

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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RAFAEL G. POLANCO and DIANA L.  
CARDONA,

Plaintiffs,

Index No: 20081/07  
Motion Date: 10/29/08<sup>1</sup>  
Motion Cal. Nos: 18, 19 & 20  
Motion Seq. No: 4, 5 & 6

-against-

INDYMAC BANK, F.S.B., NATIONAL SETTLEMENT  
AGENCY INC., STEVEN M. LEFF, RACHEL M. LEFF,  
RICHARD A. LEFF, FIDELITY NATIONAL TITLE  
INSURANCE COMPANY, HORIZON LAND  
SERVICES, LLC, JOSEPH SCOTT FINANCIAL,  
COUNTRYWIDE HOME LOANS, INC.,

Defendants.  
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The following papers numbered 1 to 51 read on the respective motions of defendants Fidelity National Title Insurance Company and Joseph Scott Financial, for an order dismissing the cross claims of defendant IndyMac Bank FSB against them, pursuant to CPLR § 3212; on this motion by defendant IndyMac Bank FSB for an order substituting the Federal Deposit Insurance Corporation, in its capacity as Receiver of defendant IndyMac Bank FSB, as the real party in interest, and in the place and stead of defendant IndyMac Bank FSB, and amending the caption accordingly; and upon this cross-motion by defendant IndyMac Bank FSB for an order granting it summary judgment on its cross claims against defendants Fidelity National Title Insurance Company and Joseph Scott Financial, pursuant to CPLR § 3212.

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<sup>1</sup> The motions and cross-motion for summary judgment were originally transferred to this Court by order dated June 16, 2008 [Ritholtz, J.]. Thereafter, all papers were held in abeyance for this Court to ascertain the status of defendant IndyMac Bank, F.S.B., in light of the recent financial turmoil in the banking industry. The motions were calendared on October 15, 2008 for a conference before this Court clarifying the bankruptcy status of defendant IndyMac and a determination as to this Court's jurisdiction. At the return date, counsel for defendant IndyMac stated that the Federal Deposit Insurance Corporation, in its capacity as Receiver of defendant IndyMac Bank FSB, should be substituted in this matter on behalf of defendant IndyMac Bank FSB. As a result, the papers were adjourned to October 29, 2008, for counsel for defendant IndyMac Bank FSB to make the motion to substitute.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum.....	1 - 7
Notice of Motion-Affidavits-Exhibits.....	8 - 11
Notices of Cross-Motion-Affidavits-Exhibits-Memorandum.....	12 - 24
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Upon the foregoing papers, it is hereby ordered that the motions and cross-motion are disposed of as follows:

### **Relevant Facts**

This is an action for damages sustained by plaintiffs Rafael G. Polanco and Diana L. Cardona (“plaintiffs”) arising from a real estate transaction in which they sought to refinance the mortgage upon property located at 25-06 23<sup>rd</sup> Avenue, Astoria, New York. In early 2007, plaintiffs applied to defendant Joseph Scott Financial (“JSF”), a mortgage broker, to refinance the existing mortgage (“primary mortgage”) held by defendant Countrywide Home Loans, Inc. (“Countrywide”) in the amount of \$537,971.00, which resulted in plaintiffs’ loan application being approved by defendant IndyMac Bank, F.S.B. (“IndyMac”), a federally chartered savings bank, for \$679,250.00, consisting of a first mortgage in the amount of \$572,000.00 and a second mortgage in the amount of \$107,250.00. Thereafter, JSF undertook to have a title search of the property conducted for the purpose of insuring IndyMac as first lienor, which was conducted by defendant Horizon Land Services, LLC (“Horizon”), as agent for Fidelity National Title Insurance Company (“Fidelity”), a licensed title insurance company. JSF also selected National Settlement Agency Inc. (“National”) from a pool of IndyMac’s authorized closing agents to serve as the settlement agent for the instant refinancing transaction on behalf of IndyMac.

