Positive Influence Fashions v Seneca Ins. Co.
2007 NY Slip Op 30083(U)
February 28, 2007
Supreme Court, New York County
Docket Number: 0604212
Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 604212/2004

POSITIVE INFLUENCE FASHIONS

vs

SENECA INSURANCE COMPANY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/24/06

MOTION SEQ. NO. _____

MOTION CAL. NO. 85

The following papers, numbered 1 to 4 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

HON. MICHAEL D. STALLMAN

Dated: 2/28/07

J.S.C.

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

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: IAS PART 7

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POSITIVE INFLUENCE FASHIONS, INC.,

Plaintiff,

Index No. 604212/04

-against-

SENECA INSURANCE COMPANY, INC., **Decision and Order**

Defendant.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this breach of contract action, defendant moves for an order (1) granting it summary judgment, pursuant to CPLR 3212, dismissing the complaint, (2) granting it leave to amend its answer, pursuant to CPLR 3025, to include a counterclaim, and (3) striking the complaint, pursuant to CPLR 3126, for spoliation of evidence.

Plaintiff Positive Influence Fashions, Inc. manufactures women's clothing. Plaintiff's business, which consists of a warehouse and production facility that houses its inventory and raw materials, is located at 4-05 26th Avenue in Astoria, New York (the premises). In 2001, defendant issued plaintiff a commercial liability insurance policy designated as Policy No. CIM 31-002-85 (the Policy) (Affirmation of Kenneth R. Maguire, Esq., dated June 5, 2006 [Maguire Affirm.]). The Policy's coverage was effective from January 19, 2001 to January 19, 2002 (Exhibit B to Maguire Affirm.).

On October 17, 2001, soot and smoke allegedly entered the premises from a fire at Gothic Cabinet Craft, Inc., a furniture company located at 27-50 First Street in Long Island City, New York, a third of a mile from the premises (Maguire Affirm. ¶¶ 3-7). Plaintiff's principal, Demetrious Bekas, retained Bruce Fischer, a public adjuster to prepare a claim concerning losses to the

company's inventory and raw materials (Affidavit of Demetrious Bekas, sworn to on June 26, 2006 [Bekas Aff.], ¶¶ 14-15). On October 17, 2001, Kevin Kurtz, defendant's senior claims adjuster, visited plaintiff's warehouse and inspected the premises for damage (Affidavit of Kevin Kurtz, sworn to on June 15, 2006 [Kurtz Aff.], ¶ 3). Subsequently, plaintiff submitted a claim for $469, 869.56 for the damage that it allegedly sustained from the fire (Exhibit E to Maguire Affirm.).

On October 22, 2001, Kurtz retained R&R Salvage Corporation (R&R) to complete a physical inventory of plaintiff's damaged stock. R&R visited the premises on October 22, 2001. On November 13, 2001, R&R compiled a report of its findings (Exhibit C to Affirmation of Daniel Hirschel Esq., dated June 26, 2006 [Hirschel Affirm.]). The report purports to show that, on October 22, 2001, five days after the reported loss, there was a lingering smoke odor present at the premises. As a result, R&R recommended that plaintiff receive an allowance of $40,577.97 for the inspection and re-bagging of its inventory (*id.*). Kurtz received R&R's report on November 13, 2001 and subsequently contacted Fischer to relay its findings. Following the receipt of the report, plaintiff informed defendant of its dissatisfaction with R&R's findings.

To resolve plaintiff's protestations, defendant retained the services of a second salvage company, Puopolo & Curtis (Puopolo) (Kurtz Aff. ¶¶ 9-14). Kurtz received Puopolo's report on December 4, 2001. The study purports to show that Puopolo found little or no damage to plaintiff's inventory. However, Puopolo recommended that plaintiff receive an allowance of $41,892.47 for the inspection and re-bagging of its inventory (*id.*). As a result, defendant agreed to Puopolo's recommendation and allotted plaintiff an award of $36,892.47 (after application of plaintiff's $5,000 deductible) (*id.*). At this juncture, the parties agreed that plaintiff would supply defendant with two separate "proof of loss" statements, the first representing the undisputed portion of the claim, and

the second reflecting the portion of the claim that was rejected (*id.*). On January 16, 2002, Kurtz received both of plaintiff's sworn proofs of loss (*id.*). On February 8, 2002, defendant issued plaintiff a check in the amount of $36,892.47 toward the undisputed portion of its claim (*id.*).

Plaintiff continued to assert damages in excess of the sums paid by defendant. As a result, defendant assigned CGM Aizley Accounting Associates (CGM) to evaluate plaintiff's claim (Affidavit of Anthony Ciccodicola, sworn to on June 2, 2006 [Ciccodicola Aff.]). During its first meeting, on January 13, 2003, CGM requested that plaintiff produce its records of sales and purchases (Ciccodicola Aff. ¶¶ 5-8). Defendant also requested that Bekas submit to an examination under oath (Kurtz Aff. ¶¶ 14-19). Defendant's counsel conducted Bekas's examination on December 18, 2002, and continued it on April 30, 2003. The parties' final meeting took place on September 18, 2003 (*id.*).

On October 30, 2003, defendant issued a letter to plaintiff disclaiming coverage for the amount of damages in excess of the sums paid by defendant (Exhibit V to Maguire Affirm.). As a result, plaintiff commenced this lawsuit, asserting two causes of action. The first alleges breach of contract for defendant's failure to indemnify plaintiff for property losses following the fire, in the amount of $469,869.59. The second alleges breach of contract for defendant's failure to indemnify plaintiff in the amount of $220,272 for its business interruption.

Defendant argues that it is entitled to summary judgment because the evidence in the record demonstrates that plaintiff is guilty of false swearing. Defendant also argues that plaintiff violated the terms of the Policy following its: (1) material misrepresentations, (2) failure to cooperate with defendant's investigation, and (3) spoliation of evidence.

Plaintiff contends that it: (1) did not make any misrepresentations within its proof of loss,

(2) has fully cooperated with defendant's investigation by making all of its books and records available, and (3) did not engage in any acts of spoliation.

I. Motion for Summary Judgment

Defendant argues that plaintiff was guilty of false swearing when it intentionally misrepresented the extent of its insurance loss within the proof of loss statements. Defendant alleges that a substantial portion of the items included in plaintiff's proof of loss (approximately 54% of plaintiff's inventory) was sealed in plastic and undamaged on the day in question. Defendant further alleges that plaintiff wrongfully included the above-mentioned inventory in its proof of loss without inspecting those items for damage, and consequently bars plaintiff from recovering under the Policy.

Plaintiff asserts that it was not guilty of false swearing because the proof of loss statements utilized the same format and content as that of its neighbor, a clothing manufacturer that successfully obtained damages from its insurer for smoke and soot damage to its inventory following the fire. Plaintiff also asserts that it did not make any misrepresentations regarding damage to its inventory following the fire. Plaintiff claims that it relied upon the recommendations of its public adjuster and Bekas to compile its proof of loss statements. Thus, plaintiff argues that it is entitled to recover under the Policy.

It is well established that an insurance company seeking to abrogate a fire insurance policy based upon statements of loss must show that the submissions were false, willfully made, and material to the insurer's investigation (*Deitsch Textiles, Inc. v New York Prop. Ins. Underwriting Assn.*, 62 NY2d 999, 1001 [1984]; *see Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]; *Pipo Bar & Restaurant, Inc. v Certain Underwriters at Lloyd's at London*, 15 AD3d 556, 557 [2d Dept 2005]; *Pacific Indem. Co. v Golden*, 985 F2d 51, 55 [2d Cir 1993]). However, the statement

of any opinion mistakenly held is not grounds for vitiating a policy (*Christophersen v Allstate Ins. Co.*, 34 AD3d 515 [2d Dept 2006]).

