

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25420
O/kmg

_____AD3d_____

Argued - November 2, 2009

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
FRED T. SANTUCCI
RUTH C. BALKIN, JJ.

2008-06544
2009-00114

DECISION & ORDER

Cuterra Tyson, respondent-appellant, v Tower
Insurance Company of New York, appellant-respondent.

(Index No. 16102/07)

Max W. Gershweir, New York, N.Y., for appellant-respondent.

Matarazzo Blumberg & Associates, LLP, New York, N.Y. (Barbara A. Matarazzo
of counsel), for respondent-appellant.

In an action to recover damages for breach of contract, (1) the defendant appeals from so much of an order of the Supreme Court, Queens County (McDonald, J.), dated April 10, 2008, as denied its cross motion for leave to amend its answer, and the plaintiff cross-appeals from so much of the same order as denied her motion for summary judgment on the complaint, and (2) the plaintiff appeals from so much of an order of the same court dated November 20, 2008, as denied her motion for leave to reargue and renew her motion for summary judgment on the complaint.

ORDERED that the appeal from so much of the order dated November 20, 2008, as denied that branch of the plaintiff's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument (*see Boakye-Yiadom v Roosevelt Union Free School Dist.*, 57 AD3d 929); and it is further,

ORDERED that the order dated April 10, 2008, is reversed insofar as appealed from, on the law, and the defendant's motion for leave to amend its answer is granted; and it is further,

ORDERED that the order dated April 10, 2008, is affirmed insofar as cross-appealed from; and it is further,

ORDERED that the order dated November 20, 2008, is affirmed insofar as reviewed;

December 15, 2009

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and it is further,

ORDERED that one bill of costs is awarded to the defendant.

This case arises from a dispute over a fire insurance policy issued by the defendant to the plaintiff on a two-family house owned by the plaintiff in St. Albans, Queens. While the plaintiff was under contract to sell the house, it was badly damaged by a fire. Nevertheless, the plaintiff allegedly sold the property after the fire at the original contract price. Thereafter, the plaintiff and the defendant disputed the amount due under the provisions of the policy. The plaintiff commenced this action seeking damages for breach of contract, and eventually moved for summary judgment on the complaint. The defendant opposed the plaintiff's motion and cross-moved for leave to amend its answer to assert an affirmative defense that the plaintiff had breached a condition of the policy. The Supreme Court denied the motion and the cross motion, and later denied the plaintiff's motion for leave to reargue and renew her prior motion for summary judgment on the complaint.

Contrary to the plaintiff's contentions, the Supreme Court properly denied her motion for summary judgment on the complaint because she failed to meet her initial burden of establishing her prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Under the so-called "broad rule of evidence" applicable here, the plaintiff failed to establish the "actual cash value" of the loss, a burden she was required to carry under the policy since the fire damage had not been repaired (*see Gervant v New England Fire Ins. Co.*, 306 NY 393, 398; *McAnarney v Newark Fire Ins. Co.*, 247 NY 176, 184; *Mazzoeki v State Farm Fire & Cas. Corp.*, 1 AD3d 9, 12; *Incardona v Home Indem. Co.*, 60 AD2d 749, 750). Further, the Supreme Court properly denied the plaintiff's motion for leave to renew her motion, since she did not offer a reasonable justification for failing to present in her initial motion the documentary evidence offered in support of renewal (*see CPLR 2221[e]*; *Renna v Gullo*, 19 AD3d 472).

The Supreme Court erred, however, in denying the defendant's cross motion for leave to amend its answer. Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see CPLR 3025[b]*; *Lucido v Mancuso*, 49 AD3d 220, 222). The defendant sought to amend its answer to include as an affirmative defense that the plaintiff had breached the policy's "[c]oncealment or fraud" condition. Contrary to the plaintiff's contention, the proposed amendment was not patently devoid of merit. Therefore, with no showing of prejudice or surprise resulting directly from the defendant's delay in seeking leave, the court should have granted the defendant's cross motion for leave to amend its answer.

FISHER, J.P., COVELLO, SANTUCCI and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court