On or about March 13, 2007, the date of the loan closing, plaintiffs executed a first and second loan agreement with IndyMac in the total amount of \$679,250.00; National issued a check payable to Countrywide in the amount of \$537,971.00, to pay off the primary mortgage and Horizon, on behalf of Fidelity, issued title insurance policies to IndyMac. Thereafter, IndyMac wired the proceeds to the escrow account of National; however, the check tendered by National to Countrywide was not honored due to insufficient funds, and Countrywide never received the \$537,971.00 designated for the repayment of the primary mortgage. As a result, plaintiffs commenced action against defendants for various claims, and on January 7, 2008, IndyMac asserted cross claims against both Fidelity and JSF for breach of contract, a claim for negligence against JSF and a claim alleging bad faith against Fidelity. It is upon the foregoing that Fidelity and JSF move for an order dismissing the cross claims of Indymac against them, pursuant to CPLR § 3212, and IndyMac moves to amend and cross- moves for an order granting it summary judgment on its cross claims against Fidelity and JSF, pursuant to CPLR § 3212.

From the outset, the motion by IndyMac for an order amending the complaint to substitute the Federal Deposit Insurance Corporation, in its capacity as Receiver of IndyMac, as the real party in interest in the place and stead of IndyMac is granted without opposition. Accordingly, the caption hereby is amended to read as follows:

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RAFAEL G. POLANCO and DIANA L. CARDONA, Index No: 20081/07

Plaintiffs,

-against-

FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of INDYMAC BANK FSB, NATIONAL  
SETTLEMENT AGENCY INC., STEVEN M. LEFF,  
RACHEL M. LEFF, RICHARD A. LEFF, FIDELITY  
NATIONAL TITLE INSURANCE COMPANY,  
HORIZON LAND SERVICES, LLC, JOSEPH SCOTT  
FINANCIAL, COUNTRYWIDE HOME LOANS, INC.,

Defendants.

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Further, the underlying pleadings hereby are deemed amended nunc pro tunc to reflect the appropriate caption, and all references to, and representations previously made shall be stricken from the record.<sup>2</sup>

**Summary Judgment**

With regard to the motions by Fidelity and JSF for an order dismissing the cross claim of Indymac against them, and IndyMac’s motion for summary judgment on its cross claims against Fidelity and JSF, both pursuant to CPLR § 3212, it is well recognized that summary judgment

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<sup>2</sup> Notwithstanding the aforementioned amendment, for the sake of clarity and consistency, this Court will, for the balance of this decision and order, continue to make reference to defendant Federal Deposit Insurance Corporation, as Receiver of IndyMac Bank FSB, as IndyMac, its previous identity as a named defendant in this action. However, prospectively, the proper caption and references shall be made, to wit, defendant Federal Deposit Insurance Corporation, as Receiver of IndyMac Bank FSB, based upon the instant order of this Court.

should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1<sup>st</sup> Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

### 1. **Fidelity's Motion**

IndyMac asserted two cross claims against Fidelity for breach of contract and bad faith. With regard to the breach of contract claim, IndyMac, inter alia, alleges:

Under the Loan Policy of Title Insurance [], Fidelity promised to insure against loss or damages [] sustained or incurred by IndyMac as the insured, by reason of (I) any defect on or lien or encumbrance on the title, (ii) unmarketability of title, or (iii) the priority of any lien or encumbrance over the lien of the insured mortgage, among other things.

Countrywide's mortgage lien dated July 18, 2006, constitutes a defect on the title as well as a lien having the priority over IndyMac's [] mortgage lien and resulted in IndyMac's mortgage being unmarketable.

Here, Fidelity, the title insurance company which issued title insurance policies for the IndyMac mortgages at issue, argues that it is entitled to judgment as a matter of law dismissing Indymac's cross claim for breach of contract on the ground that the title policies exclude the losses sustained by IndyMac. Fidelity asserts that provision 3(a) of the "Exclusion from Coverage" section of the title policies expressly excludes from coverage any "loss or damage, costs, attorneys' fees or expenses that arise by reason of [d]efects, liens, encumbrances, adverse claims or other matters [] created, suffered, assumed or agreed to by [IndyMac]."

In opposition, IndyMac contends, inter alia, that Fidelity's dereliction, "caused the Countrywide mortgage to continue and remain in a senior-lien position post-closing. A derelict insurer must bear the loss." It further contends that Fidelity was responsible for picking up a proper pay-off check from National and delivering it to Countrywide, which it failed to do. IndyMac states that the policy exclusion does not apply as it refers solely to clandestine acts by the insured itself. It asserts that as the policy is valid and insured against the very act which occurred, to wit, the non-

payment of the Countrywide mortgage, Fidelity should bear the loss, that was neither “created, suffered, assumed or agreed to by IndyMac.”

