

Geshwind v Farm Fire & Cas. Co.
2014 NY Slip Op 33533(U)
December 4, 2014
Supreme Court, Queens County
Docket Number: 1974/11
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART_2_

DAVID GESHWIND

Index

Number: 1974/11

Plaintiff,

Motion Date: 8/13/14

-against-

Motion Seq. No. 4, 5 STATE

FARM FIRE AND CASUALTY COMPANY

Defendants.

The following papers numbered 1 to 13 read on this motion by defendant State Farm Fire and Casualty Company for, inter alia, summary judgment dismissing the complaint against it and on this motion by plaintiff David Geshwind for summary judgment on the issue of liability arising under his first and second causes of action

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Upon the foregoing papers it is ordered that these motions are denied.

I. The Allegations of Plaintiff David Geshwind

David Geshwind alleges the following:

In or about January, 2003, plaintiff David Geshwind and Anne Avellone, his long-time domestic partner, his business partner, and his attorney, purchased premises known as 184-14 Midland Parkway, Jamaica, New York. At the time of the purchase and to the present, Avellone rented a one bedroom apartment located at West 66th Street, New York, New York. Avellone and Geshwind “split” their time between the Manhattan apartment and the Jamaica property, although they always left the thermostat set in the Jamaica property at 60 degrees upon their departure.

They placed the Jamaica property in his name alone for the purpose of obtaining a mortgage, but Avellone had the responsibility of paying the bills they incurred. Con Ed never turned off the electrical service for failure to pay the bill. In November, 2008, Avellone received a letter from Con Ed notifying her that she had a credit in her account (she does not know whether for the gas account or the electric account) in the amount of \$400.

On January 26, 2009, after receiving a phone call from a neighbor informing them that ice was present on a side of the Jamaica property, they left the Manhattan apartment and drove to Jamaica. Upon arriving, they observed water pouring out of the ceiling of the first floor. The water caused extensive damage to the basement and first floor and moderate damage to the second floor.

On January 26, 2009, Geshwind and Avellone called defendant State Farm Fire and Casualty Company and notified the insurer of the event. State Farm provided them with the name of a loss mitigation company, and they hired the company with the instruction to safeguard the personal property at the damaged premises.

On January 26, 2009, the gas was on at the Jamaica property, and Avellone made tea on the gas stove on that date. Shortly after the water loss, Marquis Plumbing located several small leaks in the basement and turned the gas service off at the Jamaica property.

On September 16, 2009, Stephen Rice, a State Farm claim representative, went to the Jamaica property and took pictures of what he described as a “ supply line to bathroom above that was separated.” Rice took colored photographs of the separated pipes.

Geshwind holds a Bachelor of Engineering degree from Renselaer Polytechnic Institute, where he also completed two years of graduate work. Looking through a hole in the living room wall intentionally made for the purpose of investigation, he saw the separated pipe (separated at a joint) from which State Farm's agent believes the water damage occurred. "The separated pipe did not exhibit any bursting or deformation or any other evidence that would confirm a frozen pipe condition." Avellone also looked at the pipe and did not see any sign of bursting or deformation indicating that it had frozen.

The plaintiffs were forced to sell the property after State Farm refused to properly investigate and pay the claim for water damage.

State Farm also refused to properly investigate and pay a claim for burglary. On or about March 1, 2009, Avellone informed Geshwind that burglars had entered the Jamaica premises and had stolen personal property. Avellone filed a police report and notified State Farm of the burglary. Geshwind supplied State Farm with a verified bill of particulars on November 10, 2011 alleging in detail the items stolen, and the insurer still refused to process the claim.

II. The Allegations of Defendant State Farm Fire and Casualty Company

State Farm issued a homeowner's policy covering the Jamaica property to plaintiff David Geshwind with effective dates from January 4, 2009 to January 4, 2010. The policy provides in relevant part: "Definitions [:] 5. 'Insured location' means: a. the residence premises; *** 10. 'residence premises' means : a. the one, two, three or four-family dwelling *** where you reside and which is shown in the Declarations. *** Section 1—Coverages [:] Coverage A—Dwelling [:] 1. Dwelling. We cover the dwelling used principally as a private residence on [sic] the residence premises shown in the declarations." The policy further provided in relevant part: "Section 1—Losses Insured [:] Coverage A—Dwelling We insure for accidental physical loss to the property described in Coverage A *** 12. Sudden and accidental discharge or overflow of water or steam from within a plumbing *** system ***. This peril does not include loss: ***b. caused by or resulting from freezing ***." "Section 1—Losses Not Insured [:] We do not insure for any loss to the property described in coverage A which consists of or is directly and immediately caused by one or more of the perils listed in items a through n ***b. freezing of a plumbing *** system ***. This exclusion only applies while the dwelling is vacant, unoccupied or being constructed. This exclusion does not apply if you have used reasonable care to: (1) maintain heat in the building ***."

The temperature fell to twenty-nine degrees on January 25, 2009 and January 26, 2009. When the owners went to the Jamaica property in response to a call from a neighbor,

they saw ice around the house. When Avellone called State Farm to make a claim, she informed the insurer's agent that the "insured had not been in the house for [a] week to 10 days or so," according to company records.

Upon investigation, State Farm discovered that Con Ed had terminated the electrical account for the Jamaica property and had removed the electric meter six months prior to the water damage. The gas furnace would not operate without electricity.

State Farm properly denied coverage for the water loss because, inter alia, the owners did not maintain heat in the building from July 29, 2008 to the date of the water loss. Con Edison had terminated the electric account for the Jamaica property on July 28, 2008 and had removed the meter. The owners did not open a new electrical account until January 27, 2009. The gas furnace could not operate without electricity.

State Farm also properly denied coverage for the burglary claim because the owners did not submit the documentation requested by the insurer.

III. The Deposition of Joy Scaglione

Joy Scaglione, a customer service representative for Con Ed, testified at her deposition as follows: Anne Avellone had a Con Ed account for the Jamaica property. Con Ed records indicate that electrical service was turned off July 29, 2008, probably for nonpayment. The records do not indicate that gas service was also turned off. The records Scaglione had with her at the deposition did not indicate if or when electrical service was restored. The records did indicate that a new account for the Jamaica property was opened on January 27, 2009. "I don't know if Ms. Avellone had it restored in the interim before the date that David took over on January 27th of 2009." A payment of \$1,185 was made on October 6, 2008 for gas service. There were gaps in the Con Ed records so that she could not determine if electric and gas service was on at the Jamaica property on January 26, 2009.

IV. The Experts

Paul Angelides, a professional engineer retained by State Farm, reviewed the photographs taken of the separated pipe and concluded that it separated because of a lack of heat in the dwelling. "The expanding force of ice within the pipes exerted excessive internal pressure that caused the pipe(s) to separate at the sweated joints."

On the other hand, Chuck Panetta, a professional engineer retained by the plaintiff, states: "A review of the colored photographs of the separated pipe does not show any evidence that would confirm that the separated pipe was caused by freezing. Often a pipe

that freezes and causes a water loss will display evidence of freezing in that the pipe would show bulging or splitting that results when a pipe bulges as a result of internal pressure due to the expanding ice.. The photographs of the separated pipe taken by State Farm do not show bulging or splitting.”

V. Discussion

A. Summary Judgment

1. The Water Loss Claim

In order to carry its burden of establishing a prima facie entitlement to judgment as a matter of law, State Farm was required to demonstrate that an exclusion or exception to coverage applies. (*See, Nastasi v. County of Suffolk*, 106 AD3d 1064.) An insurance company bears the burden of establishing that an exclusion in the policy applies in a particular case and is subject to no other reasonable interpretation. (*Essex Ins. Co. v. Pingley*, 41 AD3d 774.) " To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case ***." (*Continental Cas. Co. v. Rapid-American Corp.* 80 NY2d 640, 652; *see, Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377; *Tanzer v. Health Ins. Plan of Greater New York*, 91 NY2d 850.)

In order for the plaintiff insured to establish his prima facie entitlement to judgment as a matter of law, he had to submit proof that (1) there was a valid policy of insurance covering the Jamaica property, (2) a loss occurred, (3) a timely claim was made, and (4) the loss fell within the terms of the policy. (*See, Drysdale v. Allstate Property and Cas. Ins. Co.* 109 AD3d 784.)

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Once the proponent has carried his burden, the burden shifts to the other party, requiring him to submit evidence showing that there is an issue of fact which must be tried. (*See, Alvarez v. Prospect Hospital, supra.*)

In the case at bar, even assuming that both sides are capable of proving a prima facie case, nevertheless, issues of fact preclude summary judgment for either party.

There is an issue of fact concerning whether the Jamaica property was “unoccupied.” (*See, Coutu v. Exchange Ins. Co.*, 174 AD2d 241.) State Farm has offered evidence tending

to show that the Jamaica property could not have been occupied because of the lack of electrical service, but Geshwind and Avellone allege that they split their time between the Manhattan apartment and the Jamaica property.

There is an issue of fact concerning whether, if the Jamaica property was unoccupied, Geshwind “ used reasonable care to: (1) maintain heat in the building ***.” Geshwind and Avellone allege that they left the thermostat set for sixty degrees, but State Farm produced evidence tending to show that there was no electrical service at the Jamaica property, rendering the gas furnace inoperable.

There is an issue of fact concerning whether the water damage occurred because of frozen pipes. The conflicting affidavits of the experts only serve to create issues of fact and credibility which cannot be resolved here (*see, e.g., Linnane v. Szabo*, 111 AD3d 1304; *Rosenstack v. Wong*, 106 AD3d 804), although the court notes that the colored photographs show no apparent signs of bulging or deformity of the pipes. Contrary to the argument made by State Farm, the deposition testimony of Joy Scaglione and the records she referred to at her deposition do not conclusively resolve this issue. While the records do indicate that Con Ed discontinued electric service on July 29, 2008 and that a new account for the Jamaica property was opened on January 27, 2009 (the day after the water loss), the records were incomplete on certain points, and Scaglione testified that she could not determine if there was electric and gas service at the Jamaica property on the date of the water loss. Moreover, Avellone and Geshwind allege that they split their time between the Manhattan apartment and the Jamaica property, and Avellone, an attorney, alleges that she was responsible for paying the utility bills. Geshwind denied at his deposition that Con Ed turned off the electrical service while he owned the house. Even if the electrical service had been turned off, considering the absence of bulging and deformity, there is still an issue of fact concerning whether the pipe separated because of the freezing temperature or because of another cause.

2. The Burglary Claim

“[T]he failure of an insured to cooperate with the insurer in its investigation of a claim constitutes a material breach of the contract of insurance, and is a defense to a suit by the insured on the policy ***.” (*Evans v. International Ins. Co.*, 168 AD2d 374, 375; *see, Conference Associates, Inc. v. Travelers Cas. and Sur. Co. of America*, 80 AD3d 552.) State Farm alleges that the insured repeatedly failed to provide requested documentation in support of his burglary claim. On the other hand, plaintiff Geshwind alleges that State Farm never properly investigated the claim, never requested a sworn proof of loss, and did not request an examination under oath. There is an issue of fact concerning whether the

plaintiff materially breached the insurance contract by failing to cooperate with the insurer in its investigation of the burglary claim.

B. Spoliation of Evidence

The defendant insurer asserts that the plaintiff did not preserve relevant e-mails, documents concerning the maintenance of heat, and the separated pipe. A party seeking spoliation sanctions must demonstrate that the other party destroyed essential evidence leaving the former without the appropriate means to present his case. (*See, Kerman v. Martin Friedman, C.P.A., P.C.*, 21 AD3d 997.) In regard to documentary evidence, the conflicting allegations of the parties concerning whether Avellone and Geshwind failed to cooperate in the production of e-mails, bills, etc. preclude the court from determining here whether spoliation or other sanctions are warranted. The defendant insurer may seek appropriate sanctions (*e.g.* an adverse inference charge) for the alleged failure to preserve documentary evidence at the trial. In regard to the separated pipe, State Farm inspected and photographed it on September 16, 2009, and the insurer had an ample opportunity to have an expert examine it before the plaintiff sold the house. (*See, Kirkland v. New York City Housing Authority*, 236 AD2d 170, 173 [“Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them”]; *Kirschen v. Marino*, 16 AD3d 555.)

Dated: December 4, 2014

J.S.C.