30-40 E. Main St. Bayshore v Republic Franklin Ins. Co.

2007 NY Slip Op 30400(U)

March 12, 2007

Supreme Court, Suffolk County

Docket Number: 0028790

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 28790/2002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

30-40 EAST MAIN STREET BAYSHORE INC. and LOUIS J. MODICA d/b/a MODICA ORGANIZATION,

Plaintiffs,

-against-

REPUBLIC FRANKLIN INSURANCE CO. and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

ORIG. RETURN DATE: OCTOBER 4, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 003
MOTION: MOT D

ORIG. RETURN DATE: OCTOBER 4, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 004
CROSS-MOTION: MOT D

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Upon the following papers numbered 1 to 9 read on this motion FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Notice of Cross-Motion and supporting papers 4-6; Answering Affirmation and supporting papers 7, 8; Reply Memorandum of Law 9.

Defendants have filed the instant motion seeking an Order, pursuant to CPLR 3212 and Insurance Law § 3404, granting summary judgment dismissing the complaint herein on the grounds that plaintiffs breached the terms of the fire insurance policy issued by defendants to plaintiffs requiring the parties to resolve disputes on the values of the property or the amount of the loss by appraisal, or in the alternative, compelling plaintiffs to comply with the policy appraisal clause. Plaintiffs have filed a cross-motion seeking an Order, pursuant to CPLR 3212 and Insurance Law §§ 3404 and 3408, compelling defendants to

designate a disinterested appraiser; granting summary judgment for the value of the tenant's improvements and for lost rents to date, together with interest from July 2, 2002; and granting leave to increase the *ad damnum* clause of the complaint to $551,259.33. Defendants have filed an affirmation in opposition, and plaintiffs have filed a reply memorandum of law in response thereto. Accordingly, the Court has considered the foregoing submissions in rendering the within decision and Order.

The instant action is for property damage alleged by plaintiffs to have been sustained as a result of a fire at 30-40 East Main Street, Bay Shore, New York, on November 7, 2000. Apparently, the fire was caused by a combustible item placed too close to a burner within the tenant restaurant, "Tina's Pizza Restaurant." The action was commenced by summons and complaint dated November 5, 2002. Defendants joined issue by serving a Verified Answer on or about March 14, 2003. Defendant REPUBLIC FRANKLIN INSURANCE CO. ("REPUBLIC") conducts business in New York and is a subsidiary of defendant UTICA MUTUAL INSURANCE COMPANY ("UTICA"). Discovery proceeded thereafter, including a deposition of plaintiff, LOUIS J. MODICA, which began on November 18, 2005, and continued on March 22, 2006.

A policy of insurance was issued by defendants to plaintiffs, bearing policy number 2927046, in which defendants insured plaintiffs against loss from fire damage to the real property commonly known as 30-40 East Main Street, Bay Shore, New York, for the period December 15, 1999 through December 15, 2000. Plaintiffs allege in the complaint herein that on or about November 7, 2000, the insured property was destroyed by fire, covered under the terms and conditions of the policy of insurance. Plaintiffs further allege that they retained Certified General Holding Corporation ("CERTIFIED"), a public adjuster, to represent plaintiffs in connection with the submission of its claim for damages resulting from the fire. CERTIFIED then submitted to UTICA a proof of loss and an amended proof of loss resulting from the fire, from which UTICA assigned a claim number (141060).

UTICA investigated the fire damage, retained an appraiser, negotiated with CERTIFIED, and made an assessment of damages. UTICA then offered plaintiffs $214,742.67, representing the total amount of plaintiffs' damages. In July of 2001, plaintiffs accepted a net partial payment of $176,886.92, representing the damages sustained with respect to structural

damages to the premises only, after certain deductions. As such, defendants allege that the structural damages portion of plaintiffs' claim was no longer in dispute.

However, defendants allege that the parties disagreed as to the actual cash value or the amount of loss sustained by plaintiffs. Plaintiffs alleged that the structural damages totaled $303,309.90; the damages to permanent improvements affixed to the building totaled $150,383.34; and loss of rents totaled $83,264.36 (as of June 11, 2002). Defendants had estimated that plaintiffs were entitled to $214,742.67 for structural damages; $0.0 for damages to permanent improvements affixed to the building; and $41,886.00 for loss of rents. As such, on or about June 11, 2002, pursuant to Insurance Law § 3404 and the policy of insurance, plaintiffs made a written demand upon UTICA that within twenty (20) days, UTICA select a competent and disinterested appraiser to conduct an appraisal of the loss. Within said demand, plaintiffs named EDWARD GRECO as plaintiffs' competent and disinterested appraiser. In response, UTICA designated CHRISTOPHER MINOGUE, of M.J. MINOGUE ASSOCIATES, INC., as defendants' competent and disinterested appraiser. By letter dated October 17, 2002, plaintiffs objected to MR. MINOGUE as not being a "disinterested appraiser," pursuant to Insurance Law § 3404, alleging that his firm was involved in appraising the original fire damage in the instant matter, and was retained by defendants many times in the past to appraise fire damage in other matters. Defendants failed to select an alternate appraiser, and therefore, according to plaintiffs, are in breach. Accordingly, plaintiffs commenced the instant action seeking damages in the amount of $375,000 above and beyond the payments already made by defendants to plaintiffs.

Defendants' have submitted an affidavit of KATICA LEHMANN, the Property Claims Supervisor employed by UTICA, which details the offer made to plaintiffs of $214,742.67 for structural damage and $41,886.00 for loss of rents.[1] MS. LEHMANN alleges that defendants issued to plaintiffs a check totaling $176,886.92, as discussed above, and to CERTIFIED a check in the amount of $15,381.48, for a total payment of $193,950.38. The remaining difference,

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[1] According to MS. LEHMANN, the $41,886.00 offer for loss of rents represented a period of nine months: Six months for estimated repair time and an additional three month allowance for submission of all estimates and settlement negotiations.

according to MS. LEHMANN, was under the policy terms a "holdback" sum to be paid to plaintiffs if repairs were effectuated within 180 days of issuance of the check. MS. LEHMANN contends that plaintiffs were not paid the holdback portion of the offer as they failed to effectuate repairs in a timely fashion.

In the instant application, defendants allege that they are entitled to summary judgment dismissing the complaint herein on the grounds that plaintiffs have failed to proceed with the appraisal process. Defendants argue that plaintiffs have not submitted any proof that MR. MINOGUE is not a disinterested appraiser. Defendants further allege that due to plaintiffs' inaction, they have been irreparably prejudiced in their subrogation claim filed with the tenant's insurance company, which has already been paid in the amount of $235,816.00.

In opposition, plaintiffs have filed a cross-motion for partial summary judgment seeking an Order of this Court compelling defendants to designate a disinterested appraiser; granting partial summary judgment for the value of the tenants improvements and lost rentals to date, together with interest from July 2, 2002; and granting leave to increase the *ad damnum* clause of the complaint to $551,259.33. In support, plaintiffs claim that defendants' selection of an appraiser fails to meet the "disinterested" standard as set forth in Insurance Law § 3404 and the subject policy. As discussed above, plaintiffs argue that MR. MINOGUE's firm was involved in appraising the original fire damage at issue in the instant litigation, and was retained by defendants many times in the past to appraise fire damage. As such, plaintiffs request that this Court appoint a neutral disinterested appraiser.

In addition, plaintiffs allege that CERTIFIED now estimates the total amount of loss, with accrued interest, to be in the sum of $786,413.73, of which $551,259.33 is due and owing plaintiffs.[2] Plaintiffs' allege that defendants have failed to pay any sum for the value of the lost fixtures, as is required by the policy of insurance at issue. Further, with respect to lost rents, defendants have limited reimbursement to nine months following the fire, whereas plaintiffs claim they are

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[2] CERTIFIED estimates the structural loss to be $303,309.90 (based upon an estimate by R.G. ASSOCIATES), the loss with respect to the tenant's fixtures to be $111,217.77 (based upon an estimate from the tenant's insurance company), plaintiffs' lost rents to date to be $220,815.00, and accrued interest to date to be $151,071.06, for a total of $786,413.73, minus previous payments to plaintiffs totaling $235,154.40.

entitled to lost rents from the date of the fire to the present (plaintiffs' cross-motion is dated September 21, 2006), for a total of $220,815.00. Plaintiffs request a denial of defendants' motion as there exists material issues of fact and law regarding the amount of structural damage to the property, the amount of lost rents due plaintiffs, and whether defendants are liable to plaintiffs for the improvements made by the tenant in the form of fixtures which were destroyed by the fire.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). In the case at bar, the Court finds that factual issues exist that preclude the granting of summary judgment to either party. Accordingly, it is

