

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS/TRIAL PART 25**

**Present: Hon. Helen Voutsinas, J.S.C.**

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**GOLDEN FIRST MORTGAGE CORP., a New York  
Corporation,**

**Plaintiff,**

Index No.: 026405/2009  
Motion Seq. Nos. 007, 008

-against-

**JUDY ALLEYNE, ROXANNE FRASER, and “JOHN  
DOE #1” through “JOHN DOE #12”, the last twelve  
names being fictitious and unknown to plaintiff, the person  
or parties intended being the tenants, occupants, person or  
corporations, if any, having or claiming an interest in or  
lien upon the premises, described in the complaint,**

**Defendants.**

-----X  
**JUDY ALLEYNE,**

**Short Form Order**

**Third-Party Plaintiff,**

-against-

**COMMONWEALTH LAND TITLE INSURANCE  
COMPANY,**

**Third-Party Defendant.**  
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The following papers were read on these motions:

Notice of Motion, Affidavit, Exhibits, Memorandum of Law . . . . .	1
Notice of Cross Motion, Affirmation and Affidavit in Support And in Opposition to Motion, Exhibits . . . . .	2
Reply Memorandum of Law in Further Support of Motion And in Opposition Cross Motion . . . . .	3

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Upon the foregoing papers, the motion of third-party defendant Commonwealth Land Title Insurance Company (hereinafter “Commonwealth”) for an Order granting summary judgment

pursuant to CPLR §3212 in its favor and against third-party plaintiff Judy Alleyne (hereinafter “Alleyne”), and the cross motion of Alleyne for an Order granting summary judgment pursuant to CPLR §3212 in her favor and against Commonwealth, and setting the matter down for an inquest and assessment of damages, are decided as hereinafter provided.

### **Factual and Procedural Background**

Both the main action and the third party action arise out of a real estate transaction relating to the premises known as 8 Jefferson Street, Freeport, New York and designated on the tax map of Nassau County as Section 62, Block 93, Lot 911 (hereinafter “the Property”) which closed on or about September 8, 2008. At this closing, defendant Roxanne Fraser (hereinafter “Fraser”) transferred ownership of the Property to defendant/third party plaintiff Alleyne, and Alleyne executed a mortgage in favor of Golden First Mortgage Corp. (hereinafter “Golden First”). At the closing, a non-party, Executive Settlement Services, Ltd. (hereinafter “Executive”), the agent for Commonwealth, took possession of the deed and mortgage which were executed, for the purposes of recording the documents with the office of the Nassau County Clerk. For reasons unknown to the parties, Executive never recorded the deed and mortgage. The main action was brought by Golden First, seeking a declaration that it has an equitable mortgage, or in the alternative, to have Fraser, re-execute the deed and have Alleyne re-execute the mortgage. Fraser never answered or appeared in the main action.

By Order dated November 22, 2016, the Court (J. Parga) granted Golden First’s motion for summary judgment in the main action, and the third party action was severed.

In her third party action, Alleyne seeks to recover under the fee title insurance policy issued by Commonwealth, alleging that she has been damaged since she does not have "good title". Commonwealth now moves for summary judgment dismissing the third party complaint, and Alleyne cross moves for summary judgment and the scheduling of an inquest and assessment of damages.

### **Chain of Title and Undisputed Facts and Procedural History**

A more detailed discussion of the transactions and facts relevant facts, which are not disputed, follows. Copies of the documents referred to have been provided as exhibits to Commonwealth’s moving papers.

Non-party Thomas C. Rizzo conveyed the Property to non-party Judith Reid (“Reid”), pursuant to a deed dated April 13, 2005 and recorded with the Nassau County Clerk on August 9, 2005 at Liber 989, page 825. The recording cover sheet identifies the amount of consideration for this conveyance as \$455,000. On this deed, Alleyne was originally identified as the grantee, but her name was crossed out and Judith Reid was handwritten in.

Also by deed dated April 13, 2005, Reid immediately conveyed the Property 99% to

Alleyne (identified on the deed as “Judith Alleyne”) and 1% to Reid. This deed was recorded with the Nassau County Clerk on May 17, 2005 (before the deed from Rizzo to Reid) at Liber 11951, page 430. The recording cover sheet does not indicate that any consideration was paid for this transfer.

Thereafter, Reid and Alleyne conveyed the Property to Fraser, pursuant to a deed dated July 28, 2006 that was recorded with the Nassau County Clerk on August 11, 2006 at Liber 12157, page 16. The recording cover page for this deed indicates that the amount of consideration paid for this conveyance was \$550,000. In her affidavit in support of Commonwealth’s motion, Jenny Higginbotham Barrett, Senior Claims Counsel for Commonwealth, states, upon information and belief, that Alleyne and Fraser are related, as indicated by an Affidavit in Connection with a No Consideration Transfer that Alleyne and Fraser executed in connection with another conveyance of the Property (discussed below). Alleyne does not deny (or address in any way) this assertion in her cross motion and opposition papers.

