

Savarese v Allstate Indem. Co.

2007 NY Slip Op 32856(U)

September 10, 2007

Supreme Court, Nassau County

Docket Number: 5562-06/

Judge: William R. Lamarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 19**

**Present: HON. WILLIAM R. LAMARCA
Justice**

Scan

**FERDINADO SAVARESE and
BARBARA SAVARESE,**

**Motion Sequence # 001
Submitted June 8, 2007**

Plaintiff,

-against-

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ALLSTATE INDEMNITY COMPANY,

Defendant.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation and Affidavit in Opposition.....	2
Affirmation in Reply.....	3

Plaintiffs, FERDINANDO SAVARESE and BARBARA SAVARESE, move for an order, pursuant to CPLR §3212, granting them summary judgment against defendant, ALLSTATE INDEMNITY COMPANY (hereinafter referred to as "ALLSTATE"), on the issue of liability and scheduling an inquest to determine damages. ALLSTATE opposes the motion, which is determined as follows:

In this declaratory judgment action, counsel for plaintiffs relates that, on December 1, 2004, the SAVARESE residence, located at 1 Dee Court, Plainview, New York, as well as the surrounding landscaping was damaged by fire. It appears that an ALLSTATE policy

of insurance was in effect on the date of the fire and that ALLSTATE indemnified plaintiffs for the damage sustained to the structure and contents of the subject premises, but denied coverage for the landscaping.

The policy of insurance issued by ALLSTATE provides as follows with respect to landscaping:

Trees, Shrubs, Plants and Lawns

We will pay up to an additional 5% of the limit of liability shown on the Policy Declarations under Coverage A–Dwelling Protection for loss to trees, shrubs, plants and lawns at the address of the residence premises. We will not pay more than \$500 for any one tree, shrub or plant including expenses incurred for removing debris. This coverage applies only to direct physical loss caused by fire or lightening, explosion, riot or civil commotion, aircraft, vehicles not owned by an occupant of the residence premises, vandalism or malicious mischief, theft or collapse of a building structure or any part of a building structure.

It is plaintiffs' position that they notified ALLSTATE of their claim for fire damage on the day of the fire and that the ALLSTATE assigned adjuster, Christopher Ryan (hereinafter referred to as "Ryan"), visited the subject premises twice within the week after the fire. Plaintiffs claim that during those inspections, Ryan had an opportunity to inspect the damage to the landscaping at the home, which included the trees in the rear of the yard, and was able to take photographs, although they acknowledge that Ryan was assigned to adjust damages to the "structure only". Plaintiffs' claim that Ryan generated an extensive report as to the damages at the premises but made no mention of the condition of the landscaping around the premises.

Thereafter, it appears that plaintiffs hired a public adjuster to assist with the claims process and, on December 21, 2004, twenty (20) days after the fire, said adjuster wrote

to ALLSTATE with a repair estimate for the residence and advised that an estimate for the landscaping would follow. Plaintiffs' claim that, at least as early as December 21, 2004, ALLSTATE was aware that plaintiffs had a claim for damage to landscaping and that an estimate of damages would be forthcoming. Plaintiffs point out that Ryan was at the subject premises in February, in response to the December 21, 2004 correspondence from the adjuster, and again in March or April for the purpose of conducting a re-inspection, but again failed to take any notes with respect to potential damages sustained to the landscaping. It is plaintiffs' position that the landscaping was available and accessible for ALLSTATE to visit and inspect from December 1, 2004 until about July 2005, when the general contractor hired to rebuild the home had it razed to the foundation and removed all of the landscaping surrounding the house and the lots' perimeter.

In September 2005, Ryan visited the residence once again for the purpose of inspecting the landscaping damage, to find that plaintiff had removed the landscaping to conduct the necessary reconstruction. Nonetheless, plaintiffs claim that Ryan did not deny the claim but offered to reimburse plaintiffs in the sum of \$2,179.02. Plaintiff, FERDINANDO SAVARESE, states that replacement of the landscaping, that included sod, plants, bushes, trees and the sprinkler system, occurred in or about February/March 2006 at a cost of approximately \$17,000. Counsel for plaintiffs claims that, only after receiving an invoice for the replacement of the damaged landscaping (a prior bid in the sum of approximately \$25,000.00) did ALLSTATE deny the claim. By letter, dated January 2, 2006, ALLSTATE denied the claim, in essence because plaintiffs failed to show the damaged property as often as reasonably required, and because the coverage for Trees, Shrubs, Plants and Lawns applied only to "DIRECT physical loss caused by the fire".

Counsel urges that ALLSTATE should be estopped from disclaiming because plaintiffs provided reasonable access to the landscaping during a six (6) month period of time and because damage to the landscaping during the reconstruction are considered an "immediate consequence" and reasonable result of the fire, and therefore should be covered under the policy.

In opposition to the motion, counsel for ALLSTATE contends that its adjuster, Ryan, issued a partial denial of the plaintiffs' claims for damage to the landscaping and the sprinkler system based on the fact that most of the landscaping and underground sprinkler system were not damaged at all by the fire and its effects and based upon plaintiffs removal of the landscaping and entire sprinkler system without informing ALLSTATE. Pictures taken within days of the fire, annexed to the opposition papers as Exhibit "A", depict the residence, with windows boarded, but with the brick exterior of the home intact, and the shrubs, lawn and trees for the most part undisturbed. It is ALLSTATE's position that the alleged damages to the landscaping and the underground sprinkler system were not caused directly by the fire and are, therefore, not covered. An Affidavit of adjuster Ryan states that after his inspection, within two (2) weeks of the fire, he observed some damage to the landscaping as a result of the fire, but no damage to the sprinkler system. He states that, in August 2005, he received plaintiffs' estimate in support of their claim for replacement of the entire landscaping and sprinkler system at the residence in the sum of \$25,400.00 and, based upon plaintiffs removal of the said items, he was unable to verify the damages. He states that, based upon his prior inspections, he made an allowance of \$2,179.02 to compensate plaintiffs for replacement of the portions damaged directly by the fire, but said offer of settlement was rejected by plaintiffs. Counsel for ALLSTATE urge

that the motion for summary judgment be denied as triable issues of fact remain which preclude the granting of summary judgment.

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come

forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs have not demonstrated their entitlement to judgment as a matter of law. Questions of fact remain as to whether plaintiffs claim for replacement of the entire landscaping and sprinkler system at the residence are covered by the policy which requires that damage be a "direct physical loss caused by the fire". Based upon the photographs and affidavits submitted in opposition to the motion, ALLSTATE has demonstrated triable issues of fact that require a trial. Whether plaintiffs' removal of all of the landscaping and the entire sprinkler system from the residence as part of their reconstruction plan, with out notice to ALLSTATE, was a "direct" result of the fire and was reasonable or in violation of the ALLSTATE policy, is a question of fact for the jury. Based on the foregoing, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

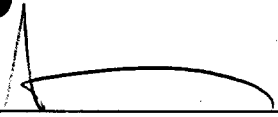
This constitutes the decision and order of the Court.

Dated: September 10, 2007

ENTERED

SEP 13 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**


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