

Maham v Everest Natl. Ins. Co.

2014 NY Slip Op 32563(U)

October 2, 2014

Supreme Court, New York County

Docket Number: 151958/13

Judge: Debra A. James

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Supreme Court of the State of New York
County of New York: IAS Part 59

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TORKAN MAHAM, individually and d/b/a
TORKAN'S STORY HOUSE, INC.,

Plaintiff,

- against -

Index No. 151958/13

EVEREST NATIONAL INSURANCE COMPANY and
PRAETORIAN INSURANCE COMPANY,

Motion Sequence No. 001

Defendants.

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DEBRA A. JAMES, J.:

Torkan Maham (Torkan) brings this breach of contract action against Everest National Insurance Company (Everest) and Praetorian Insurance Company (Praetorian). The complaint asserts four claims for breach of contract (first and third causes of action) and attorney's fees (second and fourth causes of action), the latter against both defendants.

Praetorian now moves to dismiss the complaint as time-barred pursuant to CPLR 3211 (a) (5). In the alternative, Praetorian moves for: (1) summary judgment pursuant to CPLR 3212, seeking dismissal of the breach of contract claim (third cause of action); and (2) dismissal of the attorney's fees claim (fourth cause of action), pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

Torkan owns the building located at 352 East 55th Street, New York, New York 10022 (Premises). On December 2, 2009, Praetorian allegedly issued Torkan commercial property and commercial general liability coverage, under policy number H543003862-01, insuring the Premises for the period January 30, 2010 to January 30, 2011 (Praetorian Policy). The expiration date of the Praetorian Policy was later extended to February 8, 2011. Form number CP 00 9007 88 of the Praetorian Policy contains the following terms and conditions of coverage:

"COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

. . . .

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred."

The Praetorian Policy also contains the following provision in the "Building and Personal Property Coverage Form," form number

CP 00 10 06 9:

"E. LOSS CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

. . . .

3. Duties In The Event Of Loss Or Damage

- a. You must see that the following are done in the event of loss or damage to Covered Property:

. . . .

- (1) Give us prompt notice of the loss or damage.
Include a description of the property involved."

According to Praetorian, Torkan filed three claims under the Praetorian Policy in 2010. The first claim alleged a date of loss of March 30, 2010 due to an "[u]nknown water source [that] caused damage to the building." Praetorian states that the claim was adjusted, investigated and settled on July 22, 2010. The second claim alleged a loss for "[c]himneys on the roof [that] were vandalized" on March 31, 2010. Praetorian states that the claim was adjusted, investigated and settled on

July 22, 2010. Torkan allegedly gave notice of the third claim on April 23, 2010, for a date of loss of April 11, 2010, again for "[c]himneys on the roof [that] were vandalized." According to Praetorian, this claim was adjusted, investigated and closed, per a November 1, 2010 letter, there being no economic damages as the chimneys were no longer functional and were capped correctly by the owner of the adjoining property, who had them removed. Praetorian alleges that subsequent to April 23, 2010, Torkan did not notify Praetorian of any other property damage or file any claims under the Praetorian Policy.

According to Everest, Torkan had no coverage for the period between February 8 and February 11, 2011. From February 11, 2011 to February 11, 2014, Everest provided coverage for the Premises, under policy number 7300020509-001 (Everest Policy).

According to Torkan, "within the 2011 and 2012 calendar years," the Premises suffered approximately \$125,000 in property damage, due to ongoing construction at the adjoining property at 350 East 55th Street (Neighboring Property). Torkan states that the construction at the Neighboring Property began in January 2009 and that she "first learned of the property damage in approximately February 2011." She alleges that "[t]he subject damage occurred to [her] property as the construction/expansion

of the Neighboring Property reached [her] roof level on or about February 2011." Torkan also alleges that "[s]ince that time, additional damage has been done which was communicated to the insurance broker and insurance adjusting company." Torkan does not allege the precise date that the alleged damage occurred or the date she discovered it. The engineering reports of Alan Sare (Sare Report), dated December 31, 2012, and David Salamon (Salamon Report), dated July 13, 2009, which Torkan produced in response to Everest's demand for reports concerning the alleged property damage at the Premises, are also silent as to when any of the alleged property damage occurred.

To demonstrate the "nature, timing and complaints concerning the construction work at the Neighboring Property," Everest submits a number of publicly available documents. Among these are the papers submitted in a 2009 proceeding brought by the Neighboring Property, entitled *Application of 350 East 55th Street, LLC for a Judgment Pursuant to RPAPL 881 v Torkan's Story House, Inc.* (under Index No. 107966/09, in the Supreme Court, New York County), seeking access to the Premises in order to expand from a four-story structure to a six-story one. Everest also submits Department of Buildings (DOB) records, which allegedly show that between April 2, 2008 and August 19,

2013, 122 complaints were made to the DOB against the Neighboring Property, of which 36 were allegedly made within the Praetorian Policy period. Everest claims, that of those 36, ten specifically refer to Torkan's premises or the "adjoining property." According to Everest, two of the complaints made during Praetorian's Policy period specifically refer to the roof of the Premises after the settlement of the three claims described in Praetorian's moving papers.

The first of these, DOB Complaint No. 129689, received by DOB on February 3, 2011, states:

CONSTRUCTION OF CONDO IS DAMAGING NEIGHBORING
PROPERTIES—LAST WEEK THEIR ACTIVITIES BROKE SKYLIGHT,
CONCRETE SPLASHED ON ROOF, CHIMNEY & VENTS BENT,
GUTTERS FILLED W/ CONCRETE—NO SAFETY PRECAUSTION [sic]
TAKEN

DOB Complaint No. 1297124, received by the DOB on February 7, 2011, states:

CEU—FAILURE TO PROVIDE ROOF PROTECTION ON ADJOINING
PROPERTY. STOP ALL WORK ROOF LEVEL AND ABOVE.

In addition, Everest submits Torkan's Commercial Insurance Application, which Everest received from Torkan's insurance broker, Kalayjian, Oaks & Associates (Kalayjian). The application states, in pertinent part: "Claim last year when next door renovation caused \$11,000 in damage (will be

subrogated) and now thick concrete wall is built to separate basement from next door building."

Torkan commenced this action by filing a summons and verified complaint on March 4, 2013. She alleges that she satisfied all the terms and conditions of the Everest Policy and the Praetorian Policy, made all premium payments, and gave Everest and Praetorian due notice of the property damage. Torkan alleges that Everest and Praetorian breached their respective policies by failing to reimburse her for the damage. Torkan also seeks legal fees totaling \$25,000.

In its answer, Everest asserts one cross claim for "judgment declaring the respective obligations of Everest and Praetorian." Praetorian's answer asserts one cross claim against Everest, claiming that if Torkan recovers a "judgment against defendant Praetorian, Praetorian . . . will have a claim over defendant Everest pursuant and subject to Praetorian's other insurance clause in the Policy, under which Defendant Everest is or will be responsible to Praetorian in whole or in part".

Before Praetorian brought the instant motion, Everest served interrogatories on Torkan and requested document discovery, including a demand for documents and information

concerning claims submitted to Praetorian for property damage and repairs before the inception of the Everest Policy period. Torkan responded that it was "presently conducting a search to determine the answer to this interrogatory" and "reserve[d] the right to supplement this response." Everest alleges that, as of the time of its opposition to the instant motion, dated September 11, 2013, Torkan had not supplemented the interrogatory responses. Everest also requested document discovery from Torkan's broker, Kalayjian. Since Torkan's Commercial Insurance Application specifically referenced property damage that occurred during the Praetorian Policy period, Everest requested from Kalayjian documents relating to "property damage and repairs to the Premises for [the] period up to Torkan's submission of the property damage claim to Everest." Lastly, according to Everest, it served Praetorian with interrogatories and a request for documentary discovery. Praetorian did not respond to the demand and, instead, filed the instant motion to dismiss.

Praetorian argues that Torkan's claims are barred by the Praetorian Policy, which provided that "[n]o one may bring a legal action against us under this Coverage Part unless . . . [t]he action is brought within 2 years after the date on which

the direct physical loss or damage occurred." Praetorian contends that because the "direct physical loss or damage" allegedly occurred in February 2011, the two-year limit had already expired when Torkan commenced this action on March 4, 2013. *Id.* Alternatively, Praetorian argues that it is entitled to summary judgment dismissing Torkan's third cause of action for breach of contract, because the commencement of the instant action was the first time that Praetorian was made aware of Torkan's alleged loss, in violation of the Praetorian Policy's "prompt notice of the loss or damage" requirement. In addition, Praetorian contends that the fourth cause of action for attorney's fees should be dismissed for failure to state a claim.

Torkan does not oppose Praetorian's motion. Rather, by affirmation in partial opposition and Torkan's affidavit, plaintiff requests that the court acknowledge in its order that Torkan is voluntarily discontinuing its claims against Praetorian and asks that the caption be amended to remove Praetorian. In her affidavit, Torkan states that she "understand[s] that by discontinuing [her] claim against [Praetorian], [she is] barred from making any other claims and/or filing any other lawsuits against [Praetorian] concerning

the subject property damage that occurred to [her] property in February 2011."

Everest opposes Praetorian's motion, arguing that its cross claim should remain intact. Everest contends that Praetorian has failed to comply with CPLR 2214 (a), as Praetorian's moving papers do not seek dismissal of, or state grounds for dismissing, Everest's cross claim. Should the court disregard this as a procedural defect under CPLR 2001, Everest argues that it will be prejudiced by Praetorian's failure to set forth its arguments, as Everest is unable to rebut arguments Praetorian has not made. In addition, Everest contends that Praetorian has not met its initial burden of demonstrating entitlement to judgment as a matter of law dismissing the cross claim. Everest argues that it has "[s]tated a [c]ause of [a]ction for [d]eclaratory [j]udgment for [c]ontribution" and that with discovery still in its preliminary stages, it would be premature to declare the parties' rights and obligations under the respective policies. Everest asks that the court either grant a continuance pursuant to CPLR 3212 (f) and 3211 (d), or deny Praetorian's motion outright.

In reply, Praetorian argues, for the first time, that it is entitled to dismissal of Everest's cross claim. Praetorian

contends that Everest's cross claim is based solely on the "other insurance" provision found in both policies, which applies to insurers providing coverage during the same period. Everest and Praetorian's policy periods never overlapped, and Praetorian argues that, therefore, there is no right to contribution. As for its failure to seek dismissal of the cross claim in the notice of motion, Praetorian argues that the court should disregard it pursuant to CPLR 2001. It argues that Everest will not be prejudiced because the reply papers contain only legal arguments and citations to papers submitted previously.

22 NYCRR § 202.7 (a) states that "[t]here shall be compliance with the procedures prescribes in the CPLR for the bringing of motions," and that "no motion shall be filed with the court unless there have been served and filed with the motion papers . . . a notice of motion" CPLR 2211 states that "[a] motion is an application for an order" and "[a] motion on notice is made when a notice of the motion . . . is served." In addition, CPLR 2214 (a) requires that "[a] notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based,

the relief demanded and the grounds therefor." However, CPLR 2001 states:

"At any stage of an action . . . the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid."

CPLR 3217 (a) (2) provides that, after issue is joined, an action may be voluntarily discontinued provided that a written stipulation of discontinuance is "signed by the attorneys of record for all parties" to the action. If a party refuses to sign the stipulation, "an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." CPLR 3217

(b). The Court of Appeals has explained that:

"While the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217 (subd. [b]) by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted. . . . Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or . . . obligatory."

Tucker v Tucker, 55 NY2d 378, 383-84 (1982) (internal citations omitted).

Praetorian's motion to dismiss and for summary judgment is unopposed by Torkan. Torkan requests only that the court's order, should it grant the motion, reflect that Torkan is voluntarily discontinuing its claims against Praetorian. While Everest submits opposition papers, it provides no factual or legal basis for denying Praetorian's motion to dismiss Torkan's claims, but rather, argues that its cross claim against Praetorian should not be dismissed. Everest does not address Torkan's request for discontinuance, despite having received Torkan's papers several weeks before serving its opposition, but Everest acknowledges that "Torkan has consented to the dismissal of its direct claims against Praetorian." Under these circumstances, there being no showing of prejudice to the defendants, the court sees no reason why Torkan's request for a discontinuance should be denied. Although Torkan failed to move on notice in its application for an order of discontinuance, this omission is disregarded as the parties have had ample opportunity to oppose the request. CPLR 2001; St. Pierre v Ostreich, 123 AD2d 857, 859 (2d Dept 1986) (Lawrence, J.,

concurring) (on defendants' motion to dismiss, plaintiffs requested discontinuance of action in their opposition papers and Special Term, treating the motion to dismiss as a motion for discontinuance, ordered discontinuance of the action); Antebi v 1835 JRA, LLC, 40 Misc 3d 1203(A), 2013 NY Slip Op 51017(U), *4 (Sup Ct, Kings County 2013) (disregarding plaintiff's error in moving under CPLR 3025 [b], instead of CPLR 3217, to discontinue a cause of action, "[b]ased on defendants' lack of opposition and the apparent lack of prejudice to any party"). Accordingly, as Praetorian's motion to dismiss the complaint is unopposed and there is no prejudice to defendants, Torkan's action against Praetorian is discontinued and Praetorian's motion to dismiss the complaint is denied as moot.

Praetorian's contention, in its reply papers, that Everest's cross claim should be dismissed, is without merit. Praetorian could have sought dismissal of the cross claim when it moved to dismiss the complaint. However, neither its notice of motion nor its affirmation and memorandum in support make any reference to the cross claim, which is addressed for the first time in Praetorian's reply affirmation. This request for relief is procedurally improper and deprives Everest of the opportunity to respond to Praetorian's arguments. "[T]he function of a

reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion," much less to seek additional relief. Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 (1st Dept 1992); Dannasch v Bifulco, 184 AD2d 415, 416-17 (1st Dept 1992) (reversing summary judgment where defendant, in its reply papers, asked the court to consider dismissal of action on further grounds). For these reasons, Praetorian's request to dismiss Everest's cross claim is denied, and the cross claim of Everest is deemed a third party claim against defendant Praetorian. See Jones v City of New York, 161 AD2d 518, 519 (1st Dept 1990).

Accordingly, it is hereby

ORDERED that the third and fourth causes of action of the complaint interposed against defendant Praetorian Insurance Company are discontinued, and plaintiff's action against defendant Praetorian Insurance Company is discontinued in its entirety; and it is further

ORDERED that defendant Praetorian Insurance Company's motion for summary judgment and to dismiss the complaint is denied as moot; and it is further

ORDERED that the remainder of the action shall continue, including defendant Everest National Insurance Company's cross (third party plaintiff) claim against defendant (third party defendant) Praetorian Insurance Company; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, at the courthouse of 71 Thomas Street, Room 103, New York, New York on November 6, 2014, at 9:30 AM.

Dated: October 2, 2014

ENTER:


DEBRA A. JAMES J.S.C.