

Duran v Turgeman

2007 NY Slip Op 32978(U)

September 21, 2007

Supreme Court, Richmond County

Docket Number: 0013764/2005

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

_____ X
GUILLERMO DURAN and MARTIN ENRIQUEZ,

Plaintiff(s),

-against-

DAVID TURGEMAN, VANBRO CORPORATION
and "JOHN DOE",

Defendant(s),

_____ X
DAVID TURGEMAN,

Third-Party Plaintiff(s),

-against-

STATE FARM INSURANCE COMPANY, ABLE
PLUMBING CONSTRUCTION CORP. and
GIOVANNI COLATTA,

Third-Party Defendant(s),

_____ X
VANBRO CORPORATION,

Second Third-Party Plaintiff(s),

-against-

TGC CONSTRUCTION CORPORATION, ABLE
PLUMBING CONSTRUCTION CORP., and GIOVANNI
COLATTA,

Second Third-Party Defendant(s),

_____ X
The following papers numbered 1 to 5 were used on this motion, this 11th day of September, 2007.

Notice of Motion [defendant Turgeman].....	1
Notice of Motion [third-party defendant State Farm].....	2
Affirmation in Opposition [defendant Vanbro].....	3
Affirmation in Opposition [plaintiff].....	4
Reply [defendant Turgeman]	5

On May 23, 2002, a cement truck crashed into the building located at 163-165

DCM Part 5

Present:

HON. JUDITH N. MCMAHON

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Brighton Avenue, Staten Island, New York [subject premises], and caused it to collapse. The plaintiffs, who were in the subject premises at the time of the collapse, sustained injuries as a result. They subsequently commenced this action in November, 2002, against defendant David Turgeman [Turgeman], as the alleged owner of the property, and defendant Vanbro Corporation [Vanbro], as the owner of the cement truck. On or about January 16, 2004, defendant Turgeman commenced a third party action against State Farm Insurance Company [State Farm], as his rental insurance carrier; Able Plumbing Construction Corporation [Able], as former employer of the plaintiffs; and Giovanni Colatta [Colatta], as an additional alleged owner of the subject premises. Thereafter, Vanbro commenced a second third-party action against Able, Colotta and TGC Construction Corporation [TGC], as the company contracted to build the frame of the building. In May 2006, Vanbro also commenced a third third-party action against JAC Construction Corporation but to date JAC has failed to appear.

After issue was joined and discovery was complete in all of the aforementioned actions, the defendant/third party plaintiff Turgeman and third-party defendant State Farm each separately moved for summary judgment dismissing the respective complaints against them.

Third Party Defendant State Farm's Motion

Generally, an insured's failure to give timely notice of an accident to their insurance agency relieves the agency from acting (Matter of New York Central Mutual Fire Ins. Co. v. Ward, 38 AD3d 898, 900 [2d Dept 2007]). The requirement that timely notice is provided is a condition precedent and failure to do so vitiates the contract (C.C.R. Realty of Dutchess, Inc. v. N.Y. Cen. Mutual Fire Ins. Co., 1 AD3d 304, 305 [2d Dept 2003]).

However, if the insured is able to establish a reasonable belief of non liability, the untimely notice is excused (id.).

Here, third-party defendant State Farm has met its burden establishing that Turgeman failed to give timely notice under the insurance contract. It is undisputed that the accident occurred in May, 2002. Turgeman testified that he learned of the accident in June, 2002. State Farm was first notified of this incident, by way of letter from Turgeman's attorney, in May 2003. In opposition, Turgeman contends he had a reasonable belief of non liability because, at the time of the accident, the subject premises was in contract to be sold. However, notwithstanding, the sale had never been consummated and he thereafter sold the property in April 2005. Clearly, Turgeman was aware that there was a reasonable possibility that he would be declared owner, invoking the State Farm policy, considering the title of the property remained in his name (*see C.C.R. Realty of Dutchess, Inc. v. N.Y. Cen. Mutual Fire Ins. Co.*, 1 AD3d 304 at 305 [finding that if there exists a reasonable probability that the named policy is involved, delay in notification cancels the contract]).

As a result, Turgeman's delay of eleven (11) months in notifying State Farm is unreasonable and breaches the condition precedent in the insurance contract, vitiating the duty of State Farm to indemnify him (*see id.* [finding a six month delay unreasonable]; Am. Home Assurance Co. v. State Farm Mut. Auto Ins. Co., 277 AD2d 409, 410 [2d Dept 2000][finding a seven month delay in notification unreasonable]. In opposition, Turgeman fails to present evidence sufficient to warrant an eleven (11) month delay. Therefore, summary judgment is granted to third-party defendant State Farm.

Defendant/Third Party Plaintiff David Turgeman's Motion

Defendant/third-party plaintiff Turgeman has failed to establish prima facie entitlement to summary judgment. While it is undisputed that Turgeman did enter into a contract of sale with third-party defendant Colatta in April 23, 2002, to sell the subject premises, the real estate closing never took place. As General Obligations Law § 5-1311 provides, unless the contract states otherwise, any loss prior to transfer of title is the sellers obligation. Here, the contract between Turgeman and Colatta did not provide otherwise.

Accordingly, it is,

ORDERED that the defendant/third-party plaintiff David Turgeman's motion for summary judgment is denied, and it is further

ORDERED that the third-party defendant State Farm's motion for summary judgment is granted.

THIS IS THE DECISION AND ORDER OF THIS COURT.

Dated: Sept. 21, 2007

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court