

Wilner v Allstate Ins. Co.

2009 NY Slip Op 33211(U)

December 23, 2009

Supreme Court, Nassau County

Docket Number: 16164/07

Judge: F. Dana Winslow

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SCA/

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

**Present:
HON. F. DANA WINSLOW,**

Justice

HARRY WILNER and JUDITH WILNER,

**TRIAL/IAS, PART 7
NASSAU COUNTY**

**Plaintiffs,
-against-**

**MOTION DATE: 09/09/08
MOTION SEQ. NO.: 001, 002**

**ALLSTATE INSURANCE COMPANY,

Defendant.**

INDEX NO.: 16164/07

The following having been considered on the motion (numbered 1-10):

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PRELIMINARY STATEMENT

Defendant moves pursuant to **Civil Practice Law and Rules § 3211(a)(7)** to dismiss the Second and Third Causes of Action of the Complaint. The Second Cause of Action alleges that Defendant breached its contract of insurance with Plaintiffs by refusing to provide counsel to defend Plaintiffs against charges lodged by the Village of Roslyn. The Third Cause of Action alleges deceptive acts and practices by Defendant in violation of **General Business Law § 349**. The Plaintiffs seek damages of not less than \$1,000,000, plus attorney's fees and punitive damages.

Plaintiffs cross-move for an order compelling Defendant to comply with demands for discovery and inspection and interrogatories, including: "(a) Unredacted computer notes for its internal computer system; and (b) Documents and information regarding

claims under the Allstate Deluxe Plus Homeowners Policy for damages resulting from a rain and/or wind storm which occurred on or about October 7 – 9, 2005 in Nassau County, Westchester County and New York County that resulted in litigation.”

BACKGROUND

Plaintiffs are the owners of property located at 6 Verity Lane, Roslyn, NY. The property is burdened by a storm sewer drainage easement in favor of the Village of Roslyn. Commencing on or about October 7, 2005 heavy rains overwhelmed the capacity of the storm sewer, and ultimately caused the hilltop in the rear of Plaintiffs’ property to slide downhill toward the Village Hall on Old Northern Boulevard, resulting in destruction of Plaintiffs’ retaining wall, uprooting of several trees, and damage both to the Plaintiffs’ property and the property of the Village.

Within days, the Village sent its Code Enforcement Officer to the site, and retained Cameron Engineering Associates, LLP, an engineering firm, to investigate the cause of the occurrence and subsequent damage.¹ In addition, the Village retained plumbing contractors to remove dirt and debris from and repair the storm sewer. Plumbing bills in the total amount of \$8,350 were rendered to the Village.²

On October 11, 2005, the Village issued to Plaintiffs an Appearance Ticket, summons number 101105-2, together with an Information, charging that the Plaintiffs had illegally installed a storm drain system at the base of their retaining wall, in violation of the Code of the Incorporated Village of Roslyn. The following violations were cited: (i) the storm drain system at the premises was not properly installed [Sec. 18-23.A]; (ii) the storm drain discharged water across other properties and into the public right-of-way [Sec. 18-24.D.(1)(b)]; and (iii) the storm water at the premises was not contained on the premises [Sec.18-24.D.(1)(c)]³

By letter dated October 12, 2005, counsel for the Village advised the Plaintiffs that “(i)t has been determined that the collapse was caused, in part, by a drainage system on your property which was illegally discharging storm water down the hillside” and that “(t)he Village intends to hold you responsible for the cost of the damage to the Village

¹ Exh. “L” to Cross-motion - Report of Cameron Engineering Associates, LLP

² Exh. “K” to Cross-motion.

³ Exh. “M” to Cross-motion.

Hall, including the repair and shoring up of the hillside”.⁴ By letter dated November 9, 2005, the Village directed Plaintiffs to take remedial action to stabilize the hillside within ten days, or the Village would perform such work and assess the costs to Plaintiffs.⁵

Plaintiffs notified Defendant of the Village’s potential claim, invoking the liability coverage provisions of their homeowners policy [Claim Number 5381687325 EPD]. By letter dated November 10, 2005 signed by claims service representative Bob Fitzgerald, Defendant denied liability coverage with respect to the Village on the ground that “[O]ccurrence means an accident... at this point you have been summoned by the Village of Roslyn as to violations of the Roslyn Municipal Code.” On November 21, 2005 counsel for Plaintiffs forwarded the October 12 and November 9 letters from the Village to Mr. Fitzgerald.⁶ By letter dated December 1, 2005 to Mr. Fitzgerald, Plaintiffs’ counsel reiterated his prior oral request that Defendant retain an attorney to represent Plaintiffs with respect to the Village’s claims, to hire an expert to ascertain the cause of the hillside collapse and to negotiate with the Village on Plaintiffs’ behalf.⁷ The request was denied.

On December 5, 2005, Plaintiffs filed a Notice of Claim against the Village alleging that the property damages sustained by Plaintiffs were caused by the negligence of the Village.⁸ A letter dated May 22, 2006 from the Village’s insurer denied liability on the part of the Village.⁹

The bench trial on the violations of the Village Code took place on August 22, 2006. At that time, the Code Enforcement Officer for the Village testified to the existence of a jury-rigged drywell, consisting of a 30-gallon garbage pail filled with, and surrounded by gravel, with a hose on the Plaintiffs’ property. It was located 40 feet from the house, and adjacent to the retaining wall. Because the Village could not prove that the

⁴ Exh. “N” to Cross-motion.

⁵ Exh. “V” to Cross-motion.

⁶ Exh. “V” to Cross-motion.

⁷ Exh. “W” to Cross-motion.

⁸ Exh. “P” to Cross-motion.

⁹ Exh. “Q” to Cross-motion.

hose was attached to the pail at the time of the rainfall, or that water was exiting the hose, the charges were withdrawn on September 26, 2006.¹⁰

In the interim, and concurrent with their claim for liability coverage, Plaintiffs also asserted a claim for first-party benefits for the damage to their property resulting from the occurrence of October 2005 [Claim Number 5381643898 OPS]. By letter dated October 27, 2005 signed by claims adjuster Patricia Shearer, Defendant disclaimed coverage on the basis that “[w]e do not cover loss or damage resulting directly or indirectly from Earth movement of any type, including, but not limited to earthquake, volcanic eruption, landslide, subsidence, mudflow, pressure, sinkhole, erosion or the sinking, fishing, shifting, creeping, expanding, bulging, crackline, settling or contracting of the earth.”

On or about July 24, 2006, Plaintiffs’ counsel forwarded a demand letter to Ms. Shearer, outlining his argument that the incident was, in fact, a covered event under the Allstate policy.¹¹ A follow-up letter was sent on October 6, 2006 to a new claims analyst, Robert Mituniewicz.¹² Plaintiff asserts that in October or November 2006, Defendant reopened its review of plaintiff’s claim. A letter from Plaintiff’s counsel to Mr. Mituniewicz dated October 24, 2006, refers to Mr. Mituniewicz’s request for further documentation in a telephone conversation of October 11, 2006.¹³ On December 21, 2006, an engineering firm hired by Allstate (PalMar Engineering, P.C.), was sent to Plaintiffs’ home to determine the cause and extent of the damage to the retaining wall.

On December 22, 2006, Plaintiffs filed a civil action against the Village.¹⁴ The report of PalMar Engineering, P.C. dated January 16, 2007 opined that the collapse of the hillside was caused by a clogged and malfunctioning storm sewer drain.¹⁵

The instant action was commenced on September 12, 2007. In addition to the two causes of action which Defendant seeks to dismiss herein, the Complaint contains a First Cause of Action for breach of contract relating to Allstate’s failure to pay Plaintiff’s

¹⁰ Exh. “S” to Cross-motion.

¹¹ Exh. “X” to Cross-motion.

¹² Exh. “Y” to Cross-motion.

¹³ Exh. “Z” to Cross-motion.

¹⁴ Affirmation in Support of Cross-motion at ¶ 28.

¹⁵ Exh. “AA” to Cross-motion.

claim for first-party benefits under the homeowners' policy. By letter of September 24, 2007 Allstate formally advised Plaintiffs that the property damage occasioned by the events of October 2005 was excluded from coverage.¹⁶

The instant action was originally assigned to Justice Davis of this Court, but was reassigned to the undersigned on August 5, 2008 and joined with related actions for purposes of discovery and/or trial by Order of this Court dated August 8, 2008. On September 9, 2008, the Court heard offers of proof regarding the discovery that is the subject of Plaintiffs' cross-motion. By Order dated September 25, 2008, this Court ordered Defendant "to produce *in camera* all property damage claims under the Allstate Deluxe Plus Homeowners Policy for damages resulting from a rain and/or wind storm which occurred on or about October 7, 2005 in Nassau County as well as all claims that resulted in litigation, such documents being limited to property damage claims between October 7, 2005 to January 7, 2007 in Nassau County only." A motion to reargue that Order was submitted on December 8, 2008 and the Court held a further discovery conference on December 12, 2008, at which time it was agreed that the Court's determination on the issues raised at the conferences would be reflected in this decision.

DISCUSSION

Second Cause of Action

The second cause of action is premised on the allegation that the Defendant breached its duty to the Plaintiffs by failing to provide a defense to the criminal charges filed against them by the Village. Plaintiffs allege that the failure to provide a defense compelled them to hire their own counsel to defend the criminal charges and to file a civil action against the Village to resolve the property damage dispute.

Defendant seeks to dismiss this cause of action on grounds that the defense of a criminal action, or an action alleging the criminal violation of the Village Code, does not come within the coverage afforded by Plaintiffs' insurance policy. Additionally, Defendant asserts, the obligation to provide a defense for civil liability was never triggered, insofar as the Village never commenced a lawsuit against the Plaintiffs to recover its property damages or other losses.

The concept behind Plaintiffs' claim for coverage in the criminal proceeding is that this was the opening gambit in the Village's attempt to impose civil liability upon the

¹⁶ Exh. "BB" to Cross-motion.

Plaintiffs for the damages caused by the hillside collapse. In Plaintiffs' view, the letter from counsel for the Village stating the intent of the Village to hold the Plaintiffs responsible for the Village's property damage constituted a "claim" which triggered coverage for all aspects of the process.

The Court rejects Plaintiffs' argument. The liability provision of the subject policy of insurance provides coverage for property damage arising from an "occurrence," which is defined as an "accident." The policy explicitly excludes from coverage "property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of" the insured.¹⁷ The Village's charges against Plaintiffs are based upon alleged intentional acts in violation of the Village Code, including the improper installation of a makeshift storm drain directing the flow of water away from Plaintiffs' property and onto neighboring properties. Based upon the plain meaning of the policy language, there is no coverage afforded for the defense of such criminal charges or any civil claim based upon such alleged intentional acts.¹⁸

There is no public policy argument which prevents insurers from excluding intentional or criminal conduct from homeowners' insurance coverage, as opposed to automobile coverage. "There is no statutory requirement for the full panoply of coverages known as homeowner's insurance and hence 'no prohibition against such insurers limiting their contractual liability'".¹⁹

The argument that the criminal proceeding may have been an entree to a civil action predicated upon negligence, or that a conviction would have enhanced Defendant's position in such action, is unavailing. "A liability insurer's obligation to defend an insured does not, as a general rule, arise until after a suit is filed against the insured."²⁰ In this case, there was no civil action filed by the Village to recover its own property damage, nor any such counterclaim in Plaintiffs' action against the Village.

¹⁷ Allstate Insurance Company Deluxe Plus Homeowners Policy, p. 22, ¶ 1 attached as Exh. "C" to Motion

¹⁸ See *Allstate Insurance Co. v. Swanson*, 46 A.D.3d 1453 (4th Dept. 2007).

¹⁹ *Slayko v. Security Mutual Insurance Company*, 98 N.Y.2d 289, 295 (2002), citing *Suba v. State Farm Fire & Cas. Co.*, 114 A.D.2d 280, 284 (4th Dept. 1986).

²⁰ COUCH ON INSURANCE 3d., § 201.11.

The Court determines that Defendant was not obligated to provide a defense to, or indemnify Plaintiffs in connection with, the proceeding brought against the Plaintiffs by the Village of Roslyn. Accordingly, the second cause of action is dismissed.

Third Cause of Action

The third cause of action is premised upon allegations that Defendant misled Plaintiffs by reopening Plaintiffs' first-party property damage claim and then intentionally delaying a decision on coverage. Plaintiffs claim that this compelled them to commence a tort action against the Village of Roslyn, insofar as the Statute of Limitations on Plaintiff's tort claim was about to expire and their homeowners policy required them to protect Defendant's right of subrogation.²¹ Plaintiffs assert that this reflects a pattern and practice of the Defendant which violates **General Business Law ("GBL") §349**. In Plaintiffs' view, Defendant's dilatory practices, coupled with a policy condition that requires the insured to protect Defendant's subrogation rights, effectively shifts the burden to the insured, in circumstances such as Plaintiffs', to incur the expense of litigation or risk forfeiture of coverage. Defendant argues that Plaintiffs' allegations have no basis in fact, and fail to state a cause of action under **GBL §349**, insofar as they amount to nothing more than a failure to pay a particular insurance claim.

GBL §349 is a consumer protection statute which, among other things, authorizes consumers injured by a business's deceptive acts or practices to file a private civil action in which they may recover the greater of their actual damages or fifty dollars. Upon a finding of a wilful or knowing violation of this statute, the Court may award treble damages up to \$1,000. The statute also provides for the recovery of attorney's fees and costs.

To succeed on a cause of action under **GBL §349**, the Plaintiff "... must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act".²² In the context of a motion to dismiss pursuant to **CPLR §3211(a)(7)**, the plaintiff's burden is only to demonstrate that the cause of action is viable; that is, that facts have been alleged which support each of the elements of the

²¹ See Allstate Insurance Company Deluxe Plus Homeowners Policy, p. 20, ¶ 10, attached as Exh. "C" to Motion.

²² *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) (internal citations omitted).

claim²³ Unless the claim is patently or demonstrably frivolous, the Court's inquiry is limited to its sufficiency, as opposed to its merit.²⁴

In this case, Plaintiffs' burden has been met. Plaintiffs have alleged misleading conduct falling within the objective definition articulated by the courts,²⁵ as well as injury resulting therefrom. The essence of Plaintiffs' claim is that Defendant misrepresented to Plaintiffs, expressly or by implication, that their claim had been reopened. This was confirmed by the commencement of an investigation. In reliance thereon, Plaintiffs filed suit against the Village prior to the expiration of the limitations period, in order to protect Defendant's right of subrogation and thereby preserve their insurance. Plaintiffs imply that if Defendant had not misled them that their claim was open, or had not stalled in processing the claim, or had reached a final determination prior to the expiration of the Statute of Limitations, they might not have incurred the expense of commencing the action against the Village.

The conduct alleged by Plaintiffs qualifies as consumer-oriented. "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior. . . Plaintiff, thus, need not show that the defendant committed the complained of-acts repeatedly – either to the same plaintiff or to other consumers – but instead must demonstrate that the acts or practices have a broader impact on consumers at large."²⁶ Case law contrasts transactions which are unique in nature, of consequence only to the participants, with "typical consumer transactions" having the potential to affect similarly situated consumers. Only the latter are held to fall within the protection of **GBL §349**.²⁷ Appellate courts have emphasized that "standard agreements and policies are significant

²³ See *Leon v. Martinez*, 84 NY2d 83, 87-88 (internal citations omitted).

²⁴ See *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144.

²⁵ See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995) ("deceptive acts" under GBL §349 means "representations or omissions likely to mislead a reasonable consumer acting reasonably under the circumstances").

²⁶ *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995)

²⁷ See, generally, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 (1995)

in showing that challenged actions are consumer-oriented.”²⁸ Also significant is the amount of money involved in the transaction and the relative bargaining power of the parties.²⁹

Here, Plaintiffs are individual homeowners whose knowledge, sophistication and bargaining power in insurance matters are presumably unequal to that of Defendant. As such, they are among the category of persons whom the statute was designed to protect. The circumstances alleged by Plaintiffs are not unique to the transaction between Plaintiffs and Defendant. The policy in question is the standard homeowners policy issued to Defendant’s customers. The alleged practice of delaying determination of first-party claims has the potential to affect every insured. Moreover, Defendant admits that there were hundreds of homeowners’ insurance claims filed with respect to the storm of October 2005. The extent to which the conduct alleged by Plaintiff, if true, had an impact on similarly situated claimants cannot be determined without further discovery.

Plaintiffs have alleged a pattern and practice of dilatory conduct aimed at the public at large, which, they claim, misrepresents the nature or extent of the homeowners’ coverage afforded. The Court finds that at this stage of the proceedings, it cannot determine that Plaintiffs cause of action under **GBL §349** is insufficient as a matter of law.³⁰

Plaintiff’s Cross-motion

In their cross-motion, Plaintiffs seek to compel Defendant to produce un-redacted computer notes from its internal computer system. Plaintiffs assert that the attorney-client privilege is an improper basis for redaction because a privilege log was not provided, and the claims file notes that the matter was never sent for legal review.³¹ Defendant is directed to submit to the Court, within 30 days of the receipt of a copy of this Order with

²⁸ *Interested Underwriters at Lloyd’s of London Subscribing to Policy # 991361018 v. Church Loans and Investment Trust et al.*, 432 F.Supp.2d 330, 334.

²⁹ *Interested Underwriters at Lloyd’s of London Subscribing to Policy # 991361018 v. Church Loans and Investment Trust et al.*, 432 F.Supp.2d 330, 333.

³⁰ See *Shebar v. Metropolitan Life Ins. Co.*, 25 A.D.3d 858. See also *Interested Underwriters at Lloyd’s of London Subscribing to Policy # 991361018 v. Church Loans and Investment Trust et al.*, 432 F.Supp.2d 330.

³¹ Plaintiffs’ Memorandum of Law at pp. 24 - 25.

Notice of Entry, the requested un-redacted documentation, together with a statement as to the basis for the claimed attorney-client privilege.

Plaintiffs further seek documents and information regarding other claims for damages resulting from the storm of October 2005. The basis for this discovery is that it may lead to relevant evidence regarding the alleged pattern of dilatory and misleading conduct underlying the third cause of action. As discussed in the December 12, 2008 conference, Defendant is directed to produce all computer-generated correspondence between Defendant and its insureds (or anyone on their behalf) relating to the 375 claims submitted to Defendant which arose out of the October 2005 storm, and which concern properties located in Nassau County. The documents may be redacted to exclude identifying information pertaining to other insureds.

CONCLUSION

Based upon the foregoing it is

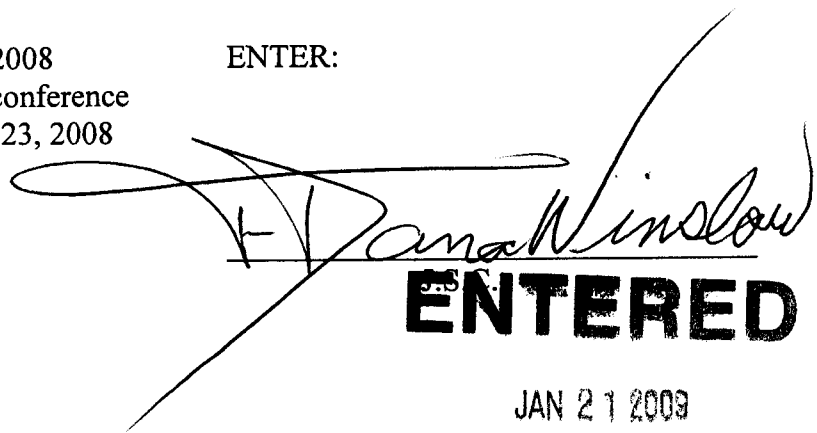
ORDERED, that Defendant's motion to dismiss is **granted in part and denied in part**, as follows: The Second Cause of Action is **dismissed**. The Third Cause of Action survives, as do the claims for counsel fees and treble damages to the extent provided under **General Business Law §349**; it is further

ORDERED, that Plaintiffs' cross-motion for discovery is **granted** to the extent indicated.

The parties shall appear for a conference on February 4, 2009. This constitutes the Order of the Court.

Originally signed: September 26, 2008
Redated: (As amended following conference
of December 12, 2008) December 23, 2008

ENTER:



ENTERED

JAN 21 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE