

Fitzsimmons v State Farm Fire & Cas. Co.
2013 NY Slip Op 31275(U)
June 13, 2013
Sup Ct, Suffolk County
Docket Number: 06-1784
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-2-13
ADJ. DATE 4-16-13
Mot. Seq. # 003 - MG; CASEDISP

-----X	
CAROL FITZSIMMONS,	PAUL GREENFIELD, ESQ.
	Attorney for Plaintiff
	36 Towhee Trail
	East Hampton, New York 11937
Plaintiff,	
- against -	
STATE FARM FIRE AND CASUALTY	RIVKIN RADLER LLP
COMPANY,	Attorney for Defendants
	926 RXR Plaza
	Uniondale, New York 11556
Defendant.	
-----X	

Upon the following papers numbered 1 to 54 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 41 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 42 - 51 ; Replying Affidavits and supporting papers 53 - 54 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action for breach of contract in which the plaintiff seeks money damages due to the alleged failure of the defendant to pay her the full proceeds of claims made under a homeowner's insurance policy. It is undisputed that the defendant issued said policy to the plaintiff, and that the policy was in effect on January 28, 2005, when her residence located at One Julia Circle, East Setauket, New York (the premises) was damaged by water after the boiler failed, the residence lost heat, and a pipe burst. Thereafter, the plaintiff submitted a claim for indemnification for the damage to her residence pursuant to the subject insurance policy, as well as a claim for damage to her personal property. It is undisputed that the defendant made a payment on the claim for building damage. Whether said payment was in full satisfaction of the plaintiff's claim is vigorously contested herein. The complaint sets forth three causes of action alleging breach of contract in failing to pay the full proceeds of her claim, breach of contract in failing to pay her

(RR)

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claim for loss of rental income, and a violation of General Business Law 349, respectively. By order dated July 19, 2006, the Court (Tanenbaum, J.) dismissed the plaintiff's third cause of action.

The defendant now moves for summary judgment dismissing the complaint on the grounds that the plaintiff's claim for additional property damage is barred by the doctrine of accord and satisfaction, that the plaintiff failed to file a timely proof of loss regarding her contents/personal property claim, and that she is not entitled to recover under the subject insurance policy for the loss of rental income. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the defendant submits, among other things, the pleadings, the deposition transcripts of the plaintiff, her public adjuster and two other nonparty witnesses, the affidavit of its claims representative, and relevant documents and correspondence. The deposition of the public adjuster, a nonparty witness, is unsigned and uncertified, and the defendant has failed to submit proof that the transcript was forwarded to the witness for his review (*see CPLR 3116 [a]*). Under the circumstances, the deposition testimony of the public adjuster is not in admissible form (*see Marmer v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). The deposition transcripts of one nonparty witness is signed and certified, that of the other nonparty witness and the plaintiff are certified but unsigned, and the defendant has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see CPLR 3116 [a]*). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also Bennet v Berger*, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

In his affidavit, Robert Kester (Kester), swears that he is the successor claims representative assigned by the defendant to the insurance claims made by the plaintiff in connection with the losses that occurred on January 28, 2005 (the loss). He states that the defendant issued a homeowners insurance policy for the premises bearing policy number 56-CE-1627-5, effective August 10, 2004 to August 10, 2005 (the policy). He sets forth the relevant coverage and loss settlement provisions of the policy regarding covered property losses and fair rental value. He indicates that the plaintiff filed her claim on February 1, 2005, and thereafter retained a licensed public adjuster to act or aid in the preparation, adjustment and negotiation of the settlement of the plaintiff's claims. The defendant investigated the claim, agreed to pay for mold testing and remediation of the damaged areas of the premises, and paid the company that completed the remediation work directly. On June 8, 2005, the defendant sent a letter to the public adjuster which contained an offer

to settle the plaintiff's building damage claim for \$23,016.51. That offer did not include any amounts for certain mold remediation expenses that were still under review by the company doing the remediation work, or for the plaintiff's claim for damage to her personal property. Kester further swears that, on June 22, 2005, the plaintiff submitted a sworn statement in proof of loss for the building damage in the amount of \$24,016.51 less the deductible of \$1,000 included in the policy, and contained the term "undisputed," with regard to said building damage. The defendant issued payment of the settlement amount to the plaintiff and her public adjuster. At plaintiff's insistence, the defendant agreed to send and pay the company performing the mold testing to re-inspect the premises. Said company confirmed that the plaintiff's additional complaints were not related to the loss. Kester swears that following the re-inspection, neither the plaintiff nor her public adjuster submitted any documentation to the defendant concerning any additional, or disputed, building damage. He states that the defendant wrote to the plaintiff and her public adjuster four times between August 29, 2005, and November 1, 2005 requesting information about the plaintiff's personal property claim and the need for a proof of loss, and that the defendant never received a response. On November 15, 2005, the defendant wrote to the plaintiff and her public adjuster demanding a sworn statement in proof of loss for her personal property claim as required by the policy, and including a proof of loss form. The plaintiff did not respond to the request, and the defendant followed up with letters dated December 12, 2005, and December 30, 2005. He indicates that the plaintiff never submitted a proof of loss for said claim. Kester further swears that the plaintiff never submitted a claim to the defendant for the loss of rental income, although this action seeks to recover under such a claim.

At her deposition, the plaintiff testified that she was residing alone at the premises at the time of the loss, and that she was not renting any portion of the premises. After January 28, 2005, she hired Mark Adler (Adler) to act as her public adjuster. She acknowledged that it is her signature on the proof of loss delivered to the defendant by Adler, and that the form indicates that the premises were being used for residential purposes only. She stated that she or Adler hired Servpro to do the remediation work at the premises, that the defendant issued a check directly to Servpro to pay for its services, and that she signed a certificate of satisfaction for the services provided. She did not remember which corporation did the mold testing and inspection at the premises. The plaintiff further testified that she did not personally provide a proof of loss in response to the defendant's request dated November 1, 2005, and that "a public adjuster would be responsible for that."

John Paciulli (Paciulli) was deposed on July 16, 2012. He testified that he is a principal of Insight Environmental (Insight) which provides industrial hygiene and environmental consulting services. He was retained by the defendant to inspect the premises to determine, among other things, the point of loss and the extent of the water damage. He inspected the premises in March 2005, and issued a report dated March 25, 2005, which indicated that the pipe that burst was located in the wall between the kitchen and bathroom. He observed mold in the lower drywall throughout the premises, noted a number of areas of mold which were not related to the loss, and issued his report with recommendations for the remediation of the damage from the loss. On April 28, 2005, he re-inspected the premises and verified that the remediation work had been completed. Paciulli further testified that he inspected the premises a third time based on the plaintiff's insistence that there was additional damage that had not been repaired. He states that he issued a report dated August 11, 2005, in which he indicated that the issues raised by the plaintiff were not related to the loss.

Robert Franza (Franza) was deposed on January 13, 2012. He was shown a copy of an estimate by Costom Care Contracting (Costom) dated April 11, 2005, indicating the cost of repairing the damage at the premises. He testified that his company is Custom Care Contracting, that the estimate shows his home address for Costom, and that he did not know if the company name on the estimate contained a typographical error. He did not remember if he performed this estimate, when it was generated, or if his company created the document. He acknowledged that the copy of the estimate indicates that he was the “estimator.” However, he did not recall doing the estimate or writing it out.

The defendant has failed to demonstrate prima facie its entitlement to summary judgment dismissing the first cause of action against it based on an accord and satisfaction. To establish the affirmative defense of an accord and satisfaction, a litigant must demonstrate that there is a disputed unliquidated claim between the parties, and that the parties reached a new agreement that a stipulated performance will be accepted, in the future, in satisfaction of all or part of the obligations under the original contract (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 604 NYS2d 900 [1993]; *Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590, 483 NYS2d 979 [1984]; *Pothos v Arverne Houses, Inc.*, 269 AD2d 377, 702 NYS2d 392 [2d Dept 2000]; *Patel v Orma*, 190 AD2d 782, 593 NYS2d 851 [2d Dept 1993]). Here, the affidavit submitted by the defendant is insufficient to establish as a matter of law that the plaintiff and the defendant mutually agreed that payment of the amount set forth in her sworn statement in proof of loss for building damage would discharge plaintiff’s claim for indemnification under the subject insurance policy (*see* 19 NY Jur 2d, Compromise, Accord, and Release § 26; *Denburg v Parker Chapin Flattau & Klimpl*, *supra*; *McKesson Corp. v Gabe’s Pharm.*, 248 AD2d 445, 669 NYS2d 518 [2d Dept 1998]; *EFCO Corp. v Liberty Mut. Ins. Co.*, 24 Misc 3d 1226[A] [Sup Ct, New York County 2009]). The defendant’s correspondence with Adler and the plaintiff between August 29, 2005 and November 1, 2005, after the alleged accord and satisfaction, repeatedly requests additional information regarding the plaintiff’s building damage claim, negating any assertion that there was a mutual agreement to discharge the claim.

Where a portion of a claim is undisputed and a portion is disputed, payment of the amount which is admittedly due can furnish no consideration for an accord and satisfaction of the entire claim (*Courtney-Clarke v Rizzoli Intl. Publs., Inc.*, 251 AD2d 13, 676 NYS2d 529 [1st Dept 1998]; *Pollack v Equitable Life Assur. Soc. of U.S.*, 154 Misc 443, 277 NYS 328 [New York City Ct 1935]; *see also Ross v Mail Order Merchandising, Inc.*, 128 AD2d 514, 512 NYS2d 446 [2d Dept 1987]; *Manley v Pandick Press, Inc.*, 72 AD2d 452, 424 NYS2d 902 [1st Dept 1980]).

However, the defendant has established its entitlement to summary judgment dismissing that part of the plaintiff’s first cause of action which alleges that the defendant’s failure to pay her entire building damage claim was a breach of contract. The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant’s failure to perform, and (4) resulting damage (*see e.g. J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). Here, the defendant has established, prima facie, that it performed its obligations under the policy to investigate, negotiate and pay the plaintiff’s building damage claim, and that it paid the subject proof of loss in full. This is true despite the fact that said proof of loss contained the term “undisputed,” as the defendant’s submission establishes that there was no additional building damage which was covered under the policy.

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Turning to that part of the first cause of action that involves the plaintiff's claim for damage to her personal property, the Court finds that the defendant has established its prima facie entitlement to summary judgment. The policy contains the following relevant language:

SECTION 1 - CONDITIONS

* * *

2. Duties After Loss. After a loss to which this insurance may apply, you shall see that the following duties are performed:

* * *

c. prepare an inventory of damaged or stolen personal property. Show in detail the quantity, description, age, replacement cost and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory.

* * *

e. submit to us, within 60 days after the loss, your signed, sworn proof of loss which sets forth to the best of your knowledge and belief:

* * *

(6) an inventory of damaged or stolen property described in 2.c.

In addition, Insurance Law 3407 (a) provides in pertinent part: "The failure of any person insured ... under any contract of insurance ... to furnish proofs of loss ... as specified in such contract shall not invalidate or diminish such claim ... unless such insurer or insurers shall, after such loss or damage, give to such insured a written notice that it or they desire proofs of loss ... on a suitable blank form or forms. Here, the defendant has established that it made a formal demand for a proof of loss with a blank form regarding the plaintiff's personal property claim, and that the plaintiff failed to submit the same. It is well settled that the failure to provide proof of loss pursuant to the terms of a contract of insurance is an absolute defense to a plaintiff's claim under said contract (*Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798, 513 NYS2d 379 [1987]; *Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 481 NYS2d 60 [1984]; *Meserole Factory, LLC v Arch Ins. Group*, 88 AD3d 967, 931 NYS2d 533 [2d Dept 2011]). Accordingly, the defendant has established its entitlement to summary judgment dismissing the plaintiff's first cause of action.

In addition, the defendant has established its entitlement to summary judgment dismissing the plaintiff's second cause of action for breach of contract based on the defendant's alleged failure to pay her claim for the loss of rental income. The policy contains the following relevant language:

COVERAGE C - LOSS OF USE

* * *

2. Fair Rental Value. When a [loss] causes that part of the residence premises rented to others or held for rental by you to become uninhabitable, we will cover its rental value.

The plaintiff's deposition testimony establishes that she did not rent the premises, or any portion thereof, to others, and that she owned, rather than rented, the premises. When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see Greenfield v Philles Records*, 98 NY2d 562, 750 NYS2d 565 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]; *Willsey v Gjuraj*, 65 AD3d 1228, 885 NYS2d 528 [2d Dept 2009]). Accordingly, the defendant has established its entitlement to summary judgment dismissing the plaintiff's second cause of action.

In light of the Court's prior dismissal of the plaintiff's third cause of action, the defendant has established its entitlement to summary judgment dismissing the complaint.

In opposition, the plaintiff submits, among other things, her affidavit, the affirmation of her attorney, estimates for the damage to her personal property, and correspondence from the defendant dated January 10, 2006. In her affidavit, the plaintiff describes how she discovered the loss, her actions thereafter, and that she had agreed to list the premises for rental shortly before the loss. She swears that she met the defendant's original claims representative at the premises on February 9, 2005, and that she gave certain receipts to the representative, who gave her "the name of a dry cleaner and a furniture repair company." She indicates that the furniture repair company, Furniture Medic, picked up her damaged furniture, and sent three estimates to the defendant detailing the cost of repairs. The plaintiff further swears that she never received her furniture back, and that Furniture Medic has demanded that she pay its estimate. She states that the dry cleaner, CRDN of Metro New York (CRDN), picked up all of her personal property for cleaning and restoration, that it is her understanding that CRDN faxed an estimate for the work to the defendant on March 15, 2005, and that the defendant paid DRDN in full on June 2, 2005. She indicates that the defendant paid this estimate without requiring her to file a proof of loss, and that, despite the payment, she has never received her property back. The plaintiff swears that the defendant's payment of the undisputed amount in her proof of loss was not intended to be a full settlement, and that "[f]rustrated by the seeming inability and/or unwillingness of both [Adler] and [the defendant] to resolve this matter completely," she commenced this action. She states that "the correspondence from Furniture Medic and CRDN to [the defendant], meet the key elements outlined in the policy" detailing what information a proof of loss must contain, and "clearly fulfill the notice and proof of loss requirements" of the policy.

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In his affirmation in opposition, the plaintiff's attorney contends that the payment of the proof of loss regarding the plaintiff's building damage claim did not constitute an accord and satisfaction, and that the facts establish that there was substantial compliance with the policy's proof of loss requirement regarding the plaintiff's personal property claim. In light of the Court's decision herein, counsel's first contention is deemed academic. The second contention is without merit. The estimates forwarded by Furniture Medic and CRDN are not sworn and do not provide the age and replacement cost of the items of property, nor do they attach all bills, receipts and related documents that substantiate the figures in the inventory as required by the policy provisions. More importantly, the courts have held that unsworn statements of loss do not satisfy the contractual or statutory requirements obligating an insured to serve a sworn proof of loss (*Alexander v New York Cent. Mut.*, 96 AD3d 1457, 949 NYS2d 305 [4th Dept 2012]; *Darvick v General Acc. Ins. Co.*, 303 AD2d 540, 756 NYS2d 457 [2d Dept 2003]; *Aryeh v Westchester Fire Ins. Co.*, 138 AD2d 337, 525 NYS2d 628 [2d Dept 1988]). In addition, counsel's contention that the defendant waived the requirement that plaintiff file a sworn statement in proof of loss, or that the defendant is estopped from relying on said requirement, is without merit.

The plaintiff has failed to raise an issue of fact requiring a trial of this action. She does not dispute that a sworn proof of loss regarding her personal property claim was not filed within 60 days of the defendant's demand, and that she did not file a claim for loss of rental income prior to the commencement of this action. Her statement that she intended to rent the premises does not negate the plain meaning of the relevant provision of the policy. Moreover, the plaintiff has not submitted any evidence to rebut the defendant's evidence that she has been paid in full for her building damage claim, or indicating that there is a question of fact whether she has been paid in full regarding that claim.

Accordingly, the defendant's motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the Order of this Court.

Dated: June 13, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION