

Panasia Estates, Inc. v Hudson Insurance Company
2006 NY Slip Op 30352(U)
July 14, 2006
Supreme Court, New York County
Docket Number: 0602472/2005
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN SMITH
Justice

PART 4th

Index Number : 602472/2005
PANASIA ESTATES
vs
HUDSON INSURANCE
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 05/24/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

FILED
JUL 24 2006
NEW YORK COUNTY CLERK'S OFFICE

is motion ~~to~~ for partial summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits Memorandum
Answering Affidavits — Exhibits Memorandum
Replying Affidavits Memorandum

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1-2</u>
Answering Affidavits — Exhibits	<u>3-4</u>
Replying Affidavits	<u>5-6</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/06

K. S.
KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----X
PANASIA ESTATES, INC.,

-against-

Plaintiff,

Index no.: 602472/2005
Motion seq.: 001
Motion date: 05/24/2006

FILED

HUDSON INSURANCE COMPANY,

JUL 24 2006

DECISION AND ORDER

Defendant
NEW YORK COUNTY CLERK'S OFF.

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant's motion for partial summary judgment is granted solely to the extent that plaintiff is precluded from asserting claims in this action for legal fees plaintiff has or will incur in the prosecution of this action and, in all other respects, the motion is denied.

Plaintiff, Panasia Estates, Inc. (hereafter referred to as "PEI") brought this action to recover insurance proceeds it alleges are due from its insurance carrier, defendant Hudson Insurance Company (hereafter referred to as "HIC") in connection with losses PEI allegedly sustained when rain infiltrated the roof of its building while repairs were being undertaken to the roof. At the time of the loss, PEI had a property insurance policy in effect (issued by HIC) which included "Builders Risk Coverage". After the loss, HIC allegedly investigated and denied the claim having determined PEI's loss was the result of repeated water infiltration over time and wear and tear rather than a risk covered under the builders risk provisions of the policy. PEI contends HIC has breached its insurance contract and engaged in bad faith dealings in conducting its investigation of the loss and reaching its conclusion that the policy did not cover the loss. Therefore, PEI contends it is entitled to the amount it claims as losses under the policy, the additional, reasonably foreseeable, costs and expenses it incurred as a result of HIC's bad faith

breach of the insurance contract, and legal fees PEI has incurred.

HIC now moves for a partial summary judgment; "...dismissing all of Plaintiff's bad faith allegations and all prayers for consequential, extra contractual, or incidental damages or attorneys fees..." (see HIC's Notice of Motion). HIC contends that PEI is attempting to assert a tort claim for bad faith denial of insurance coverage even disguised as a breach of contract claim and that New York State Law does not recognize such a claim. In its opposition to the motion, PEI argues it is not asserting a tort claim but, in fact, seeks allowable, reasonably foreseeable, damages upon a showing that HIC has breached its insurance contract. In support of its contention, PEI cites the case of *Acquista v New York Life Insurance Company et al*, 285 AD2d 73 (1st Dept 2001). In its reply, HIC argues that its insurance contract with PEI excludes "any other consequential loss". HIC also cites the Court of Appeals cases of *Roncanova v Equitable Life Ass. Soc.*, 83 NY2d 603 (1994) and *New York University v Continental Ins. Co.*, 87 NY 2d 308 (1995). Finally, HIC attempts to distinguish *Acquista* on the basis of the fact that the insurance policy involved in *Acquista* is a disability insurance policy and the insurance policy involved in this matter is a property damage insurance policy.

HIC's reliance upon *Roncanova* and *New York University* is misplaced as those two cases deal with the issue of recovering punitive damages against insurers which engage in bad faith dealings concerning claims against insurance policies they have issued. In the instant matter, no claim is being made for punitive damages. Further, this court rejects HIC's attempt to distinguish the *Acquista* case from the instant matter. Both the instant case and *Acquista* deal with issues pertaining to whether or not a specific claim is covered by an insurance policy. The relevant issues do not involve any intricacies particular to disability or property insurance and

claims but, instead, relate to the conduct of the insurance carrier in considering first party claims presented to the insurer for payment pursuant to valid insurance policies. Thus, this court finds *Acquista* to be appropriate precedent for consideration in the instant matter.

In *Acquista*, the Appellate Division, First Department adopted reasoning advanced by the Utah State courts in stating; “there is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy. Nothing inherent in the contract law approach mandates this narrow definition of recoverable damages. Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.” (*Acquista v New York Life Insurance Company et al*, 285 AD2d 73, 81 [1st Dept 2001] citing *Beck v Farmers Ins. Exch.*, 701 P2d 795, 801 [Utah 1985]). This reasoning is applicable to the facts of the instant matter. PEI alleges that HIC has engaged in bad faith in its investigation and denial of PEI’s claim. Thus, if PEI can prove its allegations, it may recover its reasonably foreseeable damages resulting from HIC’s breach of its insurance contract. HIC has failed to make a *prima facie* showing of its entitlement to a partial summary judgment and its motion concerning these allegations and claims must, therefore, be denied.

Notwithstanding this determination, the court must address HIC’s request to dismiss PEI’s claim for attorney’s fees. The *ad damnum* clause in the complaint herein states: “Panasia demands judgment against Hudson Insurance for compensatory, consequential and incidental damages, plus interest, costs and attorneys fees.” While this could be construed as a request for attorneys fees for the instant action it may also be construed as a request for interest, costs and attorneys fees incurred by PEI as part of its damages. In its opposition papers to the instant

motion, PEI indicates that its damages resulting from HIC's alleged breach of the insurance contract include the costs (interest, legal fees, etc.) of obtaining loans to pay for items PEI alleges would have been paid for by insurance proceeds had HIC not breached its contract of insurance with PEI.

It has long been held that an insured may not recover legal fees it incurs in bringing an action to settle its rights in an insurance policy (see *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979]). Thus, PEI may not recover any legal fees it incurs in prosecuting the instant action. However, if, in order to obtain loans to finance costs which should have been paid for by insurance proceeds, PEI incurred legal fees, those legal fees may be considered as part of PEI's reasonably foreseeable damages for HIC's breach of its insurance contract (assuming PEI prevails on the issue of liability and submits appropriate proof of its damages at trial). Therefore, HIC's motion is granted to the limited extent that PEI may not seek legal fees in this action for any such fees it incurs in the prosecution of this action. Accordingly, it is;

ORDERED: that HIC's motion for partial summary judgment is granted to the limited extent PEI may not assert any claims for any legal fees it incurs in connection with the prosecution of the instant action and, in all other respects, HIC's motion is denied, and it is;

FURTHER ORDERED: that counsel for all parties are to appear before Part 44 of the Court in Room 581 at 111 Centre Street, New York New York on August 21, 2006.

The foregoing constitutes the decision and order of this court.

Dated: July 14, 2006

ENTER:

KSS

Hon. Karen S. Smith, J.S.C.

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JUL 24 2006
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