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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~JUSTICE SHIRLEY WERNER~~ KORNREICH PART 54

Index Number : 104910/2005

DIAMOND STATE INSURANCE

VS.

UTICA FIRST INSURANCE

SEQUENCE NUMBER : 005

DISMISS

INDEX NO. _____

MOTION DATE 7/10/2009

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____	4
Replying Affidavits _____	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
NOV 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO ~~JUSTICE~~ FOR THE FOLLOWING REASON(S):

Dated: 11/12/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

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DIAMOND STATE INSURANCE CO.,

Plaintiff,

-against-

UTICA FIRST INSURANCE COMPANY,

Defendant.

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DECISION and ORDER

Index No.: 104910/2005

KORNREICH, SHIRLEY WERNER, J.

Motion sequences 005, 006 and 007 are hereby consolidated for disposition.

Motions before the Court

Defendant, Utica First Insurance Company (Utica), moves in motion sequence 005 to dismiss the complaint for failure to state a claim, CPLR 3211(a)(7). In motion sequence 006, plaintiff, Diamond State Insurance Company (Diamond), moves: 1) to confirm the report of Special Referee Leslie S. Lowenstein (Referee), dated May 11, 2009 (Report), recommending an award of damages to Diamond in the amount of $5,121,417.84, with interest from December 29, 2004 and costs (Recommendation); and 2) for a default judgment against Utica, pursuant to CPLR 3215. Utica moves in motion sequence 007 to reject the Referee's Report.

Background

This declaratory judgment action arose out of a fire that occurred on July 25, 2002 on the roof of premises located at 330 Lenox Road, Brooklyn, New York (Building). The Building was owned by Gentry Apartments, Inc. (Gentry), Diamond's insured. The complaint alleges that Gentry hired La Pioggia Construction Corp. (La Pioggia), Utica's insured, "to seal a leak in the roof of the [B]uilding." Complaint, ¶4. Utica disclaimed coverage for La Pioggia on October

10, 2002, relying, in part, on an endorsement, which excluded coverage for property damage:

> arising out of any roofing operations, which involve any replacement roof or recovering of existing roof" (Roofing Exclusion).

Diamond paid Gentry for the loss and commenced an action, as Gentry's subrogee, against La Pioggia in the Supreme Court, Kings County (Underlying Action).

On December 29, 2004, Diamond obtained a default judgment against La Pioggia in the Underlying Action in the amount of $5,121,417.84 for damage caused by the fire (Underlying Judgment). The Underlying Judgment was composed of damages in the amount of $3,570,253.27, plus interest in the amount of $806,874.24 and costs of $1005.00, the sum of which is $4,378,132.51, not $5,121,417.84. Diamond served the Underlying Judgment with notice of entry on Utica on January 21, 2005 and with a cover letter offering Utica thirty days to settle its obligations by paying $1,000,000.00, the limit on its policy. Utica did not respond. On February 10, 2005, La Pioggia assigned all its rights of defense and indemnification against Utica under its policy, to Diamond.

Diamond commenced this action against Utica in April of 2005. The complaint contains three causes of action: 1) breach of contract seeking payment of Utica's $1,000,000 policy with interest; 2) waiver and estoppel; and 3) bad faith damages above the limit of Utica's policy for refusal to settle the La Pioggia claim within the policy limits.

On February 1, 2007, the Appellate Division, First Department ruled that Utica had to produce claim files with respect to all other insureds involving the interpretation of the Roofing Exclusion.[1] On January 9, 2009, this court struck Utica's answer for wilful and contumacious

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[1] *Diamond State Ins. Co. v Utica First Ins. Co.*, 37 AD3d 160 (1st Dept 2007)(AD Order).

failure to comply with the AD Order regarding production of documents and referred the issue of the amount of damages to a special referee to hear and report with recommendations.

A hearing was held before the Referee on March 16, 2009. At the hearing, Diamond's attorney, Steven Fauth, was the sole witness. He stated that he had "personal knowledge of the matters herein, which are a matter of public record as well as part of my file, and by virtue of my handling of this matter." He testified that Utica disclaimed coverage, La Pioggia defaulted in the Underlying Action and an inquest was directed by the Supreme Court, Kings County. He further stated that Diamond obtained the Underlying Judgment following an inquest on November 15, 2004. The Referee accepted in evidence an affidavit of Mr. Faust, with annexed exhibits, including the complaint in this action, a certified copy of the Underlying Judgment, and a copy of this court's decision and order striking Utica's answer. The Referee took judicial notice of documents contained in the County Clerk's file in this action. Utica presented no witnesses or evidence.

