SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

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

Plaintiff(s) **Index no. 653519/2014**

-against- **DECISION/ORDER**

SENECA SPECIALTY INSURANCE COMPANY **Motion Sequences No. 6**

Defendant(s)

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Recitation, as required by CPLR § 2219(a), of the papers considered on the review of Seneca Specialty Insurance Company (the Defendant's) motion for summary judgment pursuant to CPLR § 3212

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	1
Answering Affidavits and Exhibits Annexed	2
Replying Affidavits and Exhibits Annexed	3
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Defendant's motion for summary judgment is denied.

2015 Freeman LLC a/k/a 2015 Freeman Avenue LLC (**2015 Freeman**) and 1941 BayMiller LLC (**1941 Baymiller;** 2015 Freeman and 1941 Baymiller, collectively, hereinafter the **Plaintiffs**) each purchased a commercial insurance policy from the Defendant on or about February, 2013 which insured the Plaintiffs against all risks of loss to a commercial building. On or about July 22, 2013, the Plaintiffs each suffered a loss. The Plaintiffs allege that the loss stemmed from vandalism. The Defendants allege that the loss stemmed from theft. Because theft is excluded from coverage under the policy, the Defendants denied coverage. The Defendants

also denied coverage because they argue that there were certain misrepresentations in the applications which effected the underwriting risk.

The Plaintiffs brought this lawsuit claiming that the Defendant wrongfully denied coverage under insurance policies.

The Defendants moved to dismiss pursuant to CPLR § 3211 to dismiss the plaintiff's third cause of action (re: punitive damages) based on documentary evidence and failure to state a cause of action, and, in the alternative, requested summary judgment as to the third cause of action. The Defendants argued that New York law should apply and that under New York law, dismissal was appropriate because (i) the claimed damages were not covered as resulting from theft, (ii) there were misrepresentation in the insurance application, and (iii) the premises were not properly secured as required by the policy. The Plaintiffs cross-moved arguing, among other things, that Ohio law governed.

Pursuant to a Decision/Order, dated April 16, 2015 (**Judge Kern's Decision**), New York State Supreme Court Justice Cynthia S. Kern, held that the Defendant's motion to dismiss and/or for summary judgment was denied and that Ohio law should govern. The Defendants appealed and pursuant to an order, dated February 16, 2016, the First Department affirmed Judge Kern's Decision.

The Defendants brought this motion for summary judgment arguing that the court should grant summary judgment because (i) there are misrepresentations in the application, including that the Plaintiffs indicated that the insured buildings would have a central alarm which they do not, and also would be inspected weekly. which they were not, (ii) the loss stems from theft not vandalism and loss resulting from theft is excluded from coverage, and (iii) the buildings were not properly locked and secured.

It is settled law that summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Failure to make such a prima facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v. New York Univ.*

Med. Center, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]. Once the showing has been made, the burden of going forward shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980].

The Plaintiffs, on the other hand, allege that the losses stem from vandalism not theft because the forceful removal of property that is affixed to real property is vandalism. *See Benson Holding Corp. v New York Property Insurance Underwriting Association*, 124 Misc. 2d 955, 478 N.Y.S. 2d 570, 184 NY Misc. Lexis 3279. Further, relying primarily on *Allstate Insurance Co. v Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855, 56 O.O.2d 130, the Plaintiffs argue that under Ohio law, distinction is made between a misrepresentation and a warranty and a misrepresentation renders a policy voidable while a warranty renders a policy void.[1]

For a representation in an application to constitute a warranty, the Boggs court wrote that it must be included in a statement in the policy it issues or the application must be specifically incorporated by reference into the policy.[2] In other words, the gravamen of the Boggs decision is that the misrepresentation must have been actually relied on and material to the underwriting risks undertaken by the insurer. That is, it must have been fundamental to the deal. In support of this understanding of the Boggs ruling, the Plaintiffs further cite *MBIA Ins. Corp. v. JP Morgan Sec. LLC, 43 Misc.3d 1221(A).*

The Plaintiffs argue that although there may have been misrepresentations in the application with respect to the building's security, the consequences of failing to abide by those provisions are set forth in clear and definitive terms. Specifically, the Plaintiffs argue that the policy provides that the insurer disclaimed coverage for loss from fire or theft for failing to comply with the required safeguards but did not provide that the policy itself was void.[3] In addition, the Plaintiffs argue that based on Anthony Steffa's deposition (the underwriter for Seneca)'s deposition, it is clear

[1] Plaintiff's Memorandum of Law Pertaining to Plaintiff's Application to Dismiss and/or Strike Defendant's Affirmative Defenses and Counterclaims. Pg. 7.
[2] *Allstate Insurance Co. v Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855, 56 O.O.2d 130
[3] Endorsement Protective Safeguards of the Policy. SSI 316 (07/10).

that Seneca did not rely on the representations in the application in underwriting either of the insured buildings.[4]

Inasmuch as there is a material issue of fact as to whether the property was vandalized and coverage exists, and whether Seneca relied on the statements set forth in the application that the Defendants argue are material misrepresentations which should void the policy, the Defendant's motion for summary judgment is denied.

Dated: October 24, 2018

Hon. Andrew Borrok, J.S.C.

[4] *See* Examination Before Trial of Anthony Steffa, Exh. J to the Motion for Summary Judgment, p. 83, l. 2 to l. 12; p. 93, l. 9 to l. 24; p. 96, l. 11 to p. 100, l. 8; p. 103, l. 6 to p. 107, l. 24; p. 109, l. 21 to p113, l. 22; p. 114, l. 22 to p. 118, l. 11; p. 119, l. 6 to p. 120, l. 22; p. 131, l. 13 to p. 132, l. 23 p. 135, l. 9 to p. 137, l. 18; p. 138, l. 16 to p. 141, l. 14; p. 145, l. 7 to p. 150, l. 14; p. 151, l. 9 to p. 155, l. 3; and p. 155, l. 4 to p. 157, l. 23.