Mercado v American Sec. Ins. Co.

2010 NY Slip Op 33331(U)

November 16, 2010

Supreme Court, New York County

Docket Number: 600785/06

Judge: Emily Jane Goodman

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SCANNED ON 11/23/2010

[* 1]

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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 600785/2006

MERCADO, SANDY

VS.

AMERICAN SECURITY INSURANCE CO

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

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 per attached

FILED

NOV 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/16/10.

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

SANDY MERCADO and RHINA MERCADO,

Plaintiffs,

Index No. 600785/06

-against-

AMERICAN SECURITY INSURANCE COMPANY,

Defendant.

----------X

AMERICAN SECURITY INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

PENTA HOUSING GROUP, INC.,

Third-Party Defendant.

----------X

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NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.S.C.:

In this action to recover insurance proceeds from a residential insurance policy issued to plaintiffs Sandy and Rhina Mercado by defendant American Security Insurance Company (American), American moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiffs made two claims upon their policy with American in 2004, during the course of renovations made on their property. The first claim was made in January 2004 (the January incident),

where plaintiffs notified American that they had experienced water damage caused by frozen pipes. Plaintiffs were reimbursed for $53,000 in repairs by American, but were not reimbursed for electrical and plumbing costs related to the incident allegedly due to plaintiffs' failure to provide American with a detailed summary of the cost of the repairs needed. American states that plaintiffs only provided American with conclusory statements from their contractors that the plumbing and electrical work would cost $35,000 each.

On March 10, 2004, another water-related incident caused damage to plaintiffs' property, at a time when the reconstruction was almost complete (the March incident). Plaintiffs, while aware of the damage on that date, did not inform American of the March incident until May 2004.

Plaintiffs claim that they did not inform American of the damage until that time because they had left that chore to their contractor and alleged agent, Sanjeev Bedi (Bedi), a principal or employee of Penta Company (Penta). However, plaintiffs admit that Bedi ceased working on the property immediately after the March incident, and was out of contact with them until sometime in May, when he was formally terminated from the project. From March through May 2004, no work was done to repair the damage. In May 2004, plaintiffs procured new contractors to remove the damaged portions, and repair the damage.

American claims that the 61-day delay in notifying it of the March incident relieves it of any obligation to cover plaintiffs' loss for the March incident. Plaintiffs, on the other hand, claim that they complied with the duty to inform American of the incident when they entrusted that duty to Bedi, as their "agent." Plaintiffs also argue, with respect to the motion papers themselves, that the affidavit produced by American's Vice President of Lending Solutions, Jim Kroll (Kroll), is invalid, because it is notarized by an out-of-state notary, but is not "accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded with the state," as required by CPLR 2309 (c). Plaintiffs claim that this deficiency also applies to the submission of the insurance policy (Exhibit A to the Notice of Motion).

American also seeks to dismiss plaintiffs' claims which are based on American's alleged failure to pay the plumbing and electrical costs stemming from the January incident. American claims that plaintiffs never provided it with the "detailed estimates" of these claims, as required by the policy. *See* Ex. A to Notice of Motion, at 5, "Conditions," section 5 (e) (5).

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

As an initial matter, the failure of American to provide the court with a certified copy of Kroll's affidavit is a matter which can be remedied nunc pro tunc, and American will be granted leave to provide the court with the appropriate papers.[1] *See e.g. Nandy v Albany Medical Center Hospital*, 155 AD2d 833 (3d Dept 1989).

It is well established that "'[a]n insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the

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[1]American explains that it cannot get the certification without providing the Clerk's offices in the State of Georgia with the original affidavit, which it has not been able to do, as the papers are with this court. The remedy is to provide a new, notarized and certified affidavit.

insurance contract.'" *Travelers Insurance Company v Volmar Construction Co.*, 300 AD2d 40, 42 (1st Dept 2002), quoting *Power Authority v Westinghouse Electric Corporation*, 117 AD2d 336, 339 (1st Dept 1986). Such notice is a "condition precedent" to coverage, and "absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy." *Travelers Insurance Company v Volmar Construction Co.*, 300 AD2d at 42. The insurer need not show that it has been prejudiced by the lack of notice. *1700 Broadway Company v Greater New York Mutual Insurance Co.*, 54 AD3d 593 (1st Dept 2008); *see also Paramount Insurance Company v Rosedale Gardens, Inc.*, 293 AD2d 235 (1st Dept 2002).[2] Further, the insured bears the burden of showing that it gave notice in accordance with the policy. *Id.*

The policy in question requires "you" (plaintiffs) to notify American of a loss by "immediate notice to [American] or our agent" of an incident. *See* Ex. A to Notice of Motion, "Conditions," paragraph 5 (a). Such language "is measured by the yardstick of reasonableness." *Paramount Insurance Company v Rosedale Gardens, Inc.*, 293 AD2d at 239. In the present case, plaintiffs have failed to establish that their 61-day delay in notifying American of the March incident was reasonable.

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[2]As of January 2009, with respect to personal injury claims, the insurer must demonstrate prejudice if the late notice was provided within two years of the time required by the policy (*see* Insurance Law § 3420 [a] [6]; [c] [2] [A]).

Plaintiffs have admitted that they "lost contact" with their alleged agent, Bedi, immediately after the March incident, but that they still relied on him to provide the notice to American. This is unreasonable as a matter of law, as the policy requires that "you" provide notice, and does not provide that notice to a wayward agent of the insured suffices, especially where, as here, the insureds never asked their alleged agent, within that 61-day period, whether he had provided the required notice. American is not required to languish while its insureds make no reasonable effort to provide it with notice of the incident. *See 2130 Williamsbridge Corporation v Interstate Indemnification Company*, 55 AD3d 371, 372 (1st Dept 2008)("[t]hat the insured ... was unaware that notice provided to its broker was insufficient is no excuse").

