Katz v Board of Mgrs.
2008 NY Slip Op 33723(U)
August 7, 2008
Supreme Court, New York County
Docket Number: 107821/07
Judge: Judith J. Gische

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LAURIE KATZ,

Plaintiff,

-against-

BOARD OF MANAGERS, ONE UNION SQUARE EAST CONDOMINIUM, NEW YORK, NEW YORK, AMERICAN INSURANCE COMPANY

Defendant.

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Decision/Order
Index No.: 107821/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m [dismiss] SIW affirm, TJT aff, exhs	1
Pltf LK aff in opp, KJG affirm in opp, exhs	2
Def's AIC reply affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant, American Insurance Company ("AIC"), seeks to dismiss those causes of action for breach of contract and punitive damages asserted in plaintiff's, Laura Katz ("Katz") complaint against it (Fifth and Sixth causes of action). AIC also seeks to dismiss any cross-claims interposed by the co-defendant. CPLR §3211 (a) (1) and (7). Defendant Board of Managers ("Board") has appeared in this action but has not taken any position on the instant motion.

The complaint alleges that: Katz had a Homeowner's Insurance Policy with AIC entitled "Prestige Plus Homeowners Policy" (the "Policy") from May 13, 2003 to May 13, 2004. On October 6, 2003, through no fault of Katz, there was a fire in her apartment at One Union Square East Condominium, New York, New York, unit 15A/B (the "unit"). Katz notified AIC of the fire and through her public adjuster settled

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most of her claims. Still in dispute and at issue in this action is whether additional alternative living expenses should have been paid under the Policy.

Following the fire, Katz claims she could not live in the unit because it needed restoration. Instead, she lived in a hotel, in the State of Arizona, and various apartments. AIC expected the unit to be completely restored by August 31, 2004 and notified Katz that it would reimburse comparable living accommodations until that date. AIC thereafter stopped reimbursing Katz in September 2004. According to Katz, the restoration, however, remained incomplete for three and a half years thereafter. Meanwhile, Katz paid for: moving expenses, rented furniture, storage, elevator deposits, utilities, maintenance costs to her home, special costs for assessments, and the condo's common charges. Katz alleges that she expected to be reimbursed for comparable living accommodations by AIC as provided for in her Policy. Instead, on December 29, 2004, AIC sent notice to Katz that it wanted to finalize her claim. The notice explained that if she wanted to make a claim for additional living expenses, including expenses after August 31, 2004, then she must provide a sworn statement in proof of loss within sixty days. AIC did not receive the proof of loss statement within the prescribed time and on March 9, 2005 denied coverage based upon Katz's breach of contract.

Discussion

Defendant now moves to dismiss this case pursuant to CPLR § 3211 (a) (1) and (7), which are respectively for a conclusive documentary defense and failure to state a cause of action. The documents relied upon are the complaint and the Policy.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the

benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). Under CPLR § 3211 (a) (1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law. (Leon, *supra*).

AIC seeks to dismiss Katz's claims because Katz failed to commence an action within two years after the date of loss, as required in the Policy. Usually, an action upon a contractual obligation or liability must be brought within six years (CPLR § 213), but contracting parties can agree in writing to shorten the statute of limitations prescribed by law (CPLR § 201). The contractually agreed upon shortened time period must be reasonable. John J. Kassner & Co., Inc. v City of New York, 46 NY2d 544, 551 (1979).

The policy at issue contains a two year statute of limitations from the date of loss, which is an enforceable shortened limitation period. Since the loss occurred on October 6, 2003, Katz was required to, but did not, commence this action before October 5, 2005. She commenced this action on June 5, 2007. The policy states, "[n]o action can be brought unless the policy provisions have been complied with and the action is started within two years after the date of loss." A clear, complete and unambiguous written contract should be enforced according to its terms. WWW Associates Inc. v. Giancontieri, 77 NY2d 157 (1990).

Katz alleges that the time to bring an action has not yet accrued because negotiations between herself and AIC tolled the statute of limitations. A plaintiff that

has been actively mislead by a defendant to forebear bringing an action until after a statute of limitations has passed may be able to assert an equitable tolling of the statute. Shared Communications Services of ESR, Inc. v. Goldman Sachs, 38 AD.3d 325 (1st dept 2007). Here, however, Katz simply claims ongoing negotiations. These facts, even if true, would not warrant any tolling of the statute of limitations.

Even if Katz's action was not time-barred, dismissal of these claims is warranted because Katz failed to comply with certain provisions of the policy requiring her to furnish AIC with a sworn proof of loss. The policy states, "[s]end to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:... (1) The time and cause of loss;... (7) Receipts for additional living expenses incurred and records that support the fair rental value loss...."

Insurance Law § 3407 (a) states:

> "the failure of any person insured against loss or damage to property under any contract of insurance, issued or delivered in this state or covering property located in this state, to furnish proofs of loss to the insurer or insurers as specified in such contract shall not invalidate or diminish any claim of such person insured under such contract, unless such insurer or insurers shall, after such loss or damage, give to such insured a written notice that it or they desire proofs of loss to be furnished by such insured to such insurer or insurers on a suitable blank form or forms... [n]either the giving of such notice nor the furnishing of such blank form or forms by the insurer shall constitute a waiver of any stipulation or condition of such contract, or an admission of liability thereunder."

Katz admits that she did not furnish AIC with the sworn statement of proof within the prescribed time. She claims that AIC waived relevant policy provisions or

should be estopped from asserting a defense thereunder. Igbara Realty Corp. v. New York Property Ins. Underwriting Ass'n., 63 NY2d 201 (1984).

Katz maintains, that it was impossible to comply with the relevant policy provisions because restoration of her apartment had not commenced and she could not determine her loss. Katz states that, she did not want to commit a crime by furnishing false information on the proof of loss form. At the bottom of the Proof of Loss form, the following is written: "any person who knowingly and with intent to defraud any insurance company... files a statement of claim containing any materially false information or conceals, for the purpose of misleading, information concerning any fact material thereto... is a crime."

The court is not persuaded that Katz simply could not fill out a proof of loss claim. She could have put in the costs claimed up to date and reserved a right to ongoing expenses. There is no conduct alleged that would constitute a waiver by AIC to obtain the proof of claim or that would warrant estopping them from having demanded it.

The claims against AIC for breach of contract are, therefore, dismissed.

Katz's sixth cause of action seeking punitive damages from AIC must also be dismissed since the substantive cause of action against AIC have been dismissed. Punitive damages are not generally available in a breach of contract action. Rocanova v Equitable Life Assur. Socy., 83 NY2d 603, 612 (1994) Moreover, courts do not recognize the existence of an independent cause of action for punitive damages (Aronis v. TLC Vision Centers Inc., 49 AD3d 576 [2d Dept 2008]).

AIC also seeks to dismiss any cross-claims interposed by the co-defendant. This portion of the motion must be denied because there are no cross-claims to dismiss in the Board's verified answer.

AIC's motion to dismiss is granted only to the extent that Katz's claims against AIC are hereby severed and dismissed. AIC's motion is otherwise denied.

In accordance herewith, it is hereby:

ORDERED that defendant's motion to dismiss is granted only to the extent that plaintiff's fifth and sixth causes of action against AIC are hereby dismissed; it is further

ORDERED that defendant's motion is otherwise denied.

The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 07, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.