

Poole v United Servs. Auto. Assn.

2014 NY Slip Op 31392(U)

May 16, 2014

Supreme Court, Suffolk County

Docket Number: 07-35991

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T :

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-22-13 (#004)
MOTION DATE 10-1-13 (#005)
ADJ. DATE 10-29-13
Mot. Seq. # 004 - MotD
005 - XMD

-----X

CYNTHIA B. POOLE,

Plaintiff,

- against -

UNITED SERVICES AUTOMOBILE
ASSOCIATION,

Defendant.

-----X

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Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 24 ; Answering Affidavits and supporting papers 25 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant United Service Automobile Association for summary judgment dismissing plaintiff's complaint against it is granted to extent set forth herein and is otherwise denied; and it is

ORDERED that the cross motion by plaintiff Cynthia Poole for leave to renew her previous motion for summary judgment is denied.

Plaintiff Cynthia Poole commenced this declaratory judgment action against the underwriter of her homeowners' insurance policy, United Services Automobile Association, based on its decision to disclaim coverage in connection with claims she made for property damage and loss of rental income derived from the premises which is located at 106 Briarcliff Road, Shoreham, New York. The premises was improved with a residence and a carriage house, which was rented to tenants. It is alleged that plaintiff entered a contract for the sale of the property in December 2004 whereby she agreed to lease the premises to nonparties Charles McKenna and Cynthia McKenna for a maximum of three years with the

option to purchase it at any time during that period. Although the sales agreement provided, among other things, that the McKenna's were prohibited from making alterations or renovations to the premises without obtaining plaintiff's consent, the McKenna's allegedly performed repairs to the main residence and the carriage house allegedly resulting in damage to the entire premises and surrounding property in excess of \$126,000. After the parties failed to renegotiate the proposed sale of the premises, the McKennas vacated the premises in May 2006. Subsequently, plaintiff submitted a claim to defendant for benefits under her homeowners' policy. In a letter dated August 21, 2006, defendant disclaimed coverage on the basis their policy specifically excludes damage caused by, among other things, faulty workmanship, renovation and remodeling. By her complaint, plaintiff alleges that defendant breached its contract by failing to provide coverage for her losses, that it acted in bad faith and engaged in unfair claim settlement and business practices, and that it is estopped from denying her coverage due to its failure to timely and properly advise her of the reasons for its denial of coverage.

On February 2, 2010, plaintiff moved for summary judgment on her complaint, asserting that the purported renovations were performed without her consent and, covered under provisions in her policy addressing acts of vandalism or malicious mischief. By order dated September 30, 2010, the Court (Cohen, J.) denied plaintiff's motion, finding, among other things, that a triable issue existed as to whether the renovations performed by the McKennas constituted vandalism. In May 2011, the Court denied plaintiff's request to reargue her summary judgment motion, finding that she failed to establish a ground for reargument, and that, even if such a ground existed, summary judgment was nevertheless precluded by issues of fact raised in the affidavit of defendant's claim examiner relating to defendant's liability under the subject homeowners' insurance policies and the amount of damages allegedly incurred by plaintiff.

Defendant now moves for summary judgment dismissing the complaint, arguing that it rightfully disclaimed coverage under policy provisions excluding claims of loss for faulty or defective renovations, that its delay in issuing the disclaimer was warranted by its investigation of the claim, and that plaintiff failed to state actionable claims under section 349 of the General Business Law and section 2601 of the Insurance Business Law, as no private cause of action exists under either provision. Plaintiff opposes the motion and moves again to renew her motion for summary judgment on the basis newly obtained deposition testimony demonstrates that the renovations undertaken by the McKennas constituted vandalism and/or malicious mischief. Plaintiff further asserts that the policy provisions excluding loss caused by defective repairs or renovations are inapplicable under the circumstances of this case, since they only apply to negligent work performed by or on behalf of the insured. Alternatively, plaintiff argues that defendant's reliance on Insurance Law §324 (d) to justify its delay in disclaiming coverage is misplaced, as that section does not apply to claims related to loss due to property damage.

