

Greenaway v Tri-State Consumer Ins. Co.
2016 NY Slip Op 32783(U)
May 16, 2016
Supreme Court, Nassau County
Docket Number: 600260/14
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ELBERT GREENAWAY and AUGUSTINA
GREENAWAY, on behalf of themselves and all other
persons similarly situated,

Plaintiffs,

- against -

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

TRIAL/IAS PART 37
NASSAU COUNTY

Index No.: 600260/14
Motion Seq. Nos.: 06, 07
Motion Dates: 04/12/16
04/25/16

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 06), Affirmation and Exhibits	1
Affirmation in Opposition to Motion Seq. No. 06	2
Reply Affirmation to Motion Seq. No. 06	3
Notice of Motion (Seq. No. 07), Affirmation and Exhibits	4
Affirmation in Opposition to Motion Seq. No. 07	5
Reply Affirmation to Motion Seq. No. 07 and Exhibit	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiffs move (Seq. No. 06), pursuant to CPLR § 2221(d)(2), for an order granting them leave to renew (*sic*) those portions of their prior motion (Seq. No. 05) seeking, *inter alia*, (a) class certification, pursuant to CPLR §§ 901 and 902; (b) appointment of Elbert Greenaway as class representative; (c) appointment of Wilkofsky, Friedman, Karel & Cummings and Greenblatt and Agulnick, P.C. as class co-counsel; (d) directing that notice of class certification

be sent to the class by first class mail, which were denied by the February 23, 2016 Decision and Order of this Court. Defendant opposes the motion.

Defendant moves (Seq. No. 07) for an order (a) dismissing the third cause of action in plaintiffs' Amended Verified Class Action Complaint and (b) striking paragraphs 12-22 of plaintiffs' Amended Verified Class Action Complaint. Plaintiffs oppose the motion.

As set forth in this Court's previous Decisions and Orders in this matter, on January 17, 2014, plaintiffs Elbert Greenaway and Augustina Greenaway electronically filed a Summons and Verified Class Action Complaint on behalf of themselves and all other persons similarly situated. The Verified Complaint alleges that defendant engaged in deceptive acts and practices and defrauded its policyholders by routinely deducting contractors' overhead and profit from all of its repair or replacement cost estimates, by routinely obtaining several contractors' estimates and cherry-picking the lowest one to utilize in adjusting policyholders' claims and otherwise disregarding estimates it arbitrarily believes to be too expensive, and by cancelling payments made to policyholders, as well as stalling and delaying the investigation of claims as punishment when policyholders retain representation.

Defendant issued a homeowners insurance policy on 33 Glover Avenue, Yonkers, New York ("the Premises") to the named plaintiffs, covering the period February 6, 2012 to February 6, 2013. The Verified Complaint alleges that, on or about January 27, 2013, a pipe break at the Premises caused water damage and the named plaintiffs made a claim under their homeowners insurance policy with defendant. At defendant's request, Prism General Services estimated the replacement cost value of the loss at the Premises as \$56,642.56, which included overhead and profit of \$9,295.68. Defendant obtained a second estimate of \$20,165.50 from Metro Claims

Mgmt NYC Inc., which excluded overhead and profit, and issued payment to the named plaintiffs in that amount. After the named plaintiffs retained counsel and disputed the amount defendant paid for their loss, defendant cancelled the check for \$20,165.50 and allegedly threatened to delay investigation of the named plaintiffs' claim.

The named plaintiffs sought to bring a class action pursuant to CPLR Article 9, on behalf of themselves and all current and former owners of insurance policies issued by defendant, for the period beginning six (6) years before commencement of this action to the present, who suffered an insurance loss and reported it to defendant. The Verified Complaint asserted five (5) causes of action. The first cause of action asserts a claim for breach of contract on behalf of the named plaintiffs. The second cause of action asserts a claim for violation of General Business Law § 349 on behalf of the named plaintiffs. The third cause of action asserts a claim for breach of contract on behalf of the putative class members. The fourth cause of action asserts a claim for violation of General Business Law § 349 on behalf of the putative class members. The fifth cause of action seeks a declaratory judgment on behalf of the named plaintiffs and all others similarly situated.

By Decision and Order, dated September 15, 2014, this Court granted defendant's motion (Seq. No. 01) to dismiss plaintiffs' Verified Complaint to the extent that plaintiff's fourth cause of action for violation of General Business Law § 349 on behalf of the putative class members and fifth cause of action for declaratory judgment on behalf of the named plaintiffs and all others similarly situated were each dismissed. Defendant's motion to dismiss (Seq. No. 01) was otherwise denied. Defendant filed a Notice of Appeal from that Decision and Order.

Issue was joined by the filing of a Verified Answer on November 7, 2014, followed by

the filing of a Verified Amended Answer on November 20, 2014.

Plaintiffs thereafter moved (Seq. No. 05), pursuant to CPLR §§ 901 and 902, for an order certifying a class in this action; appointing Elbert Greenaway as class representative; appointing Wilkofsky, Friedman, Karel & Cummings and Greenblatt and Agulnick, P.C. as class co-counsel; and directing that notice of class certification be sent to the class by first class mail; and moved, pursuant to CPLR § 3025(b), for an order permitting them to amend the Verified Class Action Complaint. Defendant opposed that motion. By Decision and Order, dated February 23, 2016, this Court denied the class action relief sought by plaintiffs, but granted so much of plaintiffs' motion as sought leave to amend the Verified Class Action Complaint to the limited extent of allowing plaintiffs to add allegations as to defendant's position regarding the actual cash value of claims; depreciation of the value of insureds' contents; and determinations concerning insured's contents claims. On March 23, 2016, defendant filed a Notice of Appeal from that Decision and Order.

