

Ostrager v Nationwide Prop. & Cas. Ins. Co.
2014 NY Slip Op 30552(U)
March 5, 2014
Supreme Court, New York County
Docket Number: 114910/2010
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT DONNA M. MILLS

PART 58

Justice

MURRAY L. OSTRAGER

INDEX No. 114910710

Plaintiff

MOTION DATE

NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY

Defendant

MOTION SET No. 001

MOTION CAL No.

FILED
MAR 10 2014
NEW YORK
COUNTY CLERKS OFFICE

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause/Affidavits—Exhibits _____

1, 2

Answering Affidavits—Exhibits _____

3, 4

Replying Affidavits _____

5

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

Dated: _____

3/5/14

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: _____

FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58**

MURRAY L. OSTRAGER,
Plaintiff,

-against-

NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY,
Defendant.

INDEX NO. 114910/2010
Motion Sequence 001
DECISION & ORDER

DONNA MILLS, J.:

In this insurance coverage action, defendant Nationwide Property & Casualty Insurance Company (Nationwide) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.

Factual Background

Nationwide issued policy number 6631HO544728 (the Policy) against risk and loss at the property located at 176-12 Kildare Road, Jamaica Estates, Queens County (the Premises), owned by plaintiff, during the period November 30, 2007 – November 30, 2008. The Premises is a two-story residence, with a finished basement. On or about November 18, 2008, the Premises “suffered loss and damage caused by animal entry,” that is, racoons. Memorandum of law in opposition, exhibit 3 (the Complaint), ¶ 4. Plaintiff submitted his claim through a public adjuster, Louis Marando (Marando), within two days.

Nationwide acknowledged the claim and, according to plaintiff, “undertook to remediate the environmental damage to the Premises and personal property, including demolition of the second level of the Premises.” *Id.*, ¶ 7. As of the filing of the Complaint, Nationwide had paid over \$80,000 for renovation, repair and remediation of the Premises. Plaintiff, however, insists

that additional payments are required, under the Policy, “for reconstruction of the second floor of the Premises, clean-up and repair of the ground level floor of the Premises, and for compensation necessary for substitute housing.” *Id.*, ¶ 14.

Nationwide arranged for an inspection of the Premises on January 15, 2009, and the results were reported to Marando on January 26, 2009. According to Paul Maggio (Maggio), Nationwide’s claims adjuster, Nationwide found that the net actual cash value payable to plaintiff was \$12,306.31, taking into account depreciation and deductible. Maggio aff, ¶ 12. It excluded damages that Nationwide believed resulted from the repair work. Plaintiff subsequently observed additional damage to the kitchen on the first floor, and complained of lingering animal odor. Another inspection was conducted on April 2, 2009, after which Nationwide allegedly noted that paid-for repairs and cleanup had not been completed, possibly accounting for some of plaintiff’s recent complaints.¹ Total Restoration (Total) did demolition and reconstruction work on the Premises, but no evidence is given of its contract terms or duration. Marando testified, on August 18, 2012, that plaintiff hired Total on his recommendation. Marando tr at 28. Plaintiff said that he also hired a contractor named Dempsey who “put down a floor upstairs and tore out the basement floor and sheetrocked the basement, part of it anyway, and that’s about it.” Ostrager tr at 121. Dempsey also came at Marando’s recommendation. Marando tr at 90-91. According to plaintiff, Dempsey stopped working when Nationwide’s payment ran out, although there is no indication that Nationwide ever paid for work on the basement.

Nationwide then engaged Ace Home Inspectors (Ace) to inspect the Premises on April 22, 2009. Ace described the second floor of the Premises as “an unfinished walk up attic,” and

¹ No copy of this report is provided.

observed physical damage and evidence of raccoon feces and urine in the attic. Bracken affirmation, exhibit E. Ace recommended removal of the flooring, subflooring and insulation of the second floor, and at least parts of the ceiling below.

