

**Gillen v Utica First Ins. Co.**

2009 NY Slip Op 33166(U)

December 28, 2009

Supreme Court, Suffolk County

Docket Number: 1967/2004

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
 Acting Justice Supreme Court

\_\_\_\_\_  
 THOMAS J. GILLEN, as trustee of the  
 Gillen Living Trust,

Plaintiff,

-against-

UTICA FIRST INSURANCE CO.,

Defendant.  
 \_\_\_\_\_

ORIG. RETURN DATE: DECEMBER 8, 2008  
 FINAL SUBMISSION DATE: JANUARY 29, 2009  
 MTN. SEQ. #: 007  
 MOTION: MD

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Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_  
 FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers 4, 5;  
 Replying Affirmation and supporting papers 6, 7; it is

**ORDERED** that this motion by defendant UTICA FIRST INSURANCE CO. ("defendant") for an Order, pursuant to CPLR 3212, granting summary judgment to defendant dismissing plaintiff's complaint, is hereby **DENIED** for the reasons set forth hereinafter.

Plaintiff commenced the instant action on January 21, 2004, and had originally alleged three causes of action, to wit: breach of contract, deceptive business practices (General Business Law § 349), and punitive damages for an "egregious fraud on the public." Plaintiff alleged in his first cause of action that defendant breached its obligations under a business insurance policy issued by

defendant. Specifically, plaintiff alleged that following a heavy snowstorm on or about February 17, 2003, the insured premises located in Freeport, New York was damaged when the weight of snow and ice on the roof caused at least four of the roof trusses to fracture and the roof to sag. The damage to the roof resulted in the tenant, a beauty salon, vacating the premises. The subject policy covered both the cost of repairs to the roof and damages from business interruption.

Plaintiff had alleged that the damages for repair to the roof, less the policy deductible, was \$55,000.00 and that he made a prompt claim to defendant and that defendant not only initially disclaimed coverage, but “subsequently and in a protracted manner offered to pay \$12,828.33 then \$15,000 and finally \$23,821.54.” Plaintiff further alleges that defendant’s refusal to pay the amount due under the policy caused additional damage in the amount of \$25,000.00, and that: “Utica directly or through its agents and employees repeatedly sought to manipulate plaintiff to his detriment with information it knew to be false, including the following: (a) that plaintiff was required to repair the damage within 180 days of the loss, whereas there is no such requirement in the policy; (b) that plaintiff had two years from the loss to commence an action against Utica, whereas the policy requires that any such action be commenced within one year of the loss; (c) that a release to be signed by plaintiff was in return for the cost of repair, whereas it also covered income loss, thereby waiving same; (d) that a proposed payment was to be an ‘advance’ whereas the paper to be signed was a full release.”

In his second cause of action for deceptive business practices under General Business Law § 349, plaintiff sought statutory damages in the amount of \$1,000.00 alleging that the conduct of defendant “was pursuant to a practice of intentionally deceiving policyholders about their rights and offering a policyholder a payment that the insurer knows is substantially less than is due under the policy, thereby compelling the policyholder to institute a lawsuit to recover the amount lawfully due.”

By his third cause of action, plaintiff sought punitive damages in the amount of \$10 million for an “egregious fraud on the public,” alleging defendant violated the “duty of insurers to exercise due care in adjusting the claims of their policyholder because the nature of such coverage makes policy holders extraordinarily dependent upon the timely, fair and equitable settlement of such claims.”

Defendant had previously filed a motion to dismiss plaintiff's second and third causes of action. Defendant argued that the allegations of the complaint failed to state cognizable claims under General Business Law § 349 and for punitive damages. By Order dated October 5, 2006 (Werner, J.), the Court granted defendant's motion and dismissed plaintiff's second and third causes of action. The Court held that plaintiff's complaint recited only conduct on the part of defendant relative to the "private dispute" between the parties regarding the amount of damages due under the policy as a result of the snowstorm on or about February 17, 2003, and failed to present allegations of any scheme in dealing with the general public. The Court further held that plaintiff failed to provide any sworn allegations of facts to support a finding of "good ground" to permit him to re-plead his second and third causes of action.

By Order dated December 28, 2007, this Court granted a motion by plaintiff for leave to reargue the prior motion by defendant to dismiss plaintiff's second and third causes of action, but upon reargument, the Court adhered to the determination in the Order of October 5, 2006 (Werner, J.) dismissing the second and third causes of action. As such, the only remaining cause of action herein is plaintiff's first cause of action sounding in breach of contract.

Defendant now moves for summary judgment in its favor on the breach of contract claim, which seeks \$80,000.00 in damages for the "cost of repairing the Premises, with interest from February 17, 2003." Defendant now argues that the plaintiff Trust has no right of recovery under the policy of insurance issued by defendant, because at the time of the alleged loss the Trust was neither the owner of the premises, nor did it have any insurable interest therein.

The subject insurance policy was issued by defendant to the Gillen Living Trust, under policy number BOP 1161802, for the policy period September 25, 2002 to September 25, 2003. In or about August of 2000, the Trust had acquired an interest in the premises by tax deed from the Village of Freeport after paying certain tax liens on the premises. However, defendant informs the Court that by way of a quitclaim deed dated February 8, 2003, the Trust transferred ownership of the premises to THOMAS J. GILLEN, individually. Prior thereto, defendant indicates that on or about December 27, 2001, Mr. Gillen in his individual capacity purchased a tax deed to the premises from the County of Nassau. On May 6, 2002, Mr. Gillen filed an action in Supreme Court, Nassau County, to quiet title to the premises. The action was commenced against,

among others, the Gillen Living Trust. By decision and Order dated May 20, 2003 (Jonas, J.), the Court held that Mr. Gillen acquired title to the premises in his individual capacity by the December 27, 2001 tax deed. The Order was reduced to a judgment dated August 14, 2003 ("Judgment"), which provided, among other things, that Mr. Gillen, individually, and not any other defendant therein, had an absolute and unencumbered interest in the premises from the commencement of the quiet title action. The Judgment further provided that "any claims which the defendants may have or might claim to have to the Premises are without validity and of no force and effect."

Moreover, defendant alleges that by deed dated December 11, 2003, Mr. Gillen, individually, transferred his interest in the premises to "Chenonceaux Properties Corp.," a corporation in which Mr. Gillen is the sole shareholder. According to Mr. Gillen's deposition testimony on August 27, 2008 given in the instant action, the reason for the transfer was to "provide some insulation from liability," after defendant had cancelled the subject insurance policy in or about August of 2003. By deed dated May 7, 2004, Chenonceaux Properties Corp. transferred the premises to "Inderpal Singh Dhall."

Based upon the foregoing, defendant alleges that plaintiff had no insurable interest in the premises at the time of the loss, and thus no right of recovery under the subject insurance policy. As such, defendant seeks summary judgment dismissing plaintiff's breach of contract claim.

In opposition, plaintiff argues that defendant's motion should be denied because: (1) plaintiff did not mislead defendant as to ownership of the premises; (2) defendant's argument that plaintiff had no insurable interest was waived in 2004 as it was not raised in the answer to the complaint; and (3) the plaintiff Trust at all times relevant had an insurable "100% beneficial interest" in the subject premises while it was held by Mr. Gillen and Chenonceaux Properties Corp., who held "naked title as a matter of convenience and for [the Trust]'s sole benefit." In support thereof, plaintiff has submitted, among other things, an affidavit of Mr. Gillen who avers that the Trust was created by him and his wife for estate planning purposes, and that the Trust is the beneficial owner of "almost all real property titles I acquire." In addition, Mr. Gillen alleges that the Trust indenture provides that the Trust may hold property in the name of a nominee, and may accomplish such with or without disclosing its fiduciary capacity. Mr. Gillen further alleges that the proceeds of the sale of the premises from Chenonceaux Properties Corp. to Inderpal Singh Dhall were deposited into the Trust's bank account.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that “the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable” (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent’s Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Here, defendant alleges that the plaintiff Trust has no insurable interest in the premises, and therefore no right of recovery under the subject insurance policy. Initially, the Court finds without merit plaintiff’s argument that defendant waived the defense of insurable interest because it was not raised in answer to the complaint. However, defendant, by its fifth affirmative defense, asserted that “liability is limited to the amount the plaintiff could have recovered under the policy or policies which they claim applicable and is subject to any and all terms, conditions, and provisions of said policy or policies,” and the subject insurance policy contains a clause which provides that “we do not cover more than your insurable interest in any property.” Therefore, under the circumstances presented, the Court finds that defendant has preserved this defense.

Insurance Law § 3401 provides in its entirety, “[n]o contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. In this article, ‘insurable interest’ shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage”

(Insurance Law § 3401). A legal or equitable interest in the property insured is not necessary to support an insurable interest (see *Cassadei v Nationwide Mut. Fire Ins. Co.*, 21 AD3d 681 [2005]; *Weissman v Galway Constr. Corp.*, 239 AD2d 410 [1997]).

It is uncontested that pursuant to the Judgment in the quiet title action, Mr. Gillen, individually, and not any other defendant therein, had an absolute and unencumbered interest in the premises from the commencement of that action on May 6, 2002. The date of loss was February 17, 2003. While the Judgment further provided that, “any claims which the defendants may have or might claim to have to the Premises are without validity and of no force and effect,” the parties to that action had previously stipulated to amend the caption to delete the defendant “Thomas J. Gillen, as trustee of the Gillen Living Trust.” As such, the subsequent Judgment was not entered against the Trust. Thus, as legal title is undisputed, this Court must determine whether the Trust had any beneficial, and therefore insurable, interest in the premises on the date of the loss.

Notwithstanding the fact that the Judgment was not entered against the Trust, the complaint in the quiet title action, which was verified by Mr. Gillen, alleged that “defendants [Gillen Living Trust] . . . unjustly claim or may claim an interest in the Premises, all of which are adverse to the interest of plaintiff Gillen.” The complaint further alleged that “any interest of defendants [Gillen Living Trust] . . . had in the Premises was extinguished by the delivery of the Tax Deed on December 27, 2001 . . . and Gillen now owns the Premises in fee simple absolute free of any claims of said defendants.” The complaint demanded a judgment that all defendants, and every person claiming under them, “be forever barred from all claim to an estate or interest in the Premises.” Defendant argues that this position is inconsistent with the position taken by Mr. Gillen in his affidavit in opposition to the instant application, as well as his position during the instant litigation, and therefore it should be disregarded by the Court as merely a feigned issue of fact. However, as discussed, the parties to that action stipulated to delete the Trust as a defendant prior to the entry of Judgment, and plaintiff now argues that even assuming the Judgment extinguished any beneficial or insurable interest of the Trust, it would have no bearing on the Trust’s equitable interests extant six months earlier on the date of loss.

The Court finds that defendant has established that the Trust did not hold legal title to the premises on the date of loss; however, in opposition, Mr.

Gillen indicates that the premises was held in the name of nominees as a matter of convenience and for the Trust's sole benefit. Plaintiff's allegations raise a triable issue of fact as to whether the Trust had such a relation to, connection with, or concern in the premises that it derived pecuniary benefit or advantage from its preservation, or suffered pecuniary loss or damage from its destruction in the snowstorm (see *Scarola v Insurance Co.*, 31 NY2d 411 [1972]; *Weissman v Galway Constr. Corp.*, 239 AD2d 410, *supra*; *National Superlease v Reliance Ins. Co.*, 123 AD2d 608 [1986]). As discussed, the proceeds from the sale of the premises were deposited into a Trust bank account. This Court is mindful that in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (see *Roth v Barreto*, 289 AD2d 557 [2001]; *O'Neill v Fishkill*, 134 AD2d 487 [1987]). Thus, a court is required to accept the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557, *supra*; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). In view of the foregoing, the Court finds that questions of fact exist as to the issue of the Trust's insurable interest in the premises on the date of loss.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2009



HON. JOSEPH FARNETI  
Acting Justice Supreme Court