

BNS Bldg., LLC v Greenwich Ins. Co.

2010 NY Slip Op 30654(U)

March 22, 2010

Supreme Court, New York County

Docket Number: 111445/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.
Justice

PART 10

BNS Building, LLC.

INDEX NO. 111445/09

- v -

Greenwich Insurance Co.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 22 2010

J.J.G.
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x

BNS Building, LLC.,

Plaintiff,

-against-

Greenwich Insurance Company,

Defendant.

-----x

Decision/Order

Index No.: 111445/09

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m (3211[a][5]) w/RK affid, exhs	1
Pltf's opp w/PH affirm, exhs	2
Def's reply w/ML affirm, RK affid., exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment arising from a dispute involving insurance coverage. Plaintiff, BNS Building, LLC. ("BNS"), is the insured of defendant, Greenwich Insurance Company ("Greenwich"). BNS filed an insurance claim regarding damage to BNS's property, located at 3607/3609 Broadway, New York, New York (the "Property"). Greenwich has denied the claim. BNS seeks a declaration that its policy with Greenwich is applicable to its property damage claim. Defendant now moves, pre-answer, to dismiss (CPLR § 3211) each of the causes of action asserted in the

Supplemental Complaint.¹ Plaintiff opposes the motion to dismiss in its entirety. The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference [EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005); Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 (1st Dept 2003)]. The following facts are accepted as true:

Facts Presented and Arguments Considered

BNS and Greenwich entered into two consecutive property insurance contracts (the "Contracts"). Each of the Contracts provided BNS with identical coverage for different periods of time: (1) policy number PWK 001 9571, was for the policy period from October 20, 2005 to October 20, 2006; and (2) policy number PWK 002 2699, was for the policy period from October 20, 2006 to October 20, 2007. The Contracts both state, in relevant part:

Commercial Property Conditions

D. Legal Action Against Us. No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

¹ The "Supplemental Complaint" consists of a supplemental summons and amended complaint. It includes all causes of action stated in the original complaint.

BNS contends that, on or about October 20, 2006, the Property sustained structural damage. On or about March 6, 2008, Greenwich received notice of BNS's loss, through a sworn statement by BNS. On July 15, 2008, Greenwich sent BNS a letter denying coverage for the claimed loss due to BNS's alleged failure to provide "various documents and other items of information . . . despite being warned that a failure to cooperate with [Greenwich's] investigation could lead to a denial of [BNS's] claim." The letter quoted sections of the Contracts, including the above quoted section, "Legal Action Against Us."

On August 11, 2009, approximately 34 months after the property damage occurred, BNS initiated this lawsuit against Greenwich by filing the summons and complaint. Greenwich moves to dismiss this case pursuant to CPLR § 3211 (a) (5), on the ground that the statute of limitations expired before this action was commenced.

Greenwich provides the sworn affidavit of Robert Klipera ("Klipera"), Senior Vice President of Claims for WKF&C Agency, the underwriting agents for Greenwich. Greenwich argues that BNS commenced this action after the expiration of the two year suit limitation found in the "Legal Action Against Us" provision of BNS's insurance policy. Greenwich further contends that the parties' agreement to shorten the statute of limitations to two years is consistent with Insurance Law § 3404, which establishes a statutory two year limitation suit provision and this contractual limitation is part of the standard policy form presented in the statute itself (lines 157-161).

BNS contends that the two year suit limitation provision, found under "Legal Action Against Us," is not enforceable because the "New York Changes" endorsement, contained in each of the Contracts, supercedes the two year suit limitation clause.

The "New York Changes" endorsement specifically provides as follows:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE
READ IT CAREFULLY.**

NEW YORK CHANGES

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

...

C. Legal Action Against Us

1. The **Legal Action Against Us** Loss Condition in the Legal Liability Coverage Form is replaced by the following:

No person or organization has a right under this Coverage Form:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from you; or
- b. To sue us on this Coverage Form unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against you; but we will not be liable for damages that are not payable under the terms of this Coverage Form or that are in excess of the Limit of Insurance. An agreed settlement means a settlement and release of liability signed by us, you and the claimant or the claimant's legal representative.

BNS argues, in the alternative, that the "New York Changes" endorsement renders the policy ambiguous. BNS contends that the "New York Changes" endorsement modifies the Commercial Property Coverage Part, thereby eliminating the two year suit limitation, and rendering this action timely. BNS notes that the "Legal Action Against Us" provision could be construed as applying only to the "Legal Liability

Coverage Form;" but that form is not provided to the court. Nonetheless, BNS argues this potential "ambiguity" should be construed against the insurer.

BNS also argues that Greenwich's application to dismiss is premature because it has not had the benefit of discovery to determine: the meaning behind the New York Changes endorsement; the absence of a "Legal Liability Coverage Form;" whether BNS was given proper notice; and whether Greenwich's response time in denying coverage (4 months and 9 days) was a waiver by Greenwich of the statute of limitations defense.

BNS claims that this action was timely commenced, irrespective of the suit limitations provision because there was no justiciable dispute until Greenwich denied BNS's insurance claim on July 15, 2008. BNS states that it timely gave notice of its first claim on March 6, 2008 (approximately 17 months following the property damage) and that Greenwich's 4 month delay in denying coverage materially prejudiced BNS by giving them only 3 months to file suit.

In reply, Greenwich argues that the "New York Changes" endorsement does not modify the property coverage limitation in the suit provision because the endorsement only applies to "Legal Liability Coverage," which is not a part of BNS's policy. Klipera maintains that insurers are required by law to include this standard "one size fits all" New York Changes endorsement in every commercial policy issued in New York, regardless of whether it contains the "Legal Liability Coverage" form, or any other forms, to which the endorsement may apply.

Greenwich also argues, in its reply, that Insurance Law § 3404 applies; laches is inapplicable; the claim accrued on the date of loss; and that further discovery could only lead to irrelevant parol evidence.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

BNS's argument, that the two year suit limitation provision is not valid, fails. It is black letter law that parties may shorten a statute of limitations by agreeing that any lawsuit commenced must be within a shorter period of time than prescribed by law. "[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable [Sapinkopf v. Cunard S.S. Co., 254 NY 111] provided it is in writing [CPLR 201]." John J. Kassner and Co., Inc. v. City of New York, 46 N.Y.2d 544, 551 (1st Dept. 1979).

Two year suit limitation provisions (and even one year suit limitation provisions) have been enforced by the Court of Appeals [Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966 (1st Dept. 1988); Blitman Construction Corp. v. Ins. Co. of North America, 66 N.Y.2d 820 (1st Dept. 1985)] and are recognized by statute, "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within twenty-four months next after inception of the loss" [CPLR § 3404 (e), lines 157-161].

Accordingly, the two year suit limitation provision found in each Contract is valid and BNS had two years from the date of the loss to commence this action. BNS, however, commenced this action on August 11, 2009, more than two years after October 20, 2006, the date that BNS claims it sustained property damage.

Consequently, it is unrefuted that BNS did not timely commence this action.

BNS's argument, that the "New York Changes" endorsement renders the policy ambiguous, is unavailing. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1st Dept.1990). BNS's argument rests upon an interpretation of the Contracts that is contrary to their plain meaning. The "New York Changes" endorsement clearly and unequivocally states that the form replaces the "Legal Action Against Us Loss Condition in the Legal Liability Coverage Form." However, BNS's claim was under the commercial liability part of the policy. The provision under the Contracts applicable to BNS's claim contains an unambiguous two year suit limitation provision. This was highlighted in Greenwich's letter to BNS, dated July 15, 2008, denying the claim.

Although BNS argues that Greenwich's application to dismiss is premature because there has been no discovery, this argument also fails. CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 406 (1968). Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to disclosure of admissible proof. Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center, 98 A.D.2d 624 (1st Dept 1983). Discovery, however, cannot be a fishing expedition, and it must relate to facts bearing on the controversy. Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center, *supra*.

BNS has not set forth a viable basis for which discovery would be needed. BNS claims discovery is required to determine: the meaning behind the New York Changes endorsement; the absence of a "Legal Liability Coverage Form;" whether BNS was given proper notice; and whether Greenwich's response time in denying coverage (4 months and 9 days) was a waiver by Greenwich of the statute of limitations defense. This is little more than a fishing expedition to determine whether there is in fact an ambiguity concerning whether or not the "New York Changes" endorsement applies to the two year suit limitation found in the Contracts. The court finds that BNS does not require discovery to uncover whether there is interplay between the endorsement and the Commercial Property Coverage Part since the two year suit limitation provision is clear on its face.

BNS argues that this action is timely because it timely notified Greenwich of its claim on March 6, 2008. Any delay by the insurance carrier in completing its investigation of the claim does not excuse the plaintiff from timely commencing an action, since it is "bound by the terms of the contract to either commence an action prior to the expiration of the limitation period or obtain a waiver or extension of such provision." Brown v. Royal Ins. Co. of America, 210 A.D.2d 279, 279 (2d Dept. 1994). The court, therefore, rejects BNS's contention that Greenwich's four month delay in denying the claim (July 15, 2008) after receiving the notice of loss (March 6, 2008) should be considered or that it excuses BNS's own delay in commencing this action.

There is documentary evidence (letter of July 15, 2008) that Greenwich denied BNS's claim because BNS failed to provide various documents and other information demanded and did not cooperate with Greenwich's investigation. "[D]efendants should

not be estopped or found to have waived the protection of the limitations period provided for in the contract, where . . . the plaintiffs . . . otherwise failed to provide documents and information to which the defendants were entitled in their investigation of the claim."

Minichello v. Northern Assurance Co. Of America, 304 A.D.2d 731, 732-33 (2d Dept. 2003).

Once a statute of limitations expires, the court cannot extend or revive it. "An insured is bound by the terms of the contract . . . and can protect itself by either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision." Blitman Construction Corp. v. Insurance Co. of North America, 66 N.Y.2d 820, at 823. Here, there is no claim by BNS that Greenwich extended the time to bring this lawsuit or that the contract or CPLR § 3404 builds in extra time.

Plaintiff's first cause of action for breach of contract is time-barred by the clear and unambiguous two-year period of limitations set forth in the policy of property insurance issued by the defendant to the plaintiff and such contractual limitation is valid and enforceable. [Myers, Smith & Granady, Inc. v. New York Property Ins. Underwriting Association, 201 A.D.2d 312 (1st Dept. 1994), *granted in part, dismissed in part* 83 N.Y.2d 942 (1994), *affirmed by* 85 N.Y.2d 832 (1995)]. Therefore, the statute of limitations is valid and will not be extended.

In accordance with the foregoing, defendant's motion for the pre-answer dismissal of the complaint on the basis that it is time barred is granted and the complaint is dismissed.

Conclusion

IT IS HEREBY

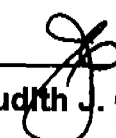
ORDERED that the Clerk shall enter judgment in favor of defendant, Greenwich Insurance Company, against plaintiff, BNS Building, LLC., dismissing the complaint; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 22, 2010

So Ordered:



Hon. Judith J. Glache, J.S.C.

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE