SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 4
NASSAU COUNTY

JOANNE CASSESE-DELGADO, PHILIP CASSESE, and PHILIP CASSESE, as Administrator of the Estate of Joseph Cassese,

Plaintiff(s),

-against-

MOTION #003
INDEX #14164/09
MOTION DATE:
October 28, 2011

E&N Associates, LLC d/b/a Paul Davis of Fairfield & Westchester Counties, Encompass Insurance Company of America,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....1
Reply Affirmation.....1

Motion in a breach of contract and/or conversion action by defendant, E & N Associates, LLC d/b/a Paul Davis of Fairfield & Westchester Counties ("E & N") for an Order pursuant to CPLR §3212 granting Summary Judgment and dismissing the complaint of the plaintiffs, Joanne Cassese-Delgado, Philip Cassese, and Philip Cassese, as Administrator of the Estate of Joseph Cassese, alleging conversion of personal property arising from a underlying fire insurance claim. The motion is granted and the complaint is dismissed as to E& N.

Plaintiffs allege, inter alia, in the underlying cause of action before this Court, that the co-defendant, Encompass Insurance Company of America ("Encompass"), refused to make payment for certain damages and/or improperly applied monies paid for damages; that Encompass converted and/or destroyed and/or instructed the destruction of plaintiff' real property, and that E & N converted, destroyed, and caused the removal or instructed the loss and conversion of plaintiffs' real property.

Co-defendant, Encompass moved this Court in January, 2011 for an Order granting

Summary Judgment dismissing plaintiffs' second cause of action alleging conversion. Such motion was granted on April 1, 2011 by this Court.

Co-defendant, Encompass, issued a policy of homeowner's insurance to the plaintiff, Joseph Cassese to insure the premises located at 9 Sunset Hill Road, Putnam Valley, New York.. Such policy provided a Property Location Limit of coverage in the amount of $581,420.00. The monetary coverage was to be allocated accordingly: $322,600 for the premises, $33,000 for other structures; and tangible personal property for $225,820.

On or about August 27, 2007, the plaintiffs suffered a fire loss at the subject premises which resulted in the alleged destruction of certain personal property. The plaintiffs made a claim for damages under the subject homeowner insurance policy. The defendants insurer retained the services of moving defendant, E & N, to perform emergency/temporary repairs on the premises and the plaintiffs executed an authorization for E & N to perform such work. In September, 2007, E & N removed salvageable property from the premises and placed them in a storage facility. According to the plaintiffs, E & N's removal of the personal property ultimately caused such property to be either destroyed or lost.

The defendant insurer paid the plaintiffs the amount of $198,709.72 for the building damage, which left $382,710.28 in available coverage under the policy for the personal property. As the plaintiffs and defendant insurer were unable to agree as to the value of the contents, the claim was submitted to an appraiser, pursuant to the provisions of the subject policy. The plaintiffs sought recovery in the amount of $497, 622.30, which reportedly included the sum of $251, 885.62 for items they categorized in their inventory as "Items Thrown Away". The appraiser determined the value of the replacement cost of the damaged property at $418, 199.28 and the actual cash value at $358,392.02. Plaintiffs were then paid, under the policy, the amount of $367,149.69[1] for the contents, which, after adding the figure for building damage, equaled the total amount of $565,859.41. Under the policy limit, the remaining amount of available coverage for any subsequent claim was $15,560.59.

In June 2009, plaintiff, through their counsel, made a demand of the storage facility for access to the stored contents for purposes of inspection and removal. In response to defendants' alleged refusal to turn over the personal property, the plaintiffs commenced the underlying action in this Court. During the pendency of this action, in September, 2011, plaintiffs secured the contents from the storage facility and such contents are presently in their possession

The relevant provisions of the insurance policy are set forth herein:

"...TANGIBLE PERSONAL PROPERTY-LIMIT OF LIABILITY

2. ....At our option, we may repair or we may replace with a new item of similar or

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[1]It is noted that the insurer paid in excess of the appraised value; however, there is no reason given for such overpayment in the record.

like kind and quality...

3. You may make claim under this policy for loss or damage on an actual cash value basis within 180 days after loss for any additional liability on a replacement basis..."

...

...HOW WE SETTLE PROPERTY CLAIMS AND WHAT YOU MUST DO....

1. How We Pay Claims.

We may pay for loss in money ro repair or replace the damaged or stolen property to you.

If we return stolen property we will pay for any damage resulting from ***theft***. We may keep all or part of the property at an agreed upon or appraised value...

...

GENERAL PROVISIONS....

8. RECOVERED PROPERTY

If you recover any property that we have made payment on under this policy you must immediately notify us. If the recovery is made prior to the conclusion of the loss adjustment, you will have the option to retain the property and we will adjust the loss payment based on the value of the property..."(see Affirmation in Opposition, Exhibit B)

The defendant argues that the issue of conversion has already been decided by this Court where it was determined that plaintiffs failed to establish a prima facie element that the insurer defendant exercised an unauthorized dominion over the personal property. Further, plaintiff has been paid the actual cash value of the personal property, including the salvageable property held in storage; however, they failed to make a claim for the difference between the actual cash value and the replacement value pursuant to the subject policy provisions. In addition, plaintiff authorized the removal of the contents from the premises.

Plaintiffs argue that the authorization executed by both parties is silent as to the removal of the salvageable contents and that the policy provides that the insured has the option to retain such property.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, *a* court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626[2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once the this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562[1980]) even if alleged by an expert (*Alvarez v. Prospect Hospital*, 68 NY2d 320 *supra*; *Aghabi v. Serbo*, 256 AD2d 287 [2nd Dept. 1998]).

A cause of action alleging conversion of property must allege legal ownership or an immediate right of possession to specifically identifiable property and that the defendant[s] exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights (see *Zendler Const. Co., Inc. v. First Adjustment Group, Inc.* 59 AD3d 439 [2nd Dept 2009]).

In light of the foregoing, this Court must consider the policy provisions and the facts and circumstances of the instant matter to determine whether defendants exercised such dominion over the property in dispute.

The authorization, referred to by both parties, indicates emergency, temporary repairs include, "... contents (Nosalvagable) [sic] Disposal.." (see Notice of Motion, Exhibit C). However, plaintiff, Philip Cassese, in his affidavit submitted into evidence, interprets the authorization in his statement: "...[a]gain this language [of the agreement authorizing removal of contents] was discussed and agreed by myself and the Paul Davis representative to mean, simply, that **nothing should be thrown out which might later be found to have any salvage value, that they should err on the side of preserving my property**..." (see Affirmation in Opposition, exhibit D). Implicit in this statement, is plaintiffs' agreement that defendants secure property that may be salvageable. The placement of property into storage is certainly appropriate, thereby undermining any unauthorized dominion of the same by the defendant.

Accordingly, the defendant has met its initial burden. As the defendant has established its prima facie entitlement to Summary Judgment, the plaintiff must now indicate that there is an issue of fact requiring denial of the instant motion.

It is well settled that courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies. The plain meaning of the policy's language may not be disregarded in order to find an ambiguity where none exists (*Cali v. Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415 [2nd Dept. 2007]). In light of the foregoing, the plaintiffs' reliance on the provision regarding recovered property is misplaced. The provision clearly states that the insured has option of retaining property that *it* recovers on which payment has been made under the policy–not property recovered by the insurer. The provision is underscored by the requirement that the inured is to immediately notify the insurer of any property it retains.

Additionally, it has not been controverted by plaintiffs that the inventory they prepared

and submitted in their claim to Encompass, sets forth the value of tangible property under the category "Items Thrown Away" of $251,885.62, is the identical to the amount sought in the second cause of action alleging conversion against Encompass, and in the third cause of action against E & N. As this amount was included in the total payment received by plaintiffs by defendants, the plaintiffs were therefore paid for the salvageable items that they claim were converted.

The plaintiffs, pursuant to the provisions of the subject policy, have not made any claims under the replacement cost value within the 180-day time constraint, a fact also noted in this Court's April 1, 2001 decision herein (see Exhibit F). As such, the plaintiffs, in opposition, have not presented evidence to create a material issue of fact.

Dated: JAN 26 2012

J.S.C.