Leighton Associates, Inc. (Leighton) conducted clearance testing for raccoon remediation on October 8, 2009, and reported to Nationwide on October 13, 2009. *Id.*, exhibit F. Leighton found indications of raccoon infestation, usually manifested by the presence of round worm eggs or raccoon fecal matter, and recommended "additional demolition work." Leighton reported on follow-up testing to Nationwide, on November 4, 2009, that showed that demolition need not extend to the Premises' two bathrooms or the second floor's hallway. *Id.*, exhibit G. Leighton returned to the Premises on November 24, 2009, and reported to Nationwide, on November 30, 2009, that tests in 20 locations throughout the Premises, eight on the first floor, eight on the second floor, and four in the basement, detected no round worm eggs. *Id.*, exhibit H.

According to Nationwide, renovations were completed in April 2010, and Nationwide had Leighton return on April 29, 2010 to test for any possible remaining contamination. On May 4, 2010, Leighton reported that there was no sign of raccoon infestation in the kitchen cabinets or the insulation between the second floor and the kitchen ceiling. *Id.*, exhibit I. In conclusion, Leighton observed that "everything is dusty and could use a good cleaning before use."

Nationwide produces copies of checks issued on plaintiff's claim (Bracken affirmation, exhibit M):

DATE	PAYEE	AMOUNT
01-30-09	Total Restoration Inc	\$12,802.15
06-05-09	Murray Ostrager and Marando, Louis	\$12,306.31
12-14-09	Total Restoration Inc and Murray Ostrager	\$6,991.36
12-22-09	Murray Ostrager	\$9,000.00

12-30-09	Murray Ostrager and Marando, Louis	\$9,196.17
01-04-10	Leighton	\$2,500.00
03-03-10	Murray Ostrager	\$3,150.00
03-03-10	Marando, Louis	\$1,350.00
04-05-10	Murray Ostrager	\$2,229.37
04-19-10	Murray Ostrager	\$10,016.58
07-07-10	Leighton	\$1,275.00
11-05-10	Murray Ostrager	\$8,987.56
11-05-10	Louis Marando and Murray Ostrager	\$998.61

TOTAL \$80,803.11

On November 10, 2010, plaintiff made a written demand upon Nationwide for \$30,000 for a “[c]omplete clean up of debris, dust, soot, etc from demolition of second floor,” and for \$35,000 for “[a]dditional construction allowance to complete replacement of the second floor of the house.” *Id.*, exhibit O. Nationwide replied, on November 11, 2010, that \$500.32 was awarded for post-construction cleaning, which, at the time, evoked no mention by plaintiff or Marando of a \$30,000 estimate for post-construction cleaning, or the submission of a detailed estimate. *Id.*, exhibit P. Similarly, Nationwide stated that the requested \$35,000 additional construction allowance was never mentioned before, and that there was no estimate presented to that effect.

The instant action commenced on November 15, 2010, with the filing of a complaint asserting causes of action for breach of contract and breach of duty of good faith and fair dealing.

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “If there is any doubt as to the existence of a triable issue, the motion should be denied.” *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). “But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Nationwide argues that: plaintiff has been paid for all covered losses; he seeks compensation for damages not covered by the Policy; and his purported damages are speculative. Additionally, Nationwide charges that the complaint’s cause of action for breach of duty of good faith and fair dealing is predicated upon conclusory allegations.

Nationwide contends that plaintiff is now seeking compensation for cleaning up after his contractor’s repairs; and to deal with undocumented damages to kitchen cabinets, on the first floor, from raccoon urine coming from the second floor (attic). Nothing in the Policy, according to Nationwide extends coverage to plaintiff due to the faulty workmanship of his contractor. Instead, Nationwide maintains that plaintiff must turn to the contractor’s liability coverage, if, in fact, plaintiff has been left with a mess to clean up. Nationwide regards plaintiff’s assertion of unresolved damages from the raccoon infestation as his feeling that “he is entitled to ‘more.’”

Memorandum of law in support at 1.

Noel Kistama (Kistama), of Five Boro Fire Restoration (Five Boro), visited the Premises

and, according to Kistama's deposition testimony, submitted two estimates for repair and renovation, dated April 9, 2011 and April 11, 2011, which are not produced. Kistama tr at 26-30. However, a "further estimate" from Five Boro, dated October 22, 2012, totaling \$55,322.75, is part of the record. Bracken affirmation, exhibit J. This estimate covers repairs and renovations throughout the Premises "to remediate environmental damages," without indicating the origin of the perceived damages. In fact, Five Boro simply appends a letter of transmittal of an estimate by R.G. Associates Inc. (RG), a construction consulting firm, from October 19, 2012. Guerrero tr, exhibit 2.

Kistama testified on August 28, 2012, almost two months before the date of the RG report. The word "urine" does not appear in the transcript of Kistama's deposition. However, he testifies to "a hole . . . where maybe water came in with the rain"; "look[s] like water came through from the top floor to the back of the kitchen cabinet"; "leaked water, a lot of debris, as of the 14th, when I was there." Kistama's tr at 28, 42 and 46. All of these observations were made on an inspection sometime after April 2011; "I went back through the whole house." *Id.* at 35. It is never established when Kistama's later visit, "as of the 14th," took place. Plaintiff does not explain how this water (not urine) damage to the Premises is connected to the racoon infestation.

Plaintiff submits an affidavit from Renee Guerrero (Guerrero), RG vice president, who prepared estimates for plaintiff, dated December 22, 2009 and October 19, 2012, the latter relied upon by Five Boro, as described above (copies attached as exhibits 1 and 2). Guerrero states that his first inspection occurred after demolition work had been conducted at the Premises. His resulting estimate, dated December 22, 2009, for reconstruction of the second floor was \$22,165.01. He asserts that "the house had a strong stench which was immediately noticeable upon entry of the house." Guerrero aff, ¶ 5. The written estimate contains no narrative; it makes

no mention of odors or their removal.

Guerrero returned to the Premises and issued an estimate, dated October 19, 2012, for \$55,322.75. While the 2009 estimate addressed the second floor of the Premises only, the 2012 estimate dealt only with the first floor – the front entry, living room, dining room, kitchen, “rear passage,” bathroom, “left rear room,” and “right rear room.” He describes the work as “remediating racoon damage to first floor of house.” *Id.*, ¶ 9. Guerrero observed that the second floor had been reconstructed, but “the contamination stench in the house remained . . . [and the] house is not inhabitable.” *Id.*, ¶ 8.

In sum, this dispute is whether Nationwide has properly compensated plaintiff for damages to the Premises caused by racoon infestation, according to the terms of the Policy. The racoons left the Premises with both physical damages to the structure and fixtures, and offensive odors. Nationwide claims that it has fully paid for renovation, repair and remediation of damages to the Premises, while plaintiff claims that almost as much work remains to be done on the first floor of the Premises as has been done on the second. This ultimately involves material issues of fact, which must be determined by a jury, making summary judgment on the breach of contract cause of action now inappropriate.

The court finds that the cause of action for breach of duty of good faith and fair dealing is merely duplicative of the cause of action for breach of contract, since the alleged denial of coverage is the breach in both instances. *Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349, 350 (1st Dept 2003) (“[a]llegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading”). Plaintiff has made no showing of bad faith on Nationwide’s

part, except for its denial of incremental coverage after paying over \$80,000 on plaintiff's claim. The cause of action for breach of duty of good faith and fair dealing shall, therefore, be dismissed.

Nationwide's motion, therefore, is denied in part and granted in part.


Accordingly, it is

ORDERED that defendant Nationwide Property & Casualty Insurance Company's motion, pursuant to CPLR 3212, for summary judgment dismissing the cause of action for breach of duty of good faith and fair dealing is granted, and that cause of action is severed and dismissed; and it is further

ORDERED that defendant Nationwide Property & Casualty Insurance Company's motion, pursuant to CPLR 3212, dismissing the cause of action for breach of contract is denied, and the action shall continue as to that cause of action.

DATED: March 5, 2014

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

* A status conference is scheduled
May 2, 2014