“[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 (citation omitted).” Brucha Mortg. Bankers Corp. v. Nations Title Ins. of New York, Inc., 275 A.D.2d 337, 337-338 (2<sup>nd</sup> Dept. 2000). “By definition, title insurance involves ‘insuring the owners of real property [] against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property.’ [A] policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured’ (citations omitted).” L. Smirlock Realty Corp. v. Title Guarantee Co., 52 N.Y.2d 179, 187-188 (1981). “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’ (citation omitted). ‘Such a policy entitles the insured to indemnity only to the extent that its security is impaired and to the extent of the resulting loss which it sustains’ (citations omitted).” Brucha Mortg. Bankers Corp. v. Nations Title Ins. of New York, Inc., 275 A.D.2d 337, 337-338 (2<sup>nd</sup> Dept. 2000).

Here, notwithstanding IndyMac’s contentions to the contrary, Fidelity did not breach its obligation under the subject title insurance policy. The record is clear that this action arises from the misappropriation of the funds designated to satisfy the Countrywide mortgage that were wired by IndyMac to National, the settlement company approved by IndyMac to appear on its behalf at the instant closing. Indeed, in the affidavit of Steven Leff, the principal of National, he admits that he failed to carry out his fiduciary duty, and stated that he secreted the funds and converted them to his own use. Thus, to the extent that IndyMac alleges that Fidelity breached its contract by allowing the Countrywide mortgage to exist as a senior lien, this claim is simply unfounded. As a preliminary matter, it is well settled that “title insurance insures against loss regarding title to the land, not the underlying debt (citations omitted).” Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512, 514 (2<sup>nd</sup> Dept. 2000). “Moreover, where as here, the underlying debt has not been satisfied, the mortgage it was meant to secure must fail (citation omitted).” Id. at 514.

Further, notwithstanding plaintiffs assertion regarding the inapplicability of provision 3(a), most fatal to IndyMac’s breach of contract claim is the exclusionary provision contained in the instant policies in which Fidelity expressly excludes coverage for any loss which was “created, suffered, assumed or agreed to” by IndyMac. Although there is much ado in the record about whether National was IndyMac’s legal or settlement agent, and which entity selected National to serve as the settlement agent on this transaction, these issues are of no moment as it is undisputed that National was the approved settlement agent of IndyMac which represented its interest at the subject closing, and IndyMac funded National’s escrow account on the misguided belief that National would carry out its obligation to satisfy the Countrywide mortgage. In complete contravention of its obligation to perform certain duties on IndyMac’s behalf at the closing, National admittedly defrauded IndyMac. Thus, where, as here, “a loss is caused by the fraud of a third party,

in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed.” Greenpoint Mortg. Funding, Inc. v. Stewart Title Ins. Co., 49 A.D.3d 687, 691 (2<sup>nd</sup> Dept. 2008); see, Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512 (2<sup>nd</sup> Dept. 2000). Thus, the actions of National are properly imputed to IndyMac as the record is clear, despite the feigned issue of agency raised herein, that IndyMac designated National as its settlement agent by directing the funds earmarked for the Countrywide mortgage to an escrow account maintained by National, and authorizing it to perform specific duties on behalf of IndyMac at the closings. Therefore, this cross claim must be dismissed as against Fidelity.

With respect to the second cross claim asserted by IndyMac against Fidelity for bad faith denial of coverage, IndyMac alleged, in pertinent part, the following:

In the marked-up title certificate, Fidelity [] falsely represented or assured that Countrywide’s mortgage lien was or would be paid off at closing to the insurer’s satisfaction.

Fidelity’s false representation or assurance has enables and facilitated [National’s] defalcation.

Fidelity knew or should have known that plaintiffs directed IndyMac to pay the loan proceeds to the escrow account of [National], and that IndyMac disbursed the funds pursuant to plaintiffs’ direction.

Fidelity denied IndyMac’s claims in bad faith without reasonable basis to assert the denial.