Simultaneous with her acquisition of title to the Property, Fraser gave a mortgage on the Property dated July 28, 2006 to Mortgage Electronic Recording Systems, Inc. (“MERS”), as nominee for WMC Mortgage Corp. (“WMC”), as security for an indebtedness in the amount of \$440,000 (the “\$440,000 Mortgage”). This \$440,000 Mortgage was recorded with the Nassau County Clerk on August 11, 2006 at Liber 30841, page 128. The \$440,000 Mortgage was assigned to Deutsche Bank National Trust Company as Trustee Under Pooling and Servicing Agreement dated as of November 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006-WMC3 Mortgage Pass-Through Certificates Series 2006-WMC3 by Barclay’s Capital Real Estate, Inc. DBA HomeQ Servicing, Attorney in Fact, pursuant to an assignment of mortgage dated May 16, 2007 and recorded with the Nassau County Clerk on August 7, 2007 at Liber 32187, page 284. The \$440,000 Mortgage was satisfied pursuant to a Satisfaction of Mortgage recorded with the Nassau County Clerk on November 24, 2008 at Liber 5850, page 724.

Fraser gave an additional mortgage on the Property dated July 28, 2006 to MERS as nominee for WMC as security for an additional indebtedness of \$110,000 (the \$110,000 Mortgage”). This \$110,000 Mortgage was recorded with the Nassau County Clerk on August 11, 2006 at Liber 30841, page 150. The \$110,000 Mortgage was assigned to Deutsche Bank National Trust Company as Trustee for Franklin Credit Trust Services pursuant to assignment of mortgage dated January 19, 2009, which assignment of mortgage was recorded with the Nassau County Clerk on March 9, 2009 at Liber 33523, page 737. The \$110,000 Mortgage was satisfied pursuant to a Satisfaction of Mortgage recorded with the Nassau County Clerk on May 20, 2009 at Liber 5896, page 437.

Fraser thereafter conveyed the Property 99% to Alleyne and 1% to Fraser pursuant to a deed dated February 16, 2007 that was recorded with the Nassau County Clerk on June 4, 2007 at Liber 12273, page 365.

Alleyne and Fraser conveyed the Property back to Fraser pursuant to another deed also

dated February 16, 2007 that was recorded with the Nassau County Clerk on June 19, 2008 at Liber 12404, page 697. In connection with this conveyance, Alleyne and Fraser executed an Affidavit in Connection with a No Consideration Transfer in which Fraser and Alleyne attest that this transfer is for no consideration because it is an “Inter-family Transfer.”

Thereafter, Fraser conveyed the property to Alleyne pursuant to a deed dated September 8, 2008 (the “Subject Deed”). Rosalind Bolden executed the deed on behalf of Fraser, pursuant to Powers of Attorney given to Bolden by Fraser dated September 6, 2008 and September 8, 2008.<sup>1</sup>

In connection with the conveyance of the Property from Fraser to Alleyne, Executive Settlement Services, Ltd. (“Executive”), at the time an authorized title insurance policy issuing agent for Commonwealth, issued to Alleyne a title insurance policy underwritten by Commonwealth (the “Alleyne Policy”).

For reasons unknown, the Subject Deed was not recorded with the Nassau County Clerk contemporaneously with the conveyance of the Property from Fraser to Alleyne. (As explained below, the Subject Deed was not recorded with the Nassau County Clerk until May 2, 2018 as instrument number 2018-00038269. Such recording of the Subject Deed was the result of the resolution of the main action.)

Also on September 8, 2008, the same day as the Subject Deed, Alleyne gave a mortgage dated September 8, 2008 on the Property to Golden First as security for an indebtedness in the amount of \$485,994 (the “Golden First Mortgage”).

In connection with the Golden First Mortgage, Executive issued to Golden First a mortgage title insurance policy underwritten by Commonwealth (the “Golden First Policy”). The Policy Number of the Golden First Policy is E-8518-08. As with the Subject Deed, for reasons unknown, the Golden First Mortgage also was not recorded with the Nassau County Clerk contemporaneous with the execution of the Golden First Mortgage. (As explained below, the Golden First Mortgage also was not recorded with the Nassau County Clerk until May 2, 2018 at instrument number 2018-00038270. Such recording of the Golden First Mortgage was the result of the resolution of the main action.)

Commonwealth first learned that the Subject Deed and Golden First Mortgage had not been recorded with the Nassau County Clerk when, on or about August 14, 2009, Federal National Mortgage Association (“FNMA”), then the owner and holder of the Golden First Mortgage and

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<sup>1</sup> In its motion papers, Commonwealth suggests, without offering any proof, that this series of conveyances between and among the same people, including multiple conveyances occurring on the same date, when viewed in its totality, is indicative of a potential mortgage fraud scheme. Alleyne does not address this comment in her cross motion and opposition papers.

assignee of the Golden First Policy, made a claim under the Golden First Policy due to the unrecorded mortgage and deed.

Commonwealth agreed to provide coverage to Golden First and retained the Hopp Law Firm, LLC (“Hopp”) to represent Golden First in connection with the title claim. Hopp was unable to resolve the matter amicably by having Fraser execute a duplicate Subject Deed and Alleyne execute a duplicate Golden First Mortgage. Thus, on or about December 21, 2009, Golden First, by its then attorney, Hopp, initiated the main action.

The complaint in the main action sought: (a) a judgment declaring that Alleyne’s ownership interest in the Property is subject, subordinate to, and burdened by, the Golden First Mortgage; (b) a judgment that Golden First holds an equitable mortgage against the Property; (c) an order compelling Fraser to re-execute a duplicate original of the Subject Deed or to record the original Subject Deed with the Nassau County Clerk; and (d) an order compelling Alleyne to re-execute a duplicate original of the Golden First Mortgage. Golden First filed a Notice of Pendency in connection with the main action as well.

Fraser never responded to the complaint in the main action. On or about March 22, 2010, Alleyne filed an answer with counterclaims in which she acknowledged her ownership of the Property and asserted a counterclaim against Golden First.

On May 28, 2010, Golden First served its answer to counterclaims in which it noted that Golden First, in its complaint, was seeking to confirm that Alleyne was the title owner of the Property subject to the Golden First Mortgage. Golden First also admitted Alleyne’s ownership of the Property as of September 8, 2008 and otherwise denied the substantive allegations of Alleyne’s counterclaims and asserted affirmative defenses thereto.

Despite the complaint and Alleyne’s counterclaim, Golden First continued to try to resolve the matter amicably by attempting to have Fraser execute a duplicate Subject Deed in favor of Alleyne and having Alleyne execute a duplicate Golden First Mortgage. In June 2012, Dorf & Nelson (“Dorf”), then Golden First’s attorney in connection with the main action, communicated with Robert Cava, Esq. (“Cava”), Alleyne’s attorney, about the possibility of executing such duplicate documents. On March 19, 2013, Cava wrote to Dorf advising that:

[M]y client, Judy Alleyne has no objection to re-signing the mortgage however there is a problem with having Roxanne Fraser signing the Quitclaim Deed. The problem is that thus far her whereabouts are unknown.

My client is attempting to locate her. If she is successful we will be in contact with your office.

Cava never contacted Dorf with Fraser’s location. Thus, the parties were unable to cure the

title defect caused by the unrecorded Subject Deed and Golden First Mortgage by executing duplicate originals for recording with the Nassau County Clerk.

Accordingly, Golden First determined that it must continue prosecuting the main action to cure the title defect. On or about May 28, 2015, Golden First moved for leave to file and serve an amended complaint. The motion was granted by Order dated July 30, 2015 (J. Parga).

On or about August 25, 2015, Golden First served the amended complaint in the main action. In the amended complaint, which added the Nassau County Sheriff and Nassau County Clerk as defendants, Golden First sought: (a) an order and judgment declaring that Alleyne is the record owner of the Property or, in the alternative, directing the Nassau County Sheriff to execute all documents necessary to effectuate the transfer of ownership of the Property from Fraser to Alleyne; (b) a judgment directing the Nassau County Clerk to record a copy of the Golden First Mortgage; and (c) a judgment declaring that the debt due from Alleyne to Golden First is secured by an equitable mortgage and lien effective as of September 8, 2008. Thus, the relief sought in the amended complaint sought, once again, to clear up the defect in Alleyne's title to the Property that the Subject Deed was not recorded.

On August 7, 2015, several weeks before Golden First served its amended complaint, but after a copy of such proposed amended complaint was served on Alleyne as an exhibit to Golden First's motion for leave to amend, Alleyne, by her attorney, Cava, filed her third party complaint against Commonwealth. In her third party complaint, Alleyne alleges that she suffered damages in the amount of \$490,000.00 as a result of the failure to record the Subject Deed and seeks money damages in such amount, as well as "equitable relief putting [Alleyne] in the position she would have been in had the deed to her residence been properly recorded."

Prior to bringing her third party complaint against Commonwealth, Alleyne had never previously made a claim for coverage under the Alleyne Policy arising from the failure to record the Subject Deed or based on any purported loss as a result the Subject Deed not being recorded.

