Jerry Shulman Produce Shipper Inc. v One Beacon Ins. Co.
2009 NY Slip Op 30767(U)
March 31, 2009
Supreme Court, Nassau County
Docket Number: 8090/2008
Judge: Randy Sue Marber

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 23

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JERRY SHULMAN PRODUCE SHIPPER, INC. and EAST END REALTY, LLC,

Plaintiffs,

-against-

ONE BEACON INSURANCE COMPANY,

Defendant.

Index No.: 8090/2008
Motion Sequence...02
Motion Date...01/29/09

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Papers Submitted:
Notice of Motion.....x
Affirmation In Opposition.....x
Reply Affirmation..... x
Sur-Reply.....x

Upon the foregoing papers, the Defendant's motion for an order granting reargument of the decision dated December 1, 2008 rendered by Justice Kenneth A. Davis is **DENIED**.

The Defendant previously moved for the dismissal of the Plaintiff's complaint. The Court (Davis, J) rendered a decision on December 1, 2008 denying the motion. Justice Davis is no longer a presiding Justice of this Court. As such, it is proper for this Court to

now render a decision upon this application pursuant to CPLR § 2221.

A motion to reargue is to be granted when the court overlooks or misapprehends the law or facts in the determination of its prior decision. CPLR § 2221 (d); see *Diorio v. City of New York*, 202 A.D.2d 625, 609 N.Y.S.2d 304 (2d Dept. 1994); *Pro Brokerage Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661 (1st Dept. 1984). The purpose of a motion to reargue is not to afford an aggrieved party a second chance. *Pro Brokerage, Inc. v. Home Ins. Co., supra*. The party bringing a motion to reargue must set forth the facts or law the court overlooked in making its original decision.

In this action, Plaintiffs seek to recover damages under an insurance policy issued by the Defendant. The Plaintiffs were insured under the same commercial insurance policy, which included coverage for real estate, equipment, business operations, and other associated risks in connection with and/or located at 4880 Depot Lane, Cutchogue, New York for a term commencing May 28, 2005 through May 28, 2006. The insured premises contain four buildings, referred to on the policy as Location 2 Buildings 1, 2, 3, and 4. The Plaintiff, East End Realty, LLC is the owner of all four buildings and the Plaintiff, Shulman leased Buildings 1, 3, and 4 and was a tenant therein.

On May 1, 2006, a fire at the premises destroyed Building 1, with all of its contents, Building 2, Building 3 and Building 4. The contents inside Building 1 were owned by the Plaintiff, Shulman, except for a small amount of personal property that was owned by its employees. The Plaintiffs commenced litigation asserting three causes of action. The

only remaining cause of action in this dispute is the third, in which the Plaintiffs allege, in addition to the insurance policy covering the loss caused by the fire in Building 1 and its contents, the policy also covered decreased value of "stock" due to damage to another part of "stock." The insurance policy defines "Stock" as "(a) Merchandise held in storage or for sale; (b) Raw Materials; or (c) in process or finished goods including supplies used in their packing or shipping."

The Plaintiff, Shulman, a shipper of produce, had numerous bags and packing materials, including boxes of reinforced tape, one case of shrink wrap, one shrink wrap roller, new washer spongers, chef potato bags, slip sheets, master bags, pallets, tote bags, wood bin boxes and poly bags, which he claims fall under the definition of "Stock" listed in the insurance policy. The Plaintiff, Shulman alleges that he sustained a "decreased value...due to damage to another part or parts of stock." Both Plaintiffs received a denial for the claim on August 30, 2006, originally submitted on June 14, 2006. The Plaintiff's second re-submission was also denied and never paid.

On September 26, 2008, the Defendant moved, pre-answer, to dismiss the Plaintiffs' third cause of action under CPLR § 3211(a)(1), (a)(5), (a)(7) and (a)(8). The Defendant presented five bases for dismissal, of which the following are presented in this action: (D) Plaintiffs Seek Coverage of Direct Damage Not Covered Under Bucket Limit of Insurance; and (E) Damage by Water Not Covered Under Policy. In his decision, dated December 8, 2008, Justice Davis denied the Defendant's motion to dismiss. Only CPLR

§3211 (a)(1) and (a)(7) are invoked in this action. The Defendant alleges that the Plaintiffs seek coverage for *direct damages* resulting from the fire, which are not covered under the "Bucket Limit of Insurance." His theory is that under the Special Property Plus Coverage Form, only *consequential damages* are covered and the Plaintiffs' losses are direct damages resulting from the fire and it is this theory that the Court misinterpreted when making its decision.

A motion to dismiss made pursuant to CPLR 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs' claim (*McCue v. County of Westchester*, 18 AD3d 830, 831 [2d Dept. 2005]; *Held v. Kaufman*, 91 N.Y.2d 425, 430-431 [1998]). Moreover, a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiffs, the complaint states in some recognizable form any cause of action in law (*AG Capital Funding Partners, L.P. v. State Martinez*, 84 NY2d 83, 88 [1994]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19). Furthermore, a motion made pursuant to CPLR 3211 requires the Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

The Defendant claims that the Plaintiffs seek coverage for *direct damages*

resulting from the fire, which are not covered under the "Bucket Limit of Insurance." The Defendant submits that under the Special Property Plus coverage Form, only *consequential damages* are covered and the Plaintiffs' loss is a direct result from the fire. The policy states, in relevant part as follows:

BUCKET LIMIT OF INSURANCE DECLARATIONS
The following limits are the total coverage limits for that particular coverage and include the amount provided in the appropriate form.

Bucket Limit of Insurance	$500,000
Personal Effects	
Valuable Information Property	
Accounts Receivable	
Outdoor Property	
Fine Arts	
Hardware, Software, Media and data	
Fire Extinguisher and Automatic Extinguishing System Recharge	
Fire Department Service Charge	
Conditional Sales Agreement	
Consequential Damage	
Tenants Improvements & Betterments	

The insurance policy also clarifies in the "Special Property Plus Coverage Form - Quick Reference Guide" that there are certain "COVERAGES" (marked as section "A"), "CAUSES OF LOSS (and Exclusions)" (marked as section "B"), "PROPERTY VALUATION & LOSS PAYMENT" (marked as section "C"), "LIMITS OF INSURANCE" (marked as section "D"), "DEDUCTIBLES" (marked as section "E"), "CONDITIONS" (marked as section "F"), and "DEFINITIONS" (marked as section "G"). The Bucket Limit of Insurance is explained under the "Limits of Insurance Section":

16. Bucket Limit of Insurance

a. Your Bucket Limit of Insurance applies to covered loss or damage to the following types of property, or Coverages:

(10) Coverage for the decreased value of "Stock" due to damage of another part or parts of "Stock";

The Definitions Section of the Special Property Plus Coverage Form defines the term "Stock":

23. "Stock" means:

a. Merchandise held in storage or for sale;

b. Raw materials; or

c. In process or finished goods; including supplies used in their packing or shipping

The Defendant argues that the Court's December 1, 2008 order is inaccurate, which states in full, "Notably, the policy does not anywhere in the Bucket Limit of Insurance section use the words 'direct damages' or 'consequential damages.'" It claims the declarations page sets forth the amount of coverage and type of coverage purchased by the insured. Therefore, the Defendant contends that the Declarations, listed above, can only lead to the conclusion that "Item No. 10 under the Bucket Limits only applies to consequential damages," and that the Plaintiffs' loss was the result of direct effects of the fire, not consequential effects.

The Plaintiffs argue that the Defendant misquotes the court and its theory that the declarations page sets forth the amount of coverage and type of coverage purchased is

inappropriate for this motion. They also contend that this is a new theory presented by the Defendant and so should not even be considered. As to the original legal theories, the Plaintiffs once again argue that in the present case, the relevant clause of the insurance policy is entirely ambiguous, as demonstrated in their Affirmation in Opposition.

Reargument is not available where the movant seeks only to argue "a new theory of law not previously advanced." (*DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 800 N.Y.S.2d 679 [1st Dept. 2005], *citing Frisenda v. X Large Enterprises*, 280 A.D.2d 514, 720 N.Y.S.2d 187 [2d Dept. 2001]). This Court agrees with the Plaintiffs in that the Defendant is presenting a new legal theory not previously mentioned in either its original motion or its reply to the Plaintiffs' opposition and such arguments cannot be entertained in a motion to reargue.

As to the legal theories presented in the previous papers, this Court agrees with Justice Davis' December 1, 2008 order, holding that the conflicting interpretations of the insurance policy presented by both parties warrants a denial of the Defendant's pre-answer motion. The unambiguous terms of an insurance policy must be given their plain and ordinary meaning. (*Seaport Park Condominium v. Greater New York Mutual Insurance Company*, 39 A.D.3d 51, 828 N.Y.S.2d 381 [1st Dept. 2007]) However, in this case, both parties have provided reasonable interpretations of the policy. Therefore, the Court was correct to conclude that the question of whether the Plaintiffs should be afforded additional coverage under the "Bucket Limit of Insurance" cannot be resolved at the pleading stage.

The Court, after a thorough review of the papers presented in the motion for dismissal, found that there were sufficient reasons to deny the Defendant's motion. The Court did not overlook or misapprehend the facts as presented by the parties or misapply the law. Accordingly, the Defendant's motion to reargue is **DENIED**.

As to the Defendant's argument that the Court has overlooked Argument (E) of Motion to Dismiss, entitled "Damage by Water Not Covered Under Policy," because it was not specifically addressed in Justice Davis' opinion, it is necessary to discuss its argument here. The policy states:

1. General Causes of Loss

b. Under General Causes of Loss, we will pay for direct physical loss of or damage to property, unless excluded below.

(1) We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(f) Water

(i) Flood, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(ii) Mudslide or mudflow;

(iii) But if Water, as described in (f)(i) and (f)(ii) results in fire, explosion or sprinkler leakage, we will pay for the loss or damages caused by that fire, explosion or sprinkler leakage.

The Definitions Section of the Special Property Plus Coverage Form defines the term "Water Damage":

25. "Water damage" means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam.

Since the policy specifically does not include damage as a result from water, the Defendant contends the Plaintiffs' admission that damage was a result of the intense heating from the fire followed by the water from the hose (which caused some of the plastic bags to fuse together) makes him ineligible to receive such damages. The Plaintiffs argue that because the policy specifically describes the water damage excluded, and nowhere does it exclude water damage caused by firefighters intentionally extinguishing the fire, such damage is covered under the policy.

Based upon the papers submitted to this Court, this Court finds that the conflicting interpretations of the insurance policy with respect to water damages warrants a denial of Defendant's pre-answer motion to dismiss the Plaintiffs' complaint. Giving the Plaintiffs every favorable inference, a reasonable chance exists that the Plaintiffs might prevail and therefore the question of whether they should be entitled to damages caused by

the water from the firefighters' hose cannot be resolved at the pleading stage. Discovery is to proceed as previously ordered in the Preliminary Conference Order.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 31, 2009

Hon. Randy Sue Marber
J.S.C.