

Biton v State Farm Ins. Co.

2007 NY Slip Op 32399(U)

July 24, 2007

Supreme Court, New York County

Docket Number: 0601732/2002

Judge: Walter Tolub

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **WALTER B. TOLUB** Justice

PART 15

Index Number : 601732/2002
BITON, CRYSTAL
vs.
STATE FARM INSURANCE
SEQUENCE NUMBER : 013
PRECLUDE

INDEX NO. _____
MOTION DATE 3/29/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the accompanying memoranda of decision.*

FILED
AUG 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/24/07 _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

WALTER B. TOLUB

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
CRYSTAL BITON and DANIELLE BITON

Plaintiffs,

-against-

STATE FARM INSURANCE COMPANY, NEW YORK
CITY TRANSIT AUTHORITY, DANNA EQUIPMENT
CORP., STONEWALL CONTRACTING INC., and
NINE NORTH MOORE STREET CONDOMINIUM,

Defendants.

-----x

WALTER B. TOLUB, J.:

Index No. 601732/02
Mtn Seq. 013

FILED

AUG 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

By this motion, defendants New York City Transit Authority ("NYCTA") and Stonewall Contracting Inc. ("Stonewall") move for an order precluding plaintiffs from offering any testimony or evidence relative to their claims for property damage on the grounds that plaintiffs willingly and knowingly destroyed evidence regarding their damages. Defendant Nine North Moore Street Condominium ("Nine North Moore") cross-moves for an order (1) restoring defendant Nine North Moore's motion *in limine* to exclude evidence at trial pertaining to alleged "toxic mold" conditions; (2) restoring co-defendants NYCTA and Stonewall's motion *in limine* regarding plaintiffs Spoliation of Crucial Evidence; and (3) compelling plaintiff to provide updated HIPPA compliant medical, collateral source, and employment authorizations for all former treatment providers and new medical providers seen since 2005.

On February 5, 2002, plaintiffs claim that they sustained in excess of \$383,473 in property damage when water entered into the basement level of their two-level condominium. Plaintiffs claim that the bulk of the damage sustained took the form of water damage to thousands of items of new clothing which had been purchased by plaintiffs with the intent of opening a clothing store.

At some point after February 5, 2002, plaintiffs filed an insurance claim with defendant State Farm Insurance company ("State Farm") and retained Biagio Tripodi to adjust their claim in exchange for somewhere between 10 to 12% of the total recovery in this action (See, Notice of Motion, p. 7; Notice of Motion, Deposition of Biagio Tripodi, Exhibit E, p. 9). Mr. Tripodi then notified defendant State Farm of his retention by plaintiffs on February 27, 2002 (See, Notice of Motion, Exhibit B, Motion in Limine of Defendants NYCTA and Stonewall, Exhibit B)

It appears from the limited portions of the deposition testimony provided by the parties that Mr. Tripodi did not view the contents or condition of plaintiffs' basement. Rather, he hired Thomas Andropoli, to actually perform the task of inventorying the contents of plaintiffs' basement (Notice of Motion, Deposition of Biagio Tripodi, Exhibit E, p. 53-54). Although Mr. Andropoli spent four days inventorying the contents of plaintiffs' basement, the inventory report he produced only

records items in generic terms and does not contain any information identifying the makers of the alleged destroyed clothing items (Notice of Motion, Exhibit C). Mr. Andropoli further admitted at deposition that 50% of the values assigned to the destroyed property were given to him by plaintiff Crystal Biton (Notice of Motion, Exhibit E, Transcript of Thomas Andropoli).¹ No photographs were taken of any of the actual contents of the basement. No receipts, price tags, or labels from the garments were retained. All of the items were removed from the apartment and thrown away.

The court notes that there is a dispute as to who was responsible for removing the damaged clothing items from plaintiffs' apartment. Ms. Biton, in her deposition, testified that the clothing was thrown away by the "two gentlemen" who were counting the items (Notice of Motion, Exhibit E, Deposition of

¹ At deposition, Mr. Andropoli testified as follows:

Q: What percentage of the items had the actual tags still on them, and I'm talking about the price tags?

A: I'm not exactly sure. Probably at least 50 percent, but the ones that weren't there were probably due to the condition down there, moving stuff around (Andropoli Deposition, p. 23, ln 2-8).

Q: Did you mark down anywhere the names of the stores?

A: That is the job of the adjuster.

Q: You didn't do it, though?

A: No. I was hired to take an inventory, not to adjust the loss (Andropoli Deposition, p. 23, ln 16-21)

Crystal Biton p. 803).² Mr. Andropoli testified that he told plaintiffs to retain and photograph the damaged clothing items (Andropoli Transcript p. 28-29).

On May 8, 2002 plaintiffs commenced this action asserting a total of nine causes of action against the defendants including claims for property damage and for injuries predicated upon exposure to mold (see, Notice of Cross-Motion of defendant Nine North Moore, Exhibit A). In April, 2005, while the aforementioned motions *in limine* were pending, this action was marked off the calendar. The action was restored at the end of the 2006 calendar year, and the instant motions ensued.

Discussion

As a preliminary matter, the portion of cross-motion made by defendant Nine North Moore seeking updated HIPPA compliant medical, collateral source, and employment authorizations for all former treatment providers, new medical providers, and employers from plaintiffs since 2005 is granted. All of the defendants in this action are entitled to this information, and plaintiffs are therefore directed to produce this information within 30 days of service of a copy of this order with notice of entry.

² Again, this court notes that only portions of the depositions were provided for review with the papers. Presumably, the reference to the "two gentlemen" is to Mr. Biagio and Mr. Andropoli, but without the entire deposition transcript, this court cannot identify with certainty to whom these comments referred to.

The balance of the cross-motion made by defendant Nine North More which seeks restoration of the motions in limine made by made by Nine North Moore and co-defendants NYCTA and Stonewall is also granted, and further discussed and resolved as follows.

Spoliation of Evidence

At the core of both the instant motion and the *motion in limine* brought by defendants NYCTA and Stonewall is a plea for this court to, at the very minimum, grant an order of preclusion preventing plaintiffs from offering testimony or evidence relative to their claims for property damage at trial (see Notice of Motion, Motion in Limine of defendants NYCTA and Stonewall). Counsel for plaintiffs, in opposition to the motions, asserts that such a sanction is unwarranted as plaintiffs had no knowledge that they were actively removing evidence of their claims, and further argues that defendants cannot demonstrate that they are prejudiced by the disposal of the damaged items. Under the facts and circumstances of this case, this argument, is at best, disingenuous.

Plaintiffs, immediately after they claim to have sustained water damage, hired an loss adjuster. However, despite having filed a previous claim for property loss in their basement,³ plaintiffs failed to document any of the claimed damage to their

³This prior damage, for which a claim was paid, was also attributed to basement water damage.

personal property and to the apartment itself with anything more than a general description. Neither plaintiffs nor their hired loss adjuster took any photographs of the premises or the allegedly damaged items. Plaintiffs provided no receipts for the clothing which they claimed was for resale, and failed to preserve the clothing tags from the damaged items or the actual damaged items. Furthermore, despite having placed defendant State Farm on almost immediate notice of their property loss, there was never an opportunity to inspect the sheetrock in plaintiffs' basement. Plaintiff Crystal Biton arranged to have all of the sheetrock replaced for \$50,000 in cash, without noticing defendants, and apparently, without keeping any receipts or records of who actually completed this work (Motion in Limine, Exhibit E, Deposition of Crystal Biton, p. 90-91).⁴

⁴Ms. Biton's deposition included the following testimony:

Q: Are you making any claims in this lawsuit for that damage [to the basement]?

A: Yes, Sir.

Q: How much are you claiming for that? [...]

A: About - It's about 45 to 50, so it was fixing the walls. It was about 50,000. [...]

Q: Who made the repairs?

A: A couple of guys that I hired.

Q: Who paid them?