On or about September 15, 2015, Alleyne served her answer and counterclaim to the amended complaint in the main action, in which she denied the substantive allegations of the amended complaint and asserted an affirmative defense that she was title owner of the Property in "fee simple absolute." Alleyne also asserted a counterclaim echoing her third party complaint, which counterclaim demanded that title of the Property be conveyed to her, and seeking compensation for damages she allegedly suffered as a result of the Subject Deed not being recorded. It is unclear to whom these counterclaims are directed, however, as the counterclaims allege that Executive was the cause of the Subject Deed not being recorded. However, Executive has never been made a party to either the main action or the third party action.

Fraser never responded to Golden First's amended complaint in the first party action.

On or about September 30, 2015, Golden First served its reply to Alleyne's counterclaim in which Golden First admitted that Alleyne owns the Property in fee simple, but denied the other substantive allegations of Alleyne's counterclaims.

On or about October 8, 2015, Commonwealth moved to dismiss Alleyne's third party complaint pursuant to CPLR 3211(a)(1) and (7). The Court (J. Parga) denied Commonwealth's motion to dismiss in an order dated February 10, 2016.

Although Alleyne had never made a formal claim with Commonwealth for coverage under the Alleyne Policy in accordance with the terms of such policy, Commonwealth opted to respond to the filing of the third party complaint by opening a claim under the Alleyne Policy. On February 23, 2016, Commonwealth wrote to Alleyne acknowledging that it had "received [Alleyne's] notice of claim." Thereafter, on March 21, 2016, Commonwealth wrote to Cava requesting documentation to determine whether coverage for the claim set forth in the third party complaint would be provided. On June 30, 2016, Commonwealth wrote to Cava advising that Commonwealth would be providing coverage to Alleyne's "claim" regarding the unrecorded Subject Deed under the Alleyne Policy.

On or about June 27, 2016, Golden First moved for summary judgment seeking a judgment, inter alia, (a) declaring that Alleyne had become the fee simple owner of the Property September 8, 2008, the date of the Subject Deed; (b) directing the Nassau County Clerk to accept for recording a copy of the Subject Deed conveying the Property from Fraser to Alleyne, and the Golden First Mortgage; and (c) declaring that Golden First holds an equitable mortgage against the Property in the amount of \$485,994.00. By this motion, Golden First also sought a default judgment against Fraser declaring that her interest in the Property was extinguished.

On or about August 3, 2016, Alleyne filed limited opposition to Golden First's motion for summary judgment. Alleyne joined in on the motion to the extent it sought a determination that Alleyne became the fee simple owner of the Property on September 8, 2008. However, Alleyne opposed the motion to the extent that it would require Alleyne to pay any costs, fees, and taxes associated with the recording of the Subject Deed.

The parties eventually agreed that Alleyne would withdraw her limited opposition to Golden First's motion under the condition that Golden First would pay all costs, fees, and taxes attendant to the recording of the Subject Deed. The parties agreed that, if Golden First's motion was granted, Alleyne's third party action would be severed from the main action, with Alleyne and Commonwealth reserving all rights against one another.

On or about September 22, 2016, Commonwealth served its verified answer to Alleyne's third party complaint, in which Commonwealth denied the substantive allegations of the third party complaint and asserted a number of affirmative defenses. As and for its third affirmative defense, Commonwealth asserts:

22. Alleyne's claims are barred because Commonwealth is fully performing its obligations under the Policy.

23. Specifically, Commonwealth's obligations under the Policy are limited to curing claimed title defects or, if such cure is not practicable within the terms and/or limits of the Policy, making payment on such claim up to the Policy's limits.

24. As a matter of contract and law, Commonwealth's obligations do not extend beyond the curing of the purported title defect and do not include providing compensation for any purported damage suffered as a result of the defect.

25. As Commonwealth is currently endeavoring to cure the purported defect in title, in accordance with the terms of the Policy, it is complying with its obligations under the Policy.

By order dated November 22, 2016, the Court (J. Parga) granted Golden First's motion for summary judgment and for a default against Fraser and severed Alleyne's third party action (the "2016 Summary Judgment Decision").

Thereafter, on February 15, 2017, Justice Parga signed a Judgment, inter alia: (a) directing the Nassau County Clerk to record copies of the Subject Deed and the Golden First Mortgage; (b) declaring that Alleyne is the fee simple owner of the Property as of September 8, 2008; (c) declaring that, in the alternative to Golden First's recorded mortgage, Golden First also holds an equitable mortgage against the Property in the original principal amount of \$484,995.00 as of September 8, 2008; and (d) declaring that Golden First's mortgage is the first priority lien encumbering the Property, (the "2017 Judgment")

Following entry of the 2017 Judgment, Advantage Foreclosure, retained by Dorf (Golden First's counsel appointed by Commonwealth), set about to record the Subject Deed, the Golden First Mortgage, and the 2017 Judgment against the Property.

