Berliner v New York Prop. Ins. Underwriting Assoc.
2015 NY Slip Op 32540(U)
May 15, 2015
Supreme Court, Nassau County
Docket Number: 4527/13
Judge: Karen V. Murphy

[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 10 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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LOLA BERLINER,

Plaintiff(s),

Index No. 4527/13

Motion Submitted: 4/7/15
Motion Sequence: 001

-against-

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Defendant moves this Court for an Order granting summary judgment in its favor, and dismissing the complaint. Defendant also seeks a judicial declaration that it has no liability to plaintiff to indemnify her for damages to her residence. Plaintiff opposes the requested relief.

Plaintiff suffered damage to her home in Long Beach, New York, on April 22, 2012. Specifically, the damage was to her kitchen's ceiling, cabinets, counter, back splash, electrical systems, appliances, and other items in her kitchen. Plaintiff filed a claim with defendant for reimbursement of the monetary loss. Defendant disclaimed coverage on or about May 12, 2012, asserting that there was no evidence of windstorm damage; rather, according to defendant, the loss or damage to the premises "was as a result of seepage not

the result of water which entered the building through an opening made by wind or hail. Your policy provides coverage only for specific cause of loss. Seepage is not a covered cause of loss."

The complaint asserts four causes of action against defendant. Plaintiff alleges breach of contract, seeks a declaration that defendant is in breach of the insurance of the insurance policy, alleges a violation of General Business Law (GBL) § 349 (g), and fraud.

Defendant's answer denies plaintiff's allegations and sets forth five affirmative defenses. Defendant asserts that plaintiff was not insured against any peril other than that caused by the direct force of wind or hail, in turn causing an opening in a roof or wall. Defendant also asserts that the causes of action for violation of GBL § 349 (g) and for fraud fail to state causes of action, and defendant is not liable to plaintiff as a matter of law or equity.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

In support of its motion, defendant submits, *inter alia*, an affidavit from its director of claims, Harry Persaud, and an affidavit from a building consultant, Christopher Minogue, hired by defendant to inspect the subject premises shortly after the date of loss.

Mr. Persaud attests that the claim was reported to defendant on April 23, 2012, and that the loss notice from plaintiff's broker stated that "high wind and heavy rain had caused a drain on a flat roof to become loose causing water to enter the home." Defendant immediately thereafter assigned Christopher Minogue of Minogue Associates, Inc. to inspect the loss incurred at the subject premises. After receiving Mr. Minogue's report, Mr. Persaud determined that the loss was not due to one of the perils named in the policy of insurance; therefore, defendant denied plaintiff's claim. It is undisputed that the annexed policy contains the following language:

2. Windstorm or Hail
   This peril does not include loss:
   a. To the inside of a building or the property contained in a building caused by rain, snow, sleet, sand or dust unless

> the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening. . .

Christopher Minogue attests that he was hired by defendant to "inspect and provide an estimate of the cost to repair damages as part of the investigation of the claim. . . In addition, from time to time we are also asked by the insurance carrier to provide our opinion as to the cause of the damage." He further states that, "[o]n April 25, 2012, [he] went to the loss location to provide the defendant with my opinion as to the cost to repair the damage as well as to determine the cause of that damage."

Based upon his observations of the damage to the subject premises, Mr. Minogue opines that the damage was caused by "many years of water intrusion causing rot and decay," not by wind creating an opening in the roof or walls of the subject premises. Specifically, Mr. Minogue observed what he characterized as "rot and decay" in the beams on the inside of the kitchen, where the cabinets and walls had already been removed by the time of the inspection. According to Mr. Minogue, one of the beams inside the premises "was rotted and was not connected but rather was falling off causing weakness to the roof in that area." Mr. Minogue also observed that fresh tar had been applied to certain of the roof's seams in the area where water went into the kitchen. In his opinion, a clogged roof drain made smaller by the addition of new roofs, including a roof that was added in 2008, caused ponding of water on the flat roof, at the location of the compromised drain, thereby causing "long term rot and decay of the sheathing and beams underneath the roof," and resulting in weakening and collapse of the roof under the weight of the water. Annexed to the instant motion are numerous photographs of the subject premises, including of the roof and the inside of the kitchen and its beams.[1]

Based upon the foregoing, defendant has established its *prima facie* entitlement to summary judgment as a matter of law as to the first and second causes of action alleged in the complaint (breach of contract and declaratory judgment) by demonstrating that the cause of the loss sustained was not covered by the insurance policy.

Aside from the complaint claiming that "[t]he defendant, by their actions, have violated New York General Business Law § 349," there is not a single allegation pled regarding a deceptive act or practice in the conduct of defendant's business, let alone any

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[1]Plaintiff's Exhibits 15 and 16 show what appear to be new metal beams installed alongside what appear to be older wooden beams. Exhibit 15 is the photograph referred to by Mr. Minogue as showing a wooden beam that is rotted and not connected to the vertical stud.

evidence of same. The facts alleged in paragraphs First through Ninth of the complaint amount to nothing more than a private dispute over policy coverage and the processing of plaintiff's claim which is unique to these parties, rather than conduct affecting the consuming public at large. Accordingly, defendant has sustained its *prima facie* burden for dismissal of the third cause of action (***Korn v First UNUM Life Insurance Company***, 277 AD2d 355 [2d Dept 2000]; ***Pellechia & Pellechia, Inc. v American National Fire Insurance Company***, 244 AD2d 395 [2d Dept 1997]).

As to the fourth cause of action alleging fraud, the complaint not only fails to contain allegations of a representation of material fact, falsity, scienter, reliance and injury (*see* ***Morales v AMS Mortgage Services, Inc.***, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]), and fails to state the circumstances of the fraud in detail, including specific dates and items (*see* ***CPLR § 3016[b]***), but the defendant's submissions establish as a *prima facie* matter of law that no fraud was committed by defendant.

In opposition, plaintiff submits, *inter alia*, her affidavit, the affidavit of a roofing contractor, Lenny Gross, Mr. Gross' invoice for roof repair, a bill evidencing installation of a new roof in 2008, and the same photographs submitted in support of the instant motion.[2]

Plaintiff states that she bought the subject premises in 2004, made significant repairs to the premises, and had damaged and rotted areas replaced. Plaintiff claims that new plywood and supports are clearly seen in certain of the submitted photographs. She also states that on or about March 11, 2008, she had a new roof installed on the subject premises, and did not experience any water leaking into the premises "after the installation of the new roof in 2008 until the date of the storm on April 22, 2012." Plaintiff does not make any statement about water leaking from the time she purchased the house until the new roof was installed in 2008.

Plaintiff also states that she contacted Mr. Gross on April 23, 2012, and that he came to the property "immediately." According to plaintiff, Mr. Gross inspected the roof and damage, "and began to repair the roof." Also on April 23, 2012, a restoration company arrived at the premises and removed "all of the damaged cabinets, insulation, interior walls/sheetrock and debris which made the exterior of the home visible from the kitchen." On that same day, April 23, 2012, plaintiff reported her claim to a representative of defendant. Mr. Minogue visited the subject premises on April 25, 2012, after Mr. Gross repaired the roof.

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[2]The Court will not consider a printout from weathersource.com, as it is not in admissible form.

Mr. Gross states in his affidavit that he went to plaintiff's home on April 23, 2012 and inspected the roof and the damage. According to Mr. Gross, he observed "that the rubber roof had pealed (sic) up in the left rear corner of [plaintiff's] home. The lifting of the rubber roof allowed the rain water from the storm to penetrate [plaintiff's] home and flood her kitchen. The roof had lifted up and away from the home. It was clear that the rubber roofing lifted as a direct result of the high speed winds sustained by the home over the course of the previous evening." He also stated that all of the home's drains were clean and free of debris, and that there was nothing impeding those drains when he was on the roof.

Mr. Gross attests that he heated the roofing material "to allow it to bond and adhere and seal[ed] the base and seams of the roof with flashing cement to ensure a tight, water proof seal." He annexes his bill to his affidavit. The bill is dated April 24, 2012. The bill corroborates his affidavit, and also indicates that he reset blown off and shifted Spanish tiles, and reset and re-nailed loose trim on the upper roof. On the bill appears the statement "[a]ll work done due to wind and rain storm damage."

Based upon the foregoing, plaintiff has raised a material issue of fact as to the cause of the water entering into her kitchen, thereby defeating defendant's summary judgment motion as to the first and second causes of action.

Plaintiff does not address defendant's arguments concerning the third and fourth causes of action sounding in a violation of GBL § 349 (g) and fraud, respectively; therefore, defendant's summary judgment motion is granted as to those causes of action. Accordingly, the third and fourth causes of action are hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: May 15, 2015
Mineola, N.Y.

Karen V Murphy
J. S. C.