Fidelity, in seeking dismissal of this cross claim, contends that IndyMac’s assertion of a bad faith claim is duplicative of the breach of contract cross claim, asserting that as there is no independent cause of action for bad faith denial of coverage, this bad faith cross claim cannot lie, and must also be dismissed. This Court agrees.

“Allegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading.” Royal Indem. Co. v. Salomon Smith Barney, Inc., 308 A.D.2d 349, 350 (1<sup>st</sup> Dept. 2003); Bettan v. Geico General Ins. Co., 296 A.D.2d 469, 745 N.Y.S.2d 545 (2<sup>nd</sup> Dept. 2002); Moreover, ““there is no separate cause of action in tort for an insurer’s bad faith failure to perform its obligations under an insurance contract (citations omitted).” Zawahir v. Berkshire Life Ins. Co., 22 A.D.3d 841 (2<sup>nd</sup> Dept. 2005); see, Paterra v. Nationwide Mut. Fire Ins. Co., 38 A.D.3d 511 (2<sup>nd</sup> Dept. 2007); Johnson v. Allstate Ins. Co., 33 A.D.3d 665 (2<sup>nd</sup> Dept. 2006). Consequently, this cross claim likewise must be dismissed as against Fidelity.

2. **JSF's Motion**

JSF, the mortgage broker, also moves for summary judgment and dismissal of the cross claims asserted against it by IndyMac that sound in breach of contractual warranty and negligence. The first cross claim alleges that JSF breached the warranties and representations set forth in the October 1, 2002 Customer Agreement and e-MITS User Agreement, which was countersigned by IndyMac on December 31, 2002. Specifically, IndyMac alleged, in relevant part:

Under the Customer Agreement, JSF had an obligation to have quality controls in place when reviewing the services of authorized agents, such as closing agents, in order to ensure that each agent comply with all instructions. (Seller's Guide Section 1217.02)

JSF breached this obligation by failing to have proper quality controls concerning [National's] conduct in loan disbursement.

Under the Customer Agreement, JSF represented and warranted the following concerning the loans to plaintiffs, as of their funding date:

- a. The proceeds of the loan have been fully disbursed as instructed (Seller's Guide Section 1206.02[h])
- b. There are no circumstances or conditions with respect to the mortgage instrument that could cause private institutional investors to regard the loan as an unacceptable investment, cause the loan to become delinquent or adversely affect the value or marketability of the loan in the secondary market (Seller's Guide Section 1206.02 [b])
- c. All documents, materials and other information provided to IndyMac in connection with the delivery of the loan are accurate and complete (Seller's Guide Section 1215)

JSF breached these representations and warranties, among others, under the Customer Agreement.<sup>3</sup>

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<sup>3</sup> As the parties do not address breaches of Seller's Guide Section 1217.02, the obligation to have quality controls in place, and Seller's Guide Section 1215, the accuracy of all documents, this Court deems those allegation abandoned.

JSF contends, inter alia, that IndyMac falsely alleges or infers that National was the agent of JSF regarding the subject loan, when in fact, National was IndyMac's agent, and appeared on its list of approved closing agents. It further contends that although it selected Horizon to serve as the closing agent, IndyMac insisted that Horizon not be used as the closing agent, and "suggested that JSF use [National], an agent that appeared on its list of approved closing agents." JSF states that IndyMac directly sent all closing instructions to National and directly wired the subject funds to National's escrow account, thus absolving it of any responsibility to insure National's payment of the mortgage held by Countrywide.

With regard to the purported breach of the representations and warranties of the Seller's Guide, JSF alleges that it "never signed a contract containing section 1206.02, and therefore never made such representations and warranties." It states that in order to conduct business with IndyMac, JSF was required to sign a Customer Agreement, known as an e-MITS User Agreement, which it signed on October 1, 2002. JSF contends that at that time, the Seller's Guide that was incorporated by reference in that Agreement did not contain section 1206.02, the relevant sections of which provide, as follows:

- (b) There are no circumstances or conditions with respect to the mortgage instrument  that could cause private institutional investors  to regard the loan as an unacceptable investment, cause the loan to become delinquent or adversely affect the value or marketability of the loan.
  
- (h) The proceeds of the loan have been fully disbursed [as instructed].

JSF states that Section 1206 came into effect on December 5, 2006, almost four years after its signing of the subject agreement, and IndyMac never gave JSF notice of such change. As a result, JSF contends that it cannot be held liable for contractual terms for which not only it had not agreed, but of which it had no notice of the terms. It also alleges that even if it were bound by the representations and warranties contained in Section 1206, the specific provisions relied upon by IndyMac to impute liability to JSF are "unclear, uncertain and ambiguous, and therefore its construction must be construed against the drafter, IndyMac."

IndyMac states that contrary to JSF's contentions, the relevant sections did exist at the time that JSF signed the Customer Agreement, but were entitled "Section 1220 (b) and (h)." It contends that the sections are materially the same, and the December 5, 2006 date was not the date that section 1206 came into effect, as claimed by JSF, but the date that the provision was last modified. Further, IndyMac asserts that JSF, after becoming a seller, was given "continuing electronic access to the Seller Guide online, and received notification of amendments by e-mail." It further contends that despite JSF's assertions, section 1206 is neither unclear nor ambiguous. IndyMac states that although JSF argues that it had no duty to police closing agents, "JSF did not need to have actual control or authority over closing agents or other services providers in order to represent and warrant

that “for each loan delivered... the proceeds of the loan have been fully disbursed.” IndyMac avers that section 1206.02 (b), which warrants that “[t]here are no circumstances or conditions with respect to the mortgage instrument [] that could cause private institutional investors [] to regard the loan as an unacceptable investment, cause the loan to become delinquent or adversely affect the value or marketability of the loan,” sets forth a measurable standard by which JSF should have been governed. As such, IndyMac asserts that “certainly, if a loan delivered to IndyMac that was intended to be in a senior position is instead in a junior position (which the Polanco loans indisputably were), private institutional investors would consider the loan to be an unacceptable investment, or, at the very least, the marketability of such junior mortgage would be affected.” Thus, it alleges that JSF is not entitled to summary judgment in its favor dismissing its cross claim, in essence, because the harm arose from JSF’s failure to properly monitor National’s conduct.<sup>4</sup>

The threshold determination thus is whether National was the agent of JSF or IndyMac. Here, this Court has already determined that the actions of National are properly imputed to IndyMac, as the record is clear that IndyMac designated National as its settlement agent by directing the funds earmarked for the Countrywide mortgage to an escrow account maintained by National, and authorizing it to perform specific duties on its behalf. Likewise, although IndyMac continues to disavow the fact that it authorized National to act on its behalf and as its agent, even more telling of the relationship between IndyMac and National, is the fact that National was on the list of approved closing agents for IndyMac. Indeed, Horizon, the title agent acting on behalf of Fidelity, was precluded from acting on IndyMac’s behalf, presumably because it was not on IndyMac’s approved list of closing agents. For IndyMac to now take the position that National, who was an approved IndyMac closing agent which had closed other loans on its behalf, was not its agent, is certainly disingenuous at best. “A principal-agent relationship may be established by evidence of the ‘consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act ... The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority.’” Time Warner City Cable v. Adelphi University, 27 A.D.3d 551, 552 (2<sup>nd</sup> Dept. 2006); see, Gonzalez v. Beacon Terminal Associates, L.P., 48 A.D.3d 518, 518 (2<sup>nd</sup> Dept. 2008); Fils-Aime v. Ryder TRS, Inc., 40 A.D.3d 917, 918 (2<sup>nd</sup> Dept. 2007). Such was the relationship here between IndyMac and National. Moreover, where, as with this

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<sup>4</sup>IndyMac makes no cognizable argument with respect to the mortgage instrument itself. Instead the thrust of its claim is that National was acting as JSF’s agent, and thus JSF is responsible for IndyMac’s loss. Although IndyMac goes to great length to argue a breach of section 1206.2(b), the crux of its argument arises not from the seller’s agreement, but from actions taken subsequent to the delivery of an otherwise valid mortgage. Nothing is presented in the record to indicate that “circumstances or conditions with respect to the mortgage instrument” prior to its issuance, would “cause private institutional investors to regard the loan as an unacceptable investment.” Nor is there any evidence that pre-delivery conditions indicated either that the loan would “become delinquent” or that its value or marketability could be adversely affected. Instead, the actions of National were non related to forecasting the advisability of any particular mortgage instrument.