In or about November 2017, the Nassau County Clerk rejected the first attempt to record the documents. Shortly thereafter, Advantage Foreclosure submitted corrected documents to address the Nassau County Clerk's issues. Ultimately, on May 2, 2018, the Nassau County Clerk accepted and recorded all of the Subject Deed, the Golden First Mortgage, and the 2017 Judgment against the Property. The Subject Deed was recorded at instrument number 2018-00038269, the Golden First Mortgage was recorded at instrument number 2018-00038270, and the 2017 Judgment was recorded at instrument number 2018-00038268.

The crux of Commonwealth's argument in support of its motion for summary judgment is that, by successfully recording the Subject Deed reflecting Alleyne's ownership of the Property,



as well as the 2017 Judgment confirming Alleyne’s ownership of the Property in fee simple, Commonwealth successfully established Alleyne’s title to the Property, and thereby satisfied all of its obligations under the Alleyne Policy. Commonwealth argues that, under the express terms of the Alleyne Policy, it has no further liability to Alleyne. Commonwealth additionally argues that Alleyne violated the express terms of the Alleyne Policy, both by never giving proper notice of the claim, and by failing to cooperate with Commonwealth.

In contrast, in support of her cross motion and in opposition to Commonwealth’s motion, Alleyne argues that Commonwealth is liable to her for damages that she allegedly incurred as a result of the deed to the Property not being timely recorded. Alleyne further posits that Commonwealth was aware of the claim when it received a letter from Golden First’s foreclosure attorneys, dated August 14, 2009, and that Commonwealth never disclaimed coverage. Finally, Alleyne argues that the prior order of this Court denying Commonwealth’s motion to dismiss pursuant to CPLR §3211[a][1] and [7] is the law of the case and binding on the parties.

### **The Relevant Terms of the Alleyne Policy**

The Alleyne Policy, underwritten by Commonwealth, utilizes a 2006 American Land Title Association Owner’s form policy jacket. The Alleyne Policy provides all of Commonwealth’s obligations and the extent of its liability with respect to claims of alleged title defects.

The Alleyne Policy expressly sets forth the types of “Covered Risks” for which coverage will be provided, and states, in relevant part:

SUBJECT TO EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [Commonwealth] insures, as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

\* \* \*

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from

(a) A defect in the Title caused by

\* \* \*

(vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law[.]

\* \* \*

### 3. Unmarketable Title.

The Alleyne Policy also excludes certain defects from coverage. These exclusions include, but are not limited to:

#### 3. Defects, liens, encumbrances, adverse claims, or other matters

(a) created, suffered, assumed, or agreed to by the Insured Claimant;

(b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

Paragraph 3 of the “Conditions” of the Alleyne Policy provides that the Insured must provide prompt notice of a covered defect:

### **3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT**

The Insured shall notify the Company [Commonwealth] promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the Policy shall be reduced to the extent of the prejudice.

Further, Paragraph 18 of the “Conditions” sets forth the specific method for providing notice under the Alleyne Policy, including the address to where a Notice of Claim is to be sent.

Paragraph 8 of the “Conditions” of the Alleyne Policy details the extent of Commonwealth’s liability under the Alleyne Policy. Specifically, Paragraph 8 provides:

#### **8. DETERMINATION AND EXTENT OF LIABILITY**

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

Paragraph 9 of the “Conditions” of the Alleyne Policy provides, inter alia, that once title has been established (or such other title defect has been removed), Commonwealth “shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured”:

#### **9. LIMITATION OF LIABILITY**

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

In addition, the Alleyne Policy provides that any claim for loss or damage is limited to the policy. Paragraph 15 of the “Conditions” of the Alleyne Policy states, in relevant part:

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

The Alleyne Policy further provides that Alleyne, as the insured, has a duty to cooperate with Commonwealth with respect to the claim, as set forth in Paragraph 6 of the “Conditions” of the Alleyne Policy:

#### **6. DUTY OF INSURED CLAIMANT TO COOPERATE**

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the Alleyne Policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of

these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

### **Summary Judgment Standard**

Under CPLR §3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Andre v. Pomeroy*, 35 NY2d 361 (1974)). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 AD2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 AD2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 AD2d 616, *aff'd* 66 NY2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 NY2d at 364; *Assing v. United Rubber Supply Co., supra*).

It is well settled that a party appearing in opposition to a motion for summary judgment must lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995]; *see, Zuckerman v. City of New York*, 49 NY2d 557; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065; *World Trade Knitting Mills v. Lido Knitting Mills*, 154 AD2d 99. Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation (*see, Federal Deposit Ins. Corp. v. Jacobs*, 185 AD2d 913; *Smith v. Johnson Prods. Co.*, 95 AD2d 675).

