Crimaudo v Allstate Ins.
2008 NY Slip Op 31056(U)
April 4, 2008
Supreme Court, Nassau County
Docket Number: 3759-05/
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 48

SALVATORE CRIMAUDO and LAURIE CRIMAUDO,

Plaintiff,

-against-

ALLSTATE INSURANCE and BEVAL AGENCY INC.,

Defendants.

INDEX NO.:013759/05

MOTION DATE:1-11-08
SUBMIT DATE:3-6-08
SEQ. NUMBER - 001 & 002

The following papers have been read on this motion:

Notice of Motion, dated 12-12-07..... 1
Memorandum of Law in Support, undated.....2
Notice of Cross Motion, dated 12-31–07.....3
Affirmation in Opposition, dated 2-22-08.....4
Affirmation in Opposition, dated 2-22-08.....5
Reply Affirmation, dated 3-3-08.....6
Reply Affirmation, dated 3-4-08.....7

The motion by the defendant Beval Agency, Inc. ("Beval") for summary judgment pursuant to CPLR 3212 is granted. The motion by defendant Allstate Insurance ("Allstate") (improperly designated as a cross motion) for summary judgment pursuant to CPLR 3212 is granted. The complaint is dismissed in its entirety.

This case concerns the alleged wrongful acts and omissions of an insurance agency and an insurer in failing to provide the plaintiffs with a policy that would have covered the full replacement value of their mobile home, destroyed in a flood in April of 2005.

In 1998 the plaintiffs purchased a 1999 model Breckenridge Park Model RV ("Breckenridge"), which is a small mobile residence of some 400 square feet. Despite the "RV" noted at the end of the model name, the home is not self-propelled, but is instead mounted on wheels and must be towed to its location; the advertising brochure for the product refers to it not as a vehicle but as a "Park Model Home." The plaintiffs initially had insurance covering the Breckenridge through Foremost Insurance Company, but on May 21, 1999 Salvatore Crimaudo approached one RoseAnn Cestaro, an employee of defendant Beval, an exclusive agent for Allstate, regarding a new policy. The plaintiffs already had several other insurance policies from Allstate, all obtained through Beval.

According to the deposition testimony and affidavit from Cestaro, he asked her if she could better the price of the coverage afforded by the Foremost policy, and presented the declarations pages for the latter. It contained coverages for, among other things, the dwelling, personal property and personal liability. There was no mention of flood coverage. After speaking with Cestaro, Mr. Cimaudo applied for an Allstate policy on that the date indicated

As a result of this inquiry and application, plaintiffs were issued an Allstate policy covering the Breckenridge. The complaint alleges that is was issued effective June 19, 1999.

The defendants have not provided the Court with the initial policy, but rather the one that was in effect at the time of the loss, claimed to have been a renewal of the same coverages purchased in 1999. It is entitled "Allstate Deluxe Mobilehome Policy" and did not provide coverage for floods. The complaint alleges that on April 3, 2005 the Breckenridge "was destroyed and totaled by a flood." When the plaintiffs made a claim under the policy, they were told that there was no coverage for flood damage, and that there was no replacement cost coverage.

However, after plaintiffs became upset at this news Cestaro contacted Allstate, and was able to have their existing Allstate automobile policy amended to add the Breckenridge as a trailer. This provided them with coverage for flood losses under their automobile comprehensive coverage. Allstate thus paid the plaintiffs $19,914 for damage to the mobile home, but plaintiffs assert that this fell short of covering their full loss, which was as noted is claimed to be total. The difference is stated to be $55,000. This action was commenced by the filing of a summons and complaint on August 29, 2005.

The complaint sets out four causes of action, without differentiating between defendants. The first sounds in negligence, the second in breach of contract, the third for reformation of contract, and the fourth for a declaratory judgment. An allegation of fraud is also made in the third claim. Beval served an answer asserting, *inter alia,* the affirmative defenses of the statute of limitations and its role as a disclosed agent of Allstate. Allstate also answered, denying the material allegations of the complaint and asserting that the

complaint failed to state a cause of action as against it. Both defendants now separately move for summary judgment.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (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 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). Nevertheless, the court must draw all reasonable inferences in favor of the

nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995).

Under these well-established standards it is apparent that Beval has made out a *prima facie* showing that this action is time-barred, and the plaintiffs have failed to raise any issue of fact with regard to the same. The policy at issue was procured and issued through its efforts on June 19, 1999. Whether posited as negligence (three years), or breach or reformation of contract (six years), this is when the cause of action accrued, as the alleged omission to provide the full replacement coverage the plaintiffs claim they wanted occurred at this time. CPLR 213, 214; *see, Neary v Tower Ins.*, 32 AD3d 920 (2d Dept. 2006); *St. George Hotel Assocs. v Shurkin,* 12 AD3d 359 (2d Dept. 2004). This action was commenced more than six years thereafter. Further, courts look to the underlying claim to determine when a cause of action for declaratory judgment accrues (*McCarthy v Zoning Bd. of Appeals of Town of Niskayuna,* 283 AD2d 857 [3d Dept. 2001]), and thus this claim is time-barred as well. As the allegedly offending policy was simply renewed year after year without objection until the subject loss, the plaintiffs have been unable to show that there were any additional intervening acts by Beval such that the claim can be said to have accrued any later. *Cf., Tucker v M & T Ins. Agency,* 35 AD3d 1156 (4th Dept. 2006).

