Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
**Justice**

---

ELEANOR FOX,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

---

Index No. 12758/09

Motion
Date December 21, 2010

Motion
Cal. No. 7

Motion
Sequence No. 1

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | 1-5 |
| Opposition..... | 6-8 |
| Reply..... | 9-14 |

Upon the foregoing papers it is ordered that this motion by defendant, Allstate Insurance Company for an order pursuant to CPLR 3212 to dismiss the Complaint of plaintiff, Eleanor Fox, based on plaintiff's failure to timely commence this action against the defendant pursuant to the suit limitation provision of the insurance policy is hereby denied.

In this action, plaintiff, defendant's insured seeks to recover under an Allstate Deluxe Homeowners Policy issued by defendant to plaintiff with regard to the premises located at 85-19 Kendrick Place, Jamaica Estates, New York 11432 and which premises were owned by plaintiff. Pursuant to the Verified Complaint, plaintiff was covered by defendant for loss or damage to the aforementioned premises. Plaintiff further alleges that on or about October 25, 2005, while said policy was in full force and effect, the aforementioned premises "was partially destroyed and damaged through water damage and was made uninhabitable thereby." Finally, plaintiff alleges in the Verified Complaint that demand has been made upon defendant for the sum of $119,311.29 for such loss, and defendant has paid to plaintiff $10,296.91.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

It is undisputed that this action was commenced by the filing of a Summons and Complaint on or about May 15, 2009.

Defendant establishes a prima facie case that the plaintiff's failure to timely commence this action within two years of the date of loss warrants the dismissal of plaintiff's Complaint. Defendant submits, inter alia, the affidavit of Keith Mayne, a Claims Analyst for defendant, wherein he avers that plaintiff commenced this action against Allstate based on water loss which occurred on October 25, 2005, the Summons and Complaint was filed on or about May 15, 2009; the policy of insurance upon which this action is based contains a suit limitation clause barring any suit or action on the policy for the recovery of any claim unless the suit or action is commenced within two years after the date of loss; a copy of the Allstate Insurance Company's policy which was in effect on the date of the loss, which policy provides in relevant part, "[n]o suit or action may be brought against us unless there has been full compliance with all policy terms. Any suit or action must be brought within two years after the inception of loss or damage;" and a copy of the examination before trial transcript testimony

of plaintiff herself, wherein she admits that the loss occurred on October 25, 2005.

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff submits an affidavit of plaintiff herself, wherein she admits that: she sustained a water damage loss to the aforementioned premises on October 25, 2005; that she initially notified Allstate of her water damage loss to the premises on October 27, 2005; that Allstate constantly promised that they would repair the premises; that she was directed to move from her premises into a hotel because the premises were unlivable due to mold problems and that Allstate representative, Jude Sampson, would send someone familiar with mold conditions to investigate and repair; that defendant never asked her for a sworn statement of proof of loss but rather indicated that same was not necessary as they were still doing their investigation and only requested bills for repairs, damages, and living expenses in the hotel and the first time anyone ever requested sworn statement of proof of loss from her was via letter dated March 31, 2008; that between January 16, 2008 and February 7, 2008, she received notices from defendant that they were in the process of finally investigating the loss of October 25, 2005 and would inform her of the status of the claim and payment after the investigation was concluded; based on the statements made to her by Allstate employees that they would make the repairs to the premises and she would get paid for her time in a hotel, and that she only needed to give them the papers relating to the claim that they requested, she did nothing related to suit or filing a proof of loss as they informed her that nothing else was necessary; Allstate had numerous adjustors go to her house to investigate the claim from October 27, 2005 through February 8, 2008; she received two checks one in 2005 and one in 2008, in partial payment of the claim, neither of which indicated that they were final in nature; there have been continuous investigations, negotiations, and discussions between defendant and plaintiff as to final settlement of the claim with Allstate employees' clear indication to her that they were going to make the repairs themselves for years after the incident occurred; and that she received a letter on October 20, 2009 indicating "our investigation of the losses continued, we will inform you of the status of the claim until it is concluded."

