

**Guevara v Allstate Ins. Co.**

2011 NY Slip Op 34246(U)

October 14, 2011

Supreme Court, Bronx County

Docket Number: 302445/2011

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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SANTA GUEVARA,

Plaintiff,

DECISION AND ORDER

Index No. 302445/2011

- against -

ALLSTATE INSURANCE COMPANY,

Defendant.  
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PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated June 27, 2011 and the affirmation and exhibits submitted in support thereof; defendant's notice of cross-motion dated September 9, 2011 and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated October 4, 2011 and the affidavit and exhibits annexed thereto; and due deliberation; the court finds:

In this action, plaintiff insured Santa Guevera seeks to recover under a residential fire insurance policy issued by defendant insurer Allstate Insurance Company regarding the premises located at 404 East One Hundred Fortieth Street, Bronx, New York. Plaintiff alleges that defendant has failed to pay her claim related to a fire at the premises on September 10, 2010. Plaintiff now moves pursuant to CPLR 3211 for an order dismissing eight of defendant's thirteen affirmative defenses on the ground that those defenses fail to comply with the pleading requirements for fraud found in CPLR 3016. Defendant cross-moves pursuant to CPLR 3212 for summary judgment on the ground that plaintiff failed to submit a sworn statement of loss, in accordance with the insurance policy, and prevented defendant from completing its investigation.

In support of the cross-motion, defendant submits an affidavit from its employee, Joanne Plumitallo ("Plumitallo"), computerized claim notes maintained by defendant, the general conditions

of plaintiff's residential fire policy, an incident report from the New York City Fire Department, and numerous letters addressed to plaintiff. Plumitallo is employed as a Special Investigator in the Special Investigations Unit. She was assigned to plaintiff's claim six days after the incident. On September 17, 2010, Plumitallo sent plaintiff a letter enclosing two blank forms entitled "Sworn Statement of Proof of Loss" and "Personal Property Inventory Loss" and directed plaintiff to return the completed forms by mail. A copy of the letter reveals it was addressed to plaintiff at 404 East One Hundred Fortieth Street. Another letter dated November 16, 2010 reminded plaintiff to complete the two blank forms sent in September. Plumitallo never received a completed statement of loss.

Plumitallo states she sent plaintiff no less than seven letters and contacted plaintiff by telephone no less than six times seeking information, including a request for a recorded statement. The computerized claim notes also reveal Plumitallo contacted plaintiff's daughter and plaintiff's public adjuster seeking plaintiff's recorded statement. No such statement or response to those requests was provided. By the time Plumitallo requested an examination under oath, plaintiff had already commenced this action.

The failure to file sworn proofs of loss within sixty (60) days after receiving a demand to do so by the insurer, accompanied by proof of loss forms, is a complete defense to a plaintiff's action on the insurance policy, *see Anthony Marino Constr. Corp. v. INA Underwriters Ins. Co.*, 69 N.Y.2d 798, 505 N.E.2d 944, 513 N.Y.S.2d 379 (1987), absent waiver of the condition or other conduct by the insurer estopping it from asserting the defense. *See Igbara Realty Corp. v. New York Property Ins. Underwriting Assoc.*, 63 N.Y.2d 201, 470 N.E.2d 858, 481 N.Y.S.2d 60 (1984). Section V of the Policy Conditions required plaintiff to provide "[w]ithin 60 days after the loss . . . a signed, sworn proof of loss." Defendant has established that it has not received a sworn proof of loss, despite a demand having been made. *See also Insurance Law* § 3407.

Plaintiff, though, submits that she never resided at the premises but instead lived next door at 406 East One Hundred Fortieth Street, and therefore never received any of the letters sent to her. At least three entries in defendant's computerized case notes beginning September 13, 2010 state that plaintiff did not live at the covered premises, with one entry indicating plaintiff lived in the building next door. Defendant addressed all of its letters, though, to plaintiff at 404 East One Hundred Fortieth Street. Thus, plaintiff has raised a triable question of fact whether defendant made a reasonable effort to serve plaintiff with its demand for proof of loss, see *MYP Food Corp. v. Tower Ins. Co.*, 12 A.D.3d 180, 783 N.Y.S.2d 466 (1st Dep't 2004). A question of fact also arises as to whether the demand was actually received. Defendant's computerized notes include an entry stating that the demand was sent to the insured by "cert and reg mail." Presumably, "cert" refers to certified mail. However, defendant submits no proof of receipt. See *Trexler v. American Home Assurance Co.*, 96 A.D.2d 686, 466 N.Y.S.2d 528 (3d Dep't 1983) (return receipts demonstrated proof of loss forms received). Furthermore, there is no indication that the demand and the blank proof of loss forms were sent to the public adjuster, Rubin & Rosen Adjusters, Inc. or her attorney, to allow an inference that plaintiff eventually received them.<sup>1</sup> See *Adamowicz v. North Country Ins. Co.*, 70 A.D.3d 47, 889 N.Y.S.2d 733 (3d Dep't 2009); *Rosalie Estates v. Colonia Ins. Co.*, 227 A.D.2d 335, 643 N.Y.S.2d 59 (1st Dep't 1996); *Esa v. N.Y. Prop. Ins. Underwriting Ass'n*, 89 A.D.2d 865, 453 N.Y.S.2d 247 (2d Dep't 1982). Accordingly, defendant's motion for summary judgment is denied.

Plaintiff also moves for dismissal of defendant's First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh affirmative defenses, which allege that plaintiff engaged in fraud, made false or

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<sup>1</sup> Correspondence from plaintiff's counsel addressed to defendant refers only to a recorded statement, not sworn proofs of loss. Defendant denies receiving any correspondence from plaintiff's counsel.

misleading statements or willfully concealed statements. A defense based upon “misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence” must be plead with particularity, with the circumstances constituting the wrong set forth in detail. *See* CPLR 3016(b); *see Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 A.D.2d 249, 538 N.Y.S.2d 249 (1st Dept 1989) (CPLR 3016(b) imposes a more stringent pleading standard where the elements of a fraud claim must be supported by factual allegations). The allegations must be particularized so as to give notice to the court and to the parties of the transactions and occurrences to be proved. *See Foley v. D’Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964).

A review of defendant’s answer reveals that the Fourth and Fifth affirmative defenses relate to plaintiff’s failure to provide documents or appear for a recorded statement, in breach of the policy. No mention is made as to any fraudulent conduct, and those two defenses are adequately pled.

Defendant’s First, Second, Sixth, Eighth, Tenth, and Eleventh affirmative defenses are replete with references to plaintiff’s alleged fraudulent conduct and misleading or willfully concealed statements.<sup>2</sup> However, those defenses lack the requisite specificity set forth in CPLR 3016(b). Indeed, defendant’s First affirmative defense reads in part that plaintiff “made false and/or fraudulent and/or material misrepresentations to the defendant concerning the incident.” The Second affirmative defense merely states that plaintiff’s claims “arose solely as the result of the plaintiff and/or of the plaintiff’s agents and/or relatives, illegal and/or fraudulent conduct.” The Sixth, Eighth, Tenth and Eleventh affirmative defenses similarly state that plaintiff willfully concealed or made misleading statements to induce defendant to issue the policy or pay the claim. Defendant neither identifies nor sets forth the

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<sup>2</sup> Defendant in its First and Sixth affirmative defenses alleges that plaintiff made false statements regarding the incident. However, defendant also contends has provide no sworn statements, examination under oath, or documents regarding the incident.

specific conduct, acts or statements to support those defenses and when or to whom the statements were made. Vague allegations of fraud that are entirely lacking in detail is insufficient as a matter of law. *See Mariani v. Dyer*, 193 A.D.2d 456, 597 N.Y.S.2d 358 (1st Dep't), *leave denied*, 82 N.Y.2d 658, 624 N.E.2d 695, 604 N.Y.S.2d 557 (1993).

However, the court, in viewing a motion to dismiss an affirmative defense, must view the allegations in the answer in the light most favorable to defendant, *see 182 Fifth Ave. v. Design Dev. Concepts, Inc.*, 300 A.D.2d 198, 751 N.Y.S.2d 739 (1st Dep't 2002), and in assessing the adequacy of the pleadings may look to evidence proffered in opposition, including affidavits. *See Big Apple Car v. City of New York*, 204 A.D.2d 109, 611 N.Y.S.2d 533 (1st Dep't 1994); *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976). Furthermore, CPLR 3016(b) need not be interpreted "so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.'" *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 373 N.E.2d 278, 279, 402 N.Y.S.2d 384, 385 (1977) (internal citation omitted).

In opposition to the motion, Plumitallo states that defendant's affirmative defenses were based upon plaintiff's refusal to provide any statement regarding her claim, which plaintiff denies, and upon a preliminary investigation that the premises had been divided into multiple single room occupancies in violation of applicable building codes. Conversion of the premises into single room occupancies raises coverage issues, as the subject policy would not have been issued had the building been used for single occupancy residences. Whether the building consisted of single room occupancies prior to the issuance of the policy, and whether plaintiff informed defendant of said condition, is within plaintiff's possession. Based upon defendant's preliminary investigation, defendant has set forth facts sufficient to permit a reasonable inference of fraud at this juncture. *See Pramer S.C.A. v. Abaplus Intl. Corp.*, 76 A.D.3d 89, 907 N.Y.S.2d 154 (1st Dep't 2010); *see also Sargiss v. Magarelli*, 12 N.Y.3d 527, 909

N.E.2d 573, 881 N.Y.S.2d 651 (2009).

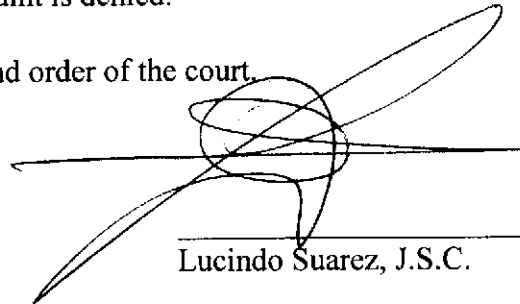
Accordingly, it is

ORDERED, that the motion of plaintiff Santa Guevara seeking dismissal of defendant's First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh affirmative defenses is denied; and it is further

ORDERED, that the cross-motion of defendant Allstate Insurance Company seeking summary judgment dismissing plaintiff's complaint is denied.

This constitutes the decision and order of the court.

Dated: October 14, 2011



Lucindo Suarez, J.S.C.