

Chandler Mgt. Corp. v First Specialty Ins.

2016 NY Slip Op 30823(U)

May 4, 2016

Supreme Court, Kings County

Docket Number: 509677/15

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of April, 2016.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

CHANDLER MANAGEMENT CORPORATION,

Plaintiff,

- against -

Index No. 509677/15

FIRST SPECIALTY INSURANCE,

Defendant.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-3 _____
Opposing Affidavit (Affirmation) _____	_____ 4 _____
Reply Affidavit (Affirmation) _____	_____ _____

Upon the foregoing papers, defendant, First Specialty Insurance Corporation, sued herein as “First Specialty Insurance” (First Specialty), moves for an order, pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), dismissing the complaint filed by plaintiff, Chandler Management Corporation (Chandler), “on the grounds that this action is time-barred under the 12-month suit limitation provision of the First Specialty insurance contract.

First Specialty issued commercial property insurance Policy Number 03000059 to Chandler, pursuant to which First Specialty provided Chandler with \$5 million in property

insurance coverage for physical loss or damage to Chandler's apartment complexes at 7777 McCallum Blvd. and 7740 McCallum Blvd. in Dallas, Texas (McCallum Apartments), during the policy period beginning on November 15, 2010 and ending on November 15, 2011 (First Specialty Policy).

The First Specialty Policy expressly provides that “[t]he laws of the State of New York . . . shall govern the construction, effect, and interpretation of this insurance agreement” and the Policy contains a New York forum selection clause, providing that “[t]he parties irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York . . .” (Simpson Affidavit, Tab 1 at 4).

The First Specialty Policy also provides that “[n]o one may bring a legal action against us under this Coverage Part unless ... 1) There has been full compliance with all of the terms of this Coverage Part; and 2) The action is brought *within 12 months after the date on which the direct physical loss or damage occurred*” (*id.* at page 5 [emphasis added]).

According to Chandler, the McCallum Apartments “sustained roof damage caused by windstorm and hail” from a storm that took place “[o]n or about May 24, 2011 . . .” (complaint at ¶¶ 1 and 21).

Chandler, on June 25, 2012, commenced a lawsuit against First Specialty in the 101st Judicial District Court of Dallas County in Texas, asserting claims for breach of the First Specialty Policy and violations of the Texas Insurance Code and Texas Consumer Protection Act (Texas Action).

First Specialty successfully moved to dismiss the 2012 Texas Action on the ground that Chandler failed to comply with the New York forum selection clause in the First Specialty Policy, which was upheld on appeal (*Chandler Mgmt. Corp. v First Specialty Ins. Corp.*, 2013 WL 715811, *aff'd* 452 SW3d 887, 890 [Tex. App. Dallas 2014]).

More than three years after the alleged hailstorm that damaged McCallum Apartments, Chandler commenced this New York lawsuit against seeking coverage under the First Specialty Policy. Chandler, on August 5, 2015, commenced the instant action by filing a summons and a complaint, verified by counsel, alleging that First Specialty breached the First Specialty Policy and violated Texas law when it denied coverage for property damage arising from the May 24, 2011 hail/windstorm (complaint at ¶¶ 1 and 21).

Chandler asserted four causes of action against First Specialty for: (1) breach of the First Specialty Policy; (2) violation of the Texas Unfair Compensation and Unfair Practices Act; (3) violation of the Texas Insurance Code Chapter 542: “The Prompt Payment of Claims Act”; and (4) breach of the common law duty of good faith and fair dealing under Texas law.

Contrary to the express terms of the First Specialty Policy, which expressly states that New York law applies, the complaint erroneously alleges that “Texas Law applies . . .” (*id.* at ¶ 16).

Discussion

CPLR 201 provides that an action “must be commenced within the time specified in this article unless a different time is prescribed by law or *a shorter time is prescribed by*

written agreement” (emphasis added). The Court of Appeals has held that:

“The parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, more effectively secures the end sought to be attained by the statute of limitations. Thus an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable provided it is in writing” *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550-51 [1979] [internal citations and quotations omitted]).

Importantly, New York courts have held that a 12-month time limitation within which to commence legal proceedings – like that at issue here – is both reasonable and enforceable (see, e.g., *Kozemko v Griffith Oil Co.*, 256 AD2d 1199, 1200 [1998]; *H.P.S. Capitol, Inc. v Mobil Oil Corp.*, 186 AD2d 98, 99 [1992]).

Here, there is no dispute that Chandler failed to commence this action within 12 months after the alleged occurrence on May 24, 2011. According to the express terms of the First Specialty Policy, Chandler was required to commence a New York lawsuit against First Specialty within 12 months of any loss, or *no later than May 24, 2012*. Here, Chandler waited until August 5, 2015, more than three years beyond the deadline. This action is subject to dismissal based on the 12-month limitations period, since Chandler failed to establish that the shortened limitations period in the First Specialty Policy was unreasonable, invalid and/or unenforceable under the circumstances.

Chandler’s commencement of the Texas Action on June 25, 2012, was also untimely by one month. Even if the Texas Action were timely commenced, Chandler’s choice of Texas as a forum violated the New York forum selection clause in the First Specialty Policy.

The forum selection clause in the First Specialty Policy is prima facie valid and enforceable, and Chandler did not establish that it was “unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or . . . that a trial in [New York] would be so gravely difficult that [Chandler] would, for all practical purposes, be deprived of its day in court” (*Bernstein v Wysoki*, 77 AD3d 241, 248-49 [2010] [internal quotations omitted]).

Accordingly, it is

ORDERED that First Specialty’s motion for an order, pursuant to CPLR 3211 (a) (5), dismissing Chandler’s complaint on the ground that it is time-barred by the 12-month limitation provision in the First Specialty Policy is granted.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

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KINGS COUNTY CLERK
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