

American Transit Ins. v Gerstner

2010 NY Slip Op 33934(U)

August 3, 2010

Sup Ct, New York County

Docket Number: 650584/2009

Judge: Shirley Werner Kornreich

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

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT:

PART 54

Index Number : 650584/2009

AMERICAN TRANSIT INSURANCE

vs

GERSTNER, JAY N

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 002

MOTION SEQ. NO. 5/26/10

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 _____

E-Filed 9-22
PAPERS NUMBERED
+ transcript 4/8/10

Cross-Motion: Yes No

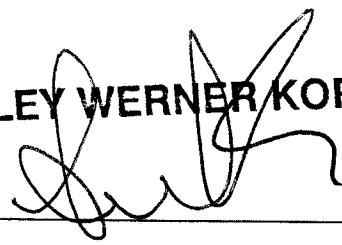
Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 8/3/10

JUSTICE SHIRLEY WERNER KORNREICH



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 650584/2009

-against-

DECISION & ORDER

JAY N. GERSTNER, SAMUEL FESTINGER, BAY
PARK BROKERAGE, INC., ROADSTAR MOBILITY
INC., BLUE STEEL ON WHEELS CORP., FRS CAR
RENTAL INC., NYT WR TRANS AML & R CO.,
TRANSPORT ITT CORP., NETWR TRANSAM
RENTAL NY FLEET TRS RENTALS, IPC
TRANSPORT, INC., PIPELINE ON WHEELS, and
QUALITY CARRIERS, INC.,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

In this automobile insurance matter, defendants Jay N. Gerstner (Gerstner) and Bay Park Brokerage, Inc. (Bay Park) (collectively, Movants) move for an order, pursuant to CPLR 3211 and 3016(b), dismissing as against them the fraud claim and plea for punitive damages of plaintiff American Transit Insurance Company (ATIC) (Mot. Seq. No. 002).¹ ATIC opposes and cross-moves for partial summary judgment on Movants' liability for fraud based upon collateral estoppel.

I. *Background*

ATIC is an insurance company. It is undisputed that Gerstner owns and operates defendant Bay Park, an insurance brokerage firm. Defendant Samuel Festinger (Festinger) owns

¹ The complaint also asserts causes of action for negligent misrepresentation, unjust enrichment and breach of contract, but they are not addressed by the motions before the court.

and operates the defendant vehicle rental entities: Roadstar Mobility, Inc., Blue Steel On Wheels Corp, FRS Car Rental Inc, NYT WR Trans Am L&R Co., Transport ITT Corp., NETWR Transam Rental, NY Fleet TRS Rentals, IPC Transport, Inc., Pipeline On Wheels, and Quality Carriers, Inc. (collectively, Festinger Entities). The complaint alleges that Movants submitted fourteen applications to ATIC on Festinger's behalf to obtain automobile insurance for Festinger's fleet under the New York Automobile Insurance Plan (NYAIP), commonly referred to as "high risk" or "assigned risk" insurance plan.

ATIC alleges that it issued the insurance policies at lower rates based upon Movants' representations that the insured vehicles were garaged in upstate New York instead of the actual garage location in Brooklyn, NY (Garage Representation). ATIC seeks damages in the amount of \$781,247, representing the difference in premiums it would have charged if it had known that the rental vehicles were garaged in Brooklyn. Additionally, ATIC claims damages in the amount of \$1,072.41 allegedly paid by it to settle claims made under the policies.

Gerstner and Bay Park contend that ATIC failed to plead fraud with particularity because the complaint does not allege: 1) facts from which it could be inferred that Movants knew the applications with the Garage Representation were false when submitted; and 2) the dates of the applications. They also move to dismiss the prayer for punitive damages on the basis that the conduct alleged is insufficiently egregious to support such an award.

In opposition and in support of its cross-motion for summary judgment, ATIC argues that Movants are collaterally estopped from denying that they defrauded ATIC based upon a determination of the New York Insurance Department (Department) issued on March 27, 2009 (Determination). During that proceeding, Bay Park and Gerstner were charged with, *inter alia*,

rate evasion based upon the Garage Representation in applications submitted to ATIC and three other insurers.

“Rate evasion” is defined as providing improper or inaccurate information on the application or failing to make reasonable inquiry of the applicant as to which a reasonable person acting as a producer [a broker] would inquire in order to submit an application or provide information which is correct and not misleading. Aff. of Geoffrey K. McDonald, dated Feb. 1, 2010 (McDonald Reply Aff.), Exh. C, p. 3; Aff. of James P. Lynn, dated Jan. 7, 2010 (Lynn Aff.), Exh. E, p. 9. The Determination affirmed the March 16, 2009 report and recommendation of a Department hearing officer, Jeffrey A. Stonehill, Esq. (Report), which found that Gerstner, Bay Park and Festinger “committed fraudulent acts to evade paying the proper insurance premium” and failed to establish “any redeeming qualities in [their] business methods.” Lynn Aff., Exh. B, Report, p. 4. The Determination revoked Movants’ certification by the NYAIP for four years. The Determination was made upon an appeal from a January 15, 2009 decision by an NYAIP Panel (NYAIP Decision), which recommended revocation of Movants’ certification for five years. Movants were represented by counsel at all stages of the proceedings leading to the Determination.

