

TADCO Constr. Corp. v Allstate Ins. Co.
2011 NY Slip Op 33621(U)
July 28, 2011
Sup Ct, Queens County
Docket Number: 2742/08
Judge: Augustus C. Agate
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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TADCO CONSTRUCTION CORP.,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

Index No.: 2742/08

Motion Dated:
May 17, 2011

Cal. No.: 27

m# 4

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The following papers numbered 1 to 9 read on this motion by the defendant for an order limiting the damages and proof at the inquest to the actual cash value of the plaintiff's vehicle for which it seeks compensation from defendant and other relief.

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Affirmation in Opposition	5 - 7
Replying Affirmation	8 - 9
Plaintiff's Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by the defendant is decided as follows:

Plaintiff commenced this action seeking to recover damages for breach of an insurance contract. Defendant issued a business automobile insurance policy to plaintiff, which covered the period from November 8, 2005 to November 8, 2006. The subject vehicle, a Ford 150 pick-up truck, was stolen on February 4, 2006, but was recovered, damaged, the next day. On February 5, 2006, plaintiff submitted a claim to the defendant for the theft and damage of the vehicle. Defendant took possession of the vehicle as part of its investigation of the claim. Plaintiff asserts that defendant never provided any coverage for the theft or damage of the vehicle nor did it ever return the vehicle to the plaintiff.

Plaintiff commenced this action by filing a summons with

notice with the Clerk of the Court on January 31, 2008. The summons and notice sought a recovery of an amount not less than \$500,000 for breach of contract, breach of the implied covenant of good faith and fair dealing and bad faith denial of coverage. Plaintiff never served a formal complaint in this action. This court, in an order dated July 15, 2009, granted defendant's application to vacate its default in appearing and denied plaintiff's motion for a default judgment. Pursuant to a decision and order dated May 18, 2010, the Appellate Division, Second Department reversed this court's July 15, 2009 order, granted plaintiff's motion for a default judgment and remitted the matter to this court for an inquest on the issue of damages.

Defendant now seeks to limit the proof at the inquest to the cash value of the subject vehicle. Defendant argues, *inter alia*, that to the extent the summons and notice seeks punitive damages, such damages are not recoverable herein. Additionally, defendant asserts that there is no separate tort for bad faith refusal to comply with an insurance contract.

To the extent defendant seeks discovery, such application is denied. It is well settled that although a defaulting defendant is not entitled to discovery, he is entitled to present testimony and cross examine witnesses at the inquest on damages. (Singh v Friedson, 36 AD3d 605, 606 [2007]; Amato v Fast Repair, Inc., 15 AD3d 429, 430 [2005]; Hall v Penas, 5 AD3d 549, 550 [2004].) Thus, defendant is entitled to contest the plaintiff's damages at the inquest.

To the extent the defendant seeks to preclude plaintiff from offering any proof at the inquest of its entitlement to punitive damages, the application is granted. Punitive damages are not recoverable for an ordinary breach of contract since their purpose is not to remedy private wrongs but to vindicate public rights. (Roconova v Equitable Life Assur. Socy. Of the United States, 83 NY2d 603, 613 [1994]; Nationwide Installation & Sales, Inc. v Nova Cas. Co., 74 AD3d 1297, 1299 [2010].) However, where the breach of contract involves a fraud evincing a "high degree of moral turpitude" and demonstrating "such wanton dishonesty as to imply a criminal indifference to civil obligations", punitive damages may be permitted where the conduct was "aimed at the public generally." (Rocanova v Equitable Life Assur. Socy. Of the United States, 83 NY2d at 614; Tartaro v Allstate Indem. Co., 56 AD3d 758, 758 [2008].) Here, plaintiff commenced this action with a summons and notice and, thus, there are no allegations of any conduct warranting an award of punitive damages. Indeed, the allegations set forth in the papers indicate that this case is a breach of an insurance contract. Further, the summons and notice

does not allege or seek to recover damages for conversion. Thus, plaintiff cannot assert that it seeks to recover damages for an independent tort for which punitive damages are recoverable. (Tartaro v Allstate Indem. Co., 56 AD3d at 758; Logan v Empire Blue Cross and Blue Shield, 275 AD2d 187, 194 [2000].)

To the extent defendant seeks to preclude plaintiff from offering any proof of consequential damages, such application is denied. Where an insurer breaches its duty to investigate, bargain and settle claims in good faith, consequential damages for breach of contract may be recovered not limited by the amount specified in the insurance policy. (Acquista v New York Life Ins. Co., 285 AD2d 73, 77 [2001]; see Bi-Economy Market, Inc. v Harleystown Ins. Co. Of New York, 10 NY3d 187, 192 [2008].) Indeed, the non-breaching party may recover damages which are the natural and probable consequences of the breach. (Kenford Co., Inc. v County of Erie, 73 NY2d 312, 319 [1989].) However, to obtain consequential damages, it must be proven that such damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. (Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d 200, 203 [2008]; Kenford Co., Inc. v County of Erie, 73 NY2d at 319.) Further, courts also look at "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made..." (Kenford Co., Inc. v County of Erie, 73 NY2d at 319.) The nature, purpose and particular circumstances of the contract are some of the factors to be considered in determining what was in the reasonable contemplation of the parties at the time of the execution of the contract. (Rose Lee Mfg., Inc. v Chemical Bank, 186 AD2d 548, 551 [1992].) Proof of consequential damages cannot be speculative or conjectural. (Ashland Mgt. Inc. v Janien, 82 NY2d 395, 403 [1993].)

In the case at bar, there is no proof that the parties contemplated the recovery of consequential damages. Plaintiff does not set forth how the parties may have contemplated such damages or even what such damages may consist of. Thus, at the inquest, plaintiff will be precluded from presenting evidence of consequential damages stemming from defendant's breach of contract.

Accordingly, this motion by the defendant is granted to the extent that plaintiff is precluded from seeking recovery for punitive or consequential damages at the inquest, and plaintiff shall be limited to seeking recovery to the actual cash value of the subject vehicle, plus interest.

The inquest against the defendant shall be held on Friday, October 28, 2011 at 9:30 A.M in Part 24 upon the filing by the plaintiff of a Notice of Inquest and Certificate of Readiness with the Clerk of the Court pursuant to CPLR 3402(a).

Plaintiff is directed to serve a copy of this order, along with a copy of the Notice of Inquest and Certificate of Readiness upon defendant no later than August 29, 2011.

Plaintiff is further directed to serve a copy of the above papers, along with proof of filing and proof of service thereof, upon the clerk of IAS Part 24 no later than October 21, 2011.

A copy of this order is being faxed to counsel for the defendant and mailed to counsel for the plaintiff on this date.

Dated: July 28, 2011

AUGUSTUS C. AGATE, J.S.C.