

Wells Fargo Equip. Fin., Inc. v Camden Fire Ins. Assn.
2008 NY Slip Op 30743(U)
March 6, 2008
Supreme Court, Nassau County
Docket Number: 6327-05/
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

WELLS FARGO EQUIPMENT FINANCE, INC.,

Plaintiff,

- against -

CAMDEN FIRE INSURANCE ASSOCIATION,
d/b/a CAMDEN FIRE INSURANCE COMPANY
and ONEBEACON INSURANCE GROUP,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 6327/05

Motion Sequence No. 006 & 007

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for summary judgment. The defendants cross move for summary judgment, and oppose the plaintiff's motion. The plaintiff opposes the defense cross motion. In the underlying action, the plaintiff seeks to recover damages allegedly resulting from a breach of contract and negligence in payment on an insurance policy regarding equipment damaged by fire on or about July 1, 2002.

The Loan Adjuster for the Plaintiff states, in detail, in a supporting affirmation dated June 27, 2006, the circumstances of the lease dated on or about March 31, 2000, between the plaintiff and a wood products and pallet manufacturer, a subsequent insurance policy dated

on or about July 11, 2001, regarding specific equipment naming the plaintiff as an additional insured for liability coverage, and as a loss payee for property damage coverage, the fire damage during the effective policy date from August 15, 2001 through August 15, 2002, a claim filed by the manufacturer, and the repairs and costs of the equipment. The Loan Adjuster asserts the defendants improperly issued a \$45,295.08 check dated on or about August 29, 2002, as part of a settlement. The Loan Adjuster avers, as a representative of the loss payee, the plaintiff is the party to whom insurance proceeds are paid for property damage. The Loan Adjuster points out on September 5, 2003, the manufacturer filed a bankruptcy protection petition, and its assets were subsequently liquidated, and the bankruptcy case was converted from Chapter 11 to Chapter 7 of the United States Code. The Loan Adjuster notes on June 29, 2004, the defendants issued a second check for \$112,705.92 to the insured and the plaintiff, as loss payee, which was purportedly issued in full settlement of the claim.

The Loan Adjuster claims there is no dispute the defendants had notice that the plaintiff had an interest in the equipment, and the plaintiff was listed as a loss payee on the insurance policy. The Loan Adjuster contends there is no dispute the defendants breached the policy terms, so the plaintiff is entitled to summary judgment on the first cause of action. The Loan Adjuster asserts the plaintiff is entitled to summary judgment on the second cause of action because the defendants also breached the insurance policy by failing to pay the plaintiff the full \$190,000.00 replacement value of the equipment as required in the policy, so the plaintiff is entitled to \$76,295.48. The Loan Adjuster states, being informed by the plaintiff's counsel that the affirmative defenses are without merit, merely vague and

conclusory statements which the defendants assert in an attempt to put forth a defense in the underlying action.

The defense attorney states, in a supporting affirmation dated November 7, 2007, the defendants are entitled to summary judgment, as a matter of law because the plaintiff's action is barred by the limitation of action provision contained in the insurance policy. The defense attorney contends the plaintiff was aware of the loss as early as August 2002, and knew of the issuance by the defendants of the \$45,000.00 advanced payment to the manufacturer. The defense attorney points out the plaintiff filed this complaint on or about April 22, 2005, fully two and one half years after it had knowledge of the issuance of the \$45,000.00 check by the defendants to the insured. The defense attorney avers the plaintiffs failed to file a complaint within the two year limitation of action provision contained in the insurance policy, so the plaintiff is barred from bringing the underlying action. The defense attorney notes, in the event the defense cross motion is denied, the plaintiff's request for full replacement cost with regard to the damage to the equipment should be denied as the policy only provides for the actual cash value of the loss, so the only damages, which could possibly be accessible to the defendants with respect to this loss, is the \$45,295.08 upon which the plaintiff was not made an additional payee. The defense attorney opines the plaintiff is seeking double recovery where it was paid \$112,705.92 as against \$190,000.00, adding together the first check and the salvage value is the \$76,295.48, the plaintiff seeks. The defense attorney states the plaintiff's request that the affirmative defenses be dismissed is without merit. The defense attorney contends this proposition is supported by the documentary evidence submitted with the defense cross motion, the plaintiff's failure to perform all of the conditions precedent

required by the contract between the parties, the waiver of the plaintiff's right to pursue the claims, and the plaintiff's inability to maintain this cause of action based on the limitation of action provision in the policy.

The plaintiff's attorney states, in an affirmation dated November 14, 2007, in further support for the plaintiff's summary judgment motion, and in opposition to the defense cross motion for summary judgment, the detailed sworn statement dated December 27, 2006, by the plaintiff's Loan Adjuster is incorporated by reference. The plaintiff's attorney states the limitations provision does not apply by its own terms to causes of action based on the defendants' breach of a settlement agreement relating to a settled claim. The plaintiff's attorney points out the underlying action is not a dispute regarding a claim denied by the defendants under a coverage part of the policy, as argued by the defense, rather the plaintiff's claims relate to the breach of a settlement agreement dated June 3, 2003, and for negligence and breach of contract claims relating to the defendants' failure to properly draft the first check to require the plaintiff's endorsement as loss payee. The plaintiff's attorney asserts, even if the limitations period does apply, the complaint was timely filed. The plaintiff's attorney avers the issue is not whether the plaintiff had knowledge of the existence of the first check on November 20, 2007, rather the issue is when the plaintiff first had knowledge that the first check had not been properly drafted to require the plaintiff's endorsement. The defense attorney alleges, although the plaintiff may have been aware of the existence of the first check as early as November 20, 2007, it was not until June 19, 2003, the plaintiff learned there could potentially be a problem regarding the first check was drafted. The defense attorney states the earliest the plaintiff could have acquired knowledge of the loss in the form

of an incorrectly endorsed first check was June 19, 2003, which is also the day the defendants first made the plaintiff aware of the settlement agreement, based upon exchanges between the plaintiff's Loan Adjuster and the defendants' Claims Adjuster, so the limitation period would, therefore expire on or about June 19, 2005, and the complaint was recorded by the Nassau County Clerk's Office on April 22, 2005. The plaintiff's attorney argues, should the Court find the limitations period expired sometime before the complaint was filed, the limitations period should be equitably tolled. The plaintiff's attorney asserts the defense misconstrues the endorsement on the first check from the plaintiff, and the defendants' own documents demonstrate an untruth to the plaintiff, and caused the plaintiff to believe the defendants had no idea what happened to the first check when the defendants' internal records show the defendants knew about their mistake as early as April 2003. The plaintiff's attorney states the defendants intentionally mislead the plaintiff in an attempt to hinder and delay the plaintiff's ability to assert a cause of action against the defendants for failing to properly endorse the first check, and to make full payment to the plaintiff of the settlement amount. The plaintiff's attorney insists the defendants offer no explanation why they advised the plaintiff they were unsure who was named on the first check, when they knew they mistakenly drafted the first check, so they should be equitably estopped from asserting a shortened limitations provision.

The defense attorney reiterates, in a reply affirmation dated November 20, 2007, in support of the defendant's motion for summary judgment, and reply to the plaintiff's opposition to the defense cross motion, the contentions with regard to the limitations provision, and argues, in detail, with respect to those assertions. The defense attorney avers

the plaintiff is not entitled to a tolling of the limitation of action provision since there is no reasonable reliance shown.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to the motion and the cross motion. Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not

genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). This Court finds the parties have shown there are facts sufficient to require a trial of any issue of fact.

Accordingly, the motion and the cross motion are denied.

So ordered.

Dated: March 6, 2008

ENTER:



J. S. C.
HON. ANTONIO I. BEANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

MAR 11 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**