In opposition to the cross motion, defendant contends that plaintiff's motion violates the rule against successive summary judgment motions and is not based on new or additional facts which were not in existence at the time of the original motion. Specifically, defendant asserts that affidavits by plaintiff and its claims examiner were previously submitted for consideration at the time of plaintiff's initial motion for summary judgment, and that the transcripts of their deposition testimony submitted in support of the instant cross motion neither provide new or additional facts previously unavailable to plaintiff. Alternatively, defendant asserts that, should the court grant renewal, plaintiff's request for

summary judgment in her favor should be denied, as triable issues remain as to whether the claimed loss resulted from vandalism rather than faulty repairs and renovations, and, if so, the amount of damages she sustained as a result of said loss.

The policies covering the main residence and carriage house on the subject premises each contained provisions entitled “Perils Insured Against,” which provide, in pertinent part, as follows:

We insure against risk of direct loss to property described in Coverage A and B only if that loss is a physical loss to property; however, we do not insure loss. . . caused by:

(2) (f) vandalism and malicious mischief, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

(2) (h) (1) wear and tear, marring, deterioration.

The provisions of the policies entitled “General Exclusions” further provide:

(2) We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverage A and B not excluded or excepted in this policy is covered.

(c) Faulty, Inadequate or defective;

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, repair, construction, renovation, and remodeling, grading, compaction;

(3) materials used in repair, construction, renovation, and remodeling; or

(4) maintenance; of part or all of any property whether on or off the described location.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O’Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316).

Initially, the Court notes that the branch of defendant’s motion seeking dismissal of plaintiff’s first cause of action for estoppel based on defendant’s alleged violation of Insurance Law §3420(d) is

granted. Although it is undisputed that defendant failed to provide plaintiff notice of its disclaimer until three months after she submitted a claim for coverage, the requirement of a prompt disclaimer pursuant to Insurance Law §3420(d) does not apply to claims for property damage such as the one asserted in the instant action (*see Fairmont Funding v Utica Mutual Ins. Co.*, 264 AD2d 581, 694 NYS2d 389 [1st Dept 1999]; *State Farm Ins. v O'Brien*, 242 AD2d 381, 661 NYS2d 997 [2d Dept 1997]). Plaintiff's claims under General Business Law §349 and Insurance Law §2601 also are dismissed, as neither statute affords a private cause of action where, as here, the claims arise from a private contractual dispute unique to the parties (*see Stutman v Chemical Bank*, 95 NY2d 24, 709 NYS2d 892 [2000]; *Rocanova v Equitable Life Assur. Soc'y*, 83 NY2d 603, 612 NYS2d 339 [1994]; *Kantrowitz v Allstate Indem. Co.*, 48 AD3d 753, 853 NYS2d 151 [2d Dept 2008]). The Court further grants the branch of defendant's motion seeking dismissal of plaintiff's fifth cause of action, which asserts that defendant acted in bad faith when it denied her claim. Since defendant relied on an exception to coverage explicitly noted in the parties' agreement, the court finds plaintiff's claim that defendant acted in bad faith to be without merit, as such a claim requires an "extraordinary showing of disingenuous or dishonest failure to carry out a contract" (*Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 437, 334 NYS2d 601 [1972]; *see Sukup v State*, 19 NY2d 519, 281 NYS2d 28 [1967]).

As to the branch of defendant's motion for dismissal of plaintiff's breach of contract claim, where an insurer denies coverage based upon an exclusion, the burden is on the insurer to demonstrate that the exclusion applies in the particular case and that it is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311, 486 NYS2d 873 [1984]). "In construing an insurance contract the tests to be applied are 'common speech and the reasonable expectation and purpose of the ordinary businessman' " (*MDW Enters. v CNA Insur. Co.*, 4 AD3d 338, 340, 772 NYS2d 79 [2004], *quoting Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398, 469 NYS2d 655 [1983]). "[W]henver an ambiguity is found in the provisions of an insurance policy, any doubt as to the existence of coverage should be resolved in favor of the insured and against the insurance carrier" (*Morales v Allcity Ins. Co.*, 275 AD2d 736, 736, 713 NYS2d 227 [2d Dept 2000], *quoting Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 987, 592 NYS2d 645 [1992]). The test for ambiguity is whether the language in the insurance contract is "susceptible of two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 495 NYS2d 969 [1985]).

Here, defendant failed to establish, prima facie, that plaintiff's loss resulted from a cause other than vandalism (*see Garnar v New York Cent. Mut. Fire Ins. Co.*, 96 AD3d 715, 946 NYS2d 199 [2d Dept 2012]; *Wai Kun Lee v Otsego Mut. Fire Ins. Co.*, 49 AD3d 863, 865, 854 NYS2d 211 [2008]; *MDW Enters. v CNA Ins. Co.*, 4 AD3d 338, 338, 772 NYS2d 79 [2004]). Significantly, the insurance policy does not define the term vandalism, and defendant failed to demonstrate that term, which has been found ambiguous (*see eg MDW Enters. v CNA Ins. Co.*, *supra*), was subject to only one reasonable interpretation. Although the insurance policy includes an exclusion for loss arising from inadequate renovations or workmanship, defendant failed to establish, as a matter of law, that the work done by the McKennas, which allegedly was performed without plaintiff's permission, constituted renovations rather than mere vandalism. Furthermore, the recent Court of Appeals decision entitled *Georgitsi Realty, LLC v Penn-Star Ins. Co.*, 21 NY3d 606, 977 NYS2d 157 (2013), which determined that vandalism "need not imply a specific intent to accomplish any particular result," does not resolve the ambiguity. Where such ambiguity exists, the term is ordinarily construed in favor of the insured (*see*

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Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311, 486 NYS2d 873 [1984]). Accordingly, the branch of defendant's motion for summary judgment dismissing plaintiff's breach of contract claim is denied.

Plaintiff's cross motion seeking renewal of her previously made summary judgment motion also is denied. The purported new evidence offered by plaintiff, which consists of the transcripts of her own deposition testimony and that of defendant's claims examiner, did not yield sufficiently new or previously unavailable evidence warranting renewal of the motion (*see Vinar v Litman*, 110 AD3d 867, 972 NYS2d 704 [2d Dept 2013]; *Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 968 NYS2d 32 [1st Dept 2013]; *Matter of Bronsky-Graff Orthodontics, P.C.*, 37 AD3d 946, 828 NYS2d 921 [3d Dept 2007]). Significantly, an examination of the deposition transcripts reveals that the deponents' testimony neither differed substantially from statements they made in affidavits that were considered with the original motion, nor contained additional information that was previously unavailable to plaintiff. Although deposition testimony elicited after the original summary judgment motion was decided may constitute new evidence (*see Auffermann v Distl*, 56 AD3d 502, 502, 867 NYS2d 527 [2d Dept 2008]), such evidence is not "newly discovered" simply because it was not submitted on the previous motion (*Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845, 892 NYS2d 764 [2d Dept 2010]). To be considered new, the evidence must be used to establish facts that were not available earlier and which could not have been established through alternative evidentiary means (*see Vinar v Litman, supra; Pavlovich v Zimmet*, 50 AD3d 1364, 857 NYS2d 744 [3d Dept 2008]; *Abramoff v Federal Ins. Co.*, 48 AD2d 676, 368 NYS2d 44 [2d Dept 1975]). In any event, a review of the transcripts reveal the existence of triable issues as to whether the work being done by the McKennas constituted incomplete renovations rather than vandalism, and, if so, the extent to which the work caused damage to the subject premises.

Dated: May 16, 2014

W. Gerard Arler
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION