Gray v Tri-State Consumer Ins. Co.
2015 NY Slip Op 32318(U)
July 21, 2015
Supreme Court, Queens County
Docket Number: 705510/13
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** Justice

IA PART 27

MICHELLE GRAY,

Plaintiff,

- against-

TRI-STATE CONSUMER INSURANCE COMPANY

Defendant.

Index No. 705510/13

Motion Date June 1, 2015

Motion Cal. No. 80

Motion Seq. No. 5

The following papers numbered EF84 to EF 122 read on this motion by plaintiff to strike defendant's answer pursuant to CPLR 3126, and for costs and fees pursuant to 12 NYCRR 130.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	EF 84
Affirmation in Opposition - Exhibits....................................	EF 85 - EF 89
Reply Affirmation...	EF 121 - EF 122

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is a first party insurance dispute between policy holder plaintiff and insurance carrier defendant, Tri-State, regarding damages sustained as a result of a fire which occurred on March 10, 2012.

Facts

On November 26, 2013, plaintiff filed the instant action against defendant seeking proceeds of the Policy for repair of the premises, replacement of personal property contained at the premises and additional funds needed due to loss of use of the premises resulting from a fire. On January 20, 2014, Tri-State prepared and filed a pre-answer motion to dismiss. In support of its motion, defendant stated that plaintiff had failed to comply with a "condition precedent" to bringing the instant action requiring its dismissal. Specifically, defendant submitted that the insurance policy required compliance with the "Appraisal" Endorsement prior to commencing an action against Tri-State, that (via affidavit from Susan Most) plaintiff

had not complied with this condition precedent and thus the action should be dismissed. Plaintiff submits that the Policy instead unambiguously states that either party "**may**" demand appraisal (Emphasis Added).

In moving for sanctions against defendant's counsel, plaintiff submits that Tri-State's counsel, Kaufman Dolowich & Voluck, LLP, by and through its managing partner, Ivan J. Dolowich, Esq., and Eric B. Stern, Esq., submitted documents to the court in support of its pre-answer motion to dismiss which were perjurious. Specifically, plaintiff alleges that Tri-State's witness, claims supervisor, Susan Most, committed perjury by misleading the court as to the language of the insurance policy which provides that "Appraisal" is an optional remedy if invoked by a party and not mandatory as Most avers in an affidavit presented by defendants in its motion to dismiss. Plaintiff further alleges that defendant's counsels, Dolowich and Stern, both suborned the perjury of Most as they were responsible for the preparation of the affidavit of Susan Most. As a result of this alleged "fraud on the court," plaintiff submits that defendant's answer should be stricken and the court should direct that costs, attorneys' fees and sanctions against Kaufman Dolowich & Voluck, LLP, Ivan J. Dolowich, Esq. and Eric B. Stern, Esq., pursuant to 22 NYCRR §130.

Discussion

The branch of the motion which is to strike defendant's answer is denied.

A court has inherent power, apart from CPLR 3126, to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution" (*Anderson v Dunn*, 19 US 204, 227 [1821]).

Fraud on the court involves wilful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial process "so serious that it undermines . . . the integrity of the proceeding" (*Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012] [citation and quotation marks omitted]). It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting "a wrong against the institutions set up to protect and safeguard the public" (*Hazel-Atlas Glass Co. v Hartford-Empire Co.*, 322 US 238, 246 [1944]; *see also Koschak v Gates Constr. Corp.*, 225 AD2d 315, 316 [1st Dept 1996] ["The paramount concern of this Court is the preservation of the integrity of the judicial process"]).

The federal courts have applied the clear and convincing standard in determining whether the offending party's actions constitute fraud on the court (*see e.g. Aoude v Mobil Oil*

Corp., 892 F2d 1115, 1118 [1st Cir 1989]). Characteristic of federal cases finding such fraud is a systematic and pervasive scheme, designed to undermine the judicial process and thwart the nonoffending party's efforts to assert a claim or defense by the offending party's repeated perjury or falsification of evidence (*id.* at 1118). Fraud on the court warrants heavy sanctions, including the striking of an offending party's pleadings and dismissal of the action.

For example, in *McMunn v Memorial Sloan-Kettering Cancer Ctr.*, plaintiff commenced suit against her former employer alleging disability discrimination in violation of the Americans with Disabilities Act. Following discovery, defendant moved to dismiss citing "improper conduct of the plaintiff" (191 F Supp 2d 440, 443 [SD NY 2002]). The court found plaintiff "lied at her deposition . . . intentionally and in bad faith, and that her false testimony directly and irrevocably destroyed potentially critical evidence" (*id.* at 448); plaintiff "repeatedly lied and misled [defendant] in an intentional effort to prevent it from deposing [a material witness]" (*id.* at 452); and plaintiff "intentionally spoiled relevant evidence" (*id.* at 454). Accordingly, the court dismissed plaintiff's claim, finding "a lesser penalty . . . would be ineffective as a sanction for [plaintiff's] dishonest behavior, which pervades every aspect of this case" (*id.* at 462).

In *Shangold v Walt Disney Co.* (2006 WL 71672, *1, 2006 US Dist LEXIS 748, *1-4 [SD NY, Jan. 12, 2006, No. 03 Civ 9522 (WHP)], *affd* 275 Fed Appx 72 [2d Cir 2008]), plaintiffs, authors who had submitted story proposals to a publisher owned by defendant, sued defendant claiming that defendant published a book similar to plaintiff's 1995 story (*id.*). Defendant established the plaintiffs' 1995 submission contained several references to a "Palm Pilot," a device which was not in existence when plaintiffs allegedly submitted their story proposal (2006 WL 71672, 2006 US Dist LEXIS 748). Accordingly, the court found plaintiffs intentionally fabricated the basis for their lawsuit, and bolstered that fabrication with perjury (*id.*). In dismissing plaintiffs' action, the court noted "no sanction short of dismissal [would] suffice to deter future misconduct" (2006 WL 71672, *5, 2006 US Dist LEXIS 748, *15).

In *DAG Jewish Directories, Inc. v Y & R Media, LLC* (2010 WL 3219292, 2010 US Dist LEXIS 82388, [SD NY, Aug. 12, 2010, No. 09 Civ 7802 (RJH)]), plaintiff sought to enjoin defendants from using their company trade name, or misrepresenting themselves as affiliated with plaintiff in an effort to attract customers (*id.*). The court ordered a preliminary injunction. Thereafter, plaintiff moved for contempt against defendants, submitting a contract allegedly used by defendants that included plaintiff's trade name, in violation of the court's order (2010 WL 3219292, *2, 2010 US Dist LEXIS 82388, *6). The court held a full evidentiary hearing in which it found the contract submitted by plaintiff was a blatant forgery (2010 WL 3219292, *4, 2010 US Dist LEXIS 82388, *10-12), and concluded "nothing less than outright dismissal would deter similar misconduct" (2010 WL 3219292, *5, 2010 US Dist LEXIS 82388, *17).

In contrast, courts have failed to find egregious conduct constituting fraud on the courts where the moving party fails to meet its evidentiary burden (*see e.g. Passlogix, Inc. v 2FA Tech., LLC*, 708 F Supp 2d 378, 401 [SD NY 2010] ["(plaintiff) has not presented clear and convincing evidence that (defendant perpetrated fraud)"]); the conduct constitutes isolated

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instances of perjury about matters not central to the issues in the case (*see e.g. Carling v Peters*, 2013 WL 865842, 2013 US Dist LEXIS 32808,[SD NY, Mar. 8, 2013, No. 10 Civ 4573 (PAE) (HBP)] [defendant's conduct was "insignificant, collateral and (did) not give rise to sanctions pursuant to the Court's inherent power"]); or the offending party offers "equally plausible alternative explanations" for discrepancies in testimony or evidence (*see Zimmerman v Poly Prep Country Day Sch.*, 2012 WL 2049493, 2012 US Dist LEXIS 78816, [ED NY, June 6, 2012, No. 09 CV 4586 (FB)]).

In *CDR Creances S.A.S. v Cohen*, (23 NY3d 307 [2014]), the Court of Appeals held that

> "the evidentiary standard applied by the federal courts is sufficient to protect the integrity of our judicial system, and discourage the type of egregious and purposeful conduct designed to undermine the truth-seeking function of the courts, and impede a party's efforts to pursue a claim or defense. We adopts this standard and conclude that in order to demonstrate fraud on the court, the nonoffending party must establish by clear and convincing evidence that the offending "party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" (*McMunn*, 191 F Supp 2d at 445, citing *Skywark v Isaacson*, 1999 WL 1489038, *14, 1999 US Dist LEXIS 23184, *50-51 [SD NY, Oct. 14, 1999, No. 96 Civ 2815 (JFK)], *affd* 2000 WL 145465, 2000 US Dist LEXIS 1171 [SD NY, Feb. 9, 2000]).

The Court of Appeals further noted that [a] court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents concerns "issues that are central to the truth-finding process" (*CDR Creances S.A.S. v Cohen, supra at INSERT PAGE NUMBER], CITING McMunn*, 191 F Supp 2d at 445). Essentially, fraud upon the court requires a showing "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense" (*McMunn*, 191 F Supp 2d at 445, quoting *Aoude*, 892 F2d at 1118).

A finding of fraud on the court may warrant termination of the proceedings in the nonoffending party's favor (*see e.g. McMunn*, 191 F Supp 2d at 462 ["(defendant) deserves the harsh sanction of dismissal"]; *Shangold*, 2006 WL 71672, 2006 US Dist LEXIS 748, [plaintiffs' fabrication of evidence warrants dismissal]; *Hargrove v Riley*, 2007 WL 389003, 2007 US Dist LEXIS 6899, [ED NY, Jan. 31, 2007, No. CV-04-4587 (DGT)] [same]; *DAG Jewish Directories*, 2010 WL 3219292, 2010 US Dist LEXIS 82388, [same]). For "when a party lies to the court and [its] adversary intentionally, repeatedly, and about issues central to the truth-finding process, it can fairly be said that [the party] has forfeited [the] right to have [the] claim decided on the merits" (*McMunn*, 191 F Supp 2d at 445). Therefore, once a court concludes that clear and convincing evidence establishes fraud on the court, it may strike a pleading and enter a default judgment.

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Nonetheless, the sanction of striking an answer is "an extreme remedy that 'must be exercised with restraint and discretion' " (*CDR Creances S.A.S. v Cohen* supra at 321, quoting *Chambers v NASCO, Inc.,* 501 US 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27; *see Dodson v Runyon,* 86 F.3d 37, 39 [2d Cir.]; *McMunn v Memorial Sloan–Kettering Cancer Ctr.,* 191 F.Supp.2d 440, 461 [S.D.N.Y.]). The striking of a party's pleadings is inappropriate where the fraud is not "central to the substantive issues in the case" (*Rezende v Citigroup Global Mkts., Inc.*, 2011 WL 1584603, 2011 US Dist LEXIS 45475, [SD NY, Apr. 27, 2011, No. 09 Civ 9392 (HB)]), or where, as here, the court is presented with "an isolated instance of perjury, standing alone, [which fails to] constitute a fraud upon the court" (*McMunn*, 191 F Supp 2d at 445, *citing Gleason v Jandrucko*, 860 F2d 556, 560 [2d Cir 1988]). In such instances, the court may impose other remedies including awarding attorney fees (*Rezende*, 2011 WL 1584603, 2011 US Dist LEXIS 45475), awarding other reasonable costs incurred (*Sanchez v Litzenberger*, 2011 WL 672413, 2011 US Dist LEXIS 18528, [SD NY, Feb. 24, 2011, No. 09 Civ 7207 (THK)] ["Plaintiff will be required to reimburse Defendants for the expenses and fees incurred in rooting out Plaintiff's true identity"]), or precluding testimony (*Ades v 57th St. Laser Cosmetica, LLC*, 2013 WL 2449185, 2013 US Dist LEXIS 79864, [SD NY, June 6, 2013, No. 11 Civ 8800 (KNF)]). Thus, the court grants that branch of plaintiff's motion which is for costs and fees, including attorneys' fees associated with bringing this motion. Under 22 NYCRR § 130–1, a party may be awarded reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct of the opposing party. Frivolous conduct has been defined by statute to include the assertion of material factual statements that are false.

Accordingly, [plaintiff shall submit documentation of her costs and fees associated with bringing the instant motion.]

[[this matter is scheduled for a hearing on the issue of the appropriate amount of a sanction to be imposed and/or reasonable counsel fees to be awarded to the plaintiff, pursuant to 22 NYCRR § 130–1.1. This matter shall be heard on [INSERT DATE], at [INSERT TIME] in Part 27.]]

Dated: July 21, 2015

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DARRELL L. GAVRIN, J.S.C.