

40 Rector Holdings, LLC v The Travelers Indemnity Co.

2006 NY Slip Op 30262(U)

September 11, 2006

Supreme Court, New York County

Docket Number:

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

40 Rector Holdings

INDEX NO.

604094/04

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
Travelers Insurance

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

SEP 20 2006

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 9/11/06

LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
**40 RECTOR HOLDINGS, LLC, 40 RECTOR
MANAGER, LLC, PL 40 LLC and REC 40 LLC,**

Index No. 604094/04

Plaintiffs,

-against-

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

-----X
LOUIS B. YORK, J.:

FILED
SEP 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

This action arises from damage that was caused to the building (Building) located at 40 Rector Street in Manhattan, as the result of the terrorist attacks on September 11, 2001. Defendant The Travelers Indemnity Company (Travelers) now moves, pursuant to CPLR 3025, for leave to amend its answer to remove several affirmative defenses and to add one. Plaintiffs cross-move, pursuant to CPLR 3124, for an order compelling defendant to respond to certain discovery requests and to produce defendant's employees Michele S. Busson and Robert Sullivan for deposition. The second and eighth affirmative defenses have been withdrawn.

Defendant's Motion

Prior to the commencement of this action, Travelers paid plaintiffs \$2,616,039.61, under insurance policy number KT-CMB-295T752-5-01 (Policy), an all risks policy issued on January 18, 2001. That payment covered damage to the Building caused by the impact of the soot and concrete dust that arose as the Twin Towers burned and fell. Subsequent to that payment, plaintiffs made a claim for an additional \$2,800,000 to cover, among other

things, damage to the facade of the Building, which, plaintiffs' expert opined, had been caused by "shock wave[s] ... from the explosions and collapses" on September 11, 2001." See Preisler Affirm. (1/6/06), Exh. D, passim. Travelers, thereupon, retained an expert, who pointed out that shock waves would be expected to fall into one or more of the following categories: (1) direct impact from projectiles, (2) pressure wave acting directly on exterior surfaces, and (3) ground vibrations from the sudden release of energy during the collapse of the Towers. See Wilkowsky Affirm., Exh. 1, at 5. This expert discounted the possibility that the Building had been damaged by ground vibrations. At the October 28, 2005 deposition of James E. Stevenson, Traveler's general adjuster who was assigned to plaintiffs' claim, plaintiffs' counsel asked whether Mr. Stevenson was "able or willing to attribute [any of the cracks in the facade of the Building] to the effects of the seismic shock that might have been suffered by the [B]uilding in the moments after the collapse of the towers." Preisler Affirm. (1/6/06), Exh. F, at 263. Mr. Stevenson testified that, in his opinion, a claim that the facade of the Building had suffered damage as a result of seismic shock would come within the exclusion for earth movement. Id. at 393-394. Plaintiff's counsel, thereupon, pointed out that Travelers had not asserted that exclusion as one of its affirmative defenses. Id. at 398-399. The affirmative defense that Travelers now wishes to assert is that the Policy contains an exclusion for earth movement, and that at least a portion of plaintiff's claim with regard to the facade comes within that exclusion.

While leave to amend a pleading is to be freely given absent prejudice to the opposing party (CPLR 3025 [b]; Leff v Benihana of Tokyo, 304 AD2d 350 [1st Dept 2003]; Gonfiantini v Zino, 184 AD2d 368 [1st Dept 1992]), leave should be denied when the proposed amendment plainly lacks merit. Santori v Met Life, 11 AD3d 597 (2d Dept 2004); Sharon Ava & Co. v Olympic Tower Assoc., 259 AD2d 315 (1st Dept 1999).

Plaintiffs contend that they would be prejudiced by a grant of leave, because they have incurred considerable expense in conducting lengthy depositions and in hiring experts, premised on Traveler's failure to plead the earth moving exclusion, and that, moreover, the proposed amendment lacks merit. Prejudice, such as would warrant the denial of a motion for leave to amend, arises "where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment." Whalen v Kawasaki Motors Corp. U.S.A., 92 NY2d 288, 293 (1998); see also Valdes v Marbrose Realty, Inc., 289 AD2d 28 (1st Dept 2001). Plaintiffs have incurred no such detriment. Nor, being presumed to have read the Policy, can they claim to be surprised by the proposed amendment.

Insofar as is relevant here, section D (1) of the Policy's Property Coverage Form provides:

The Company will not pay for loss or damage caused directly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. EARTH MOVEMENT

(1) Any earth movement (other than "sinkhole collapse") earthquake, mine subsidence, landslide, erosion, the expansion or contraction of soil due to the presence of moisture or water, or the lack thereof, and any other earth sinking, rising, shifting or movement, all whether naturally occurring or due to man made or artificial causes.

While Travelers may not prevail on its proposed affirmative defense, the standard of proof required on a motion to amend the pleadings is "much less exacting" than that required on a motion for summary judgment. Baskin & Sears, P.C. v Lyons, 188 AD2d 307, 308 (1st Dept 1992). Notwithstanding plaintiffs' arguments, that the earth movement exclusion covers only permanent changes in the position of the earth, and that the earth between Ground Zero and the Building acted as a "conduit" for shock waves, but did not move, Traveler's defense is at least colorable.

Plaintiffs note that Section D (j) of the Policy excludes "collapse of buildings" from coverage, but exempts from that exclusion a collapse caused by "a specified cause of loss." Section G (10) of the Policy defines the latter phrase to include "aircraft or vehicles." William F. Guernsey, a Travelers director, testified at his deposition that this exemption from the exclusion for collapse would include an aircraft crashing into a neighboring building resulting in damage to a covered building. Wilkofsky Reply Affirm., Exh. 1, at 50. However, because the earth movement exclusion is applicable "regardless of any other cause or event that contributes concurrently or in any sequence to the loss," the exemption to the collapse exclusion is irrelevant to the proposed amendment. Accordingly, Traveler's motion will be granted.

Plaintiffs' Cross Motion

Plaintiff's cross motion with regard to discovery stems from a document which was included in the claims file that Travelers provided to plaintiffs. That document is a copy of a January 5, 2002 e-mail sent by Ms. Busson to Mr. Stevenson. It is addressed to "Jim," and it is subscribed "Michele." The body of the e-mail states, in relevant part, that plaintiffs claim "has total payments in excess of the ratio to file estimates as selected for your office." The e-mail notes that "TOTAL EST \$" amount to "26125.00," "TOTAL PAID \$" amount to "1731785.00," and "TOTAL PAID %" is "66.28." At his deposition, Mr. Stevenson testified that he did not know Ms. Busson, did not know her position at Traveller's, if any, and did not know what the e-mail meant. Charles O'Reilly, Mr. Stevenson's immediate supervisor, testified to a similar lack of knowledge at his deposition. Subsequent to Mr. Stevenson's receipt of the e-mail, Travelers made no further payment on plaintiffs' claim prior to the commencement of this action, despite an outstanding claim of several million dollars. Travelers issued no written denial of the outstanding claim and provided no reason for its failure to pay the claim. Understandably, plaintiffs are interested in exploring the connection, if any, between Mr. Stevenson's receipt of Ms. Busson's e-mail and the cessation of payments on plaintiffs' claim. Travelers' incentive compensation plan for claims adjusters in the relevant years has provided that funding for the plan depends on meeting or exceeding four objectives, the first of which is "Reduc[ing] previous year's Claim payout." Similarly, the plan has provided that "[i]ndividual award amounts will be determined based on your actual

results against pre-established goals" in four specified areas, the first of which is "Claim Payout." Plaintiffs suggest that Messrs. Stevenson and O'Reilly may have been laboring under the burden of a conflict of interest.

Travelers argues that the requested discovery cannot lead to any relevant information, because plaintiffs' sole cause of action alleges breach of contract, and the determination of whether or not there has been a breach rests entirely on a reading of the relevant provisions of the Policy. As Travelers correctly notes, plaintiffs may not add a cause of action for violation of General Business Law § 349 because the instant dispute concerns only one contract, and does not affect consumers at large (Wall Street Transcript Corp. v Cohn, 243 AD2d 341 [1st Dept 1997]), and they cannot add a cause of action for violation of the Unfair Claim Settlement Practices Act, Insurance Law § 2601, because that Act does not provide for a private right of action. Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603 (1994). However, as the Court of Appeals noted in New York Univ. v Continental Ins. Co. (87 NY2d 308 [1995]),

[t]he very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in the performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim.

Id. at 316. Indeed, more than 20 years earlier, the Court of Appeals had noted that:

[f]or a breach of contract based only on a failure to make reasonable settlement of a claim within the policy limits, damages are measured by the policy limits. For a breach of implied conditions of the contract to act in its performance in good faith in refusing to settle within the policy limits, the damages may exceed the policy limits.

Gordon v Nationwide Mut. Ins. Co., 30 NY2d 427, 436-37 (1972); see also Cohen v New York Property Ins. Underwriting Assn., 65 AD2d 71 (1st Dept 1978). The discovery that plaintiffs seek may enable them to show that Travelers acted in bad faith, and such a showing may entitle plaintiffs to punitive damages. Moreover, quite apart from the issue of punitive damages, a jury may find that Travelers failed to pay plaintiffs' claim for reasons having nothing to do with any of Travelers' affirmative defenses, and, thus, that Travelers breached its contract. Accordingly, plaintiffs will be allowed to depose Ms. Busson and Mr. Sullivan. Mr. O'Reilly testified that Mr. Sullivan was his direct supervisor, had authority to pay plaintiffs' outstanding claim, and was copied on an e-mail from Mr. Stevenson calling for a meeting to discuss "strategy" the morning before a meeting with plaintiffs regarding their open claim.

The documents, the production of which plaintiffs seek to compel, concern the calculation and communication of the "ratio to file estimates selected" for Mr. Stevenson's office, as referred to in Ms. Busson's January 5, 2002 e-mail and the performance reports concerning, and the incentive payments made to, Travelers employees who have been identified as directly involved in dealing with plaintiffs' claims, or as the supervisors of such employees. These documents may well be relevant to plaintiffs' claim of breach, and Travelers has failed to meet its burden of establishing that any of the material is privileged. That Travelers' attorneys may have been involved in creating some of these documents is irrelevant. In order to come within the attorney-client privilege, a document must be

"primarily or predominantly a communication of a legal character." Brooklyn Union Gas Co. v American Home Assur. Co., 23 AD3d 190, 191 (1st Dept 2005). These documents were created by Travelers in the ordinary course of business, and plaintiffs contend that they pertain to Travelers' determination as to whether, and to what extent, to accept or reject coverage. Thus, they are discoverable. Id.

Accordingly, it is hereby

ORDERED that defendant's motion to add an affirmative defense is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiffs may serve a reply thereto within 20 days from the date of said service; and it is further

ORDERED that plaintiffs' cross motion is granted, and defendant is directed to produce the documents requested in plaintiffs' Notice for Discovery and Inspection, dated January 30, 2005, at numbers five through nine, within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendant will produce Michele S. Busson and Robert Sullivan for deposition, at a date to be agreed upon by the parties, but no later than 30 days after service of a copy of this order with notice of entry.

Dated: 9/11/06

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