Court's earlier finding regarding Fidelity, "a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed." Greenpoint Mortg. Funding, Inc. v. Stewart Title Ins. Co., 49 A.D.3d 687, 691 (2<sup>nd</sup> Dept. 2008); see, Fidelity Nat. Title Ins. Co. of New York v. Consumer Home Mortg., Inc., 272 A.D.2d 512 (2<sup>nd</sup> Dept. 2000). This is so, particularly where, as here, there has been a finding that National was the agent of IndyMac on this transaction, and acted, albeit, to IndyMac's detriment, with IndyMac's expressed, apparent and implied consent. Consequently, the same result obtains, and the breach of contract cross claim must be dismissed.

As for the second cross-claim sounding in negligence asserted against JSF, IndyMac alleges in its answer that JSF, as the mortgage broker on the transaction, was in a position of influence and had the ability to guide National in the proper execution and performance of its obligations to IndyMac. IndyMac further alleges:

JSF knew or should have known that [National's] principal, defendant Steven Leff, an attorney admitted in the State of New York, has been suspended from the practice of law.

JSF owed IndyMac a duty to not select [National] or control [National's] conduct concerning the loans so as to prevent its fraud or conversion of the funds.

JSF owed IndyMac a duty to warn or advise IndyMac of [National's] prior failures or propensity to neglect or derelict its duty as a closing agent.

JSF breached the duty of care owed to IndyMac.

The initial question in a negligence action is whether a duty of care is owed to the injured party. See, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002); Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1<sup>st</sup> Dept. 2004). To prove a prima facie case of negligence, there must be a demonstration of the existence of a duty, a breach of that duty, and such breach was a proximate cause of the injury. See, Fernandez v. Elemam, 25 A.D.3d 752 (2<sup>nd</sup> Dept. 2006); Edwards v. Mercy Home for Children & Adults, 303 A.D.2d 543, 544 (2<sup>nd</sup> Dept. 2003). "In the absence of a duty, there is no breach and no liability (citations omitted)." Coral v. State, 29 A.D.3d 851 (2<sup>nd</sup> Dept. 2006). "Although juries determine whether and to what extent a particular duty was breached," [Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395, 396 (2<sup>nd</sup> Dept. 2003)], the existence and scope of that duty are legal questions for the courts to determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist., 43 A.D.3d 1035 (2<sup>nd</sup> Dept. 2007).

Here, on its motion, JSF argues, in effect, that it owed no duty to IndyMac with respect to the selection of National, upon the rationale:

the selection of [National] as a closing agent cannot possibly be construed to have been a negligent act by JSF on the grounds that (a) Jonathan Ravens suggested that [National] be selected as the closing agent regarding the loans to plaintiffs; and (b) [National] appeared on IndyMac's list of approved closing agents.

As IndyMac did not address its negligence claim in its cross-moving or opposition papers, this claim was not refuted or rebutted. This Court thus finds that JSF owed no duty to IndyMac with respect to the selection of National, and accordingly, also dismisses IndyMac's negligence cross-claim asserted against JSF. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., *supra*; Solan v. Great Neck Union Free School Dist., *supra*; Daubert v. Flyte Time Regency Limousine, *supra*.

### **Conclusion**

Based upon the foregoing, the motion by defendant IndyMac Bank FSB for an order substituting the Federal Deposit Insurance Corporation, in its capacity as Receiver of defendant IndyMac Bank FSB, as the real party in interest, and in the place and stead of defendant IndyMac Bank FSB, and amending the caption accordingly is granted, and the underlying pleadings hereby are deemed amended nunc pro tunc to reflect the appropriate caption, and all references to, and representations previously made shall be stricken from the record. The motions of defendants Fidelity National Title Insurance Company and Joseph Scott Financial, for an order dismissing the cross claims of defendant IndyMac Bank FSB asserted against them, pursuant to CPLR § 3212, hereby are granted, and IndyMac's cross claims are dismissed as to those defendants. The cross-motion by defendant IndyMac Bank FSB for an order granting it summary judgment on its cross claims against defendants Fidelity National Title Insurance Company and Joseph Scott Financial, pursuant to CPLR § 3212, is denied. This constitutes the decision and order of the Court.

Dated: February 5, 2009

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J.S.C.