While plaintiffs' Notice of Motion (Seq. No. 06) refers to the instant motion as a motion for leave to renew, it states that plaintiffs are moving pursuant to CPLR § 2221(d)(2), which is the statute governing a motion for leave to reargue. The papers offered in support of plaintiffs' motion indicate that plaintiffs are requesting leave to reargue, not leave to renew. The Court will therefore treat plaintiffs' motion (Seq. No. 06) as seeking leave to reargue.

CPLR § 2221(d)(2) provides that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those

originally presented. *See Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104 (2d Dept. 2014); *Haque v. Daddazio*, 84 A.D.3d 940, 922 N.Y.S.2d 548 (2d Dept. 2011); *Mazinov v. Rella*, 79 A.D.3d 979, 912 N.Y.S.2d 896 (2d Dept. 2010); *Pryor v. Commonwealth Land Tit. Ins. Co.*, 17 A.D.3d 434, 793 N.Y.S.2d 452 (2d Dept. 2005).

In its February 23, 2016 Decision and Order, this Court held that the plaintiffs adequately established the requirement of numerosity necessary for certification of a class action. *See* CPLR § 901(a)(1). This Court also held that plaintiffs established that the claims of the named plaintiffs are typical of the claims of the proposed class and that the named plaintiffs could adequately protect the interests of the proposed class. *See* CPLR § 901(a)(3) and (4).

However, this Court found that, while plaintiffs met the other prerequisites of CPLR § 901(a), they failed to meet the commonality and superiority requirements necessary for certification of a class action. *See* CPLR § 901(a)(2) and (5). As a precondition to the certification of a class action, there must be questions of law or fact common to the class which predominate over any questions affecting only individual members of the putative class (*see* CPLR § 901(a)(2)) and a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. *See* CPLR § 901(a)(5).

This Court held that, while there are some common questions regarding defendant's handling of its policyholders' claims, the constituency of the proposed class may only be determined after each alleged member of the class proves that they made a timely claim to defendant for which they were entitled to overhead and profit and that they did not receive it; and/or that defendant requested more than one estimate of damage and then chose the lower estimate to adjust the claim; and/or that defendant canceled payment of a claim when a policy holder retained representation or disputed a payment amount. This Court also held that there

would be separate issues as to whether there are any defenses or set-offs to each policyholder's claim and what, if any, damages each policyholder would be entitled to receive. This Court denied class certification concluding that, even if there are common issues, the predominance of individualized factual questions renders this case unsuitable for class treatment and a class action would be unlikely to achieve judicial economy or efficiency.

Plaintiffs only seek to reargue so much of this Court's Decision and Order which denied class certification based upon defendant's conduct as it pertains to its failure to pay profit and overhead. Plaintiffs do not seek leave to reargue this Court's determination denying class certification based upon defendant's practices of sending multiple contractors to inspect a loss, cherry-picking the lowest of its contractor's estimates to adjust the policyholder's claim, or defendant changing its position when an insured retained representation.

Even limiting plaintiffs' proposed class to those of defendant's insureds who should have been paid profit and overhead, class certification should still be denied because the constituency of that proposed class may only be determined after each alleged member of the class proves that they made a claim to defendant for which they were entitled to overhead and profit and that they did not receive it. In order to determine whether a policyholder is entitled to overhead and profit, a determination would have to be made that a general contractor would likely be needed to replace their damaged property. *See Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 766 N.Y.S.2d 719 (3d Dept. 2003). The need to make this individualized determination for each member of the proposed class makes certification untenable herein.

With regard to defendant's motion (Seq. No. 07) for an order dismissing the third cause of action and striking paragraphs 12-22 of plaintiffs' Amended Verified Class Action Complaint, the third cause of action in plaintiffs' Amended Verified Class Action Complaint asserts a cause

of action for breach of contract on behalf of all class members. Since the Court, in its February 23, 2016 Decision and Order, denied all of the class action relief sought by plaintiffs, the third cause of action on behalf of class members must be dismissed as there is no class on whose behalf this claim may be brought. Moreover, since paragraphs 12 through 22 of the Amended Verified Complaint contain class action allegations, they must be stricken as they are irrelevant in light of this Court's determination denying class certification in this matter.

Therefore, based upon the foregoing, plaintiffs' motion (Seq. No. 06), pursuant to CPLR § 2221(d)(2), for an order granting them leave to renew (*sic*) those portions of their prior motion (Seq. No. 05) seeking, *inter alia*, (a) class certification, pursuant to CPLR §§ 901 and 902; (b) appointment of Elbert Greenaway as class representative; (c) appointment of Wilkofsky, Friedman, Karel & Cummings and Greenblatt and Agulnick, P.C. as class co-counsel; (d) directing that notice of class certification be sent to the class by first class mail, which were denied by the February 23, 2016 Decision and Order of this Court, is hereby **DENIED**.

Defendant's motion (Seq. No. 07) for an order (a) dismissing the third cause of action in plaintiffs' Amended Verified Class Action Complaint and (b) striking paragraphs 12-22 of plaintiffs' Amended Verified Class Action Complaint is hereby **GRANTED**.

All parties shall appear for a Certification Conference in IAS Part 37, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on May 17, 2016, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTERED

MAY 25 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER: 
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 16, 2016