

Hopper v McCollum

2008 NY Slip Op 33755(U)

July 14, 2008

Supreme Court, Putnam County

Docket Number: 327/2007

Judge: Andrew P. O'Rourke

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

PUTNAM COUNTY
CLERK

2008 JUL 16 PM 1:46

To commence the statutory period of appeals as of right CPLR (5515 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, PUTNAM COUNTY**

**Present: Hon. Andrew P. O'Rourke
Supreme Court Justice**

-----X
DAVIT HOPPER AND JEAN HOPPER,

Plaintiff,

-against-

SUSAN MCCOLLUM,

Defendant.
-----X

INDEX NO.: 327/2007
MOTION
DATE:7/11/2008

The following documents numbered 1 to 15 read on this motion by defendant to dismiss the complaint.

- Notice of Motion- Affidavits1-2
- Cross Motion
- Answering Affidavits 9-10
- Replying Affidavits 14
- Affidavits
- Pleadings-Exhibits-Stipulations-Minutes 3-8, 11-13, 15
- Briefs: Plaintiff
- Defendant

Motion is decided as follows:

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Defendant moves to dismiss the Plaintiff's complaint alleging Plaintiff were paid by their insurance company, Allstate, for the property damage they allege herein.

Plaintiffs allege a tree fell on their garage on January 18, 2006. They reported the claim to their insurance company and were paid \$24,331.01 to repair the garage. At his deposition David Hopper acknowledged receipt of \$24,000 but stated he used that money to only repair the roof not the whole garage.

Mrs. Hopper testified the \$24,331.01 received from Allstate was used to only partially repair the garage." Mrs. Hopper testified that the \$24,331.01 was the maximum amount they could receive from Allstate. The Hoppers testified the garage should be demolished and rebuilt. However, they did not demolish and rebuild they only repaired the roof.

Defendant refers to the payment notice to Plaintiff's from Allstate which states "to recover an amount in excess of the actual cash value, you must, repair, rebuild, or replace the damaged property within 180 days of our payment." Since the Hoppers did not act within the 180 days, they are precluded from making any claim against Allstate.

Of the \$24,331.01 the Hoppers received they only used \$3000 to replace the roof on the garage. They did not repair the cracked foundation or the supporting beams of the roof. They testified they used some of the money to replace the roof on their house, make other repairs on the house and the remainder was placed in savings.

Defendant alleges Plaintiffs' action must be dismissed because they accepted the actual cash value from Allstate and elected not to pursue available repair or replacement cost from Allstate within the contract 180 days.

In opposition Plaintiffs allege the contract they had with Allstate and the recovery they

received from Allstate did not preclude their ability to recover against Defendant. The tender letter with the 180 day condition and Plaintiffs' failure to exercise same did not inure to Defendant's benefit foreclosing any action Plaintiffs may have against Defendant.

Plaintiffs allege "Defendant's assertion that Plaintiffs claim is limited to what they have already received from the carrier is without merit and should be denied."

Plaintiffs have provided Defendant with estimates as to the cost of the repair of the garage. There is nothing "speculative" about Plaintiffs' damages.

Plaintiffs allege "Defendant has presented no legal authority for their argument that this contractual limitation is applicable to that portion of the claim that exceeds the carrier's obligation damages for which the Plaintiff may seek compensation from the defendant."

In reply Defendant states:

1. She is not an insurance carrier and is not a party to the contract terms.
2. She is not asking that the insurance agreement be held applicable to her.
3. She does state Plaintiffs have received the actual cash value of their damages under their insurance policy.
4. Additionally, Plaintiffs chose not to receive additional compensation, the replacement cost value, and cannot demand same from Defendant.

Defendant states at this point in time Plaintiffs' damages are "speculative" because they did not repair the cracked foundation and water conditions to damage the garage worsening the situation.

Additionally, Plaintiffs testified, they only expended \$3000 to fix the roof on the garage. They utilized \$6500 from Allstates' payment to put a new roof on their house and then deposited

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some \$14,800 in a savings account.

Plaintiffs never used all of the Settlement money they received for their damaged garage to repair same.

Plaintiffs obtained estimates for demolishing and then rebuilding the garage ranging from \$52,600 to 180,000. Plaintiffs also received an estimate from Zott Construction, Inc. to repair the garage and restore it to its original condition, without demolishing or enlarge same for \$12,792.27. The cost is for less than the \$14,800 Plaintiffs placed in their savings account from the replacement money received from Allstate.

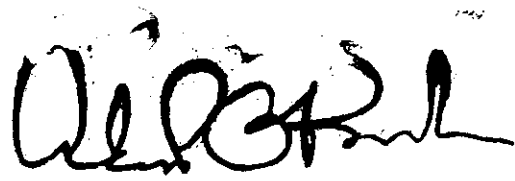
After a review of all documents submitted, Plaintiffs received \$24,331.01 from their insurer Allstate, the actual cash value for damage to their garage. They only paid \$3000 for a new roof on the garage but did nothing to repair the foundation. Pursuant to the terms of their contract they could have recovered "an amount in excess of the actual cash value," if they undertook to "repair, rebuild or replace the damaged property within 180 days of our payment." Plaintiff had 180 days from January 18, 2006 to exercise their right to obtain a sum "in excess of the actual cash value" but they did nothing.

A year later they commence a lawsuit against Defendant for their damages.

The Plaintiffs received a settlement from their insurer and did not apply said money to the repair or replacement of their garage nor did they exercise that provision of their policy to receive additional compensation.

Defendant's motion for an order dismissing Plaintiffs' complaint as against her is granted.

This constitutes the order of the Court.



Andrew P. O'Rourke
Justice of the Supreme Court

Dated: July 14, 2008
Carmel, NY

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