty to defend · duty to indemnify · insurance coverage · declaratory judgment · appellate procedure

PRACTICE AREAS

insurance law · title insurance · real estate litigation · appellate procedure · declaratory judgments

QUESTIONS PRESENTED

1. Whether the title insurance policy required Fidelity to defend and indemnify Ash Development in the underlying adverse possession action.
2. Whether Fidelity was required to reimburse Ash Development for attorneys' fees incurred after Ash Development retained private counsel in the easement action.
3. Whether the Supreme Court properly dismissed the declaratory-relief cause of action rather than entering a declaration adverse to the plaintiff.
4. Whether the direct appeal from the October 19, 2023, order survived entry of the judgment.

HOLDINGS

1. Fidelity was not obligated to defend or indemnify Ash Development because the title insurance policy contained an exception for claims arising from the rights of persons in possession, and there was no other reasonable interpretation of that exception.
2. Fidelity was not required to reimburse Ash Development for attorneys' fees incurred after Ash Development retained private counsel not approved by Fidelity because the circumstances did not establish a conflict of interest requiring payment.
3. The Supreme Court erred by dismissing the declaratory-relief cause of action merely because the plaintiff was not entitled to the declaration it sought; the judgment had to include a declaration that Fidelity was not obligated to defend, indemnify, or reimburse the plaintiff.
4. The appeal from the October 19, 2023, order had to be dismissed because the right to a direct appeal from that order terminated upon entry of the judgment, although the issues raised by that appeal were reviewable on the appeal from the judgment.

KEY QUOTATIONS

> *“The appeal from the order dated October 19, 2023, must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action”* ([*1])

> *“However, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision”* ([*2])

> *“However, the Supreme Court erred in dismissing the cause of action for declaratory relief merely because the plaintiff "[was] not entitled to the declaration" that it sought”* ([*2])

FACTUAL BACKGROUND

Ash Development was insured under a title insurance policy issued by Fidelity National Title Insurance Company. Ash Development sought a defense and indemnification in an underlying adverse possession action involving claims arising from the rights of persons in possession, and sought reimbursement of attorneys' fees incurred in an easement action after retaining private counsel not approved by Fidelity. The court determined that the policy's possession-of-others exception excluded the adverse possession claims and that the circumstances did not establish a conflict of interest requiring reimbursement of the private-counsel fees.

PROCEDURAL HISTORY

Ash Development commenced an action for breach of contract, declaratory relief concerning the defendant's duty to defend and indemnify it in an adverse possession action, and reimbursement of attorneys' fees incurred in an easement action. The Supreme Court, Nassau County, converted the defendant's CPLR 3211(a)(7) motion to a motion for summary judgment, granted summary judgment dismissing the complaint, and later adhered to that determination after reargument while denying renewal. The Appellate Division dismissed the appeal from the original order as moot after entry of judgment, modified the judgment to issue the required declaration, affirmed the judgment as modified, and affirmed the later order insofar as appealed from.

DISPOSITION

other

CASES CITED

- Matter of Aho, 39 NY2d 241, 248
- Melamed v First Am. Tit. Ins. Co., 190 AD3d 724, 725-727
- A. Gugliotta Dev., Inc. v First Am. Tit. Ins. Co. of N.Y., 112 AD3d 559, 560
- Pierot v Chicago Tit. Ins. Co., 202 AD3d 1010, 1011
- Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 310-311
- Long Is. Rail Rd. Co. v New York Mar. & Gen. Ins. Co., 198 AD3d 888, 890
- Allstate Ins. Co. v Zuk, 78 NY2d 41, 45
- Francis v D & W Saratoga, Inc., 49 AD3d 597, 598
- Herbil Holding Co. v Commonwealth Land Tit. Ins. Co., 183 AD2d 219, 228
- Findlay v Chicago Title Ins. Co., 2022 IL App (1st) 210889, 215 NE3d 1006, 1018-1019
- Lanza v Wagner, 11 NY2d 317, 334
- 200 Genesee St. Corp. v City of Utica, 6 NY3d 761, 762
- Elgin Realty, Inc. v Klein, 109 AD3d 785, 787
- Serrano v Republic Ins., 48 AD3d 665, 666