Movants urge that the Determination should not be given preclusive effect because NYAIP is not an administrative agency, the Determination did not find them guilty of fraud, and Movants were not given a full and fair opportunity to litigate the issue of fraud presented in this action.

II. *Discussion*

On a motion to dismiss, the court must accept the facts alleged in the complaint as true,

accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976). “The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved.” *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); see also *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993). Moreover, in assessing a motion under CPLR 3211, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello*, at 635. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

A. Fraud

CPLR 3016(b) provides that where fraud is alleged, “the circumstances constituting the wrong shall be stated in detail.” CPLR 3016(b) requires factual allegations in support of each element of fraud. *Kaufman v Cohen*, 307 AD2d 113, 120 (1st Dept 2003), citing *Bernstein v Kelso & Co.*, 231 AD2d 314, 320 (1997). The detail required must be sufficient to clearly inform the defendant of the alleged misconduct. *Lanzi v Brooks*, 43 NY2d 778, 780 (1977), quoting *Jered Contracting Corp v NYC Transit Auth*, 22 NY2d 187, 292 (1968). CPLR 3016(b) does not require “unassailable proof of fraud,” but rather facts sufficient to permit a reasonable inference of the alleged conduct. *Pludeman v Northern Leasing Systems Inc*, 10 NY3d 486, 492 (2008). The complaint must allege a representation of material fact, the falsity of the

representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury, or, alternatively, concealment where the defendant had a duty to disclose material information.” *Kaufman, supra* at 119 - 120, citing *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 (1st Dept 1996). Allegations that the statements were false and were known by the defendant to be false when made are sufficient to plead the defendant's knowledge of falsity. *Black v Chittenden*, 69 NY2d 665, 668 (1986).

The insurance applications to which the complaint refers and the circumstances surrounding them are sufficiently identified to alert Movants to the time of the alleged fraudulent acts, especially as they submitted the applications, which were the subject of administrative proceedings during which they were represented by counsel. In the complaint, ATIC alleges that in fourteen insurance applications, Movants falsely made the Garage Representation. Complaint, ¶ 14. All of the applications on behalf of Festinger Entities’ are in Movants’ possession. Lynn Aff., Exh. E, NYAIP Panel Transcript, p. 41. ATIC also sufficiently alleges that Gerstner knew that Festinger’s fleet was garaged in Brooklyn. Complaint, ¶ 14. In the NYAIP Transcript, which may be considered to remedy any defects in the complaint, Gerstner admitted that insurance companies contacted him with questions about the veracity of the Garage Representation on the Festner Entities’ applications. Lynn Aff., Exh. E, NYAIP Transcript, pp. 64-67. Gerstner testified that he accepted Festinger’s verbal assurances that the Garage Representation was true after Festinger provided him with 2005-2006 and 2006-2007 business directory advertisements listing the upstate car rental location, and a 2005 lease for the property. *Id.* The record also reflects that Gerstner said he failed to open his mail from insurers and that there was contradictory evidence as to whether one of his employees told him that ATIC was

questioning the Garage Representation. Accepting the complaint's allegations as true, as supplemented by the NYAIP Transcript, ATIC has sufficiently alleged that Movants knew that the Garage Representation was false when made. Gerstner's claim that he relied upon Festinger and his documents merely raises an issue of fact.

B. Punitive damages

In order to recover punitive damages for fraud, a plaintiff must prove that the defendant's conduct was "not simply intentional but evinced a high degree of moral turpitude that demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations." *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 (2007). *See also, Don Buchwald & Assocs. v Rich*, 281 A.D.2d 329, 330 (1st Dept 2001)(punitive damages for tort requires showing of: intentional or deliberate wrongdoing; aggravating or outrageous circumstances; fraudulent or evil motive; or conscious act that willfully and wantonly disregards rights of another), *citing Swersky v Dreyer & Traub*, 219 AD2d 321, 328 (1st Dept 1996). A principle goal of punitive damages is to deter "future reprehensible conduct" by the wrongdoer "and others similarly situated." *Ross, supra* at 489. Whether conduct is sufficiently reprehensible to warrant an award of punitive damages is an issue for the trier of fact. *Dobroski v Bank of America, NA*, 65 AD3d 882, 884 (1st Dept 2009), *lv den* 14 NY3d 785 (2010), *citing Swersky, supra*.

ATIC has alleged a business relationship between Festinger and Gerstner spanning over ten years and Gerstner's participation in a portion of Festinger's series of alleged frauds. Complaint, ¶¶ 12-13. At this early stage in the litigation, all facts and circumstances surrounding the alleged fraud have not been explored through discovery. However, according ATIC every possible favorable inference, due to the alleged pattern and duration of the scheme, and the

potential deterrent effect, plaintiff has met the pleading requirements to recover punitive damages for fraud.

C. ATIC's Motion for Summary Judgment based on Collateral Estoppel

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Collateral estoppel allows “the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided.” *Gramatan Home Investors Corp v Lopez*, 46 NY2d 481, 485 (1979). The doctrine of collateral estoppel “precludes a party from litigating in a

subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity.” *Buechel v Bain*, 97 NY2d 295, 303 (2001); *Lumbermens Mut Cas Co v 606 Restaurant, Inc.*, 31 AD3d 334 (1st Dept 2006). The issue decided in the prior action must be identical to be decisive in the present one and the party against whom the doctrine is asserted must have had a full and fair opportunity to contest it. *Id.* at 303-04. Stated differently, the point actually to be determined in the second action or proceeding must be such that “a different judgment in the second would destroy or impair rights or interests established by the first.” *Ryan v New York Telephone Co*, 62 NY2d 494, 501 (1984), quoting *Schuylkill Fuel Corp v Nieberg Realty Corp*, 250 NY 304, 307; *see also BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 (1st Dept 2010). The party to be precluded from re-litigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.” *Buechel, supra* at 303-304.

ATIC has not made a *prima facie* showing of entitlement to partial summary judgment because it is unclear that the Department determined that Movants had the requisite intent required to prove common law fraud. The issue before the Department was whether Movants were guilty of rate evasion in violation of section 15A of the NYAIP rules due to the submission of inaccurate applications for an insured. McDonald Reply Aff., Exh. C, p. 3; Lynn Aff., Exh. E, NYAIP Transcript, pp. 8-12. However, as previously noted, fraud requires proof of scienter, while rate evasion is defined as providing inaccurate information on an application or failing to make reasonable inquiry in order to submit an application that is correct and not misleading. During the administrative proceeding, Gerstner contended that the Garage Representation was the product of computer software defaults that he failed to correct and his reliance upon

Festinger's statements and documentation. Hearing Officer Stonehill's report, which was affirmed by the Determination, stated that Movants committed "fraudulent acts." Lynn Aff., Exh. B, Report, p. 4). However, he also said that Movants' reliance upon Festinger was "misplaced" and did not excuse their failure to follow NYAIP rules, conduct their insurance business in a prudent and professional manner, communicate with insurance carriers raising questions about the Garage Representation and conduct their own investigation. *Id.* It was not necessary to find intentional fraud to sustain the charge of rate evasion, which could have rested upon failure to make reasonable inquiry. Further, the Hearing Officer's finding that Movants failed to communicate with insurers who called concerning rate evasion, related to calls from an insurer known as AutoOne, not ATIC. Lynn Aff, Transcript, Exh. E, pp. 72-74 and 121-122. Therefore, the issues decided in the prior proceeding are not identical to the fraud claim in this action. It is not necessary to determine whether Movants had a full and fair opportunity to contest the Determination in light of the ruling that it did not establish fraud against ATIC. While Movants urge that the NYAIP is not an administrative agency, the Department clearly is one. Accordingly, it is

ORDERED that the motion of JAY N. GERSTNER and BAY PARK BROKERAGE, INC., to dismiss the first cause of action for fraud and the plea for punitive damages on that cause of action is denied; and it is further

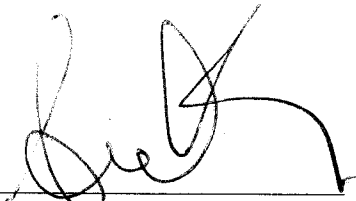
ORDERED that the cross-motion of AMERICAN TRANSIT INSURANCE COMPANY for partial summary judgment on liability first cause of action for fraud against JAY N. GERSTNER and BAY PARK BROKERAGE, INC., is denied; and it is further

ORDERED that the parties are directed to appear of a preliminary conference in Room

228 of the courthouse located at 60 Centre Street, New York, NY 10007, on September 14, 2010
at 11:00 a.m.

Dated: August 3, 2010

ENTER:



A handwritten signature in black ink, appearing to be 'J.S.C.', is written over a horizontal line. The signature is stylized and cursive.

J.S.C.