The Court also cannot agree with plaintiffs that any cause of action for fraud lies, but even if it did, it too would be time barred. It has a six-year limitations period, and resort to so much of the statute that can extend that period for two years fails in that such additional

period runs the point in time from the plaintiff's discovery of the fraud "or could with reasonable diligence have discovered it." CPLR 213(8). Inasmuch as the plaintiffs had the "wrong" policy in their possession in 1999, the alleged fraud could have been discovered at that time. Finally, the Court cannot agree with plaintiffs that the later alteration to their automobile policy to provide them with some coverage for their loss constitutes a ground for invoking equitable estoppel. Their contention that this act was done to cover up defendants' errors and to forestall this action for the entire replacement value of the mobile home is based on no more than sheer speculation.

Moreover, even if the action were timely, it would still have to be dismissed on the merits. An insurance agent such as Beval may be held liable for its own act of negligence in failing to procure insurance. *Katz v Tower Ins. Co. of New York*, 34 AD3d 482 (2d Dept. 2006). However, this defendant has demonstrated by way of affidavit and other proof that the policy it procured was at plaintiffs' request to replace the coverages of the Foremost policy, but at lower cost. Neither Salvatore Crimaudo's deposition testimony, nor the affidavits he has submitted in opposition to the present motions, has flatly contradicted this assertion such that this basic instruction by the plaintiffs has been placed in issue.

In that regard, and as noted above, Foremost's declarations page makes no mention of flood coverage, and a flood is what caused the subject loss. The plaintiffs have not demonstrated that the Foremost policy replaced by Beval and Allstate had such coverage, nor have they presented admissible proof that they specifically asked for flood coverage from Allstate. Indeed, in their responsive papers their attorney states that "the proper insurance

policy [now] has been provided along with the requisite flood insurance" (LoPresti Aff., ¶ 12), but the new Foremost policy they present intended to cover another mobile home purchased after the loss of the Breckenridge states that "Your mobile home policy does NOT provide coverage from loss caused by flood..." (Emphasis in original.) Separate flood insurance was apparently obtained through the National Flood Insurance Program, which policy is annexed to plaintiffs' papers. Absent coverage for a flood, there would have been no contractual obligation on either Foremost's or Allstate's part to pay for a loss caused thereby – whether that payment be partial or for the full replacement value of the mobile home. Therefore, in this critical area Beval has demonstrated that the Allstate policy did not fail to cover a loss that the Foremost policy would have, for the simple reason that neither covered damages caused by a flood. In short, Beval has demonstrated that it did not procure a policy with lesser coverage for this particular loss. The plaintiffs have not presented admissible proof placing this in issue.

Further, Beval has established that the Allstate policy that was issued to the plaintiffs was in their possession since 1999 and was renewed multiple times, all the while containing the lesser coverages now complained of. There is no deceit or overbearing conduct apparent on Beval's part that would relieve the plaintiffs of their own duty to have read the Allstate policy, and if they did not they are not relieved from its terms simply from ignorance or "inexucusable trustfulness." *Metzger v Aetna Ins. Co.,* 227 NY 411, 415-416 (1920); *see also, Choung v Allstate Ins. Co.,* 283 AD2d 468 (2d Dept. 2001). This constitutes a separate reason for judgment in Beval's favor. Finally, the fact that one of Allstate's employees

referred to Beval's handling of the policy as being erroneous, stressed by plaintiffs, does not change any of the foregoing. Nor does Beval's later acts, in concert with Allstate, of altering another policy held by the plaintiffs to provide some coverage for the loss.

Allstate waived the statute of limitations defense by not asserting it by way of answer or motion to dismiss. CPLR 3211(e). It is potentially liable for Beval's acts as its principal. *Neil Plumbing & Heating Constr. Corp. v Providence Washington Ins. Co.,* 125 AD2d 295 (2d Dept. 1986). However, this rule of vicarious liability also affords Allstate the same defenses available to Beval (*see, e.g., Ruane v Cooper,* 127 AD2d 524 [1st Dept. 1987]), especially where, as here, the complaint does not assert separate causes of actions against each based upon separate theories of liability. Summary judgment in favor of Allstate on the merits is thus granted for the reasons stated above.

This shall constitute the Decision and Order of this Court

ENTER

DATED: April 4, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
APR 09 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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