

Brennor v Metropolitan Prop. & Cas. Ins.

2014 NY Slip Op 32861(U)

September 24, 2014

Supreme Court, Westchester County

Docket Number: 50009/2011

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

GLORIA M. BRENNOR,

Plaintiff(s),

- against -

METROPOLITAN PROPERTY AND CASUALTY
INSURANCE a/k/a METLIFE AUTO & HOME,
and CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendant(s).

ORDER

Index No.: 50009/2011

Motion Date: 7/30/14

Defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves (Mot. #003) for an order, pursuant to CPLR 2221 (d), granting leave to reargue Con Edison's motion for summary judgment or, in the alternative, dismiss plaintiff's action until plaintiff exhausts her administrative remedies. Plaintiff cross moves (Mot. #004) to reargue the motion for summary judgment filed by defendant Metropolitan Property and Casualty Insurance a/k/a MetLife Auto & Home (MetLife).

The following papers were read:

Notice of Motion (Mot. #003), Affirmation, and Exhibits (5)	1-7
Notice of Cross-Motion (Mot. #004), Affirmation, and Exhibit	8-10
Affirmation in Opposition and Exhibit	11-12
Affirmation in Reply	

By way of background, plaintiff owns a rental property located at 360 Harrison Avenue, Harrison, New York (Premises). In February 2009, plaintiff's tenant moved out of the Premises and she had Con Edison transfer the gas and electric account to her. In March 2009, plaintiff received a letter from Con Edison requesting a deposit for the gas and electric account. Beginning in March 2009, each bill from Con Edison threatened to discontinue the gas and electric service if plaintiff did not pay the deposit. Plaintiff did not

pay the deposit, but she did pay her monthly service charges. Plaintiff maintains that she did not receive bills from Con Edison for December 2009 or January 2010. On January 25, 2010, Con Edison discontinued the gas and electric service to the Premises, which allegedly caused the pipes to freeze. On or about January 31, 2010, Con Edison reconnected the gas and electric service to the Premises. Plaintiff alleges that the termination and reconnection of the gas and electric service caused damage to the Premises. At the time that the alleged damage occurred, plaintiff possessed an insurance policy issued by MetLife, which allegedly insured plaintiff against loss or damage to the Premises up to a specific amount. Subsequent to the damage to the Premises, plaintiff notified MetLife of the loss and made a claim to MetLife to pay for the damage. On or about February 23, 2010, MetLife denied plaintiff's claim.

On January 26, 2011, plaintiff commenced the instant action against Con Edison for its alleged negligence in discontinuing and reconnecting the gas and electric service and against MetLife for its alleged wrongful denial of plaintiff's claim. On November 8, 2013, defendants moved for summary judgment. On May 12, 2014, the Court granted MetLife's motion and denied Con Edison's motion. In denying Con Edison's motion, the Court found, among other things, that Con Edison failed to make a *prima facie* showing that the final notice of termination sent to plaintiff provided the information required by 16 NYCRR 13.3 (b). Con Edison now moves for leave to reargue its motion and plaintiff moves to reargue MetLife's motion.

In support of its motion, Con Edison contends that the Court misapprehended and misapplied 16 NYCRR 13.3 (b). Con Edison asserts that, contrary to the Court's order, the final notice of termination did provide the earliest date on which Con Edison might terminate plaintiff's utilities, namely, as soon as April 2, 2009. Con Edison further argues that the Court's finding is erroneously premised on the assumption that it was the discontinuance rather than the reconnection of plaintiff's utilities that proximately caused the alleged damage to the Premises. Next, Con Edison argues that the Court's prior order is inconsistent by virtue of granting MetLife's motion and denying Con Edison's motion. Should the Court adhere to its prior determination, Con Edison argues that the Court should dismiss the action until plaintiff has exhausted her administrative remedies.

CPLR 2221 provides that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*see* CPLR 2221 [d] [2]).

Con Edison has failed to demonstrate that the Court misapprehended or overlooked any matters of fact or law in the prior order. At paragraph 19 of the complaint, plaintiff alleges, in part, that the damage to the Premises was caused by the negligence of Con Edison in failing to properly and adequately notify plaintiff of its action in turning off the electric and gas services. As such, the Court did not erroneously assume that the alleged

damage to the Premises relates to the discontinuance of plaintiff's utilities, that is what the complaint alleges.

In support of its prior motion, Con Edison contended that it did sufficiently notify plaintiff about its intent to turn off her utility service. Under New York law, Con Edison "may only terminate service to a customer if it provides advance final notice of the termination" (*see* 16 NYCRR 13.3 [a] [1]), which states "the earliest date on which termination may occur" (*see* 16 NYCRR 13.3 [b] [1] [ii]). Con Edison asserts that it provided this notice in its bill for the month of March 2009, which indicated that it was a "FINAL TURN-OFF NOTICE" and further stated that "it will be necessary to turn off your service for non-payment of the deposit unless payment is received by APR 02, 2009." As noted above, Con Edison sent multiple notices entitled "FINAL" to plaintiff after March 2009 and finally discontinued the gas and electric service to the Premises on January 25, 2010. However, Con Edison has not produced nor identified the actual final notice that was sent to plaintiff. As such, the Court did not misapply or misapprehend the significance of 16 NYCRR 13.3 (b) when it found that Con Edison had failed to establish, *prima facie*, that it sufficiently notified plaintiff about its intent to turn off her utility service.

The Court's prior order is not inconsistent. The Court did not find that there were material issues of fact as regards plaintiff's claim against Con Edison. The Court found that MetLife had made a *prima facie* showing of entitlement to judgment as a matter of law and that Con Edison had not.

Based on the foregoing, Con Edison's motion for leave to reargue is granted and upon reargument, the Court adheres to its prior determination.

Lastly, the Court considers Con Edison's motion to dismiss this action until plaintiff has exhausted her administrative remedies. Con Edison argues that the Public Service Commission has primary jurisdiction over billing and service disputes, such as the instant action. Consequently, Con Edison argues, this matter is more appropriately handled by the Public Service Commission.


Assuming *arguendo* that the Public Service Commission has primary jurisdiction over this matter, the Court finds that Con Edison waived this defense. On or about June 10, 2011, Con Edison served its answer, which did not raise the doctrine of primary jurisdiction as an affirmative defense. Rather, Con Edison litigated this matter before this Court for the next two years. On August 6, 2013, the Court issued a trial readiness order, noting that discovery was complete and setting a schedule for the filing of the note of issue and any motions for summary judgment. On August 26, 2013, plaintiff filed the note of issue and on November 8, 2013, Con Edison and MetLife filed motions for summary judgment. On May 12, 2014, the Court ruled on these motions. On June 26, 2014, the Court held a settlement conference and the parties are currently scheduled to appear in the Trial Ready Part on November 17, 2014. Now, on the eve of trial, Con Edison raises the

doctrine of primary jurisdiction for the first time. Under these particular circumstances, the Court finds that Con Edison has waived this defense (*cf. Bastidas v Epic Realty, LLC*, 58 AD3d 776, 777 [2d Dept 2009]). Accordingly, Con Edison's motion to dismiss is denied.

On July 9, 2014, plaintiff filed a motion for leave to reargue. CPLR 2221 (d) (3) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, MetLife served the Court's order with notice of entry on May 19, 2014. As plaintiff failed to file this motion within the time constraints of CPLR 2221 and failed to offer any excuse for this failure, the Court denies plaintiff's motion for leave to reargue.

This matter is scheduled for the Trial Ready Part on November 17, 2014 at 9:15 a.m. in Room 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther, King, Jr. Boulevard, White Plains, New York. This order will be electronically filed.

Dated: September 24, 2014
White Plains, New York


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Justice of the Supreme Court

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