## Ruling of the Court

The Court turns first to an analysis of the terms of the Alleyne Policy, and the obligations and liabilities provided for therein.

“The title insurer’s liability to its insured is essentially based on contract law, and ‘liability is governed and limited by the agreements, terms, conditions, and provisions contained in the title insurance policy.’” (*E.C.I. Financial Corp. v. First American Title Insurance Company of New York*, 121 AD3d 833, 834 [2d Dept 2014] (quoting *Nastasi v. County of Suffolk*, 106 AD3d 1064, 166 [2d Dept 2013]; *Property Hackers, LLC v. Stewart Title Insurance Co.*, 96 AD3d 818, 819 [2d Dept 2012]; *Citibank v. Commonwealth Land Tit. Ins. Co.*, 228 AD2d 635, 637 [2d Dept 1996]. See also, *Renaissance Venture Capital Corp. v. Fidelity National Title Insurance Co.*, 128 AD3d 790, 790 [2d Dept 2015] (“The liability of the title insurer is based on the contract, and the rights of the parties are limited to its terms”); *McColgan v. Brewer*, 75 AD3d 876, 877 [3d Dept 2010] (“The obligation of an insurer with respect to a title insurance policy is defined by the terms of the policy itself.”); *Corvetti v. Fidelity National Title Insurance Co. of New York*, 258 AD3d 32, 34 [3d Dept 1999] (“The obligations of a title insurance company are ‘to be determined by reference to the provisions of the policy of title insurance’”) (citation omitted).

Further, it is well settled that “[a] title insurer's obligation to indemnify is defined by the policy itself and limited to the loss in value of the title as a result of title defects against which the policy insures” (*Darbonne v. Goldberger*, 31 AD3d 693, 695 [2d Dept 2006], quoting *Citibank v. Chicago Tit. Ins. Co.*, 214 AD2d 212 [1st Dept 1995]). The kind of loss contemplated by the policy is a damage sustained when because of a defect in the title, the insured was bound to pay something to make it good (*see, Darbonne, supra; Grunberger v. Iseson*, 75 AD2d 329 [1st Dept 1980]). “Moreover, ‘title insurance only provides indemnification for any diminution in value of property sustained as a result of the defects in a title insured by the policy.’” *Renaissance*, *supra*, 128 AD3d at 790, quoting *Darbonne*, 31 AD3d at 695).

“[A] policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title.” (*E.C.I. Financial Corp. v. First American Title Insurance Company of New York*, 121 AD3d 833, 834 [2d Dept 2014] quoting *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 52 NY2d 179, 188 [1981]); accord *Bankers Corp. v. Nations Title Insurance of New York*, 275 AD2d 337, 338 [2d Dept 2000] (same); *Grunberger*, 75 AD2d at 331; (“Title insurance is, indeed, an indemnity contract and as such is to provide reimbursement for actual loss only”).

The phrase 'actual monetary loss or damage' used in a policy of title insurance has been construed to exclude consequential damages. (*Gomez v. Fidelity National Title Ins. Co.* 34 Misc.3d 1233(A)[Sup Ct Queens County 2012], *affirmed*, 109 AD3d 638 [2d Dept 2013], citing, *First American Bank v. First American Transp. Title Ins. Co.* 585 F3d 833 [5th Cir. 2009]).

Here, in her third party complaint, Alleyne seeks damages for lost Superstorm Sandy recovery funds, lost rent, and a lost loan modification, all of which she alleges were lost due to the delayed recording of the Subject Deed. However, these claimed damages are not related to any diminution in value of the Property as a result of the now cured title defect regarding the unrecorded Subject Deed.

Commonwealth has shown that, under the express terms of the Alleyne Policy, and in accord with the case law discussed above, any claim that Alleyne may make is “restricted by the policy” (See Alleyne Policy, “Conditions”, paragraph 15), that Commonwealth’s liability shall not exceed the lesser of the amount of the Alleyne Policy and “the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy (See Alleyne Policy, “Conditions”, paragraph 8(a)), and that the type of loss recoverable is limited to the loss in value due to the defect, or to reimburse the insured for monies expended to make title good (*Renaissance*, supra, *Darbonne*, supra, *Grunberger*, supra).

The Court finds that the type of damages sought by Alleyne, constituting consequential damages, are not within the confines of the Alleyne Policy, and are not among those for which Commonwealth agreed to indemnify Alleyne in the Alleyne Policy. (*See Renaissance*, 128 AD3d at 790).

Further, Commonwealth has shown that it has satisfied its obligations under the Alleyne Policy by curing the defect in title (Alleyne Policy, “Conditions” paragraph (9(a)), by successfully recording copies of the Subject Deed and Golden First Mortgage, pursuant to the judgment entered in resolution of the main action. Based on all of the foregoing, Commonwealth has sufficiently made its prima facie showing of its entitlement to summary judgment.

Commonwealth further opines that Alleyne breached her obligations on the policy by (1) never making a claim under the title insurance policy, in accordance with its express terms (Alleyne Policy, “Conditions” paragraph 3) and (2) failing to cooperate with Commonwealth, in accordance with the express terms of the title insurance policy (Alleyne Policy, “Conditions” paragraph 6). Instead, Commonwealth asserts, Alleyne essentially did the opposite of cooperating, by filing her third party complaint, having never formally made a claim under the Alleyne Policy.

In light of the Court’s finding that Commonwealth has established its prima facie entitlement to summary judgment, the issues of whether Alleyne breached the terms of the title insurance policy by failing to give notice of claim and failing to cooperate with Commonwealth, need not be decided. However, these issues will be discussed in connection with Alleyne’s arguments.

In opposition to Commonwealth’s motion for summary judgment, and in support of her cross motion for summary judgment, Alleyne posits various arguments.

Addressing the assertion that Alleyne never gave notice of claim under the title policy, she opines that that letter from Golden First's foreclosure attorneys, Rosicki, Rosicki & Associates, dated August 14, 2009, was "Commonwealth's first notice of claim being made under its policy."

Alleyne also points to Commonwealth's letter to Alleyne, dated February 23, 2016, in which Commonwealth acknowledges that it "has received [Alleyne's] notice of claim" and to Commonwealth's letter dated March 21, 2016, which Alleyne describes as "acknowledging counsel's notice of claim".

Alleyne next points to Commonwealth's letter, dated June 30, 2016, in which Commonwealth acknowledges that it "has determined that coverage is afforded for this matter subject to the terms and conditions of the [Alleyne] policy. Alleyne describes this letter as an "unequivocal declaration of coverage" that is binding on Commonwealth. Alleyne argues further that Commonwealth is bound by its declaration of coverage and should be estopped from taking a position now that is contrary to it. Alleyne posits that this letter is fatal to Commonwealth's motion for summary judgment and that it establishes her right to summary judgment.

Alleyne's reliance on Commonwealth's letters is misplaced. As discussed, Commonwealth decided to treat the filing of the third party complaint as a "claim" under the Alleyne Policy (although Commonwealth also opines that the filing of the third party complaint violates Alleyne's duty to cooperate under the policy). Commonwealth's letter of February 23, 2016, acknowledged receipt of the "notice of claim" (referring to the third party complaint) and advised Alleyne that the claim is being investigated, and requests that Alleyne forward any additional relevant information or documentation.

Commonwealth's letter of March 21, 2016, which Alleyne describes as "acknowledging counsel's notice of claim", in fact is a letter from Commonwealth's claims counsel stating that he has been assigned "administration of the claim referenced in the third party complaint" and that "[a]dditional documents are needed to complete the investigation of the claim". The letter asks Alleyne's counsel to provide:

Copies of all correspondence by your client purporting to assert a title insurance claim to [Commonwealth] (other than the Third Party Complaint).

Documentation supporting the assertion that your client applied for funds to repair and restore the property from NY Rising Housing Recovery Program and all correspondence received in response to that claim.

Documentation supporting the assertion that your client applied for a loan modification, that the application was denied, and the basis for denial.



Documentation supporting the claim of lost rental income.

The letter provides further:

**A coverage determination has not yet been reached. All rights under any applicable agreement and prevailing law are expressly reserved.** [emphasis added]

In its letter of June 30, 2016, Commonwealth states:

As discussed below, [Commonwealth] has determined that coverage is afforded for this matter **subject to the terms and conditions of the Policy.**

\* \* \*

The company has determined that this claim falls within the Policy's insuring provisions. **The company is currently evaluating its options to resolve this claim according to the terms, exclusions and conditions of the Policy.** Please note that the company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title, as insured, or to prevent or reduce loss or damage to the insured.

Please be advised that the company may continue its independent investigation of this matter and maintains the right to assert any defense, including a defense which is not apparent at this time it becomes apparent during the course of its continuing investigation of the above referenced claim. **The company maintains any and all rights and defenses that it has under the Policy or under any applicable legal theory or principle.** [emphasis added]

Commonwealth's letters of February 23, 2016, March 21, 2016 and June 30, 2016 do not, as Alleyne argues, establish a defense to Commonwealth's motion for summary judgment. Commonwealth acknowledged Alleyne's claim, and in its June 30, 2016 advised that there is coverage "subject to the terms and conditions of the Policy", that it was "evaluating its options to resolve this claim according to the terms, exclusions and conditions of the Policy" and that it "maintains any and all rights and defenses that it has under the Policy or under any applicable legal theory or principle".

In its verified answer to Alleyne's third party complaint, served on or about September 22, 2016, Commonwealth asserted a number of affirmative defenses, including, but not limited to, its

third affirmative defense, which asserted that Commonwealth's obligations under the Policy are limited to curing claimed title defects; that as a matter of contract and law, Commonwealth's obligations do not extend beyond the curing of the title defect and do not include providing compensation for any purported damage suffered as a result of the defect; and that, "as Commonwealth is currently endeavoring to cure the purported defect in title, in accordance with the terms of the Policy, it is complying with its obligations under the Policy."

As already discussed, by successfully recording the Subject Deed reflecting Alleyne's ownership of the Property, as well as the 2017 Judgment confirming Alleyne's ownership of the Property in fee simple, Commonwealth successfully established Alleyne's title to the Property.

Commonwealth also points out that, in any event, Alleyne's claims are supported by nothing more than her conclusory, self-serving assertions, made without any backup; that Alleyne has never presented any evidence to support any of the alleged losses that she purports to have incurred or that such losses, if they did in fact occur, were the result of her claimed title defect. Even in response to Commonwealth's summary judgment motion, Alleyne presents no documentary evidence to support her claim of the lost mortgage loan modification or lost rental income. In regard to Alleyne's purportedly not being able to obtain a grant for funds to repair damage to her home from Hurricane Sandy, Alleyne produces a letter from the NY Rising Housing Recovery Program indicating that she needed to submit a deed, among a host of other documents, with her application. This alone is insufficient to demonstrate that, but for the Subject Deed being unrecorded at that time, Alleyne would have been able to receive the grant.

Commonwealth further asserts that Alleyne has not taken any steps whatsoever, since the November 28, 2016 Order (J. Parga) granting summary judgment to Golden First and severing Alleyne's third party action, to prosecute her third party claim against Commonwealth. This is not disputed by Alleyne.

Alleyne also argues that Commonwealth is precluded from obtaining summary judgment because the denial of Commonwealth's prior motion to dismiss pursuant to CPLR §3211[a][1] and [7] is the "law of the case." Alleyne's argument is unavailing. It is well settled that a decision on a motion to dismiss pursuant to CPLR Rule 3211 is not law of the case as to a subsequent motion for summary judgment because "the scope of review applicable to each motion is distinct." (*Bernard v. Grenci*, 48 AD3d 722, 724 [2d Dept 2008] (holding that motion court's reliance on the law of case doctrine "was misplaced"); *347 Cent. Park Assoc. LLC v. Pine Top Assoc. LLC*, 144 AD3d 785, 785 [2d Dept 2016] ("the law of the case doctrine is inapplicable where, as here, a summary judgment motion follows a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action"); *Borawski v. Abulafia*, 140 AD3d 817, 817-818 [2d Dept 2016] (same)).

The Court further notes that at the time that Commonwealth's motion to dismiss was being adjudicated, Commonwealth had not yet established title in favor of Alleyne and Commonwealth's cure of Alleyne's title defect had not yet been completed. Thus, the Court's denial of the motion

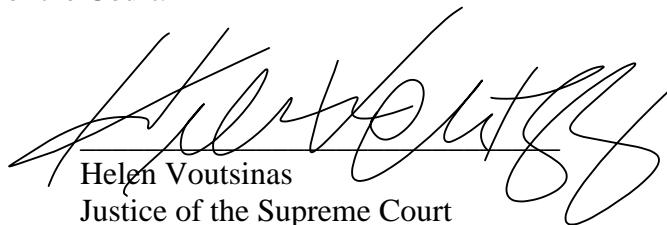
to dismiss pursuant to CPLR §3211 is irrelevant to whether Commonwealth is now entitled to summary judgment, regardless of the differing standards of review on the two motions.

The Court finds that, Commonwealth, having established Alleyne's title to the Property as fee simple owner, pursuant to the express provisions of the Alleyne Policy, has fully performed all of its obligations under the Alleyne Policy with respect to any claim of a title defect arising from the unrecorded Subject Deed, and is not liable for the alleged consequential damages purportedly caused thereby. Alleyne has failed to raise a genuine triable issue of material fact warranting denial of summary judgment to Commonwealth.

Accordingly, third party defendant Commonwealth Land Title Insurance Company's motion for summary judgment is **GRANTED**, and defendant/third-party plaintiff Judy Alleyne's cross motion for summary judgment is **DENIED**.

This constitutes the decision and order of the Court.

Dated: April 16, 2020  
Mineola, NY



Helen Voutsinas  
Justice of the Supreme Court