

MDW Enterprises, Inc. v CNA Insurance Co.
2005 NY Slip Op 30088(U)
March 24, 2005
Supreme Court, Suffolk County
Docket Number: 1002840/2000
Judge: Mary M. Werner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. MARY M. WERNER
Justice of the Supreme Court

MOTION DATE 9-3-04
ADJ. DATE 1-20-05
Mot. Seq. # 003 - MD
004 - XMD

-----X	
MDW ENTERPRISES, INC.,	:
	:
Plaintiff,	:
	:
- against -	:
	:
CNA INSURANCE COMPANY, VALLEY	:
FORGE INSURANCE COMPANY and	:
A.C. EDWARDS INC.,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 26 ; Answering Affidavits and supporting papers 27 - 29; 30 - 40 ; Replying Affidavits and supporting papers _____ ; Other _____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor on damages is denied; and it is further

ORDERED that this cross motion by defendants for an order pursuant to CPLR 3212 granting summary judgment to defendant CNA Insurance Company dismissing plaintiff's damage claims relating to plaintiff's building, debris removal and loss of rental income or, in the alternative, granting partial summary judgment limiting plaintiff's recovery to \$80,726.92, is denied.

Plaintiff, MDW Enterprises, Inc., owned commercial property consisting of attached buildings (hereinafter referred to as building) located at 20 Mooney Pond Road in Selden, New York. Plaintiff had purchased an all-risk commercial insurance policy for said property from

defendant CNA Insurance Company (CNA) through its broker, defendant A.C. Edwards (Edwards). Coverage was provided by defendant Valley Forge Insurance Company. The last commercial tenant vacated the premises in December 1998. Plaintiff did not procure another tenant since plaintiff had contracted to sell the building and land to a third party. The president of MDW, Michael Tenzyk (Tenzyk), contacted plaintiff's broker and spoke to an unknown account representative, informing him that the building was vacant and that a sale was pending. Tenzyk inquired as to coverage, but was advised to maintain the same coverage. Plaintiff's policy was subsequently renewed. On March 23, 2000, the building on the property was destroyed by a fire. Following an investigation, it was determined that the fire was intentionally set by unknown persons. On April 3, 2000, plaintiff submitted a claim of loss. On May 11, 2000, defendant CNA disclaimed coverage on the ground that the damage was caused by vandalism and that coverage was excluded under the vacancy provision of the policy.

By order dated June 20, 2002 (Underwood, J.), the Court denied plaintiff's motion for summary judgment on the issue of liability on its first cause of action for breach of contract finding that coverage was excluded and granted defendants' cross motion for summary judgment dismissing the remaining second and third causes of action against the broker, defendant Edwards. On appeal, the Appellate Division Second Department determined that plaintiff's second and third causes of action against the broker had been properly dismissed but that summary judgment should have been granted to plaintiff on the issue of liability on the first cause of action for breach of contract (*see, MDW Enterprises, Inc. v CNA Ins. Co.*, 4 AD3d 338, 772 NYS2d 79 [2d Dept 2004]). The matter was remitted to this Court for a determination on the issue of damages.

Plaintiff now moves for summary judgment in its favor on the issue of damages. Plaintiff seeks all consequential damages under the policy in the sum of \$236,000.00 plus four percent pursuant to the inflation guard provision plus interest. Plaintiff calculates its damages to be the value of the building, \$218,000.00, plus the loss of rental income of \$8,400.00, plus the cost of removal of the debris, \$9,800.00, totaling \$236,000.00. In support of its motion, plaintiff submits the complaint; the answer; the subject policy providing coverage from March 30, 1999 to March 30, 2000; the affidavit and loss valuation of Joe Palmieri; the receipt for debris removal; the letter dated May 11, 2000 from defendant CNA to plaintiff denying coverage for the subject loss; and the prior order in this action dated June 20, 2002 (Underwood, J.) and the subsequent decision of the Appellate Division, Second Department dated February 2, 2004.

Defendants cross-move for summary judgment in favor of defendant CNA on the issue of damages dismissing the complaint on the grounds that plaintiff is not entitled to recover any damages under the subject policy. In the alternative, defendants seek partial summary judgment limiting plaintiff's recovery for damages to loss of its building at the policy limits of \$80,726.92. According to defendants, plaintiff is only entitled to recover the actual cash value of the building if, as in this case, the building was not replaced. Defendants argue that, in any event, the building had no actual cash value because the highest and best use of the property as of the date

of the fire was to demolish the building and redevelop the site. In addition, defendants argue, plaintiff only offered proof of the replacement cost and had no insurable interest in the building at the time of the loss. Defendants further contend that since plaintiff's recovery is limited to the actual cash value of the building, plaintiff cannot recover debris removal costs and plaintiff cannot recover for the loss of rental income inasmuch as the building was not being rented at the time of the fire and was not in a condition to be rented. As a final argument, defendants contend that if plaintiff is to recover it can only recover the policy limits plus the adjustment for inflation guard, which is \$96,149.32, less 15 percent for the vacant building, which is \$14,422.40, less the deductible of \$1000.00 to equal the sum of \$80,726.92. In support of the cross motion, defendants submit, among other things, the deposition transcript of Tenzyk; the affidavit and supplemental affidavit of defendants' appraiser, Jan A. Barenholtz; plaintiff's response to defendants' interrogatories; the affidavit of Madeline Giliberti, an adjuster for defendant CNA; and the affidavit of William P. Nolan, retained by defendant CNA to investigate the subject fire.

In opposition to the cross motion, plaintiff contends that it had an insurable interest in the subject building inasmuch as the building was completely intact, rentable, and plaintiff had not divested his interest in the building merely because plaintiff had contracted to sell it. In addition, plaintiff argues that defendants are estopped from questioning value and insurable interest since plaintiff paid its premiums and was informed by its broker that despite the vacancy and pendency of sale the insurance should not change. Plaintiff further argues that defendants' valuation is defective since it is based on the land whereas it is the building that was insured, not the land, and is based on a future event of rezoning that did not occur. Plaintiff reasserts its right to anticipated rental income, had the fire not occurred, and the cost of debris removal. In support of its opposition, plaintiff submits, among other things, the contract of sale of the subject property.

Here, by determining that there was an ambiguity in the policy, the Appellate Division, Second Department determined that there was a "covered cause of loss" under the policy and granted summary judgment on the issue of liability on the first cause of action for breach of contract. Therefore, this Court now addresses whether damages are recoverable in this action.

The renewal declaration page of the subject commercial general liability policy that was in effect on the date of the fire indicates limits of insurance to be \$1,000,000.00 for each occurrence, \$50,000.00 for fire damage for any one fire, and \$2,000,000.00 as the general aggregate limit. Plaintiff seeks to recover damages above the policy coverage limits and characterizes its loss as "consequential damages." It is well-settled law in this state that consequential damages are not recoverable in an action to recover damages for breach of contract in the absence of the plaintiff's "showing that such damages were foreseeable and within the contemplation of the parties at the time the contract was made" (*Martin v Metropolitan Property and Cas. Ins. Co.*, 238 AD2d 389, 656 NYS2d 318 [2d Dept 1997] quoting *Sweazey v Merchants Mut. Ins. Co.*, 169 AD2d 43, 45, 571 NYS2d 131 [3d Dept 1991], *appeal dismissed* 78 NY2d 1072, 576 NYS2d 221 [1991]). It appears that the consequential damages of loss of rental income and debris removal costs were provided for in the policy,

subject to certain conditions (*compare, Martin v Metropolitan Property and Cas. Ins. Co., supra*). Plaintiff may recover for direct loss caused by the fire (*see, Frost v Whiting Natl. Ins. Co., 141 AD2d 400, 529 NYS2d 490 [1st Dept 1988]*).

Regarding the direct loss, under Section E “Loss Conditions” subsection 4 (a) of the policy’s Building and Personal Property Coverage Form, the loss payment is at CNA’s option to either (1) pay the value of the lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property, subject to certain conditions; (3) take all or any part of the property at an agreed or appraised value; or (4) repair, rebuild or replace the property with other property of like kind and quality, subject to certain conditions.

Since plaintiff did not replace the building destroyed by the fire and had no intention of doing so, the actual cash value of the building is applicable in this instance. Where there is a total loss of the entire value of the property, the insurer is liable for the full amount of the loss caused by the fire (*Kates Group v New York Property Ins. Underwriting Assoc., 128 AD2d 838, 513 NYS2d 757 [2d Dept 1987]*). Actual cash value is payable regardless of whether the property is eventually repaired or replaced (*Mazsocki v State Farm Fire & Cas. Corp., 1 AD3d 9, 766 NYS2d 719 [3d Dept 2003]*). Under New York law, “[t]he determination of actual cash value is made under a broad rule of evidence which allows the trier of fact to consider ‘every fact and circumstance which would logically tend to the formation of a correct estimate of the loss’” (*Cass v Finger Lakes Coop. Ins. Co., 107 AD2d 904, 905, 483 NYS2d 849 [1985]*, quoting *McAnarney v Newark Fire Ins. Co., 247 NY 176, 184, 159 NE 902 [1928]*).

Here, neither the appraisal letter dated April 3, 2000 nor the affidavit of plaintiff’s appraiser, Joseph Palmieri, indicate what the figure of 90 represents, which when multiplied by 2425 square feet totals \$218,000.00, offered by plaintiff as the appraisal value of the building on the subject premises. It is unclear whether the valuation is the actual cash value of the building at the time of the loss or the replacement value. Thus, the appraisal by plaintiff’s appraiser lacks probative value. Therefore, plaintiff has failed to sustain its burden of establishing the actual cash value of the building at the time of loss.

Without said evidence, the limits of plaintiff’s additional coverage of debris removal under section 4 (a)(1) of the Building and Personal Property Coverage Form cannot be determined. In any event, plaintiff’s proof of debris removal costs is insufficient. Plaintiff merely submits an unsworn letter dated June 12, 2000 from the president of R.W. Behan Contracting, Inc. cursorily stating that the total cost of removal of fire debris at the subject premises as well as filling in the basement and regrading the site is \$9,800.00. Said letter is in inadmissible form for consideration on a motion for summary judgment and fails to specifically itemize the costs of removal of the fire debris (*see, CPLR 3212 [b]*). Thus, plaintiff has failed to satisfy its burden of demonstrating its debris removal costs.

In addition, plaintiff is not entitled to recover for loss of rental income. A review of the policy language makes clear that lost rent coverage only applies if the building was actually rented at the time of the loss and it is clear that the building was vacant and unoccupied at the time of the fire (see, *De Crescenzo v Capital Mut. Ins. Co.*, 187 AD2d 793, 589 NYS2d 669 [3d Dept 1992]). Tenzyk expressly states in his affidavit that plaintiff did not have a tenant at the time of the loss and did not anticipate renting the building since plaintiff was in the process of selling the property. There was no "anticipated rental income" pursuant to the policy terms and plaintiff's mere ability to have rented the building does not satisfy the requirements of the policy. Therefore, plaintiff cannot recover lost rental income under the subject policy. Plaintiff having failed to sustain its burden of proof cannot obtain summary judgment on the issue of damages.

With respect to the cross motion, defendants failed to adduce evidence that plaintiff was planning to raze the building on the subject property prior to sale, particularly since the contract of sale indicated that the building and the land were to be sold. That the third-party buyer was planning to raze the building after the sale with plaintiff's knowledge is of no consequence. In addition, the mere existence of the executory contract of sale did not affect plaintiff's insurable interest in the property (see, Insurance Law § 3402; *Johnson v New York Mut. Underwriters Ins. Co.*, 182 AD2d 1070, 582 NYS2d 871 [4th Dept 1992]). Thus, defendants failed to demonstrate that plaintiff did not have an insurable interest in the building at the time of the fire (see, Insurance Law § 3401; *Henry & John Associates v Palan*, 187 AD2d 704, 590 NYS2d 286 [2d Dept 1992]).

In addition, defendant's appraiser, Jan A. Barenholtz, states in his affidavits that the existing improvements on the subject premises were outdated, vacant and unusable on the date of loss and contributed zero value to the market value of the whole property such that the building had no actual cash value because the highest and best use of the land would be to demolish the building and redevelop it. However, the affidavits of defendants' appraiser raise an issue of fact as to whether "the highest and best use of the property as of the date of the fire" is the appropriate method to determine the actual cash value of the building on the subject property pursuant to the policy (see generally, *Perlbinder v Jakobovitz*, 239 AD2d 294, 658 NYS2d 267 [1st Dept 1997]). Therefore, defendants failed to establish that there was no actual cash value to the building on the property at the time of loss. Inasmuch as there is an issue of fact as to the actual cash value of the subject building at the time of loss, it is premature at this juncture to determine plaintiff's recoverable loss under the subject policy.

Accordingly, the instant motion and cross motion are denied.

Dated: 3/24/05



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION