Bread & Butter, LLC v Certain Underwriters at Lloyd's London
2009 NY Slip Op 32068(U)
September 1, 2009
Supreme Court, Nassau County
Docket Number: 005379/08
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

----------x **TRIAL TERM PART 47**

BREAD & BUTTER, LLC d/b/a BK SWEENEY'S,

INDEX NO.: 005379/08

Plaintiff,

MOTION DATE:6-19-09
SUBMIT DATE: 6-26-09
SEQ. NUMBER - 003 & 004

-against-

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,

Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 6-2-09.....1
Defendant's Memorandum of Law, dated 5-29-09.....2
Memorandum of Law in Opposition, dated 6-15-09.....3
Defendant's Reply Memorandum of Law, dated 6-25-09.....4
Notice of Motion, dated 6-4-09.....5
Affirmation in Opposition, dated 6-16-09.....6
Affirmation in Reply, dated 6-26-09.....7

This motion pursuant to CPLR 2221 by the plaintiff Bread & Butter, LLC, d/b/a, BK Sweeney's for reargument of stated portions of its prior motion for summary judgment, which motion was denied in part, by order of this Court dated April 8, 2009, is denied. This motion pursuant to CPLR 2221 by the defendant Certain Underwriters at Lloyds of London, for: (1) reargument of its prior motion for, *inter alia*,

summary judgment dismissing the plaintiff's complaint which motion was denied by order of this Court dated April 8, 2009; (2) leave to amend its second affirmative defense and/or to add a "lack of cooperation" affirmative defense; and (3) a stay of execution of judgment pursuant to CPLR 5519[c], is denied in its entirety.

As detailed in this Court's April 8, 2009 order, the plaintiff Bread & Butter, LLC, d/b/a BK Sweeney's ["the plaintiff"], purchased an already established "BK Sweeneys" restaurant/bar located on Sunrise Highway in Lynbrook, New York The plaintiff later acquired a commercial property/general liability insurance policy from the defendant, Lloyds of London ["Lloyds" or the "defendant"], which was to be effective for the one-year period commencing March 28, 2005.

In December of 2005, a fire completely destroyed the property, after which the plaintiff submitted to Lloyds, various claims and estimates originally exceeding $500,000.00 – including a claim to repair and make good, so-called lost "betterments and improvements" (Order at 3-4)

After a somewhat contentious and lengthy claims investigation period, Lloyds offered settlements for certain "non-betterment" portions of the plaintiff's losses. However, by separate disclaimer letter also dated April 22, 2007, Lloyds denied the plaintiff's betterments claim in its entirety, relying in sum upon its finding that neither the plaintiff nor its tenant-predecessor had "acquired" or "made" the improvements and/or betterments in question.

Thereafter, and within the two-year contractual limitations period imposed under the policy, the plaintiff commenced an action in the United Stated District Court for the

Eastern District of New York, alleging breach of the policy. That action was subsequently discontinued without prejudice, since diversity jurisdiction was arguably lacking, but recommenced days later in this Court – although after the expiration of the original, two-year period.

Thereafter, the parties moved and cross moved for summary judgment on their respective claims. By order April 8, 2008, this Court denied Lloyd' cross motion and granted stated portions of the plaintiff's motion. More particularly, this Court: (1) denied Lloyds' motion in entirety, including the branch thereof based upon the statute of limitations (in light of a written agreement/e-mail relating to recommencement); and (2) similarly denied that branch of the plaintiff's motion which was to recover, *inter alia*, losses attributable to improvement and betterments. S*ee, Bread & Butter, LLC v. Certain Underwriters at Lloyd's London,*, 23 Misc.3d 1109(A), 2009 WL 997482 (Supreme Court, Nassau County 2009).

With respect to the latter, "betterments" claim, the Court held in sum, that neither the plaintiff nor the defendant had submitted evidence adequately demonstrating how, when and by whom the disputed betterments/improvements were "acquired"or "made" within the meaning of the applicable coverage provision, thereby precluding summary disposition of that claim (Order at 11, 16-17, 19)

After reviewing the partes' evidentiary submissions, the Court did, however, grant summary judgment to the plaintiff with respect to certain "non-betterment" losses – as reflected and supported by both relevant documents and amounts which had previously been offered by Lloyd 's adjuster in an April, 2007 letter, *i.e.*, $196,346.29 (Order at 20).

The parties now move respectively, for reargument of their prior applications for summary judgment.

