

Park Sq. Assoc., Inc. v Interstate Indem. Co.

2010 NY Slip Op 31045(U)

April 28, 2010

Sup. Ct, NY County

Docket Number: 111805/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

PARK SQUARE ASSOCIATES, INC., and
LESAGE, LLC.,
Plaintiffs,

Index No.: 111805/07

Motion Date: 10/27/09

Motion Seq. No.: 02

- v -

Motion Cal. No.: 92

INTERSTATE INDEMNITY COMPANY, FIRST STATION
REALTY, LLC, SAF DEVELOPERS, LLC, LONG
ISLAND CONCRETE, INC., and VACHRIS
ENGINEERING, P.C.,
Defendants.

The following papers, numbered 1 to 12 were read on this motion for summary judgment.

FILED
APR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

1 - 4

5 - 10

11, 12

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff-insureds are the managing agent and owner respectively of the premises at 162 Stanton Street, New York. The first cause of action in the complaint, upon which the plaintiffs seek partial summary judgment on this motion, is asserted against defendant Interstate Indemnity for breach of contract based upon the asserted failure of defendant insurer to cover plaintiffs' claim for damages under a commercial property casualty policy issued by defendant upon plaintiffs' premises.

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):

The other causes of action, not at issue on this motion, seek damages from the remaining defendants on the theory that the construction excavation on the premises abutting plaintiffs' property caused damage to plaintiffs' premises.

On or about October 6, 2005, plaintiffs submitted a claim to defendant Interstate based upon the 162 Stanton Street premises "sustaining cracking, settling, and shifting from the long term construction being done at the eastern adjoining vacant lot located at 162-166 Stanton Street." By letter dated October 30, 2006, Interstate stated that its policy did not provide coverage for this type of event based upon the policy's "Earth Movement" exclusion.

Interstate opposes plaintiffs' motion on the grounds that its coverage obligations cannot be determined until liability for the damage to plaintiffs' premises is resolved and discovery has not yet taken place. The remaining defendants take no position on the motion except to oppose any resolution that would fix liability for the alleged damage to plaintiffs' property. The court finds that Interstate's argument, which Interstate concedes is similar to the one it raised on its prior motion to sever, is contrary to governing law and therefore the court shall grant the motion with respect to the plaintiffs' first cause of action only with any damages with respect to the first cause of action to be determined at trial. Plaintiff has not moved for summary

judgment with respect to liability for property damage and in any event the court agrees with the remaining defendants that there are insufficient facts in the record at this pre-discovery phase to consider such relief.

The sole ground for Interstate's disclaimer was the earth movement exclusion. "[A]n insurer generally has the burden of proving that a loss is within the scope of a policy exclusion." Maurice Goldman & Sons, Inc. v Hanover Ins Co., 80 NY2d 986, 987-988 (1992) citing Facet Indus v Wright, 62 NY2d 769, 771 (1984). The sole issue on this motion is whether the alleged occurrence is within the policy exclusion relied upon by Interstate. The Court of Appeals has recently rendered a decision in a case involving similar facts and policy language to that presented here. The Court stated there

Plaintiff is the owner of a condominium apartment building. After cracks began appearing in the building, a structural engineer was called in. He found a number of cracks, separations and open joints, and concluded that they were caused by work that was in progress on the lot next door. That lot was being excavated, and underpinning had been built to protect the foundation of plaintiff's building. The engineer concluded, and it is undisputed in this case, that the underpinning was flawed, and that as a result earth slid away beneath plaintiff's building, causing damage.

Plaintiff submitted a claim for the damage to defendant State Farm Fire & Casualty Company (defendant), which had insured the building against "accidental direct physical loss." Defendant disclaimed coverage, relying on the "earth movement" exclusion in its policy.

Pioneer Tower Owners Assn v State Farm Fire & Cas Co., 12 NY3d 302, 305 (2009). Before the trial court the respective parties

brought summary judgment motions based upon expert affidavits and the court held "here, the plaintiff's loss involved the physical removal of earth from underneath the plaintiffs building during excavation and underpinning operations on the adjoining lot, and therefore, the plaintiff's loss does not fall within the 'earth movement' exclusion" relying upon the Court's decision in Lee v State Farm Fire & Cas., 32 AD3d 902 (2d Dept 2006). Pioneer Tower Owners Assn v State Farm Fire & Cas Co., 2007 NY Slip Op 50869 *3-4 (Sup Ct, Nassau Ct, March 29, 2007). The court then directed "[t]he parties shall proceed with discovery with respect to plaintiff's claimed damages." Id. The Appellate Division affirmed stating "[t]he plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the insurance policy exclusions did not clearly and unambiguously apply to the loss in this case." Pioneer Tower Owners Assn v State Farm Fire & Cas Co., 51 AD3d 649, 650 (2d Dept 2008). The Court of Appeals affirmed the courts below (12 NY3d 302, 306).

In support of their motion plaintiffs submit two expert affidavits that the damage to plaintiffs' premises was caused by improper excavation and underpinning by the adjacent construction. These affidavits are sufficient to carry plaintiffs' burden of demonstrating that the policy exclusions did not apply to the loss as asserted by the defendants. The

court is not presented with and need not decide whether these affidavits are sufficient to establish causation or liability as that is not the issue with respect to the existence of coverage.

The defendants fail to submit any evidence to establish that the policy's earth movement exclusion is applicable. Interstate concedes that their adjuster had the opportunity to inspect the premises and only speculates that further discovery would lead to facts that may support its disclaimer. Interstate further fails to identify facts not in its possession that would establish its other affirmative defenses as they relate to liability.

Interstate's further assertion that the application of the doctrine of judicial estoppel defeats plaintiffs' motion is unsupportable as there is no inconsistency between plaintiffs' arguments opposing severance and in favor of summary judgment. Plaintiffs' argument that inconsistent verdicts could result from severance refers to the amount of damages plaintiff is due whereas Interstate's liability is based in contract and the other defendants' liability is based in tort. Therefore, there is no inconsistency meriting the application of any estoppel.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment as to liability on the first cause of action in the complaint is GRANTED against defendant INTERSTATE INDEMNITY COMPANY; and it is further

ORDERED that the parties are hereby directed to attend a status conference on June 15, 2010, at 11:00 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: April 28, 2010

ENTER:

~~By the Court~~
J.S.C.

HON. DEBRA A. JAMES

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