

**Grandview Palace of N.Y. Condominium v Ott Ins.
Agency**

2014 NY Slip Op 32933(U)

November 12, 2014

Supreme Court, New York County

Docket Number: 650748/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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GRANDVIEW PALACE OF NEW YORK
CONDOMINIUM,

Index No.: 650748/2014

Plaintiff,

Mtn Seq. No. 001

-against-

DECISION AND ORDER

OTT INSURANCE AGENCY,

Defendant.

-----x

JEFFREY K. OING, J.:

Undisputed Facts

Briefly, this action and three related insurance declaratory judgment actions arise from the April 14, 2012 fire which destroyed the Grandview Condominium Complex (Index No. 155113/2012, NYSCEF Dkt No. 113, pp. 5-7). In one declaratory judgment action, plaintiff insurers, Illinois Union Insurance Company and Great American Insurance Company of New York (collectively "Illinois Union") assert the following three causes of action for declaratory relief:

- 1) the policies are void ab initio because of Grandview Palace's material misrepresentations;
- 2) there is no liability because Grandview Palace breached its contracts with plaintiffs by failing to comply with the protective safeguards provisions of the policies; and
- 3) there is no liability because Grandview Palace breached its contracts with plaintiffs by failing to comply with the loss conditions of the policies.

Index No. 650748/2014
Mtn Seq. No. 001

Page 2 of 7

(Illinois Union Insurance Company and Great American Insurance Company of New York v. Grandview Palace Condominium Association Corp. a/k/a Grandview Palace of New York Condominium, Index No. 155113/2012, NYSCEF Dkt No. 1, the "Illinois Union action").

With respect to the first cause of action, Illinois Union seeks rescission of the insurance policy it issued to Grandview Palace of New York Condominium ("Grandview") on the ground that Grandview purportedly made material misrepresentation in its insurance application regarding the existence of alleged uncorrected fire code violations and the presence within the complex of certain fire alarm and sprinkler systems.

In the other two declaratory judgment actions, plaintiff insurers, Western Heritage Insurance Company ("Western Heritage") and National Surety Corporation ("National Surety") assert a single cause of action identical to the one asserted by Illinois Union (NYSCEF Dkt Nos. 115, 129).

This Court consolidated all three declaratory judgment actions for joint trial and discovery (Illinois Union Insurance Company and Great American Insurance Company of New York v. Grandview Palace Condominium Association Corp. a/k/a Grandview Palace of New York Condominium, Index No. 155113/2012, 11/12/2014, Mtn Seq. Nos. 007 & 008).

In this action, Grandview asserts against its insurance agent, defendant Ott Insurance Agency ("Ott"), two declaratory judgment claims: negligence and breach of contract. Grandview essentially alleges that any material misrepresentations in the relevant insurance applications were due to Ott's negligence and breach of contract. In that regard, Grandview seeks to recover against Ott in the event the policies of insurance, supra, are found to be void and unenforceable. .

Reliefs

Defendant, Ott Insurance Agency ("Ott"), moves, pursuant to CPLR 3211, for an order dismissing the first and second cause of action on the ground that those claims fail to state a cause of action. Ott also moves, pursuant to CPLR 3211(a)[3], for dismissal on the ground that plaintiff has failed to plead legal capacity to sue. Alternatively, Ott moves, pursuant to CPLR 602(a), for an order consolidating this action with the Illinois Union action for joint trial and discovery.

Grandview cross-moves for an order staying this action pending final resolution of the Illinois Union action.

Discussion

Ott argues that the two causes of action seek the equitable remedy of a declaratory judgment and that such relief is not available where an adequate remedy at law exists. That argument

is not persuasive. Although labeled as "declaratory" in nature, the essence of the allegations is that Grandview has allegedly sustained a loss, namely, a denial of insurance proceeds, which it claims it is entitled to but for Ott's negligence and breach of contract. As such, the claims are not equitable in nature, but are causes of action at law.

Ott next argues that only the board of managers of a condominium is empowered to commence an action on behalf of the unit owners. That argument is also unavailing. This Court has held that Grandview has the legal capacity to sue and be sued (Illinois Union action, Dkt No. 52, at pp. 13, 22-23). In any event, contrary to Ott's argument, RPL § 339-dd does not provide that only the Board of Managers may commence an action, but, rather, it "may" do so. Further, the complaint alleges that Grandview, and not the condominium board, purchased the relevant insurance policies through Ott, who was the insurance broker for Grandview, and not the condominium board (NYSCEF Dkt No. 4, Ex. A). In any event, any perceived legal impediment may be cured by way of an amendment to the caption, and does not warrant the drastic remedy of dismissal.

Accordingly, that branch of Ott's motion, pursuant to 3211(a)[3] and [7], to dismiss the complaint is denied.

Index No. 650748/2014
Mtn Seq. No. 001

Page 5 of 7

That branch of Ott's motion to consolidate is granted for the same reasons set forth in this Court's decision/order rendered in Illinois Union Insurance Company and Great American Insurance Company of New York v. Grandview Palace Condominium Association Corp. a/k/a Grandview Palace of New York Condominium, Index No. 155113/2012, 11/12/2014, Mtn Seq. Nos. 007 & 008.

In seeking a stay of this action pending final resolution of the Illinois Union action, Grandview argues that given "the precise amount of Ott's liability to Grandview cannot be fully determined until [the Illinois Union action] is resolved, it would make sense, and preserve both judicial and party resources, to put this action on hold until [the Illinois Union action] is done" (NYSCEF Dkt No. 14, ¶ 16). Further, Grandview posits that "[s]hould Grandview prevail in the [Illinois Union action] it may not be necessary to pursue its claims against Ott to ultimate resolution" (Id.).

This argument is unavailing for two reasons. First, staying this action would not preserve judicial or party resources. Illinois Union served a non-party EBT subpoena on Ott in the Illinois Union action. Although granting Ott's motion to quash that subpoena, this Court nonetheless directed Ott to produce a witness for an EBT upon receiving all discovery to date in the Illinois Union action (Illinois Union action, Dkt No. 215).

Second, contrary to Grandview's position, resolution of the Illinois Union action has no bearing on Ott's entitlement to seek dispositive relief in this action after completing discovery. As such, a stay of this action is not warranted. Accordingly, Grandview's cross-motion for a stay of this action is denied.

Accordingly, it is

ORDERED that branch of Ott's motion to dismiss the complaint is denied; and it is further

ORDERED that Ott is directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that branch of Ott's motion to consolidate this action with the Illinois Union action is granted; and it is further

ORDERED that this action is hereby consolidated with the Illinois Union action and shall be consolidated under Index No. 155113/2012, with each action bearing its own caption; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141B), who

Index No. 650748/2014
Mtn Seq. No. 001

Page 7 of 7

is respectfully directed to consolidate the papers in the actions hereby consolidated and shall mark the court records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is respectfully directed to mark the court records to reflect the consolidation; and it is further

ORDERED that Grandview's cross-motion for a stay of this action pending final resolution of the Illinois Union action is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48, Room 242, on November 21, 2014 at 10:30 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/2/14



HON. JEFFREY K. OING, J.S.C.