Forman v State Farm Fire & Cas. Co.
2014 NY Slip Op 32302(U)
August 21, 2014
Sup Ct, Kings County
Docket Number: 502371/13
Judge: Edgar G. Walker
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Neal Forman,
Plaintiff,

-against-

State Farm Fire & Casualty Company,
Defendant.

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State Farm Fire & Casualty Company,
a/s/o Neal Forman,
Plaintiff,

-against-

St. George Tower and Grill Owners Corp.,
AKAM Associates, Inc., Quimby Equipment
Co., Inc. And Allstate Sprinkler Corp.,
Defendants.

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Neal Forman,
Plaintiff,

-against-

St. George Tower and Grill Owners Corp.,
AKAM Associates, Inc., Quimby Equipment
Co., Inc. And Allstate Sprinkler Corp.,
Defendants.

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Hon. Edgar Walker
PART: IA 90

Index No. 501136/12
Action No. 1

Index No. 502371/13
Action No. 2

Index No. 9378/13
Action No. 3

Defendant State Farm Fire & Casualty Company (State Farm)'s motion to dismiss, pursuant to CPLR §3211(a)(1) and (a)(7), is granted solely to the extent that plaintiff's fourth, fifth, eighth, ninth, tenth and eleventh causes of action are dismissed. Defendants (in actions No. 2 and 3) St. George Tower and Grill Owners Corp. and AKAM Associates, Inc.'s motion, pursuant to CPLR §602(a), for an order consolidating all three actions herein for all purposes, is

granted solely to the extent that Actions No. 2 and 3 are hereby consolidated. The court further orders that the trial in Action No. 1 shall precede the trial in the consolidated actions.

On May 26, 2012, plaintiff's condominium apartment and the contents located therein sustained substantial water damage stemming from a burst pipe. At the time of the loss, the property and its contents were insured under a Condominium Unitowner's policy of insurance issued by State Farm ("the Policy") to plaintiff. In the complaint, plaintiff seeks damages for losses he sustained as a result of this occurrence. During the course of State Farm's adjustment of plaintiff's building damage claim, State Farm paid plaintiff $148,139.73, which State Farm contends was the actual cash value of his building damage. Plaintiff disputed this amount and, pursuant to the Policy, the parties sought to resolve their disagreement through appraisal. After the instant action was commenced, an umpire issued an award with respect to plaintiff's building damage claim which stated a replacement cost at a lump sum of $190,789.80, depreciation at a lump sum of $37,142.83, and an actual cash value loss at a lump sum of $153,646.97.

State Farm contends that plaintiff's second and third causes of action, in which plaintiff seeks damages in connection with architect and project manager fees, and plaintiff's seventh cause of action, to the extent it seeks damages for building damage, should be dismissed because such costs were previously considered by the umpire and are subsumed within the appraisal award. Defendants also contend that there is no provision in the Policy for architect and project manager fees. State Farm contends that plaintiff's fourth and fifth causes of action should be dismissed because, pursuant to the appraisal provision in the Policy, the parties must share equally the expenses of the appraiser's fee, umpire's fee and the cost of photocopies. State Farm contends that plaintiff's sixth cause of action should be dismissed because plaintiff cannot be reimbursed for his public adjuster's fee since there is no such provision in the Policy and State Farm was not a party to plaintiff's public adjuster agreement. Plaintiff's eighth cause of action, which seeks damages for the cleaning and replacement of clothing should be dismissed, State Farm contends, because it is duplicative of plaintiff's seventh cause of action which seeks, in part, the repair and/or replacement of damaged clothing. State Farm contends that plaintiff's

ninth cause of action should be dismissed because plaintiff is not entitled to damages for emotional distress based entirely on a breach of a contract. State Farm contends that plaintiff's tenth cause of action should be dismissed because plaintiff is not entitled to recover attorney's fees incurred to settle his rights under an insurance contract. Finally, State Farm contends that plaintiff's eleventh cause of action should be dismissed because plaintiff is not entitled to punitive damages in connection with a breach of an insurance contract which does not seek a vindication of public rights.

In opposition to the motion, plaintiff contends that the appraisal award is invalid because defendants' appraiser did not submit an itemized appraisal to the umpire and the umpire failed to issue an itemized award.

Pursuant to Insurance Law §3404(e), the standard policy language regarding appraisals must include, *inter alia,* the following terms:

> In case the insured and [the insurer] shall fail to agree as to the actual cash value or the amount of loss . . . [t]he appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with [the insurer] shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

As defendants note, the appraisal provision of the Policy does not state that the appraisers *shall state separately actual cash value and loss to each item* nor that the award in writing, *so itemized*, shall determine the amount of actual cash value and loss. Defendants provide no explanation as to why the Policy does not conform to the requirements of the statute. Although Insurance Law §3404(f) permits an insurer to deviate from the standard language set forth in Section 3404(e) with the approval of the Superintendent of Insurance, there is no evidence, and defendants do not allege, that State Farm obtained such approval. Nor does the Policy otherwise meet the requirements set forth in Section 3404(f) to permit such deviation. Defendants' reliance on *Gansevoort Holding Corp. v. Palatine Ins. Co.,* 11 Misc.2d 518 is misplaced. In that case, the

court found that the parties had substantially complied with the appraisal provision in the policy, notwithstanding that the award did not itemize the cash value of the building, because both the appraisers and the umpire provided a detailed itemization of the building damage. Here, there is no evidence that a detailed itemization of the building damage was ever provided by either the appraisers or the umpire. Since the award herein did not itemize the cash value or the loss, it is not in compliance with the statute and, therefore, unenforceable. *See* Insurance Law §3404(e); *see also G.E. Capital Mtge. Servs. v. Daskal,* 211 A.D.2d 613. Nor does the court find merit in defendants' assertion that, because there is no express provision in the Policy relating to architect and project manager fees, plaintiff may not recover for such costs. In the court's view, the absence of such language renders the policy ambiguous as to those costs. Therefore, defendants' motion to dismiss plaintiff's second and third causes of action, and that part of plaintiff's seventh cause of action in which plaintiff seeks damages for expenses related to assessing and repairing building damage, is denied.

However, as the policy expressly provides that "[e]ach appraiser shall be paid by the party selecting that appraiser" and "[o]ther expenses of the appraisal and the compensation of the umpire shall be paid equally by [plaintiff] and [State Farm]," defendants' motion to dismiss plaintiff's fourth and fifth causes of action, wherein plaintiff seeks damages for appraisal and umpire fees and expenses, is granted.

In contrast, there is no language in the Policy regarding fees and/or expenses of a public adjuster. Like architect and project manager fees, the court finds that the absence of such language renders the Policy ambiguous as to such costs. Therefore, defendants' motion to dismiss plaintiff's sixth cause of action is denied.

Plaintiff's seventh cause of action seeks damages for, *inter alia,* repair and/or replacement of clothing. As such, plaintiff's eighth cause of action, wherein plaintiff seeks damages for "cleaning clothing and replacement of clothing," is duplicative of his seventh cause of action. Therefore, defendants' motion to dismiss plaintiff's eighth cause of action is granted.

As defendants note, in an action for breach of contract, a plaintiff cannot recover damages

for emotional distress. *See Fleming v. Allstate Insurance Company,* 106 A.D.2d 426 citing *Wehringer v. Standard Security Life Ins. Co. of N.Y.,* 57 N.Y.2d 757. As such, defendants' motion to dismiss plaintiff's ninth cause of action is granted.

Defendants contend that plaintiff may not recover his attorneys fees because there is no provision in the Policy for the recovery of attorneys fees. Absent a contractual or policy provision permitting the recovery of an attorney's fee, an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy. *See Stein, LLC v. Lawyers Title Insurance Corp.,* 100 A.D.3d 622. As such, defendants' motion to dismiss plaintiff's tenth cause of action is granted.

Defendants also contend that plaintiff cannot recover punitive damages because the complaint alleges an ordinary breach of an insurance contract. "It has been consistently held that plaintiffs may not recover punitive damages without submitting factual allegations that defendant, in its dealings with the general public, engaged in a fraudulent scheme which demonstrates 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *See Fleming v. Allstate Insurance Company, supra,* citing *Walker v. Sheldon,* 10 N.Y.2d 401, 405. Allegations of breach of an insurance contract, even a breach committed willfully and without justification, are insufficient to authorize recovery of punitive damages. *See Fleming v. Allstate Insurance Company, supra* at 426-427;*Catalogue Serv. of Westchester v. Insurance Co. of North Amer.,* 74 A.D.2d 837, 838. Viewed from this perspective, the plaintiff's allegations are insufficient to justify an award of punitive damages. Therefore, defendants' motion to dismiss plaintiff's eleventh cause of action is granted.

The court will not consider defendants' contention that, to the extent that plaintiff seeks consequential damages in connection with his first cause of action, such claim must be dismissed, as it was improperly raised, for the first time, in reply papers. *See Monadnock Construction, Inc., v. DiFama Concrete, Inc.,* 70 A.D.3d 906; *Borbeck v. Hercules Construction Corp.,*48 A.D.3d 498.

Defendants St. George Tower and Grill Owners Corp. and AKAM Associates, Inc. move,

pursuant to CPLR §602(a), to consolidate all three actions herein. Consolidation is appropriate where the actions sought to be consolidated require the court to determine common questions of law and fact. Here, since Action Nos. 2 and 3 are based on allegations of negligence on the part of the same defendants in causing or contributing to the damage to plaintiff's property, the court will necessarily be required to determine common questions of law and fact. However, given that Action No. 1 is based upon State Farm's alleged failure to properly adjust and settle plaintiff's claim, the court would be required to determine questions of law and fact immaterial to Actions No. 2 and 3. Further, the consolidation of Action No. 1 with Action Nos. 2 and 3 would place State Farm in the confusing roles of both plaintiff and defendant. *See M&K Computer Corp.*, 271 A.D.2d 660. Therefore, defendants' motion to consolidate is granted solely to the extent that Action Nos. 2 and 3 are hereby consolidated.

Since the amount of damages State Farm would be entitled to if it prevailed in Action No. 2 is limited by the amount it must pay to satisfy plaintiff's claim, Action No. 1 should be tried before Action Nos. 2 and 3.

Dated : 8-21-14

Hon. Edgar G. Walker, J.S.C.