

Gray v Tri-State Consumer Ins. Co.

2015 NY Slip Op 32522(U)

December 14, 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** IA PART 27
Justice

MICHELLE GRAY,		Index No.	705510/13
Plaintiff,		Motion	
- against -		Date	September 20, 2015
TRI-STATE CONSUMER INSURANCE COMPANY,		Motion	
Defendant.		Cal. No.	162 & 163
		Motion	
		Seq. No.	6 & 7

The following papers numbered EF125 to EF252 read on this (1) order to show cause by defendant, Tri-State Consumer Insurance Company (Tri-State), to extend the time for defendant to move for summary judgment; (2) motion by Tri-State for summary judgment in its favor pursuant to CPLR 3212; (3) cross motion by plaintiff to strike defendant's answer for failure to comply with a So-Ordered Stipulation which directed defendant to respond to plaintiff's Supplemental Demand for Discovery and Inspection following Penny Hart's deposition, or in the alternative to preclude defendant from offering evidence at trial and to compel defendant to provide the same; and (4) cross motion by plaintiff for summary judgment in her favor pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Order to Show Cause Notice of Motion - Affidavits - Exhibits...	EF125-EF141, EF165-EF192
Notices of Cross Motions - Affidavits - Exhibits	EF143-EF149, EF212- EF229
Answering Affidavits - Exhibits.....	EF150-EF159, EF234-247
Reply Affidavits.....	EF160-EF163, EF248-EF252

Upon the foregoing papers it is ordered that the order to show cause, motion and cross motions are combined herein for purposes of disposition, and are determined as follows:

Facts

Plaintiff owned and had an insurable interest in real property located at 138-02 231st Street, in Laurelton, New York, 11413 (premises/property). In this regard, plaintiff had an insurable interest in the building, contents, fixtures, furniture, completed additions and completed operations located at the property. Plaintiff had a fire insurance policy with defendant, Tri-State. A fire occurred at the premises on March 10, 2012, while the insurance policy was in full force and effect. As a result of the damage caused by the fire, plaintiff, her husband, mother-in-law and four children were displaced. On March 10, 2012, plaintiff notified Tri-State of the fire and of the loss sustained thereat.

On or about March 12, 2012, Tri-State sent their contractor, Prism General Services (Prism), to the property, and Prism generated an estimate totaling 132 pages in length, inclusive of a line item breakdown of the damage and photographs. On March 15, 2012, Tri-State sent their Contents Adjuster “Smith” to compile an inventory of plaintiff’s contents. On March 16, 2012, “Peter”, an employee of Prism General Services (hired by Tri-State), conducted an estimate of the damages at the property. Plaintiff submits that despite the case value of the loss under Coverage “A” being valued by Tri-State as \$224,790.49, defendant only paid plaintiff an actual cash value (ACV), in the amount of \$190,000.00. The actual case value was determined solely by Tri-State after its inspection of the property. Plaintiff further submits that this amount of actual cash value determined by Tri-State represents the amount of money that both parties agree should be paid for actual cash value of the dwelling. It appears from the record that the parties disagree on when the ACV should be paid. Tri-State contends that the balance of the ACV is not due from them until after the work is completed. Plaintiff appears to assert that the total ACV was due within 60 days of the parties’ “agreement” upon the same.

Plaintiff commenced the instant action seeking, inter alia, the \$34,790.49, representing the difference between what plaintiff was paid and the actual cash value as indicated by Tri-State. Plaintiff also seeks consequential damages.

Order to Show Cause

The order to show cause by Tri-State to extend the time for it to move for summary judgment is granted as unopposed, and otherwise on the merits (*see Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803 [2d Dept 2009] (defendants established good cause in support of that

branch of their motion which was for leave to extend their time to move for summary judgment until 120 days after receipt of all outstanding discovery, since there was significant discovery outstanding at the time the note of issue was filed); *Jones v Grand Opal Const. Corp.*, 64 AD3d 543 [2d Dept 2009] (Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was for leave to extend their time to move for summary judgment to the extent of permitting such motion no later than 45 days after the completion of physical examinations, since there was significant discovery outstanding at the time the note of issue was filed); *Alvarez v Eviles*, 56 AD3d 500 [2d Dept 2008] (Honeywell demonstrated good cause for the delay in making the renewed motion (*see generally Brill v City of New York*, 2 N.Y.3d 648), since significant discovery was still outstanding after the deposition was taken and Honeywell's expert witnesses needed to consider the additional discovery in preparing the affidavits submitted on the motion); *Tower Ins. Co. of New York v. Razy Associates*, 37 AD3d 702 [2d Dept 2007] (significant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment); *Sclafani v Washington Mut.*, 36 AD3d 682 [2d Dept 2007] (defendants demonstrated good cause for the delay in filing their motions for summary judgment, since the note of issue was filed while there was significant discovery outstanding).

Motion by Tri-State

The motion by Tri-State for summary judgment on its counterclaim for concealment or fraud, is denied.

The concealment and fraud provision of the policy provided, *inter alia*, that the defendant “does not cover you or any other person insured under this policy who has concealed or misrepresented any material fact or circumstance, before or after a loss.” The defendant contends that plaintiff breached this provision when she submitted a claim for property which was almost three times the estimate provided by the adjuster(s).

A concealment and fraud provision of an insurance policy “makes clear that the general rule of insurance law requiring good faith and fair dealing applies to fraudulent statements and false swearing made by an assured after a loss” (*Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 App Div 187, 189 [1926]). “This provision is breached if an insured tenders a fraudulent proof of loss as the basis for a recovery under the policy” (*Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]; *see Kantor Silk Mills, Inc. v Century Ins. Co., Ltd.*, 253 NY 584 [1930]).

“Courts have been assiduous to prevent the use of the clause to bar a recovery where the alleged fraud or false swearing was not intentional, or the false statements were

matters of opinion honestly, although mistakenly, held by the assured” (*Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 App Div at 189; *see* 70A NY Jur 2d, Insurance § 2017). “On the other hand, [courts] have not hesitated to hold that a recovery would not be permitted if it clearly appeared that the assured had intentionally made false and fraudulent statements or intentionally sworn falsely” (*Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 App Div at 189; *see* 70A NY Jur 2d, Insurance § 2022 [2011]). Thus, a key issue in determining whether a concealment and fraud provision of an insurance policy has been breached is whether the inaccurate proof of loss was created or submitted with “a willful intent to defraud or to misrepresent the material facts” (*St. Irene Chrisovalantou Greek Orthodox Monastery v Cigna Ins. Co.*, 226 AD2d 624, 624 [1996]; *see Christophersen v Allstate Ins. Co.*, 34 AD3d 515, 516 [2d Dept 2006]). One manner in which fraudulent intent may be established is through proof that the claimed value of the loss was grossly disproportionate to the actual value of the loss (*see Saks & Co. v Continental Ins. Co.*, 23 NY2d at 165; *see also* 70A NY Jur 2d, Insurance § 2022 [2011]). Such an inference of fraudulent intent raised by proof that the insured's claimed losses were grossly overvalued “becomes conclusive where it is shown that the difference between the amounts claimed in the proof of loss and those actually proved to have been destroyed are grossly disparate and the explanation tendered is so unreasonable or fantastic that it is inescapable that fraud has occurred” (*Saks & Co. v Continental Ins. Co.*, 23 NY2d at 165-166; *see Pipo Bar & Rest., Inc. v Certain Underwriters at Lloyd's at London*, 15 AD3d 556, 556-557 [2005]).

In the instant action, defendant failed to present proof that the price values submitted by plaintiff were significantly inflated from the actual prices that she paid for the claimed items (*see Azzato v Allstate Ins. Co.*, 99 AD3d 643, 645 46, [2d Dept 2012]; *Pogo Holding Corp. v New York Prop. Ins. Underwriting Assn.*, 97 AD2d 503, 505 [2d Dept 1983], *affd* 62 NY2d 969 [1984]; *Domagalski v Springfield Fire & Mar. Ins. Co.*, 218 App Div at 189).

Accordingly, the motion by defendant for summary judgment in its favor on its counterclaim for fraud and concealment, is denied.

Cross Motion by Plaintiff for Summary Judgment

The cross motion by plaintiff for summary judgment in her favor on her claim for breach of contract, is denied. The failure to pay plaintiffs' claim within 60 days of submission of proof of claim is not a breach of contract (*Catalogue Serv. of Westchester, Inc. v Ins. Co. of N. Am.*, 74 AD2d 837, 837 [2d Dept 1980]). Pursuant to the Loss Payment provision of the contract, Tri-State was to pay the loss 60 days after receipt of the proof of loss *and* either an agreement is reached with the insured, there is entry of

final judgment or there is a filing of an appraisal award. Since none of these conditions have been met, there has been no breach of contract (*232 Broadway Corp. v Calvert Ins. Co.*, 149 AD2d 694 [2d Dept 1989] [Emphasis Added]).

The branch of the cross motion which seeks consequential damages is denied. In order to recover consequential damages arising from Tri-State's alleged breach of the insurance contract, plaintiff was required to show, at the outset, that recovery of such damages was "brought within the contemplation of the [contracting] parties" (*Kenford Co. v. County of Erie*, 73 NY2d 312, 319). Where, as here, the policy itself does not specifically permit the recovery of consequential damages in the event of a breach by the carrier (*see High Fashions Hair Cutters v Commercial Union Ins. Co.*, 145 AD2d 465, 467 [2d Dept 1988]), "the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject" (*Kenford Co. v County of Erie*, 67 NY2d 257, 262). Assuming, without deciding, that Tri-State may be held contractually liable for consequential damages resulting from the untimely processing of the claim, plaintiff in this case bore the burden of establishing, *prima facie*, that its alleged damages were "reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes" (*Kenford Co. v County of Erie, supra*, 67 NY2d at 261). Because plaintiff failed to make that showing, her claim for consequential damages is "speculative, conjectural and legally insufficient" (*see KSW Mech. Servs., Inc. v Am. Prot. Ins. Co.*, 40 AD3d 709, 711 [2d Dept 2007]).

Cross Motion by Plaintiff to Strike Defendant's Answer

The cross motion by plaintiff to strike defendant's answer for failure to comply with the court-ordered stipulation directing defendant to respond to plaintiff's supplemental demand for discovery, dated April 17, 2015, is granted, unless defendant complies with the same within 30 days of service of a copy of this order, with notice of entry.

Although actions should be resolved on the merits wherever possible (*see Cruzatti v St. Mary's Hosp.*, 193 AD2d 579, 580 [2d Dept 1993]), a court may, *inter alia*, strike the "pleadings or parts thereof" as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed [upon notice] (CPLR 3126 [3]). While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the court (*see Soto v City of Long Beach*, 197 AD2d 615, 616 [2d Dept 1993]; *Spira v Antoine*, 191 AD2d 219 [1st Dept 1993]), "striking [a pleading] is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Espinal v City of New York*, 264 AD2d 806 [2d Dept

1999]). In the case at bar, the record does not reveal willful and contumacious disobedience of a prior court order respecting discovery and therefore the extreme relief sought by plaintiff is inappropriate (*see Vogel v Benwil Indus.*, 267 AD2d 232 [2d Dept 1999]). Accordingly, Tri-State is hereby directed to provide a meaningful responses to plaintiff's supplemental demand for discovery, dated April 17, 2015, within 15 days after service of a copy of this Order with notice of entry. Failure to do so shall result in appropriate sanctions by the court.

Conclusion

The order to show cause by Tri-State to extend the time for it to move for summary judgment is granted.

The motion by defendant for summary judgment in its favor on the counterclaim for fraud and concealment, is denied.

The cross motion by plaintiff for summary judgment in her favor on the claim for breach of contract, is denied.

The cross motion by plaintiff to strike defendant's answer for failure to comply with the court-ordered stipulation directing defendant to respond to plaintiff's supplemental demand for discovery, dated April 17, 2015, is granted, unless defendant complies with the same within 30 days of service of a copy of this order, with notice of entry.

Dated: December 14, 2015

DARRELL L. GAVRIN, J.S.C.