30-40 E. Main St. Bayshore Inc. v Republic Franklin Ins. Co.

2012 NY Slip Op 30173(U)

January 11, 2012

Supreme Court, Suffolk County

Docket Number: 28790/2002

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX NO. 28790/2002

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

30-40 EAST MAIN STREET BAYSHORE INC. and LOUIS J. MODICA d/b/a MODICA ORGANIZATION,

Plaintiffs,

-against-

REPUBLIC FRANKLIN INSURANCE CO. and UTICA MUTUAL INSURANCE COMPANY,

Defendants.

ORIG. RETURN DATE: APRIL 28, 2011
FINAL SUBMISSION DATE: JUNE 9, 2011
MTN. SEQ. #: 007
MOTION: MD

ORIG. RETURN DATE: MAY 31, 2011
FINAL SUBMISSION DATE: JULY 14, 2011
MTN. SEQ. #: 008
MOTION: MD

ORIG. RETURN DATE: JUNE 30, 2011
FINAL SUBMISSION DATE: AUGUST 18, 2011
MTN. SEQ. #: 009
MOTION: MG

PLTF'S/PET'S ATTORNEY:
MOLANDER & ASSOCIATES
4875 SUNRISE HIGHWAY - SUITE 300
BOHEMIA, NEW YORK 11716
631-256-8495

DEFT'S/RESP ATTORNEY:
FAUST GOETZ SCHENKER & BLEE
TWO RECTOR STREET - 20TH FLOOR
NEW YORK, NEW YORK 10006
212-363-6900

ATTORNEY FOR NON-PARTY STATE FARM INSURANCE COMPANY:
NICOLINI, PARADISE, FERRETTI & SABELLA, PLLC
114 OLD COUNTRY ROAD
P.O. BOX 9006
MINEOLA, NEW YORK 11501
516-741-6355

KAK

Upon the following papers numbered 1 to 19 read on these motions TO COMPEL, TO INCREASE *AD DAMNUM* CLAUSE, AND TO QUASH SUBPOENA. Notice of Motion and supporting papers 1-3 ; Affirmation in Opposition and supporting papers

4, 5 ; Reply Affirmation and supporting papers 6, 7 ; Notice of Motion and supporting papers 8-10 ; Affirmation in Opposition and supporting papers 11, 12 ; Reply Affirmation 13 ; Order to Show Cause and supporting papers 14-16 ; Affirmation in Opposition and supporting papers 17, 18 ; Reply Affirmation and supporting papers 19 ; it is,

ORDERED that this motion (seq. #007) by plaintiffs, 30-40 EAST MAIN STREET BAYSHORE, INC. and LOUIS J. MODICA d/b/a MODICA ORGANIZATION ("plaintiffs"), for an Order, pursuant to CPLR 3124, compelling defendants to comply with plaintiffs' discovery demands, and directing defendants to provide such discovery prior to scheduling depositions of defendants, is hereby **DENIED** as procedurally defective. Plaintiffs have failed to annex a good faith affirmation to their application, indicating that plaintiffs' counsel conferred with defendants' counsel in a good faith effort to resolve the issues raised in the motion (22 NYCRR § 202.7 [a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]), and defendants have raised this objection. In any event, defendants have now responded to plaintiffs' discovery demands, and have attached a copy thereof to their opposition papers; and it is further

ORDERED that this motion (seq. #008) by plaintiffs for an Order: (1) permitting plaintiffs to increase the *ad damnum* clause representing consequential damages for attorney fees, costs of suit and lost interest on deposit in amounts as stated; or, in the alternative (2) granting plaintiffs leave to amend the complaint to assert a separate cause of action sounding in breach of the implied covenant of good faith and fair dealing and demanding consequential damages, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #009) by non-party STATE FARM INSURANCE COMPANY ("State Farm") for an Order, pursuant to CPLR 2304, quashing the subpoena served by plaintiffs dated May 18, 2011, is hereby **GRANTED** for the reasons set forth hereinafter.

The instant action is for property damage alleged by plaintiffs to have been sustained as a result of a fire at 30-40 East Main Street, Bay Shore, New York, on November 7, 2000. A policy of insurance had been issued by defendants to plaintiffs, bearing policy number 2927046, in which defendants insured plaintiffs against loss from fire damage to the real property commonly known as 30-40 East Main Street, Bay Shore, New York, for the period

December 15, 1999 through December 15, 2000. Plaintiffs allege that on or about November 7, 2000, the insured property was destroyed by fire. Apparently, the fire was caused by a combustible item placed too close to a burner within the tenant restaurant, "Tina's Pizza Restaurant."

By Order dated April 2, 2008, this Court granted plaintiffs' application for leave to increase the *ad damnum* clause of their complaint to $634,705.42, representing the Award of the Appraisers, issued in August of 2007, in the amount of $536,971.42 and the loss of rents for a twenty-one month period totaling $97,734.00. Plaintiffs now seek to increase the *ad damnum* clause further to $787,945.39, representing consequential damages for attorney fees in the amount of $74,926.29, costs of suit in the amount of $9,409.33, and lost interest on deposits in plaintiff LOUIS J. MODICA's personal accounts in the amount of $68,904.35 as a result of his use of personal funds to restore the building. In the alternative, plaintiffs seek leave to amend their complaint to assert a cause of action sounding in breach of the implied covenant of good faith and fair dealing.

An application for leave to amend a complaint to increase an *ad damnum* clause rests in the sound discretion of the Court. While leave to amend an *ad damnum* clause should be liberally granted, it is not automatic, and a motion to amend must be supported by a proper showing by the plaintiff as to the merits of the request for the amendment and an explanation for the failure to initially assert the increased amount of damages (*see Century Resources Corp. v Weir*, 134 AD2d 398 [1987]).

The Court finds that plaintiffs have not met their burden for an increase of the *ad damnum* clause herein. It is well-settled that a litigant is not allowed to recover damages for the amounts expended in the successful prosecution or defense of its rights. In addition, a prevailing party may not recover an attorney's fee from the losing party except where authorized by statute, agreement, or court rule (*see e.g. Insurance Co. of Greater N.Y. v Clermont Armory, LLC*, 84 AD3d 1168 [2011]). Further, recovery of costs and attorney's fees may not be had in an affirmative action brought by an insured to settle its rights (*see New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308 [1995]; *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12 [1979]; *Grazioli v Encompass Ins. Co.*, 40 AD3d 696 [2007]).

Regarding that branch of plaintiffs' motion for leave to amend the complaint, CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" absent surprise or prejudice resulting from the delay (CPLR 3025 [b]). Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (CPLR 3025 [b]; *Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Here, the Court finds plaintiffs' motion procedurally defective in that they failed to annex a copy of a proposed amended complaint for review (*see Chang v. First Am. Title Ins. Co.*, 20 AD3d 502 [2005]; *Ferdinand v Crecca & Blair*, 5 AD3d 538 [2004]; *Haller v Lopane*, 305 AD2d 370 [2003]). In any event, defendants have claimed prejudice resulting from the delay, as this action has been pending since 2002. Accordingly, this motion by plaintiffs to increase the *ad damnum* clause or to amend their complaint is **DENIED**.

Next, non-party State Farm has filed an application for an Order, pursuant to CPLR 2304, quashing the subpoena served by plaintiffs dated May 18, 2011. The subpoena seeks State Farm's entire subrogation file regarding its insured, Tina's Restaurant Pizzeria, with respect to the loss suffered on November 7, 2000.

CPLR 3101 (a) (4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a] [4]). A subpoena served on a non-party is facially defective and unenforceable if it neither contains, nor is accompanied by a notice stating the circumstances or reasons such disclosure is sought or required (*see Needleman v Tornheim*, 88 AD3d 773 [2011]; *Kooper v Kooper*, 74 AD3d 6 [2010]; *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055 [2009]; *Wolf v Wolf*, 300 AD2d 473 [2002]; *Knitwork Prods. Corp. v Helfat*, 234 AD2d 345 [1996]).

Here, the Court finds that plaintiffs' subpoena is defective and unenforceable as it neither contains, nor is accompanied by a notice stating the circumstances or reasons such disclosure is sought or required. Indeed, counsel for State Farm was left to "presume" the circumstances or reasons plaintiffs

sought this disclosure. As such, State Farm's motion to quash the subpoena served by plaintiffs dated May 18, 2011, is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: January 11, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**