Plaintiff alleges that a question of fact exists as to whether the defendant waived its rights or is estopped from relying upon the two-year contractual limitation. If there are allegations of any representations or conduct by the insurer which could show that plaintiff was lulled into inactivity or misled plaintiff into believing that the time limitation in the

policy would not be invoked, then summary judgment is not warranted (*see*, *McGivney v. Liberty Mutual Fire Insurance Co.*, 305 AD2d 559 [2d Dept 2003]; *Minichello v. Northern Assurance Co. of America*, 304 AD2d 731 [2d Dept 2003]; *Grumman Corp. v. Travelers Indemnity Co.*, 288 AD2d 344 [2d Dept 2001]; *Brostowin v. Hanover Ins. Co.*, 154 AD2d 418 [2d Dept 1989]).

In *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 968 [1988] the Court of Appeals addressed the issue of waiver or estoppel in insurance policies when it held:

> Evidence of communications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel [citations omitted]". Waiver is an intentional relinquishment of a known right and should not be lightly presumed [citations omitted]". Plaintiff offers no evidence from which a clear manifestation of intent by defendant to relinquish the protection of the contractual limitations period could be reasonably inferred [citation omitted]". Nor do the facts show that defendant, by its conduct, otherwise lulled plaintiff into sleeping on its rights under the insurance contract [citation omitted]". Indeed, since the conduct complained of occurred subsequent to expiration of the limitations period, plaintiff could not have relied on that conduct in failing to timely commence its action.

In the instant case, the parties had been involved in extensive negotiation and settlement discussions. This court recognizes that these negotiations, without more, are insufficient to demonstrate a waiver of the insurer's rights under the policy to time bar any action not commenced within the two-year contractual limitation period (*see, Frank Corp. v. Federal Ins. Co., supra,* at 968; *Warhoftig v. Allstate Ins. Co.*, 199 AD2d 258 [2d Dept 1993]). However, the conduct of the defendant/insurer, included more than just the investigating and negotiating of a possible settlement; the defendant made two payments to the plaintiff on her claim. A check for $20,839.09 was issued on February 7, 2008 with a memo that it was "in payment of dwelling loss on 10-25-2005". A second check for $10,296.91 was issued on December 26, 2005 with a memo that it was "in payment of dwelling loss caused by roof leak on 10/25/05". Thereafter, and still during the two-year limitation of time to commence suit, there were additional investigations, negotiations, and discussions between the parties as to the final settlement of the plaintiff's claim. There is nothing in the

record to show that plaintiff delayed the investigation by failing to cooperate fully in the investigation. To the contrary, the undisputed facts show that plaintiff was the model of cooperation and having responded timely and decisively to all of the insurer's demands.

Based upon these undisputed facts, this court determines that a question of fact exists on whether defendant waived its right to assert that plaintiff's claim is time barred by defendant's conduct in issuing partial payments of the claim. The plaintiff has submitted proof in evidentiary form which raises an issue of fact as to whether the defendant "lulled plaintiff into inactivity sufficient for a waiver or estoppel" or lulled plaintiff into sleeping on her rights to commence an action due to the conduct of the insurer in having issued payments on the claim (*see, Brostowin v. Hanover Ins. Co., supra* at 419;Carat *Diamond Corp. v. Underwriters At Lloyd's, supra,* at 546; *Minichello v. Northern Assurance Co. Of America,* supra at 732).

As the court finds that there is an issue of fact as to whether defendant, by its conduct, otherwise lulled plaintiff into sleeping on her rights under the insurance contract, the court finds that there is an issue of fact as to whether plaintiff was estopped from exercising her rights due to the conduct of the insurer in having issued two checks over a three year period in partial payment of the claim and in continuing investigation up to at least June 2009 without a final determination. Defendant's motion for summary judgment dismissing the plaintiff's complaint based upon the two-year contractual limitation to commence an action against the defendant is denied.

This constitutes the decision and order of the Court.

Dated: February 18, 2011 .....

**Howard G. Lane, J.S.C.**