

Tapinekis v Belesi & Conroy, P.C.

2008 NY Slip Op 31536(U)

May 20, 2008

Supreme Court, Nassau County

Docket Number: 5510-06/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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TINA M. TAPINEKIS,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 5510/06
Motion Seq. Nos.: 01 & 02**

BELESI & CONROY, P.C., formerly known as BELESI,
DONOVAN & CONROY, P.C., formerly known as BELESI
& DONOVAN, P.C., JOHN M. BELESI and MATTHEW
J. CONROY,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Plaintiff's Notice of Motion	01
Plaintiff's Notice of Cross Motion	02
Plaintiff's Affirmation in Opposition	xx
Plaintiff's Reply Affirmation	xx

PRELIMINARY STATEMENT

This is a legal malpractice action in which the Defendants move under Civil Practice Law and Rules § 3212 for summary judgment, or, alternatively, for a dismissal of the Complaint pursuant to Civil Practice Law and Rules § 3211. The Plaintiff cross-moves for Summary Judgment.

BACKGROUND

The Plaintiff's home at 70 East Euclid Street, Valley Stream, New York suffered water damage on February 16, 2003. The Plaintiff believes that the cause of the damage was frozen pipes. This is despite a representation that the heat in the premises remained on and the thermostat

was set at 68° during the course of renovations, when she was living at her parents' home.¹ At the time of the incident, the premises were insured by Allstate Insurance. The Plaintiff notified Allstate and they began an investigation of the loss.²

Eventually, Allstate requested that the Plaintiff submit to an Examination Under Oath with respect to the matter, and it was in conjunction with that requirement that she retained the Defendants on June 7, 2004.³ The Examination was conducted on July 26, 2004 and Allstate continued their investigation thereafter. By letter dated March 9, 2006, Allstate declined coverage for the claim.⁴

The Defendants commenced suit against Allstate on behalf of the Plaintiff by the filing of a Summons and Verified Complaint on July 15, 2005.⁵ Allstate served a Verified Answer dated September 27, 2005.⁶ It contained Affirmative Defenses of 1) Concealment of Fraud both in the Examination Under Oath and in document submissions to them; 2) an Exclusion for damage caused by freezing of plumbing while the structure is vacant, unless the insured took reasonable care to maintain heat in the building, or shut off the water supply and drained the system; 3) failure of the Plaintiff to commence action within two years, the limitation contained in the policy; and, 4) failure to give a signed, sworn proof of loss within sixty days of the loss.

¹ Affidavit of Plaintiff attached to Cross-Motion at ¶¶ 6 — 7.

² *Id.* at ¶¶ 5 and 8.

³ Exh. "C" to Cross-Motion.

⁴ Exh. "E" to Cross-Motion.

⁵ Exh. "F" to Cross-Motion.

⁶ Exh. "G" to Cross-Motion.

By motion returnable on September 5, 2006 Allstate moved for summary judgment dismissing the Verified Complaint on the grounds that the action was barred by the two-year limitation contained in the policy as well on the failure of the Plaintiff to provide a Sworn Statement in Proof of Loss, as required by the policy.⁷ On November 16, 2005, current counsel for the Plaintiff were substituted for the Defendants.⁸

The Plaintiff herein opposed the motion by affidavit dated September 20, 2006.⁹ In it she controverted the allegation of her failure to submit a Sworn Proof of Loss, stating that she mailed it to the Allstate representative on October 30, 2003 via Federal Express¹⁰ and that the actions of Allstate in mailing the demands for her to sign and return the sworn statement were sent to the premises, where they knew she did not reside, and continuing the investigation beyond the two-year statute contained in the policy, lulled her into believing that the matter would be resolved.¹¹

There was a controversy as to whether or not the Proof of Loss was in fact sent. The affidavit of Dixie Schulze, the investigation coordinator for Allstate, stated that despite mailing blank copies to the insured, she never received the sworn statement.¹² While Exh. "K" to the Cross-Motion contains a receipt from Federal Express dated October 30, 2003, it does not appear to have been annexed to the Proof of Loss form submitted in opposition to the Allstate motion for

⁷ Exh. "J" to Motion.

⁸ Exh. "I" Motion.

⁹ Exh. "E" to Motion.

¹⁰ *Id.* at ¶ 9.

¹¹ *Id.* at ¶¶ 11 — 16.

¹² Exh. "M" to Motion.

[4]
Summary Judgment.¹³

By Order dated December 18, 2006 and Entered on December 27, 2006 Supreme Court Nassau County (LaMarca, J.) granted Allstate's motion for summary judgment "on the ground that the action is barred by the two (2) year limitation period."¹⁴ This action for legal malpractice followed.

The Summons and Complaint were filed on March 31, 2006. There were four causes of action:

1. Negligence in failing to commence an action against Allstate within the two-year limitation of the policy of insurance;
2. Negligence in failing to file a Sworn Statement in Proof of Loss and return of the signed transcript of the Examination Under Oath;
3. Breach of Contract in failing to commence the action against Allstate withing two-years from the date of loss; and,
4. Breach of Contract in failing to file the Sworn Statement in Proof of Loss and executed transcript of the Examination Under Oath.

The Defendants Answer, dated June 26, 2006, denied the operative allegations of the Complaint, and raised nine Affirmative Defenses:

1. Damages caused by intervening acts of third persons;
2. Assumption of risk;
3. Collateral estoppel;

¹³ Exh. "K" to Motion at Exh "D".

¹⁴ Exh. "L" to Motion.

[* 5]

4. Reduction in Plaintiff's award pursuant to Civil Practice Law & Rules § 4545(c) for remuneration for all or some of her claimed economic loss;

5. Culpable conduct of the Plaintiff;

6. Defense based on documentary evidence;

7. Failure to mitigate damages;

8. Action is premature;

9. Res judicata.

DISCUSSION

The action against Allstate Insurance was dismissed for failure to commence the action within two years of the date of loss. The issue to be determined is whether, had the action been timely commenced, Plaintiff would have likely succeeded in the underlying action.

Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *Quinn v Krumland*, 179 A.D.2d 448, 449 — 450 (1st Dept 1992); See also, *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 343 (1974).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Stillman v Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v Garlock*, 23 A.D.2d 94 (3d Dept 1965); *Crowley's Milk Co. v Klein*, 24 A.D.2d 920 (3d Dept 1965).

The evidence will be considered in a light most favorable to the opposing party. *Weill v*

[* 6]

Garfield, 21 A.D.2d 156 (3d Dept 1964). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *Tortorello v Carlin*, 260 A.D.2d 201, 206 (1st Dept 2003). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Attorney malpractice

In order for a Plaintiff to recover against an attorney on a claim of professional malpractice, they must show that “ (1) the attorney failed to exercise the care, skill, and diligence commonly possessed by a member of the legal profession, (2) the attorney's conduct was a proximate cause of the loss sustained, (3) the plaintiff suffered actual damages a direct result of the attorney's action or inaction, and (4) but for the attorney's negligence, the plaintiff would have prevailed in the underlying action.’ ” *Moran v McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725, 725 — 726 (2d Dept 2006), quoting *Lichtenstein v Barenbaum*, 23 A.D.3d 440 (2d Dept 2005). For a Defendant to prevail on a motion for summary judgment they must “ ‘tender evidence in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements.’ ” *Oberkirch v Charles G. Eichenger, P.C.*, 35 A.D.3d 558 (2d Dept 2006), quoting *Terio v Spodek*, 25 A.D.3d 781, 784, 785 (2d Dept 2006) (internal citations omitted).

There is no question but that the action against Allstate was not commenced within two years of the date of loss. The Defendants do not contend to the contrary. Failure to commence an action within the abbreviated statute of limitations contained in the policy of insurance is *prima*

facie a departure from the standards of legal practice in the community. *Bergin v Grace*, 39 A.D.3d 1017 (3d Dept 2007). The Plaintiff has therefore met her burden on the first element of her claim for professional malpractice.

The issue of proximate cause is similarly not open to debate. The action against Allstate was dismissed explicitly because of the failure to commence the action within the requisite two-year statute of limitations.¹⁵ As a consequence of this dismissal, the Plaintiff has suffered damages to the extent that she was precluded from receiving reimbursement for the property damage she sustained, thus satisfying the second and third prongs of her burden of proof.

The issue as to whether, but for the attorney's negligence, the Plaintiff would have succeeded in the underlying action, is more problematical. The Plaintiff claims that she submitted the requisite Sworn Proof of Loss to Allstate, while Allstate denies ever receiving it. The Proof of Loss document submitted by the movants¹⁶ is but a single sheet of paper; but the submission by the cross-movant¹⁷ is far more substantial. The October 30, 2003 cover letter identifies the attachments as including an authorization form, the sworn statement of loss, a list of the lost items and expenses, a copy of the Plaintiff's general ledger log for February 1, 2003 — October 31, 2003, copies of checks for room and board and a copy of a Home Depot invoice dated 2/16/03. Most notably, after much discussion about the inability of the Plaintiff to prove mailing, also attached is a FedEx receipt dated 10/30/03, addressed to the adjuster at Allstate Insurance. This was within 60 days of the demands which Allstate sent to the dwelling by certified mail, but which

¹⁵ Exh. "L" to Motion (Order of J. LaMarca dated December 18, 2006).

¹⁶ Exh. "N" to Motion.

¹⁷ Exh. "K" to Cross-Motion.

were returned because the Plaintiff was not residing there during the course of renovations.

There is, at the very least, a question of fact as to whether or not the Plaintiff complied with the policy requirements by submission of a Sworn Proof of Loss. This alone precludes the grant of summary judgment, since the moving Defendants cannot show by a preponderance of the evidence that the Plaintiff would not have succeeded in the underlying action. Neither does it constitute evidence in admissible form to conclusively establish that the Proof of Loss was sent to the carrier.

The policy in question excludes coverage of damage caused by freezing pipes in a vacant dwelling unless the insured has made reasonable efforts to keep the home heated. Annexed to the Proof of Loss is the Plaintiffs general ledger, which shows payments to LIPA and Keyspan shortly before the incident on February 3, 2003. Presumably, evidence of this, coupled with her testimony of setting the thermostat to 68° would have overcome a claim to the contrary by the insurer.

The sole remaining issue is the alleged failure to execute and return the transcript of the Examination Under Oath. The Court would expect that this document was never sent directly to the insured, but to the counsel who represented her in that proceeding, the Defendants herein. The record is barren of evidence that the Plaintiff received the transcript and failed or refused to sign and return it as required. The facts may be different, but if the execution of the transcript were, in fact, a serious obstacle to success at trial, it would surely have been signed and notarized so as to obviate the problem if the matter had not already been dismissed.

The Court cannot help but analogize the Examination Under Oath to a deposition under the disclosure provisions of Article 31 of the Civil Practice Law and Rules. § 3116 provides that if the witness fails to sign and return the transcript within sixty days, it may be used as fully as though signed, and the deponent is not authorized to make changes. This would seem to be equally as

applicable to the Examination Under Oath.

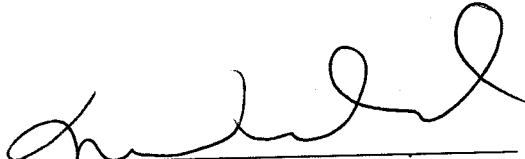
CONCLUSION

The motion and cross-motion are both **denied**, subject to renewal, upon a determination of the factual issue with respect to whether or not the Plaintiff did, in fact, provide the Sworn Proof of Loss to Allstate on October 30, 2003, as claimed.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: May 20, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

MAY 27 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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