The Recommendation was based on the Referee's finding that Diamond was entitled to judgment against Utica in the amount of $1,000,000 on the first two causes of action and, $5,212,417.84 on the third cause of action for bad faith. The Referee refused to correct a mathematical error in the Underlying Judgment on the ground that it should be corrected by a motion in Supreme Court, Kings County, pursuant to CPLR 5015. The Referee awarded interest from the date of the Underlying Judgment.

Mr. Fauth submitted an affirmation on Diamond's motion to confirm that elaborated on the basis for his personal knowledge. He averred that he was a Senior Vice-President of Claims at Tower Risk Management (Tower), Diamond's lawful agent, during the relevant time frame and

that he has personal knowledge of the underlying fire loss, the Underlying Action, the Underlying Judgment, the assignment, the demand on Utica to pay, and Utica's refusal to pay. Affirmation of Steven G. Fauth, dated May 26, 2009 (Fauth Affirmation), ¶¶ 17 and 18. Mr. Fauth further stated that he is familiar with the contents of the Tower file maintained in the ordinary course of business relating to the claim. Also submitted with the motion to confirm was an affidavit of David Elliott, Diamond's Assistant Vice-President of Claims. He avers that Diamond paid Gentry $3,570,253.27 and that no part of the Underlying Judgment was paid to Diamond or Tower.

Documentary Evidence

Diamond submits: 1) a copy of the notice of entry of the Underlying Judgment addressed to Utica (among others); 2) the assignment by La Pioggia of its rights against Utica , 3) a letter from Diamond's counsel to Utica, dated January 21, 2005, transmitting the Underlying Judgment (with a stamp stating that it was received by Utica on January 25, 2005) and demanding that Utica tender its policy limit; 4) a copy of Utica's policy; and 5) a letter from the New York State Superintendent of Insurance, dated July 16, 1991, approving the Roofing Exclusion as an endorsement. Attached to the Superintendent's letter is a letter from Utica's Senior Vice President, Richard J. Zick (Zick Letter).

The Zick Letter states the following with regard to the Roofing Exclusion:

> We had just filed with you and had approved the Form UFR-1 (Ed. 7/91). We just received the approval and were in the process of releasing this to the agents, however, we are starting to encounter quite a bit of resistance regarding the wording on this as it would take any carpenter or sider completely out of the coverage ***if they are doing any roofing***.
>
> ***The intent of this form was really to eliminate any coverage if they were involved in doing straight replacement roofing or reroofing type of jobs***. What we have found is that many of these small contractors do the entire job on additions or add ons to homes where there is a new roof being installed. The

> problem we are concerned with on losses is not for this type of exposure but for the exposure where the old roof is being worked on and as such, we have reworded this endorsement to amend the wording before we release this to the agents.
>
> ***The first version of this endorsement was really too drastic because it would have taken us out of any carpenters because many of them will do small roofing jobs*** where they put on the additions, and we already have many of them on the books that we have written for. ***The endorsement as it has been reworded will take us out of coverage where we have a reroofing or a resurfacing job which is what the original intent was.***

[emphasis supplied]

Discussion

Utica now moves to dismiss the complaint on the ground that it fails to state a claim. In its opposition, Diamond concedes that even after a party's answer has been stricken, the court must still determine whether the plaintiff has a legally cognizable cause of action. *Feffer v Malpeso*, 210 AD2d 60 (1994)(malpractice complaint verified by attorney without personal knowledge unsupported by documentary or testimonial evidence); *Green v Dolphy Construction Co., Inc.*, 187 AD2d 635 (2d Dept 1992)(after default allegations of complaint are admitted but legal conclusions to be drawn from them are determined by court).

Once Utica's answer was stricken, it was deemed to have admitted all traversable allegations of the complaint, including liability. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728 (1984). At inquest, the standard of proof is "not stringent," but it must amount to "some firsthand confirmation of the facts." *Feffer, supra* at 61.

Utica objects that the complaint, verified by an attorney for Diamond and Mr. Fauth's testimony are not a firsthand confirmation of the facts. However, Utica's arguments are unavailing because an attorney's affidavit may be used as a vehicle to present documentary

evidence and Mr. Fauth had personal knowledge of the facts from his involvement in the case and review of documents in his file. *See, Zuckerman v City of NY*, 49 NY2d 557 (1980)(attorney's statement may be used as vehicle to present documentary evidence and facts based upon attorney's personal knowledge). Further, on a motion to dismiss for failure to state a cause of action, the court must accept the allegations of the complaint as true and afford them the benefit of every favorable inference. *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998). The plaintiff may submit affidavits to remedy defects in the complaint and to preserve inartfully pleaded, but potentially meritorious claims, and such additional submissions also will be given their most favorable intendment. *Id.*, *citing Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976).

Diamond's documentary proof includes the Underlying Judgment; service of the Underlying Judgment with notice of entry on Utica, on January 25, 2005, with a letter demanding that Utica settle within its policy limit; the lapse of more than thirty days after the demand; the complaint in this action; and La Pioggia's acknowledged assignment of its claims under the Utica Policy to Diamond. In addition, the Fauth Affirmation and the Elliot Affidavit establish Diamond's payment of the Underlying Judgment and Utica's refusal to pay its policy limit thirty days after service with notice of entry and a demand.

The terms of the Utica Policy were filed with the County Clerk, as were Utica's disclaimers. The issue of whether the Roofing Exclusion unambiguously precludes coverage for the fire in Gentry's Building, as Utica contends, is a matter of law. The Referee was entitled to and did take judicial notice of all documents in the County Clerk's files, as may this court. The terms of the Utica Policy prove that Utica issued a liability insurance policy to La Pioggia that protected it against property damage during a coverage period that included the day of the fire in

the Gentry Building. Further, in prior motion practice, also in the County Clerk's file, Utica relied upon La Pioggia's insurance application, which stated that its operations included painting, carpentry and masonry work, but not roofing.

With respect to failure to state a cause of action, Utica relies on the argument that the Roofing Exclusion unambiguously and, as a matter of law, precluded coverage for any roofing work. Exclusions in a policy of insurance are strictly and narrowly construed against an insurer and, where there are two reasonable interpretations, the policy must be construed so as to afford coverage. *Pioneer Tower Owners Assoc. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 308 (2009); *Seaboard Surety Co. v The Gillette Co.*, 64 NY2d 304, 311 (1984)(insurer's burden to show that exclusion applies to particular case and that is subject to no other reasonable interpretation). Exclusions should also be interpreted in accordance with the customs, practices, usages and terminology as generally understood in the particular trade or business. *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F3d 608, 617 (2d Cir 2001)(decided under NY law).

The court rules that Diamond's interpretation of the Roofing Exclusion is reasonable and, therefore, the fire caused by La Pioggia was a covered occurrence under Utica's policy. The Roofing Exclusion is susceptible to the interpretation that it was intended to cover total roof replacement and recovering, rather than any roof repairs, no matter how minor. The phrase "arising out of any roofing operations" is modified by the phrase, "which involve any replacement roof or recovering of existing roof." If Utica had intended to exclude all roofing operations of any type, it need not have added the modifying clause "which involve any replacement roof or recovering of existing roof." *William Press, Inc. v. State*, 37 NY2d 434 (1975)(contracts should be read as a whole and should be construed to give meaning to all parts); *General Electric Co. v*

Hatzel and Buehler, Inc., 19 AD2d 40 (1st Dept. 1963), *aff'd* 14 NY2d 639 (1964)(courts should not adopt construction of a contract that will render contract provision meaningless); *see also*, *McCormick & Co., Inc. v Empire Ins. Group*, 878 F2d 27, 30 (2d Cir. 1989)(construing modifying clause subject to more than one interpretation in favor of insured). Utica's interpretation would render the modifying clause meaningless and, therefore, the court will construe it in favor of Diamond as limiting the words "arising out of any roofing operations."

Diamond's view is further supported by the Zick Letter, an admission binding on Utica, which may be considered in determining whether Diamond has stated a cause of action. The court must accept as true that La Pioggia was hired to "seal a leak in the roof." Sealing a leak is not the same as installing a replacement roof. This leaves recovering of an existing roof, likened to a "reroofing" in the Zick Letter, which stated that contractors doing any roofing were not intended to be excluded from coverage. Diamond has presented evidence, that may be considered in determining whether it has stated a cause of action, that recovering is a term of art in the roofing business for covering an existing roof with a new roofing system.

Finally, the parties have cited no case, and the court's independent research has uncovered none, that interpreted the Roofing Exclusion in the context of sealing a leak, as opposed to a total roof replacement or recovering. The precedents relied upon by Utica either did not quote the language of the exclusion, involved broader exclusions covering any roofing work or involved replacement of an entire roof. Hence, the court holds that the Roofing Exclusion did not preclude coverage for the fire as a matter of law.

The first cause of action states a claim for failure to pay the Underlying Judgment in accordance with Insurance Law §3420. It alleges that Utica did not pay its policy limit within

thirty days of service upon it of the Underlying Judgment with notice of entry. Insurance Law §3420 provides that liability insurance policies must contain a provision that an action may be maintained against an insurer who fails to satisfy, within thirty days after service upon it of a copy of the judgment with notice of entry, a judgment against its insured for a loss during the policy period. The action may be brought to recover up to the limit of the policy. The action may be maintained by an assignee of the insured or anyone subrogated to the insured's rights. *Id.* Here, the record establishes service upon Utica of the Underlying Judgment with notice of entry and its failure to satisfy it within thirty days. The damages would thus be the $1,000,000 limit of the Utica policy.

With respect to the second cause of action for waiver and estoppel, the allegations of the complaint are conclusory and there was no testimony or documentary evidence to support them. Moreover, they are moot in light of the determination that Diamond is entitled to judgment on the first cause of action. Accordingly, the second cause of action is dismissed.

With respect to the third cause of action for bad faith refusal to settle within the policy limits, the court holds that Utica cannot prevail on its motion to dismiss because the reason its answer was stricken was its failure to provide disclosure on the bad faith claim. A bad faith claim requires evidence that the insurer "engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits would not be accepted." *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 454 (1993). In this case, however, the Appellate Division directed Utica to produce documents that Diamond requested in order to prove its bad faith claim. Utica cannot profit from its own wrongful refusal to supply discovery. *See, e.g.*,

Strelov v Hertz Corp., 171 AD2d 420 (1st Dept 1991)(preclusion and judgment on liability granted for disposal of evidence as sanction under CPLR 3126).

Turning to the parties' motions to confirm and reject the Referee's Report, at the outset the court notes that on such a motion, it "may make new findings with or without taking additional testimony." CPLR 4403; *Olstein v Olstein*, 309 AD2d 697, 700 (1st Dept 2003). It is clear from the foregoing recitation of the evidence that the court rejects Utica's claim that the Report must be rejected for insufficient evidence. The record of the current motions, the hearing before the Referee and the County Clerk's file are more than adequate to support a judgment against Utica on the first and third causes of action and, thus, Diamond's motion to confirm the Report and for a default judgment is granted, with a correction as to the amount of the judgment.

The remaining issues are Utica's claim that the Referee should not have awarded pre and post-judgment interest and that the Referee erred in refusing to correct a mathematical error in the Underlying Judgment. Utica objects to the award of pre-judgment and post-judgment interest on the ground that its policy was not in evidence before the Referee and hence there was a failure to prove that the policy provided for interest. In addition, Utica objects that the complaint in this action did not request pre-judgment interest.

The court has already ruled that Utica's policy may be considered. The section entitled "Defense Coverage" provides that in any suit for property damage Utica defended, it would pay pre-judgment interest on an award against any insured on any judgment it paid. As Utica should have defended the Underlying Action and is now being directed to pay the Underlying Judgment (as corrected), an award of pre-judgment interest is proper in the judgment now to be entered against Utica. The Utica policy also provides for payment of post-judgment interest up until the

time that Utica pays the judgment against its insured. With respect to the mathematical error, Utica is correct that the Underlying Judgment should have been in the amount of $4,378,132.51 and the court hereby corrects it to conform the pleadings to the proof, as suggested in Diamond's memorandum of law. Accordingly, it is

ORDERED that Utica's motion to dismiss the complaint is granted solely to the extent of dismissing the second cause of action and in all other respects the motion is denied; and it is further

ORDERED that Diamond's motion for a default judgment and to confirm the report of Special Referee Leslie S. Lowenstein , dated May 11, 2009, is granted solely to the extent that a default judgment is granted in favor of Diamond State Insurance Company and against Utica First Insurance Company on the first and third causes of action in the complaint and the Clerk is directed to enter judgment in favor of Diamond State Insurance Company and against Utica First Insurance Company in the amount of $4,378,132.51 with interest from December 29, 2004, and in all other respects the motion is denied; and it is further

ORDERED that the motion by Utica to reject said referee's report is granted solely to the extent that the second cause of action in the complaint is dismissed and the amount of the judgment is reduced to $4,378,132.51 with interest from December 29, 2004, and in all other respects the motion is denied.

Dated: November 12, 2009 ENTER:

J.S.C.