A: I paid them.

Q: How did you pay them?

A: Cash.

Q: You mean U.S. Currency?

A: Yes. [...]

Q: Can you tell me the name of the contractor who did the repair work?

A: It was Robert. It was Juan. It was Luis.

It is well established that spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in a dispute before an adversary has an opportunity to inspect them (Kirkland v. New York City Housing Authority, 236 AD2d 170, 173 [1st Dept. 1997]). Here, despite the lack of complete deposition transcripts, it is apparent to this court that plaintiffs were advised, on at least one occasion, to keep the evidence of their damaged belongings and premises in order to better support their claims. They chose not to follow this advice and the result, is that a complete evaluation into plaintiffs' damage claims with respect to the extent of the water damage is now impossible. The unavailability of this evidence, contrary to any of the arguments and excuses offered by plaintiffs' counsel, is highly prejudicial to defendants (see, Standard Fire Insurance Company v. Federal Pacific Electric Company, 14 AD3d 213 [1st Dept 2004]). As such, the portions of plaintiffs' complaint which asserts causes of action predicated on water damage to personal property or to the basement level of apartment itself, are dismissed and plaintiffs are precluded from introducing evidence of such damage to these items at trial.

Q: Did they work for a company?

A: Yes. [...] (Transcript of Crystal Biton, p. 90-91).

Toxic Mold Claim

Turning next to the motion in limine submitted by defendant Nine North Moore, this court considers whether defendants are entitled to an order precluding the expert opinions offered on behalf of Crystal Biton by Dr. Ira Feingold with respect to the exposure of mycotoxins produced by mold in plaintiff's apartment and the ailments caused by Ms. Biton's exposure to such mycotoxins. Plaintiffs claim, as part of the instant complaint, that the water damage in their apartment caused the growth of toxic mold which caused, contributed and/or exacerbated plaintiff's claimed injuries (See Complaint and Bill of Particulars).

The court has reviewed the papers submitted by the parties on these issues, and, after much consideration, has determined that a Frye hearing is warranted (Frye v. United States, 293 F. 1013 [CADC 1923]). Accordingly, it is

ORDERED that the motion made by defendants New York City Transit Authority and Stonewall Contracting Inc. for an order precluding plaintiffs from offering any testimony or evidence relative to their claims for property damage on the grounds that plaintiffs willingly and knowingly destroyed evidence regarding their damages is granted in accordance with this decision; and it is further

ORDERED that the portion of the cross motion of Defendant

Nine North Moore Street Condominium seeking restoration of the *in limine* motion made by defendants New York City Transit Authority and Stonewall Contracting Inc. regarding plaintiffs Spoliation of Crucial Evidence, is granted, and upon restoration, is decided in accordance with the previous decretal paragraph; and it is further

ORDERED that the portion of the cross motion of Defendant Nine North Moore Street Condominium seeking restoration of their *in limine* motion to exclude evidence at trial pertaining to alleged "toxic mold" conditions is held in abeyance pending a Frye hearing; and it is further

ORDERED that the portion of the cross motion of Defendant Nine North Moore Street Condominium seeking an order compelling plaintiffs to provide updated HIPPA compliant medical, collateral source, and employment authorizations for all former treatment providers and new medical providers seen since 2005 is granted; and it is further


ORDERED that plaintiffs shall provided updated HIPPA compliant medical, collateral source, and employment authorizations for all former treatment providers and new medical providers seen since 2005 within thirty days of service of a copy of this order with notice of entry.

Counsel for the parties are directed to appear in IA Part 15, Room 335, 60 Centre Street, New York, New York on August 20,

2007 at 9:30 a.m. for the purpose of setting a date for a Frye hearing. At this date, in addition to setting the Frye hearing, the court will additionally set a conference date so as to ascertain the status of the remaining discovery in this matter, and to assign a final date for the filing of the Note of Issue in this matter.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/24/07


HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 03 2007
NEW YORK
COUNTY CLERKS OFFICE

NEW YORK
COUNTY CLERKS OFFICE