

Brennor v Metropolitan Prop. & Cas. Ins.
2014 NY Slip Op 32868(U)
May 12, 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: 2/19/14

Defendant Metropolitan Property and Casualty Insurance a/k/a MetLife Auto & Home (MetLife) moves (Mot. #001) for an order, pursuant to CPLR 3212, granting summary judgment in its favor. Defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves (Mot. #002) for an order, pursuant to CPLR 3212, granting summary judgment in its favor.

The following papers were read:

Notice of Motion (Mot. #001), Affirmation, Affidavits (2), and Exhibits (15)	1-19
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Affirmation in Opposition, Affidavit, and Exhibits (2)	21-24
Affirmation in Reply	25
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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 plaintiff received from Con Edison threatened to terminate the gas and electric service if she 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 or about January 25, 2010, Con Edison terminated 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 damages. 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 terminating and reconnecting the gas and electric service and against MetLife for its alleged wrongful denial of plaintiff's claim. Defendants now move for summary judgment.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion, MetLife has proffered the subject insurance policy and noted that it specifically excludes coverage for damage caused by freezing of the plumbing system, unless plaintiff has used reasonable care to maintain heat at the Premises. MetLife argues that plaintiff's actions were unreasonable as a matter of law. MetLife notes that plaintiff testified at her deposition that, prior to the termination of gas and electric services, she had received at least four written notices from Con Edison, which contained a bold, underlined, capitalized, large-font statement that this was a final turn-off notice. MetLife further notes that the notices explained that service would be discontinued for non-payment unless payment was received immediately. In addition, MetLife notes that a representative for Con Edison testified that each bill sent to plaintiff from March 2009 through January 2010 contained the same warning.

Based on the foregoing, MetLife has set forth a *prima facie* showing of entitlement to judgment as a matter of law. As such, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In opposition, plaintiff contends that she did not believe that Con Edison would turn off the gas and electric service because she was paying her monthly bills and Con Edison had not terminated the service for 10 months. Based on this, plaintiff contends that a “jury may deem reasonable [plaintiff’s] belief that Con Edison would not turn off the service at any time because of her refusal to pay the security deposit because of Con Edison’s course of conduct during the period of close to 10 months.”

Plaintiff has failed to raise a triable issue of fact. The subject policy excludes coverage for damage caused by freezing of a plumbing system, unless plaintiff has used reasonable care to maintain heat at the Premises. While it is true that the resolution of whether a party’s actions are “reasonable” frequently presents a triable issue of fact, that is not always the case (*see, e.g., MacWhinnie v Nugent*, 28 AD3d 431, 432 [2d Dept 2006]; *Schuster v Amboy Bus Co., Inc.*, 267 AD2d 448, 449 [2d Dept 1999]). This is not a case where there is an issue as to whether plaintiff knew that the power might be terminated (*see McCabe v Allstate Ins. Co.*, 260 AD2d 850, 852 [3d Dept 1999]) or where there is an issue as to whether plaintiff thought s/he had done everything necessary to restore the power (*see Billitier v Merrimack Mut. Fire Ins. Co.*, 777 F Supp 2d 488, 491 [WDNY 2011]) or where there is an issue as to whether the damage was in fact caused by the freezing of the plumbing system (*see Farrell v. American Intern. Ins. Co.*, 2010 WL 2517240 (Sup Ct, NY County 2010)). Here, the question of whether plaintiff used reasonable care to maintain the heat at the Premises does not depend on triable issues of fact. Plaintiff was repeatedly warned that Con Edison would terminate the gas and electric service if she did not pay a certain amount of money. Plaintiff did not contact Con Edison to dispute or even address the amount that was supposedly due. Instead, plaintiff simply did not pay the amount that Con Edison claimed was due, notwithstanding Con Edison’s repeated threats to terminate the gas and electric service. As a matter of law, plaintiff failed to use reasonable care to maintain heat at the Premises. Accordingly, MetLife’s motion for summary judgment is granted. To the extent not specifically addressed herein, the Court finds plaintiff’s remaining arguments as to MetLife’s motion for summary judgment to be without merit.

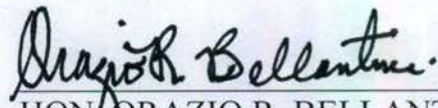
In support of its motion, Con Edison contends that it sufficiently notified plaintiff of its intent to terminate the gas and electric service. Moreover, Con Edison contends that it had no duty to inspect plaintiff’s home prior to reconnecting the gas and electric service. Con Edison notes that, under New York law, it is entitled to require a security deposit from a new customer and that it is authorized to terminate service for a customer’s failure to pay charges due or failure to pay a security deposit.

Con Edison has failed to make out a *prima facie* showing. Under New York law, Con Edison is authorized to terminate a customer’s service for non-payment, but it is obligated to provide a final notice of termination, which must contain certain information (*see* 16 NYCRR 13.3 [b]). Among other things, the final notice of termination must state

“the earliest date on which termination may occur” (*see* 16 NYCRR 13.3 [b] [1] [ii]). Con Edison’s motion fails to establish that the final notice of termination that it sent to plaintiff provided this information or the other requisite information. Accordingly, Con Edison’s motion for summary judgment is denied. To the extent not specifically addressed herein, the Court finds Con Edison’s remaining arguments to be without merit.

This matter is scheduled for a Settlement Conference on June 26, 2014 at 9:30 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: May 12, 2014
White Plains, New York


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Justice of the Supreme Court

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