Further, "notice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier." *Gershow Recycling Corporation v Transcontinental Insurance Company*, 22 AD3d 460, 462 (2d Dept 2005). So much less can plaintiffs reasonably claim to have entrusted Bedi, as their "agent" (and not just their contractor) to provide American with notice, especially under the circumstances, where plaintiffs' reliance on Bedi was unreasonable in itself.

"Even relatively short periods of unexcused delay are

unreasonable as a matter of law." *2130 Williamsbridge Corporation v Interstate Indemnification Company*, 55 AD3d at 372; *see also Young Israel Co-Op City v Guideone Mutual Insurance Company*, 52 AD3d 245 (1st Dept 2008)(delay of 40 days unreasonable as a matter of law); *Power Authority v Westinghouse Electric Corporation*, 117 AD2d at 342 (written notice not provided to insurer for 53 days). As such, plaintiffs' 61-day delay was unreasonable as a matter of law.

While American is not required to show that it was prejudiced by the delay (*see 1700 Broadway Company v Greater New York Mutual Insurance Co.*, 54 AD3d 593, *supra*), it appears that plaintiffs took corrective measures to address the damage from the March incident before American was notified that plaintiffs would be making a claim, making it impossible for American to make an investigation of the damage as it existed at that time. Thus, this court finds that prejudice has been shown.

As for the unpaid costs electrical and plumbing costs concerning the January incident, plaintiffs argue that they are entitled to pursue their claim because the concept "detailed estimates" is not defined, there is no requirement for submission of an itemized statement, and what they submitted was sufficient. They additionally argue that, at the very least, the policy is ambiguous requiring denial of the motion. Further, plaintiffs point to the policy provision regarding the appraiser process,

the remedy for a disagreement as to the amount of loss, and argue that that process, which was not followed, was Defendant's remedy, as opposed to denial of the claim.

Plaintiffs have established that they provided American with "detailed estimates" for the work. Plaintiffs first provided American with two estimates, both from a contractor, Raphael Whittingham. The first (Ex. K to Notice of Motion) lists the areas of plumbing work to be done, and concludes that "[o]ur price for the above work is Thirty Five Thousand Dollars ($35,000)." Similarly, in Ex. L to Notice of Motion, another contractor, C & A Electrical Corp., lists the electrical work to be done, with the conclusion that "[t]he total price for the above work is $35,000 (Thirty Five Thousand dollars)." No price breakdown is afforded in either estimate. Another estimate is provided from a contractor, The Plumbing Company, Inc., in which the plumbing work to be done is estimated at $35,200. Notice of Motion, Ex. O. This estimate breaks down the cost simply as to amount per floor, with no detail as to the work to be preformed.[3]

Further, when asked for a more complete statement of the

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[3]American claims that this estimate is fraudulant, because, in a letter from The Plumbing Company to an unidentified party, dated October 7, 2009, the contractor describes work it performed on the location with regard to final inspections conducted on the premises, concluding with the words "[p]lease note; We did not do any physical work at the premises mentioned above." However, the mere fact that The Plumbing Company, Inc. provided plaintiffs with an estimate does not indicate that it worked on the premises or that the estimate is fraudulent.

expected costs, plaintiffs provided American with two documents purporting to show a detailed cost breakdown for the electrical and plumbing work. *Id.*, Ex. M. These statements indicate that they are "from" Penta, and are dated January 14, 2004.

The written statements "from" Penta are sufficiently detailed estimates of the electrical and plumbing work required. While American claims that these documents do not indicate from whom they originate, and that plaintiffs, when asked, failed to indicate to American exactly who had prepared the statements, it is not true that there is no indication therein of the contractor involved. Penta was plaintiffs' contractor. As such, American was required to accept those estimates as part of its investigation of the claims. Therefore, despite the weak showing thus far of the actual costs made to date as to these losses, plaintiffs may continue their suit as to the electrical and plumbing costs attributable to the January incident.[4]

The court notes that the dispute process provided in the policy was not triggered by American's request for estimates, and there is no call for an appraiser at this time, if ever.

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[4]Plaintiffs also provided American with credit card statements purporting to show payments for the $70,000 in costs. Many of these statements fall within 2003, 2005 and 2006, and are therefore perplexing as regard to payments made in 2004, and the remaining statements only show balance transfers, in amounts far below the purported $70,000 plaintiffs claim in actual repair costs.

In sum, plaintiffs cannot recover any costs relating to the March incident, but may pursue their claims for the electrical and plumbing costs. Dismissal of part of plaintiffs' claims is conditioned on Defendant's compliance with this court's instructions, correcting the deficiency as ordered below.

It is hereby

ORDERED that the motion brought by defendant American Security Insurance Company for summary judgment dismissing the complaint is granted solely as to the dismissal of any claims for electrical or plumbing work stemming from the claimed damage arising from the incident of March 2004, conditioned on the provision to this court, within 60 days of receipt of a copy of this order with notice of entry, of an original affidavit from Jim Kroll, properly notarized and certified in accordance with CPLR 2309 (c); and it is further

ORDERED that absent such compliance, the motion is denied in its entirety; and it is further

ORDERED that a pretrial/settlement conference shall be held on 12/16/10 at 12 noon where the parties shall PERSONALLY APPEAR, with their attorneys.

This Constitutes the Decision and Order of the Court.

Dated: November 16, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

NOV 23 2010

NEW YORK
COUNTY CLERK'S OFFICE