

Hon v Allstate Indem. Co.

2010 NY Slip Op 32974(U)

October 15, 2010

Supreme Court, New York County

Docket Number: 603182/09

Judge: Joan A. Madden

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UNFILED ON 10/21/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Miller
Justice

PART 11

Index Number : 603182/2009
HON, D.O., JOHN
VS.
ALLSTATE INDEMNITY COMPANY
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and order.

FILED
OCT 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 15, 2010 _____
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 : IAS PART 11

-----x
JOHN HON, D.O.,

Index No. 603182/09

Plaintiff,

- against -

ALLSTATE INDEMNITY COMPANY and
ALLSTATE INSURANCE COMPANY,

Defendants.
-----x

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HON. JOAN A. MADDEN, J.:

In this action for coverage under a homeowners insurance policy, defendants Allstate Indemnity Company and Allstate Insurance Company (collectively, "Allstate") move, pursuant to CPLR 3211(a)(5), to dismiss the Complaint as barred by the limitations period contained in the policy.

BACKGROUND

Plaintiff, John Hon, D.O., commenced this action to recover under a Deluxe Homeowners-Primary Residence Policy, Policy No. 90326 8383, issued by Allstate. The policy insured plaintiff's residence located at 132-07 41st Road, Flushing, New York (the "insured premises"), for the period July 16, 2003 to July 16, 2004, and outlined the losses that were covered and excluded thereunder. Section 1, ¶12 of the policy states that any action against Allstate "must be brought within two years after the inception of loss or damage" (Policy, Not of Mot, Exh A, p. 21).

On February 12, 2004, the insured premises sustained damages as a result of ongoing excavation work at an adjoining premises. Plaintiff submitted a written claim of loss to Allstate, which

undertook an investigation of the loss. By letter dated March 16, 2004, Allstate disclaimed coverage on the ground that the loss was excluded under certain policy exclusions.

In October 2009, plaintiff commenced this action seeking to recover damages from Allstate for disclaiming coverage for the loss. The complaint alleges causes of action for breach of the insurance policy (first cause of action); unjust enrichment (second cause of action); breach of the implied covenant of good faith (third cause of action); and unfair claim settlement practices (fourth cause of action).

Allstate's answer includes general denials of the allegations in the Complaint and numerous affirmative defenses, including that plaintiff did not commence the action within the policy's two-year limitations period. Allstate now seeks to dismiss the action as untimely.

DISCUSSION

Generally, CPLR 213(2) provides that a suit in contract must be commenced within six years after the cause of action accrued. The cause of action accrues and the Statute of Limitations begins to run from the time of the alleged breach (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]).

However, parties may cut back on the statute of limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law (*id.* at 550-551). An agreement which modifies the statute of limitations by specifying a

shorter, but reasonable, period within which to commence an action is enforceable, provided it is in writing (*id.* at 551 [internal citations omitted]).

Here, the Notice of Motion includes a copy of the Allstate policy containing the shortened limitations period. Furthermore, it is undisputed that plaintiff failed to commence this action within the two-year limitations period of the insurance policy.

However, plaintiff argues that the action was timely since it was commenced within the six-year limitations period applicable to contract actions. Plaintiff submits an affidavit denying receipt of a copy of the insurance policy setting forth the two-year contractual statute of limitations. He insists that the insurance policy documents sent to him did not include any provision reducing the statute of limitations period for him to commence suit.

In reply, Allstate asserts that it requested documentation regarding the materials that were sent directly to plaintiff. However, this Court denied Allstate's request for permission to submit a "Supplemental Affidavit in Opposition" outlining its procedures for mailing policies to insured. Nevertheless, Allstate purported to serve plaintiff with the Supplemental Affidavit in Opposition on June 1, 2010. The Court again refused to accept the supplemental affidavit during oral argument.

The Court herein reaffirms its denial of Allstate's request to submit the Supplemental Affirmation in Opposition, which is,

in effect, an improper sur-reply (CPLR 2214; *Flores v Stankiewicz*, 35 AD3d 804 [2d Dept 2006]).

Plaintiff's claim that he never received the Allstate policy with the shortened limitations policy has not been adequately rebutted by Allstate. Thus, at the very least, the record raises triable issues of fact as to whether Allstate may avail itself of the benefit of the shortened limitations period, as opposed to the general six-year Statute of Limitations for an action upon contract applies (see *1303 Webster Ave. Realty Corp. V. Great American Surplus Lines Ins. Co.*, 63 NY2d 227 [1984]; *Medical Facilities v. Pryke*, 62 NY2d 716, 717 [1984]; *Teitelbaum v. New York Prop. Ins. Underwriting Assn.*, 126 Misc2d 240, 242 [Sup Ct. Queens Co. 1984]). Plaintiff commenced the action within six years of the accrual of his cause of action. Thus, the motion to dismiss the action as untimely is denied.

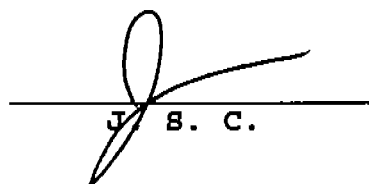
Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY, on November 4, 2010 at 9:30 am.

Dated: October 15, 2010

ENTER:


J. S. C.

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