

2015 Freeman LLC v Seneca Specialty Ins. Co.

2015 NY Slip Op 30596(U)

April 16, 2015

Sup Ct, New York County

Docket Number: 653519/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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2015 FREEMAN LLC A/K/A 2015 FREEMAN AVENUE
LLC AND 1941 BAYMILLER LLC,

Plaintiffs,
-against-

Index No.653519/2014
DECISION/ORDER

SENECA SPECIALTY INSURANCE COMPANY,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced this action against defendant insurance company based on their claim that defendant wrongfully denied coverage under the insurance policies issued to them for two commercial properties located in Ohio. Defendant has brought the present motion to dismiss plaintiff's third cause of action based on documentary evidence and failure to state a cause of action and in the alternative, it requests summary judgment dismissing the third cause of action. It argues that New York law should apply to this action and that under New York law, it is entitled to dismissal of plaintiffs' third cause of action for bad faith settlement practices. Plaintiffs have brought a cross-motion for a declaration that Ohio law should be applied to this action.

The relevant facts, as alleged in the complaint, are as follows. Both of the plaintiffs in

this action are limited liability companies duly formed pursuant to the laws of the State of Ohio and both have a registered address in Ohio. Defendant is an insurance company organized and existing under the laws of Arizona with its main office located in New York. In February 2013, defendant issued a commercial insurance policy to plaintiff 1941 Baymiller LLC against all risks of loss to a commercial building located in Ohio. At the same time, defendant issued a commercial insurance policy to the plaintiff 2015 Freeman against all risks of loss to a commercial building located in Ohio. On or about July 22, 2013, when the policy was in effect, both of plaintiffs' premises suffered a loss due to vandalism, which is a covered loss under the policy. Defendant has refused to pay plaintiffs under the policies, although duly demanded, in breach of the insurance contracts. The defendant denied plaintiffs coverage on the grounds that the majority of the claimed damages are not covered as these damages were a result of theft, which is not covered under the policy; that there were material misrepresentations on the insurance application; and that both of the premises were not properly secured. Plaintiffs allege in the complaint that defendant's denial of coverage was undertaken in bad faith without proper and reasonable grounds and with intentional and reckless disregard of plaintiffs' contractual and statutory rights and interests.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any

cause of action known to our law.” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995).

Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

The first issue the court must resolve is whether New York or Ohio law should apply to this action. To determine the appropriate choice of law in a contract case, under New York’s “center of gravity” or “grouping of contacts” test, the court is “required to apply the law of the state with the ‘most significant relationship to the transaction and the parties.’” *Certain Underwriters at Lloyd’s London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 21 (1st Dept 2006), *aff’d*, 9 N.Y.3d 928 (2007), quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 317 (1994). Under this approach, a contract of liability insurance is governed “by the law of the state which the parties understood was to be the principal location of the insured risk...unless with respect to the particular issue, some other state has a more significant relationship...to the transaction and the parties.” *Certain Underwriters*, 36 A.D.3d at 21-22. When the court is required to determine which law should govern a liability insurance policy which covers risks in multiple states, “the state of the insured’s domicile should be regarded as a proxy for the principal location of the insured risk.” *Id.* at 24.

Applying the foregoing principles, the court finds that Ohio law, rather than New York law, should apply to this action as Ohio is the principal location of the insured risk. The court

makes this finding based on the fact that both of the properties which are insured pursuant to the policy are located in Ohio, the alleged vandalism and/or theft occurred in Ohio and both of the insureds are companies formed and organized under the laws of the state of Ohio. Under these circumstances, Ohio is the principal location of the insured risk. The cases relied upon by defendant, which focus on the state of the insured's domicile, are inapplicable as those cases govern a situation where the policy covers risks in multiple states, a situation which is not applicable here.

Pursuant to Ohio law, there is an independent cause of action for bad faith based upon a wrongful denial of an insurance policy. See *McCurdy v. Hanover Fire & Cas. Ins. Co.*, 964 F. Supp. 2d 863, 874 (N.D. Ohio 2013); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272 (1983). "An insurer has a duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action against the insurer." *Id.*

According to the court in *McCurdy*:

To successfully assert a bad faith claim, a plaintiff must show that defendants 'failed to exercise good faith in refusing to pay the claim, by showing that such refusal was based upon circumstances that did not 'furnish reasonable justification therefor....' The inquiry under this standard is 'whether the decision to deny benefits was arbitrary or capricious, and there existed a reasonable justification for the denial,' not whether the insurance company's decision to deny [coverage] was correct.

Thus, under Ohio law, an insurer does not act in bad faith if it had a reasonable justification for its denial of coverage. *Id.*

The issue of whether the defendant in this case had reasonable justification for its decision to deny coverage is not an issue which can be determined on a motion to dismiss. For purposes of this motion to dismiss, the court must accept as true plaintiffs' allegation that

defendant's denial of coverage was undertaken in bad faith without proper and reasonable grounds and cannot look at defendant's affidavits and proof as to how it conducted its investigation to determine whether defendant had reasonable justification for its denial. It is only on a summary judgment motion, where both sides have the opportunity to lay bare their proofs, that the court could possibly make a determination as to whether defendant had a reasonable justification for its denial of coverage. Moreover, it would be inappropriate for this court to entertain defendant's motion for summary judgment until plaintiffs have had an opportunity to conduct discovery. Finally, defendant has not submitted any documentary evidence which definitively disposes of plaintiffs' claims.

Based on the foregoing, defendant's motion to dismiss or for summary judgment on the third cause of action is denied based on Ohio law. The foregoing constitutes the decision and order of the court.

Dated: 4/16/15

Enter: CK

J.S.C.
CYNTHIA S. KERN
J.S.C.