ORDERED that this motion by defendants for an Order, pursuant to CPLR 3212 and Insurance Law § 3404, granting summary judgment dismissing the complaint herein on the grounds that plaintiffs breached the terms of the fire insurance policy issued by defendants to plaintiffs requiring the parties to resolve disputes on the values of the property or the amount of the loss by appraisal, or in the alternative, compelling plaintiffs to comply with the policy appraisal clause, is hereby **GRANTED** to the extent that plaintiffs are directed to proceed with the

appraisal process as provided by the subject policy of insurance and Insurance Law § 3404, and as hereinafter provided. It is further,

ORDERED that the branch of plaintiffs' cross-motion seeking an Order compelling defendants to designate a disinterested appraiser, is hereby **GRANTED**. Defendants have acknowledged, in the affidavit of KATICA LEHMANN, that defendants hired insurance loss appraiser and fire damage surveyor, M.J. MINOGUE ASSOCIATES, INC., to provide an estimate for repair and replacement of the subject property. MS. LEHMANN avers that M.J. MINOGUE conducted a field and site inspection, and submitted an estimate and report to UTICA on or about March 7, 2001. Further, M.J. MINOGUE's estimate, dated February 28, 2001, was annexed to defendants' moving papers as Exhibit I. As such, by definition, the M.J. MINOGUE firm is not a "disinterested" appraiser, having performed the initial inspection and having submitted an estimate and report to defendants at their behest. Accordingly, the firm of M.J. MINOGUE ASSOCIATES, INC. is hereby disqualified from acting as an appraiser on behalf of the defendants herein during the appraisal process as provided by the subject policy of insurance and Insurance Law § 3404. Defendants shall select a "competent and disinterested" appraiser within twenty (20) days of service of the within decision and Order, with notice of entry, upon counsel for defendants. That appraiser, along with plaintiffs' selected appraiser, EDWARD GRECO , shall then select a "competent and disinterested" umpire, who shall resolve any differences between the selected appraisers, utilizing the procedure set forth in Insurance Law § 3404. It is further

ORDERED that the branch of the cross-motion by plaintiffs, for an Order granting summary judgment for the value of the tenant's improvements in the form of fixtures, and the lost rents to date, is hereby **DENIED**. The Court finds that questions of fact exist as to the value of the tenant's improvements which are alleged to be fixtures, and whether plaintiffs are entitled to any reimbursement for such fixtures. To meet the common law definition of fixture, the personalty in question must: (1) be actually annexed to real property or something appurtenant thereto; (2) be applied to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) be intended by the parties as a permanent accession to the freehold (*Metromedia, Inc. v Tax Com.*, 60 NY2d 85 [1983]; *Mastrangelo v Manning*, 17 AD3d 326 [2005]; *Long Island Lighting Co. v Assessor for Town of Brookhaven*, 202 AD2d 32 [1994]). On this record, the Court cannot determine whether plaintiffs are entitled to any

reimbursement for the tenant's improvements, claimed to be in the form of fixtures, as plaintiffs neither itemized nor described with particularity the items claimed to be fixtures. As such, the Court cannot make a determination as to whether these items meet the common law definition of fixtures.

In addition, the Court finds that questions of fact exist as to the amount of lost rents due plaintiffs. Each party represents that the other is responsible for the prolonged period of restoration following the fire. Under section A.5.f of the subject policy, plaintiffs may be reimbursed for actual loss of business income during the "period of restoration," which, pursuant to section G.6, begins on the date of loss and ends on the earlier of when business is resumed or "the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." Defendants submit that plaintiffs are responsible for the delay in the restoration period by failing to timely repair the premises, while plaintiffs submit that defendants are responsible for the delay by failing to sufficiently reimburse plaintiffs the amounts due under the claim. This period of restoration must be determined before the amount of lost rents due plaintiffs may be calculated pursuant to the subject policy. It is further

ORDERED that the branch of the cross-motion by plaintiffs for leave to increase the *ad damnum* clause of the complaint to $551,259.33, is hereby **<u>DENIED</u>** without prejudice to renew after the completion of the appraisal process as set forth herein.

The foregoing constitutes the decision and Order of the Court.

Dated: March 12, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court