Defendant has failed to show that plaintiff's submissions were false, willfully made, and material to the insurer's investigation (*Pacific Indem. Co. v Golden*, 985 F2d 51, *supra*). Following the fire, defendant hired R&R and Puopolo to determine the extent of damage to plaintiff's inventory. The parties determined that plaintiff's inventory was valued at $892,031.65 (Exhibit C to Hirschel Affirm.). Both companies found some damage to plaintiff's inventory. R&R recommended that plaintiff receive $40,577.97 to cover its losses (Exhibit I to Maguire Aff). Puopolo recommended that plaintiff receive an allowance of $41,892.47 for the inspection and re-bagging of its inventory (*id.*). However, plaintiff disputed R&R's and Puopolo's findings. Although defendant agreed to follow Puopolo's recommendations, it encouraged plaintiff to file a proof of loss statement for both the disputed and undisputed portions of its claim.

Plaintiff avers that it did not seek to recover the total value of the goods lost, but an amount based on the salvageable value of the items (Exhibit W to Maguire Affirm.). The record reveals that plaintiff hired Fischer, a New York state licensed public adjuster, to evaluate its losses following the fire (Exhibit N to Maguire Affirm.; Kurtz Aff. ¶¶ 3-10). Plaintiff also relied upon Bekas's knowledge and expertise to estimate the value of its merchandise following its exposure to smoke and soot (Bekas Aff. ¶¶ 10-14). In accordance with his expertise, Bekas submitted proof of loss statements in support of plaintiff's claim. Bekas avers that the proof of loss statements accounted for all of the inventory at the premises at the time of the loss (*id.*). The proof of loss statements included the total value of inventory that was hanging, wrapped and unwrapped, in addition to the bolts of fabric in cartons, sealed and unsealed (*id.*). The proof of loss in question represented a

salvage value of the effected garments and fabric in the amount of $261,070.96 and $124, 014.96 respectively (Bekas Aff. ¶¶ 7-12).

Bekas's appraisal was further supported by testimony in the record from Donald Weiner, an experienced clothing manufacturer, who attested that once fabric is exposed to smoke, there is no method by which the smell of smoke can be completely removed from the garment, and thus the value of the merchandise is greatly reduced (Exhibit F to Hirschel Affirm. ¶¶ 103-110). The record also includes letters from merchants that declined to purchase plaintiff's stock following its exposure to smoke and soot (Exhibit G to Hirschel Affirm.).

Defendant also argues that plaintiff's failure to provide it with the purchase orders and sales invoices, indicating the quantity, style number, and unit price of the items sold, constituted a material breach of the Policy's cooperation clause, thereby precluding recovery.

"An insurer who seeks to disclaim liability based on lack of cooperation of the insured faces a heavy burden" (*Hanover Ins. Co. v DeMato*, 143 AD2d 807, 808 [2d Dept 1988]). The insurer must demonstrate: (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction (*Baghaloo-White v Allstate Ins. Co.*, 270 AD2d 296 [2d Dept 2000]). In other words, defendant must demonstrate that plaintiff's behavior involved a pattern of non-cooperation for which no reasonable excuse was offered (*Argento v Aetna Cas. & Sur. Co.*, 184 AD2d 487, 488 [2d Dept 1992]).

Here, defendant has not demonstrated that the attitude of plaintiff, after its cooperation was sought, was one of willful and avowed obstruction (*Baghaloo-White v Allstate Ins. Co.*, 270 AD2d

296, *supra*). It is undisputed that plaintiff provided defendant with prompt notice of its loss. The record establishes that during the course of a two-year period, plaintiff submitted to an investigation by Kurtz, defendant's senior claims adjuster, on October 17, 2001, R&R on October 22, 2001, and Puopolo on November 28, 2001. Plaintiff also submitted to two examinations under oath at defendant's request, and on January 13, 2003, met with Ciccodicola, Richard Mastrocinque (an accountant from CGM), Alan Fourman, an outside accountant, and Manny Petrolakis, plaintiff's inventory control manager (Ciccodicola Aff. ¶¶ 3-10). During that meeting, Fourman provided defendant with access to plaintiff's records (*id.*, ¶ 4).

Subsequent to the January 13, 2003 meeting, Ciccodicola delivered a letter to plaintiff requesting copies of various documents which included plaintiff's records for sales and purchases. The record demonstrates that R&R compiled a report containing the details of plaintiff's merchandise, including the quantity, style number, and unit price of the items sold (Exhibit C to Hirschel Affirm.). Moreover, in June 2003, in response to defendant's demands, plaintiff supplied CGM with information regarding plaintiff's sales (Affidavit of Anthony Ciccidicola, sworn to on July 5, 2006 [Ciccidicola Aff. II], ¶¶ 7-10). In July 2003, plaintiff furnished CGM with an updated sales summary that included the dates of sales, as requested by defendant (*id.*). On September 18, 2003, plaintiff again allowed defendant to examine its inventory, sales/shipment data, and receipt records (*id.*).

However, defendant argues that, on September 18, 2003, CGM was not allowed to complete its investigation, and the records it was seeking have been subsequently lost. Plaintiff argues that it has proffered what it believed were reasonable substitutes for the documents in question, and has attempted to explain its position regarding those items that it could not, or would not, produce

(Bekas Aff. ¶¶ 4-12). Accordingly, there are triable issues of fact regarding the reasonableness of plaintiff's cooperation.

II. Leave to Amend

Defendant also seeks leave to amend its answer to include a counterclaim against plaintiff to recoup the $36,892.47 paid to plaintiff.

Pursuant to CPLR 3025 (b), leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise (*see Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Such leave should be denied in the event that the proposed amendment is palpably insufficient or patently devoid of merit (*Matter of Rouson*, 32 AD3d 956, 958 [2d Dept 2006]). Moreover, the Court of Appeals has held that permission to amend pleadings may be granted even in midtrial in the absence of operative prejudice involving "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991]). Thus, delay alone does not warrant a denial of a motion for leave to amend (*Schiavone v Victory Mem. Hosp.*, 300 AD2d 294, 296 [2d Dept 2002]).

Plaintiff has not demonstrated that it would be prejudiced by the proposed amendment nor that the proposed amendment is devoid of merit. A policy of insurance is vitiated where the insured has willfully placed a false and fraudulent value upon the articles which he did own (*Christophersen v Allstate Ins. Co.*, 34 AD3d 515, *supra*). Hence, defendant is entitled to amend its answer to assert a counterclaim against plaintiff to recover the disputed funds.

III. Sanctions

When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, a court should dismiss the pleadings of the party responsible for the spoliation (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]). Courts have broad discretion to impose sanctions when a party intentionally, contumaciously or in bad faith destroys evidence prior to an adversary's inspection (*Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11, 17 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Generally, dismissal is justified by the deliberate nature of the conduct that effectively impedes the ability of the deprived party to assert a claim or a defense (*id.* at 18). Recognizing that striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness (*Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]). The party seeking disclosure has the burden to show willfulness by the non-disclosing party, but the latter must demonstrate an excuse for its failure to disclose (*see Sage Realty Corp.*, 275 AD2d at 18).

Defendants argues that spoilation occurred when plaintiff destroyed its financial records that would have quantified plaintiff's loss, despite defendant's repeated request for said information in the processing of its claim. Plaintiff maintains that it was under the belief that defendant obtained all the records that it needed for its investigation as of September 2003. Plaintiff also maintains that due to defendant's failure to indemnify, it was compelled to cease operations at the end of 2003, and subsequently was forced to destroy its records due to the cost and inconvenience of maintaining space for those files (Bekas Aff. ¶¶ 18-20).

Here, defendant has not met its burden. The record reveals that defendant is in possessions of documents responding to defendant's discovery request, which include the style and invoice

numbers, quantity ordered and price of plaintiff's stock. Given plaintiff's explanation, defendant has failed to establish either that plaintiff intended to impede defendant, or that its conduct actually impeded defendant's ability to assert a claim or a defense in this matter.

Accordingly, it is

ORDERED that defendant's motion is granted only to the extent of granting it leave to amend its answer, 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 plaintiff shall serve a reply to the amended answer within 10 days from the date of said service.

Dated: 2/28/07
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK