

Paris Suites Hotel, Inc. v Seneca Ins. Co., Inc.

2013 NY Slip Op 31511(U)

July 2, 2013

Sup Ct, Queens County

Docket Number: 28184/09

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Paris Suites Hotel, Inc., Aggressive Realty Corp.,
Aggressive Holding Corp.,
Plaintiff,

Index No.: 28184/09
Motion Date: 4/1/13
Motion Cal. No.: 83
Motion Seq. No.: 11

-against-

Seneca Insurance Company, Inc.,
Archer A. Associates, Inc.,
Defendants.

-----X
Seneca Insurance Company, Inc.,
Third-Party Plaintiff,

-against-

Mayer, Sommer, Banerjee, Inc., Dad’s Construction,
Inc., J.R. Builders, Inc., and A.J. Sigman,
Third-Party Defendants.

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The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR §3212 dismissing and severing all claims asserted against Archer A. Associates and directing the entry of summary judgment in favor of Archer A. Associates; and/or (2) and order pursuant to CPLR 3211(a)(10) dismissing this action as against Archer A. Associates, Inc., for failure to name Markel Insurance Company as a necessary party.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Affirmation In Further Support.....	10 - 11
Affirmation of Seneca in Response to motion for SJ.....	12- 13

Upon the foregoing papers, it is hereby ordered that the motion for summary judgement

dismissing the complaint against Defendant Archer A. Associates is denied, as fully set forth below.

Facts

Paris Suites Hotel, Inc. Aggressive Realty Corp., and Aggressive Holding Corp (Collectively referred to as “Plaintiff”) own the property located at 109-17 Horace Harding Expressway, Corona, NY 11368 (“the Hotel”) and on October 17, 2007, the Hotel while under renovation, allegedly suffered water damage during a storm. It is unclear how the water entered the premise.

Defendant, Archer A. Associates (“Archer”) is the insurance broker for the plaintiff. At the time of the water damage, the plaintiff held two insurance policies. At the time of the damage, the plaintiff was insured under Seneca Insurance Company, Inc. (“Seneca”) through a builders risk insurance policy, and under Markel Insurance Company (“Markel”) through a commercial property policy. The Seneca policy was obtained by the plaintiff to provide coverage during their renovations. The Markel policy was obtained by the plaintiff to cover damage during their regular commercial operations.

Following the flood, plaintiff requested that Archer notify Seneca and Markel of the damage sustained to the property. On November 15, 2007, Archer submitted a claim on behalf of the plaintiff to Markel. Markel disclaimed coverage under its policy as

“[t]he damages [the plaintiff] have presented are excluded from coverage because they are all a result of faulty, inadequate or defective design, renovations, workmanship, repair construction, remodeling. The interior water damage was not sudden and accidental, but rather took place over a period of several months” (See Markel Disclaimer, Archers’ Notice of Motion Exhibit “D”).

Archer did not submit any claim to Seneca until over six months later; no excuse was provided.

In a letter sent on June 11th, 2008, Seneca reserved the right to deny coverage because Archer

failed to notify Seneca within 6 months. On July 9th, 2009, in another letter, Seneca stated it would not pay because of Archer's failure to submit a claim within six months. The letter further stated Seneca would not have been obligated to cover the damage, regardless of the untimely notice, because it was not required to pay for any water damage unless the damage occurred as a result of damage covered by the policy.

Discussion

Archer moves for Summary Judgment on the grounds that assuming Archer had breached a duty to the plaintiff, liability does not attach because plaintiff was not entitled to coverage under the Seneca policy.

Procedurally, the Court is aware that the defendant Archer was late in submitting its Affidavit in Further Support of its Motion for Summary Judgment (defendant's reply). (See CPLR §2214.) The court will not reject Archer's affirmation because submission of a reply brief one day late is deemed inconsequential and minuscule. (*see CPLR 3012(d) (discretion to accept late pleadings)*; *cf Romeo v. Ben-Soph Food Corp*, 146 A.D. 2d 688 [2nd Dept] (finding an abuse of judicial discretion if papers were submitted several weeks late without excuse.) In addition, any new legal arguments contained within Archer's reply will not be considered. (*DeMeo v. New York City Transit Authority*, 174 A.D. 2d 596 [2nd Dept 1991] (finding defendant's contentions need not be considered when raised for first time in reply briefs); *but see State Farm Fire and Cas. Co. v. LiMauro*, 103 A.D. 2d 514 [2nd Dept 1984] (finding an order to strike is the proper remedy when a new substantive issue of law is raised in a reply brief for the first time).

As to the merits, Archer failed to meet its burden for Summary Judgment as a reasonable jury could find that Archer was negligent and that its negligence was the proximate cause of the

plaintiff's injuries. To meet its burden, Archer must foreclose any genuine issue of material fact showing it is entitled to a judgment as a matter of law. (*Bush v. St. Clare's Hosp.*, 82 N.Y. 2d 738 [1993] (reasoning that if a question of fact exists the court is precluded from granting a summary judgment motion); *Winegrad v. New York Univ. Med. Center*, 64 N.Y. 2d 851 [1985]; *Zuckerman v. New York*, 49 N.Y. 2d 557 [1980].)

An insurance broker owes to the insured a reasonable duty of care with respect to notifying the insurer of damage claims. (*Martini v. Lafayette Studios Corp.*, 273 A.D. 2d 112 [1st Dept 2000] (the insurance broker has reasonable duty of care to notify the appropriate insurer of any claim reported to by the plaintiff); *Abetta Boilder & Welding Service, Inc. V. American Inter. Speciality Lines Ins. Co.*, 76 A.D. 3d 412 [1st Dept 2010] (insurance broker breached its duty of care by causing a 17month delay when they incorrectly notifying the wrong insurer.) Here, the plaintiff requested that Archer notify both Seneca and Markel shortly after the incident took place. Archer notified Markel on November 15, 2007, but failed to notify Seneca until over six months later. Archer had a reasonable duty of care to notify the insurer of the plaintiff's claims but breached that duty by taking over six months to do so.

Further, Archer must prove no reasonable jury could determine its negligence was the proximate cause of the plaintiff's injuries, as "[i]t is axiomatic that liability for negligence will not attach absent proof that the negligence was the proximate cause of the harm sued upon." (*Res. Fin., Inc. v. Nat'l Cas. Co.*, 219 A.D. 2d 627 [2nd Dept 1995].) Therefore, Archer must foreclose the possibility that its failure to timely notify Seneca caused the plaintiff's injuries. (*MacDonald v. Carpenter & Pelton, Inc.*, 31 A.D. 2d 952 [2nd Dept 1969].) To do so Archer must establish that the plaintiff would not have recovered under Seneca's policy even if timely notice

was provided. (See *Lee v. State Farm Fire & Cas. Co.*, 32 A.D. 3d 902 [2nd Dept 2006] (establishing that it is not the burden of the insured to foreclose the possibility of any other reasonable interpretation of a policy, given a particular case); see also *Neuwirth v. Blue Cross & Blue Shield of Greater New York*, 62 N.Y. 2d 718 [1984].)

Here, Archer argues that it was not the proximate cause of plaintiff's injuries because (1) Seneca did not cover water damage and (2) Seneca did not cover rust damage. However, the Court finds that it remains disputed whether it is possible for the plaintiff to recover under the Seneca plan. The plaintiff contends it would be entitled to recover if the damage was caused by a windstorm damaging the roof or walls. Archer argues that no evidence of damage caused by a "Covered Cause of Loss to the roof or walls" exists. Yet the plaintiff puts forward expert testimony establishing that the plaintiff's Hotel was damaged as a result of a windstorm.

Archer further contends that most of the plaintiff's damages occurred from rust, not a covered loss, and not from any water or flood damage, which would be covered. Archer argues that rust grew inside the marble on a mesh wiring and oozed out of the marble causing the damage. However, upon closer examination of the record Archer is mischaracterizing the expert testimony in question to support their theory. The plaintiff argues that it is common knowledge that rust damage follows flood or water damage. This too remains a disputed issue. Lastly, Seneca itself denied coverage because of Archer's failure to timely notify them and sought Summary Judgment solely on those grounds. Therefore, several key facts remain in dispute because a reasonable jury could find that Archer was negligent in failing to timely notify Seneca and that Archer's negligence was the proximate cause of the plaintiff's injuries when the plaintiff could have recovered for their damage, absent Archer's negligence, through the Seneca insurance

policy.

Finally, Archer argues that a motion to dismiss is appropriate when a necessary party is absent from the action. (CPLR §3211(a)(10).) A party must be joined if (1) failure to do so will prevent complete relief from being rendered between parties, or (2) failure to do so will inequitably affect the unnamed party. (See CPLR §1001; *Huber Lathing Corp. v. Aetna Cas. And Sur. Co.*, 132 A.D. 2d 597 [2nd Dept 1987] (second insurer is not a necessary party when complete relief can be granted between parties already in the action); *Castaways Motel v. Schuyler*, 24 N.Y. 2d 120 [1969]; *see also Firemen's Fund Ins. Co. v. Crandall Horse Co. of Buffalo, N.Y.*, 47 F. Supp. 78 [W.D.N.Y. 1942].) Archer fails under both prongs of CPLR §1001. First, the Court could provide complete relief to the plaintiff by rendering a judgment against Archer for the total amount of coverage entitled to the plaintiff under the Seneca policy absent Archer's failure to submit timely notice. Second, Markel will not be inequitably affected if such a judgment is rendered because it issued a completely independent insurance policy.

Conclusion

For the reasons set forth above, Archer's motions for summary judgment and motion to dismiss pursuant to CPLR §3211(a)(10) are denied.

Dated: July 2 , 2013

Bernice D. Siegal, J.S.C.