| **Authelet v Nationwide Mut. Ins. Co.** |
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| 2008 NY Slip Op 32929(U) |
| October 24, 2008 |
| Supreme Court, Suffolk County |
| Docket Number: 03-15522 |
| Judge: John J.J. Jones |
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[* 1 ]

SHORT FORM ORDER

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INDEX No. 03-15522
CAL. No. 08-00821-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

***PRESENT:***

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 5/19/08
ADJ. DATE 8/13/08
Mot. Seq. #007 - MotD

LANCE AUTHELET,

Plaintiff,

- against -

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18-20; Replying Affidavits and supporting papers 21-22; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by the defendant for an order (i) pursuant to CPLR 3212, granting partial summary judgment limiting the plaintiff's recovery to the actual cash value of the cost to repair the plaintiff's dwelling, pursuant to the terms of the plaintiff's policy with the defendant, (ii) pursuant to CPLR 3212, dismissing the plaintiff's first and second causes of action, in that the plaintiff has been paid all sums to which he is entitled under the subject policy, (iii) pursuant to CPLR 3211 (a) (7) and 3212, dismissing the plaintiff's second and fourth causes of action, in that they fail to state a cause of action as a matter of law, (iv) pursuant to CPLR 3211 (a) (7) and 3212, dismissing the plaintiff's third cause of action, in that it fails to state a cause of action as a matter of law, and (v) pursuant to CPLR 3211 (a) (7) and 3212, dismissing the plaintiff's demands for attorney's fees and litigation expenses, in that the plaintiff commenced this action against the defendant for coverage, is granted to the extent indicated below, and is otherwise denied.

On April 7, 2003, the plaintiff's dwelling, located at 239 Shore Road, Mount Sinai, New York, was destroyed by fire. At the time of the fire, the dwelling was insured under a homeowners' policy issued by the defendant. The policy, which had a coverage limit of $675,000 for the dwelling, contained a replacement cost provision which provided, in relevant part, as follows:

4. Loss Settlement. Covered losses will be settled, up to the applicable limit of liability, by us paying:

* * *

b) the cost to repair or replace without deduction for depreciation for buildings in Coverage A [Dwelling] or B [Other Structures] based on like construction and use on the same premises except:

(1) we will pay no more than the actual cash value of the damage until the repair or replacement is made when the cost to repair or replace the damage is more than $1,000 or more than 5 percent of the amount of insurance in this policy on the building, whichever is less.

(2) when you claim loss or damage to buildings on an actual cash value basis. You may make claim within 180 days after the loss for any added loss based on the cost to repair or replace.

(3) if you choose not to repair or replace, we will pay only the actual cash value of the damaged building, not to exceed the applicable limit of liability.

"Actual cash value" is defined in the policy as "the amount it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence."

After the plaintiff submitted timely claims under the policy, the defendant arranged for Angelo Mustich of Leihbacher-Mustich, Inc., a builder and appraiser, to inspect the premises and estimate the amount it would cost to repair the damage caused by the fire. On or about April 23, 2003 and May 22, 2003, Mustich prepared reports containing the requested estimates and specifications. Nevertheless, a dispute arose between the parties as to whether the dwelling was capable of repair, as the defendant claimed, or whether it needed to be demolished and rebuilt, as the plaintiff claimed. Consequently, when the defendant tendered payment in the amount of $152,402.17 (comprised of three checks–one in the amount of $130,652.17 for the plaintiff's building claim, one in the amount of $20,250.00 for the plaintiff's additional living expense claim, and one in the amount of $2,500 for the plaintiff's contents claim) in settlement of the plaintiff's claims, the plaintiff rejected the tender, ostensibly because the amount was insufficient to restore the dwelling to its previous condition. The defendant refused to pay the plaintiff's claim for building code upgrades required as a result of the fire, citing a policy exclusion for loss resulting from enforcement of any ordinance or law regulating construction, repair or demolition of buildings. This action followed.

The plaintiff alleges four causes of action in his complaint: the first, for breach of contract, alleging, in part, the defendant's failure to pay the sum of $450,000.00 required to replace the dwelling, the second, for breach of the covenant of good faith and fair dealing, the third, for fraud, alleging that

coverage for "building code upgrade" was excluded from the policy without notification to the plaintiff, and the fourth, alleging that the defendant's conduct constituted bad faith, entitling the plaintiff to exemplary damages.

It is undisputed that, apart from boarding up the property and removing certain hazardous materials from the premises to make it safe, the plaintiff did not repair any of the damage to the property from the date of the fire through March 31, 2004, when he sold the property for the sum of $399,000.00. The plaintiff acknowledges that much of the premises had been gutted and that all appliances had been removed prior to the fire. It also appears that, on or about May 3, 2006, the plaintiff accepted checks in the amounts of $136,096.01 and $20,250.00 from the defendant in partial settlement of the building claim and the additional living expense claim, and also executed a limited release, absolving the defendant from liability as to those claims up to those amounts but permitting the plaintiff to pursue additional payments for those claims in excess of those amounts.

Addressing the first cause of action, the defendant contends that the plaintiff is entitled only to the actual cash value of the damage under the terms of the policy because he did not repair any of the damage caused by the fire, and that the plaintiff has already been paid in full for all damage resulting from the fire. The Court agrees that the plaintiff, having failed to repair or replace any of the damaged property and pursuant to the clear language of the replacement cost provision quoted above, is entitled only to the actual cash value of the damage. Although the plaintiff contends that this provision does not apply because the defendant failed to notify him of an amendment to the policy which replaced the policy's original replacement cost provision, it suffices to note that the same result would obtain even under the original policy, which likewise provides that loss settlement "will be based on actual cash value" as to any property which the insured "may elect not to repair or replace." The plaintiff's alternative argument, that the limit to recovery is not contained in the portion of the policy applicable to dwellings (Coverage A), is without foundation. The Court also agrees that the plaintiff has been paid in full with respect to his additional living expense (or "loss of use") claim–the complaint alleges damages for loss of use in the amount of $20,250.00, and the plaintiff has since accepted payment in that amount in settlement of his claim. However, as to the defendant's argument that the plaintiff has been paid in full with respect to his building claim, the Court finds the defendant's proof wanting. To the extent that the defendant relies on the reports provided by Angelo Mustich, they are unsworn and, therefore, inadmissible. While the defendant also submits an affidavit from Mustich in support of the motion, the affidavit only confirms that he prepared the reports and does not purport to verify the accuracy of their contents. Further, even if, as the defendant claims, the plaintiff may not be entitled to the payment of $450,000.00 he seeks because of the premises' gutted condition, this does not warrant the granting of summary judgment. It was incumbent on the defendant, *inter alia*, to establish the amount to which the plaintiff was entitled under the policy and that this amount was less than or equal to the amount paid, *i.e.*, $136,096.01. The defendant having failed to do so, the Court is constrained to deny summary judgment with respect to this portion of the first cause of action.

The plaintiff's second cause of action, alleging a breach of the implied covenant of good faith and fair dealing, pleads the same conduct which is also the predicate of the cause of action for breach of contract, *i.e.*, the defendant's failure to pay the full amount of the plaintiff's claim. As such, it is

duplicative of the plaintiff's first cause of action (*see*, ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]). The plaintiff nevertheless contends in his attorney's opposing affirmation that the true basis of his claim is that the defendant deliberately attempted to confuse the plaintiff as to the details of the policy by issuing a letter seven days after the fire notifying the plaintiff of a change in a different policy, relating to a different property, and then claiming that this letter constituted proper and timely notice of an amendment to the subject policy. However, as the plaintiff's core allegation remains that the defendant failed to pay the full amount of the plaintiff's claim, *i.e.*, that it engaged in this conduct to avoid its contractual obligation, the fact the defendant may have breached the covenant in doing so does not state a cause of action for its breach which is distinct from the cause of action for breach of contract. The Court directs that the claim for breach of the implied covenant, together with the plaintiff's demand for consequential damages, be incorporated into the plaintiff's first cause of action (*see*, ***Bi-Economy Mkt. v Harleysville Ins. Co. of N.Y.***, 10 NY3d 187, 856 NYS2d 505 [2008]; ***Panasia Estates v Hudson Ins. Co.***, 10 NY3d 200, 856 NYS2d 513 [2008]; ***Acquista v New York Life Ins. Co.***, 285 AD2d 73, 730 NYS2d 272 [2001]). The Court further notes, to the extent that the plaintiff seeks consequential damages for "having been compelled to * * * retain legal counsel to seek redress," that an insured may not recover attorney's fees or other legal expenses incurred in bringing an action against an insurer, as here, to determine its rights under a policy (***New York Univ. v Continental Ins. Co.***, *supra*; ***Mighty Midgets v Centennial Ins. Co.***, 47 NY2d 12, 416 NYS2d 559 [1979]; ***Barry v Romanosky***, 147 AD2d 605, 538 NYS2d 14 [1989]). Hence, any consequential damages to which the plaintiff may ultimately be entitled shall be exclusive of such expenses.

As to the third cause of action, in which the plaintiff alleges that the defendant perpetrated a fraud by failing to advise him that "building code upgrade" coverage was no longer included in the policy or that he could only obtain such coverage by purchasing an endorsement, the defendant contends that the plaintiff was in possession of the declarations page and all forms and endorsements comprising his policy as early as July 15, 2002 and that he had more than nine months prior to the fire within which to read the policy in order to ascertain the coverages provided. Consequently, the defendant contends that it cannot be said to have misrepresented the coverage, and that the plaintiff cannot be found to have reasonably relied on any alleged misrepresentation or omission as to the scope of coverage. The Court rejects the defendant's contentions. It is settled law that an insurer which undertakes to prepare a policy in pursuance of a previous agreement, but which changes a material term and then delivers it as a renewed policy without providing notice of the change, "commits a fraud which entitles the [insured] to relief according to the circumstances presented" (***Hay v Star Fire Ins. Co.***, 77 NY 235, 240 [1879]; *accord*, ***Matter of State Farm Mut. Auto. Ins. Co. v Guarascio***, 153 Misc 2d 485, 582 NYS2d 605 [1992]). The defendant failed to offer any evidence that the plaintiff was properly notified of the policy amendment excluding the relevant coverage (*see*, ***Allstate Ins. Co. v Young***, 265 AD2d 278, 696 NYS2d 189 [1999]). Additionally, while an insured who has a policy in his possession for a sufficient period of time may be conclusively presumed to know its contents and to have assented to them, this presumption applies only "in the absence of fraud or other wrongful act on the part of the other contracting party" (***Brownstein v Travelers Cos.***, 235 AD2d 811, 813, 652 NYS2d 812, 814 [1997]). The presumption is, therefore, inapplicable to a cause of action for fraud. Absent the presumption, the Court finds the defendant's proof insufficient to warrant the granting of summary judgment, particularly given that fire insurance policies "are rarely examined by the insured" and that such insureds are not expected to

exercise the "same degree of vigilance and critical examination" as might be required in the case of some other instruments (***Hay v Star Fire Ins. Co.***, *supra* at 240; *accord*, ***Janes v New York Cent. Mut. Ins. Co.***, 281 AD2d 982, 722 NYS2d 669 [2001]).

The plaintiff's fourth cause of action, alleging bad faith, is legally insufficient. Even assuming that it was the plaintiff's intention to state a tort claim distinct from the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, it is axiomatic that allegations that an insurer acted in bad faith in denying coverage do not give rise to an independent tort cause of action (***New York Univ. v Continental Ins. Co.***, *supra*; ***Alexander v GEICO Ins. Co.***, 35 AD3d 989, 826 NYS2d 777 [2006]; ***Johnson v Allstate Ins. Co.***, 33 AD3d 665, 823 NYS2d 415 [2006]). Moreover, to state a claim for exemplary damages, egregious conduct must be alleged which is not only actionable as an independent tort, but which is also part of a pattern directed at the public generally, neither of which elements has been pleaded here (***New York Univ. v Continental Ins. Co.***, *supra*; ***Alexander v GEICO Ins. Co.***, *supra*; ***Johnson v Allstate Ins. Co.***, *supra*).

Accordingly, the defendant's motion is granted to the extent of (i) granting partial summary judgment as to the first cause of action by limiting the plaintiff's recovery under the policy to the actual cash value of the loss, excluding from any recovery of consequential damages attorney's fees and other legal expenses incurred by the plaintiff in bringing this action, and dismissing the plaintiff's claim of damages for loss of use in the amount of $20,250.00, (ii) granting summary judgment dismissing the second cause of action but incorporating its material allegations into the first cause of action, and (iii) dismissing the fourth cause of action pursuant to CPLR 3211 (a) (7), and is otherwise denied.

The Court directs that all claims which have been dismissed are hereby severed and that the remaining claims shall continue.

Dated: 24 Oct 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**