

Kendall v Amica Mutual Ins. Co.

2012 NY Slip Op 33693(U)

November 8, 2012

Sup Ct, Albany County

Docket Number: 4363-11

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

RICHARD K. KENDALL and HOLLY M. KENDALL,

Plaintiffs,

DECISION and ORDER
RJI NO. 01-12-107666
INDEX NO. 4363-11

-against-

AMICA MUTUAL INSURANCE COMPANY,

Defendant.

Supreme Court Albany County All Purpose Term, September 14, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs allege that Defendant breached its insurance contract, and commenced this action seeking to recover the resulting damages. Issue was joined, discovery is ongoing and Defendant now moves to dismiss. Plaintiffs oppose the motion and cross-move to amend their complaint. Defendant opposes the cross motion. Because Plaintiffs demonstrated their entitlement to amend, their motion is granted and Defendant’s motion is denied as academic.

Considering Plaintiff’s motion to amend first, “it is well settled that, where a proposed

amendment is meritorious, leave should be freely granted absent prejudice or surprise to the other party.” (Webber v Scarano-Osika, 94 AD3d 1304, 1305 [3d Dept 2012]; CPLR §3025[b]; Crawford v Burkey, 93 AD3d 1134 [3d Dept 2012]).

Here, Plaintiffs demonstrated that their proposed amendment is meritorious. Plaintiffs submit the affidavit of Holly Kendall. She explains, based on her own knowledge, that her home was contaminated with tear gas. To cover its remediation she submitted a claim to Defendant, her homeowner’s insurance company. Defendant accepted the claim, provided insurance coverage, was involved in coordinating the tear gas remediation and informed the Plaintiffs that the cleanup was complete. Whereupon, the Plaintiffs moved back into their home. During the cleanup, however, one of the remediation companies used undiluted Anthium Dioxide. Plaintiffs submitted a report detailing the dangers posed by undiluted Anthium Dioxide, and Ms. Kendall explained the harmful effects she and her husband suffered by such exposure when they moved back into their home. She asserts that they submitted a second claim to Defendant to cover the undiluted Anthium Dioxide contamination, but Defendant has unduly delayed accepting coverage. Based upon these allegations the Amended Complaint’s breach of contract cause of action is not “wholly devoid of merit.” (Mokay v Mokay, 67 AD3d 1210 [3d Dept 2009], quoting Berger v Water Commrs. of Town of Waterford, 296 AD2d 649 [3d Dept 2002]; Bast Hatfield, Inc. v Schalmont Cent. School Dist., 37 AD3d 987 [3d Dept 2007]). Neither, within this procedural posture, is its breach of good faith and fair dealing cause of action. (Gauthier v Countryway Ins. Co., __ AD3d __ [3d Dept 2012]; Elmhurst Dairy, Inc. v Bartlett Dairy, Inc., 97 AD3d 781, 784 [2d Dept 2012]).

Moreover, this amendment neither prejudices nor surprises Defendant. Plaintiffs set forth

the facts underlying the undiluted Anthium Dioxide claim in their complaint¹ and in the complaint they served on Defendant in a related action (Index Number 1982-12). Additionally, Plaintiffs served a pro se complaint in yet a third action, in which Defendant's counsel appeared, which was based on an identical second insurance claim (Index Number 2319-11). Moreover, these three actions were previously the subject of motion practice before this Court wherein the undiluted Anthium Dioxide issue was discussed. Upon this background, Defendant cannot claim surprise. Nor can it claim prejudice from any delay. (Crawford v Burkey, supra). No scheduling order has yet to be entered and discovery is ongoing. Moreover, Defendants made no allegation or showing of prejudice.

Accordingly, Plaintiffs motion to amend their complaint is granted.

Turning to Defendant's motion to dismiss, because Plaintiffs have been granted leave to amended their complaint Defendant's motion is denied as academic. "It is well settled that an amended complaint supersedes the original complaint, thus rendering without legal effect the defective earlier pleading." (Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, supra; Chalasani v. Neuman, 64 NY2d 879 [1985]; Pourquoi M.P.S., Inc. v Worldstar Intern., Ltd., 64 AD3d 551 [2d Dept. 2009]). As Defendant's motion challenges only Plaintiff's now superseded original Verified Complaint, his motion to dismiss is rendered academic. (Elegante Leasing, Ltd. v Cross Trans Svc, Inc., 11 AD3d 650 [2d Dept 2004]; Lansco Corp. v Strike Holdings LLC, 90 AD3d 427 [1st Dept 2011]). Moreover, Defendant did not request that its motion be applied to

¹ Although it appears from Defendant's submission that it was served with a copy of the complaint that was missing the page that contained Plaintiffs' undiluted Anthium Dioxide allegations, this ministerial error caused no surprise. The abrupt break in the complaint's allegations and their non-consecutive numbering certainly put Defendant's counsel on notice of this clerical error.

Plaintiffs' amended complaint.

Accordingly, Plaintiffs' motion to amend their complaint is granted. Plaintiffs shall file and serve a copy of their Amended Complaint within ten days of the date of this Decision and Order. In addition, Defendant's motion is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 8, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 25, 2012; Affidavit of Panagiota Hyde, dated July 25, 2012, with attached Exhibits A-B; Affidavit of Timothy Gerardi, dated July 25, 2012, with attached Exhibits 1-3.
2. Notice of Cross-Motion, dated September 4, 2012; Affidavit of Shawn May, dated August 31, 2012, with attached Exhibits A-E.
3. Affidavit of Panagiota Hyde, dated September 13, 2012; Affidavit of Timothy Gerardi, dated September 13, 2012, with attached Exhibits 4-5.