The plaintiff contends, in sum, that the partial award in the sum of 196,346.29 should be substantially increased to the principal amount of $389,434.34, while Lloyd's motion, in effect, challenges each and every adverse determination or implied ruling rendered by Court with respect to, and in connection with, its claims and defenses.

Lloyds also seeks leave to amend its second fraud/concealment affirmative defense and also add a "lack of cooperation" affirmative defense – defenses and theories which were previously raised by Lloyds on the motion and rejected by the Court in its April, 2009 order (Order at 21-22).

Lastly, Lloyds moves the Court pursuant to CPLR 5519[c], for a discretionary stay of any proceedings to execute upon the partial summary judgment award pending its appeal therefrom. S*ee generally*, *Schwartz v. New York City Housing Authority*, 219 AD2d 47 (2d Dept. 1996); Siegel, New York Practice § 535, Injunctions and Stays, at 922-923 (4th ed 2005) *cf.*,CPLR 2201, 3211[e]; *Robert Stigwood Organisation, Inc. v. Devon Co.*, 44 NY2d 922, 923 (1978).

The parties' respective motions for reargument and/or related species of relief, should be denied.

It is settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision". *Carrillo v. PM Realty Group*, 16 AD3d 611,

612 (2d Dept. 2005), *see*, CPLR 2221[d][2]; *Barnett v. Smith,* 64 AD3d 669 (2d Dept. 2009);*McGill v. Goldman,* 261 AD2d 593, 594 (2d Dept. 1999), *see*, *Simon v. Mehryari*, 16 AD3d 664 (2d Dept. 2005); *Frisenda v. X-Large Enterprises*, 280 AD2d 514 (2d Dept. 2001); *Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept. 1992), *see also, Foley v Roche*, 68 AD2d 558 (1st Dept. 1979).

Notably, the remedy "is not designed to provide an unsuccessful party with successive opportunities" to make repetitious applications, "rehash questions already decided" or "present arguments different from those originally presented". *McGill v. Goldman, supra,* 261 AD2d 593, 594 (2d Dept. 1999); *William P. Pahl Equipment Corp. v. Kassis, supra,* 182 AD2d at 27 (1st Dept. 1992), *see*, *Gellert & Rodner v. Gem Community Mgt.*, 20 AD3d 388 (2d Dept. 2005); *Pryor v. Commonwealth Land Title Ins. Co.,* 17 AD3d 434, 436 (2d Dept. 2005); *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 (2d Dept. 2004) ; *Silver v. Frieden*, 12 Misc.3d 1181(A), 2006 WL 1909956 at 1-2 (Supreme Court, New York County 2006).

With these principles in mind, the Court perceives no reason to depart from its recently issued determinations with respect to: (1) its construction of the betterments coverage provision; or (2) its factual conclusion with respect to the defendant's motion, *i.e.* that the defendant's submissions failed to establish that the alleged, on-site betterments were *not* made or acquired by the plaintiff or its immediate leasehold predecessor (Order at 19-20).

Nor has the defendant demonstrated that the court overlooked or misapprehended the facts or law relative to its analysis and subsequent dismissal of the defendant's statue

of limitations, fraud and lack of cooperation claims/defenses – concerning which the defendant's current submissions now rehash, repeat and recast the same basic theories and arguments previously advanced and rejected upon its original application. *See generally, Miller v. Goord,* 1 AD3d 647, 648 (3d Dept. 2003); *Patriot Securities, Inc. v. Cantor Fitzgerald Securities,* 226 AD2d 216 (1st Dept. 1996); *Dialcom, LLC v. AT & T Corp.*, 20 Misc.3d 1111(A), 2008 WL 2581876 at 4 (Supreme Court, Kings County 2008).

Further, this Court did not overlook or misapprehend the legal principle that an attorney's affirmation can serve as a vehicle for the submission of otherwise competent evidence (*e.g., Alvarez v. Prospect Hosp.,* 68 NY2d 320, 325 [1986]; *Davey v. Dolan*, 46 AD3d 854 [2d Dept. 2007]; *State v. Grecco*, 43 AD3d 397, 400 [2d Dept. 2007]); rather, the Court merely concluded that the evidence submitted – irrespective of how introduced – did not warrant the granting of summary judgment to Lloyds (Def's Mem. at 2-3).

Moreover, while it is true as a general principle of law that an insured bears the burden of proof with respect to coverage (*Metropolitan Heat & Power Co., Inc. v. AIG Claims Services, Inc.*, 47 AD3d 621, 622 [2d Dept. 2008]; *American Mfrs. Mut. Ins. Co. v. Quality King Distributors, Inc.*,16 AD3d 607 [2d Dept. 2005]), where the carrier is the movant, it must still discharge its burden of the demonstrating the absence of coverage in the first instance with respect to the claimed loss (*Metropolitan Heat & Power Co., Inc. v. AIG Claims Services, Inc., supra*; *Zaccari v. Progressive Northwestern Ins. Co.*, 35 AD3d 597, 600 [2d dept. 2006]), Indeed, "[b]asic summary judgment principles have long held that it is the movant's burden to present evidence demonstrating his or her *prima facie*

entitlement to judgment as a matter of law. *Zecca v. Riccardelli*, 293 AD2d 31, 33-34 (2d Dept. 2002) *see, Zuckerman v City of New York*, 49 NY2d 557 (1980); *Empire Ins. Co. v. Insurance Corp. of New York,* 40 AD3d 686, 687 (2d Dept. 2007) *cf., Fitzpatrick v. Chase Manhattan Bank*, 285 AD2d 487, 488 (2d Dept. 2001).

Turning to that branch of the Court's order which granted partial summary judgment to the plaintiff on stated portions of the non-betterments claim, the record belies the defendant's assertion that the Court improperly granted summary judgment on a cause of action or claim with respect to which relief was not requested (Def's Brief at 10). *See, Dunham v. Hilco Const. Co., Inc.*, 89 NY2d 425, (1996); *Madero v. Pizzagalli Const. Co.*, 62 AD3d 670 (2d Dept. 2009); *Michel v. Blake*, 52 AD3d 486 (2d Dept. 2008).

Here, the gravamen and object of the plaintiff's original motion for summary judgment was its demand for relief on the entirety of its first cause of action, which included damages attributable to all allegedly covered losses – including the non-betterment losses claimed to have been sustained here (Pltff's Original Brief in Supp., at 24-25).

The fact that the Court ultimately granted judgment with respect to only a limited or stated portion of the non-betterment component of the first cause of action — as to which summary judgment was plainly sought – belies the assertion that relief was granted on an issue or claim not raised by the plaintiff.

In any event, a review of the plaintiff's original motion submissions indicates that the plaintiff separately addressed this portion of the claim and sought judgment thereon based not only on the inferences to be drawn from the adjuster's letter, but also based

upon the independent sufficiency of the loss documentation it had provided to the adjuster during the pre-litigation claims process (*see*, Pltff's Orig Brief in Opp., at 11-12; 21-22).

Nor did the Court – as the defendant repeatedly asserts – solely predicate its partial summary judgment holding upon the adjuster's April 2007 letter (*see,* Def's Mem at 10-11), but rather, considered that document as only one component of the cumulative, evidentiary landscape presented with respect to the items at issue (*e.g.*, Order at 20-21).

As to the plaintiff's motion for reargument concerning the same finding, *i.e.* – its claim that the Court erred in declining to award it the total and, far greater "non-betterment" amount sought – the Court similarly perceives no misapprehension, legal, factual or otherwise, which warrants modification of this branch of the order. More specifically, a review of the Court' s order indicates that the award was predicated upon, *inter alia*, its analysis and assessment of the evidence, and its conclusion that the plaintiff's *prima facie* showing supported only the limited award of relief which was actually granted.

The record does not support the plaintiff's claim that the Court, upon viewing that evidence, concluded that the plaintiff had submitted "ample proof" in support of the "entirety" of its non-betterments claims (Schlossberg Aff., ¶ 5). To the contrary, the Court's order plainly states that the *prima face* showing made was limited solely to those relevant portions of the non-betterment losses referenced in the defendant's April 2007 letter (Order at 20).

That branch of the defendant's motion which is for leave to amend and/or add

previously examined and rejected fraud/concealment and lack of cooperation defenses, is denied.

While leave to amend is to be freely given (CPLR 3025 [b] *see*, *Edendale Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *Kinzer v. Bederman,* 59 AD3D 496, 497 [2d Dept. 2009]), a court should nevertheless deny the motion when, *inter alia*,"the insufficiency and lack of merit of the plaintiff's proposed amendment are clear and free from doubt." S*ee e.g., McCluskey v. Gabor and Gabor,* 61 AD3d 646 (2d Dept. 2009); *Lucid v. Mancuso* , 49 AD3d 220, 226-227 (2d Dept. 2008); *Norman v. Ferrari,* 107 AD2d 739, 740 (2d Dept. 1985) *see generally, Rosenblum v. Frankl,* 57 AD3d 960, 961 (2d Dept. 2008); *Scofield v DeGroodt*, 54 AD3d 1017, 1018 (2d Dept. 2008); *Smith-Hoy v. AMC Property Evaluations, Inc.,* 52 AD3d 809, 811 (2d Dept. 2008).

Additionally, "a plaintiff must meet his or her burden of demonstrating that the proposed amendments to the complaint were not palpably insufficient or patently devoid of merit". *Zeleznik v. MSI Const., Inc.*, 50 AD3d 1024, 1025 (2d Dept. 2008) see, *Brunetti v. Musallam*, 59 AD3d 220, 223 (1st Dept. 2009); *Lucido v. Mancuso, supra; Joyce v. McKenna Associates, Inc.*, 2 AD3d 592 (2d Dept. 2003); *Ripepe v. Crown Equipment Corp.*, 293 AD2d 462, 463 (2d Dept. 2002); *Tessler v. Delta Environmental Consultants, Inc.*, ___Misc3d___ 2008 WL 2328171 (Supreme Court, Nassau County 2008).

The decision whether to grant leave to amend a pleading rests within the court's discretion, the exercise of which will not be lightly disturbed. *Pergament v. Roach,* 41 AD3d 569, 572 (2d Dept. 2007).

Here, although now resubmitted through the vehicle of a motion to amend, the very same theories and claims were substantively examined only recently, and determined by this Court to be lacking in merit. *Cf., Miller v. Goord, supra,* at 648).

The defendant has not submitted any new factual material in connection with the subject application which would warrant a departure from the Court's previously issued precedent. Accordingly, the Court in its discretion concludes that the plaintiff's "cooperation" and fraud/concealment theories are lacking in sufficiency, thereby supporting denial of the motion to amend. *Zeleznik v. MSI Const., Inc., supra see, Scofield v. DeGroodt, supra; Smith-Hoy v. AMC Property Evaluations, Inc., supra* 52 AD3d 809, 811 (2d Dept. 2008); *Miller v. Goord, supra,* 1 AD3d 647, 648 (3d Dept. 2003).

Lastly, and pursuant to CPLR 5519[c], the defendant requests that the Court, in its discretion, stay execution of that branch of its prior order which awarded partial summary judgment to the plaintiff (Becker Aff., at 2; Def's Reply Mem., at 12-13). The application should be denied.

"CPLR 5519[c] permits this court, *inter alia*, to grant a discretionary stay of proceedings to enforce the order or judgment appealed from, or to vacate, limit or modify any automatic stay obtained pursuant to CPLR 5519(a) or (b)". *Schwartz* v. *New York City Housing Authority, supra*, 219 AD2d 47, 48 (2d Dept. 1996); Siegel, New York Practice § 535, Injunctions and stays, at 922-923 (4th ed 2005).

Pursuant to the equitable principles which underlie CPLR 5519[c], the court's discretion "'will be influenced by any relevant factor, including the presumptive merits of

the appeal and any exigency or hardship confronting any party'". *Brabson v. The Friendship House of West. New York, Inc.*, ___F. Supp2d ___, 2000 WL 1335745 at 2 (W.D.N.Y. 2000), *quoting from*, Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5519:4, at 227 *cf., Lancaster v. Kindor*, 64 NY2d 1013 (1985).

Here, the defendant's submissions – which cite no case law authorities – are conculsory, *i.e.*, the defendant does not enumerate the specific reasons why the relief sought has been requested and fails to set forth the specific, equitable considerations which support an award of relief upon the facts presented (*see*, Becker Aff., at 2; Def's Reply Mem., at 12-13).

Although the Court possesses discretion to grant a stay where warranted, the unelaborated assertions offered here do not support an affirmative exercise of that discretion in favor of the relief sought. *Brabson v. The Friendship House of West. New York, Inc., supra cf., Hussey v. Joseph N. Leggio Agency, Inc., Inc.,* 299 AD2d 690, 692 (3d Dept. 2002).

The Court has considered the parties' remaining contentions and concludes that they are lacking in merit.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 1, 2009

ENTERED

SEP 03 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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