

Dorchester, L.L.C. v Herzka Ins. Agency, Inc.

2018 NY Slip Op 34079(U)

February 27, 2018

Supreme Court, Nassau County

Docket Number: Index No. 607478/16

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DORCHESTER, L.L.C.,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 607478/16

MOTION DATE: 2/6/18

Motion Sequence 004

-against-

HERZKA INSURANCE AGENCY, INC.,

Defendant.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Memorandum of Law in Support.....X
- Memorandum of Law in Opposition.....X
- Affirmation in Opposition.....X

Motion by defendant Herzka Insurance Agency, Inc. to compel plaintiff to produce its managing member, Bradford Mott, for a deposition and to compel a further deposition of Evelyn Gillespie is **granted** in part and **denied** in part.

This is an action against an insurance broker for negligence. Plaintiff alleges that the broker's negligence resulted in a misrepresentation in the application for insurance, which allowed the insurer to disclaim coverage under the policy.

Plaintiff Dorchester, LLC is the owner of an apartment building located at 9-17 St. Paul's Road North in Hempstead. Bradford Mott is the sole member of Dorchester. Defendant Herzka Insurance Agency, Inc. was Dorchester's insurance broker.

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Dorchester claims that between October 2010 and June 2013, Herzka electronically transmitted 13 insurance applications to Distinguished Programs Group, an underwriting agent for Great American Insurance Company (Doc 50 at 5). The applications were for umbrella and excess liability policies covering apartment buildings owned by Dorchester or its affiliates (Id at 6). Dorchester claims that each application contained language that buildings were “not eligible” if they had not had their “electrical systems updated in the last 25 years” or they included “single room occupancy” (Id).

Nevertheless, Dorchester claims that on June 27, 2012, Great American issued a certificate of insurance covering 23 apartment buildings owed by Dorchester or its affiliates, including St. Paul’s Road (Doc 41). The coverage provided was a \$5 million umbrella and excess liability policy, which was excess to a primary policy for \$1 million issued by Starr Indemnity & Liability Company, and was for the period August 19, 2012 through August 19, 2013 (Id). Dorchester alleges that the only document which Distinguished ever received from Dorchester or Herzka referring to St. Paul’s Road, prior to coverage being bound on March 26, 2012, was an email from Herzka dated March 21, 2012, stating that the square footage of St. Paul’s Road was 56,550, and that it was a 3 story, 40 year old masonry building, and contained 78 units.

Dorchester alleges that Herzka submitted the insurance application to Great American without verifying the accuracy of the information and without giving the insured an opportunity to review it for accuracy (Complaint ¶ 2). Dorchester alleges that, as a result of Herzka’s negligence, Great American successfully sued to rescind the insurance on the ground of misrepresentation, namely the application falsely stated that the electrical system in the St. Paul’s building had been updated within the last 25 years, and there was no single room occupancy in the building.

On February 9, 2013, a fire occurred in the building, as a result of an unattended candle lit by one of the tenants. The fire resulted in the filing of two wrongful death and two personal injury actions against Dorchester. Mott was named as a defendant in three of the actions. One of the actions in which Mott was named, the Frias action, was settled for \$1,750,000, which Mott paid from his own personal funds. Another of the actions in which Mott was named, the Barillas action, was settled for \$150,000, which was paid by Dorchester.

On July 21, 2014, Great American commenced an action against Dorchester in the federal court for rescission of the umbrella and excess liability policy based upon misrepresentations in the insurance application. In the rescission action, Dorchester filed a third-party complaint against Herzka for negligence and breach of contract. On August 30,

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2016, Judge Alvin Hellerstein granted Great American summary judgment, rescinding the policy based upon misrepresentations with regard to single room occupancy and upgrades to the electrical system. Judge Hellerstein found that “Dorchester had knowledge of the decades-old electrical system and single room occupancy at St. Paul’s Road, that Dorchester’s agent stated otherwise on the insurance application to cover the property, and that these representations were material” (deft’s ex G at 8). Judge Hellerstein found that these misrepresentations, “even if made negligently rather than intentionally,” were sufficient for rescission” (Id).

On August 31, 2016, Judge Hellerstein dismissed the third-party complaint for lack of pendent jurisdiction and tolled the statute of limitations for 30 days, to allow Dorchester to commence a state court action against Herzka. Judge Hellerstein noted that, “The third party complaint raises different issues that will have to be litigated-the conversations and relationship between Dorchester and Herzka, as principal and agent-as opposed to the question of misrepresentations on the insurance application addressed in [Judge Hellerstein’s] action” (Doc 56 at 2-3). Following Judge Hellerstein’s decision, Dorchester and Great American settled the rescission action, with Great American paying Dorchester \$150,000. The rescission of the policy was not effected by the settlement.

The present action was commenced on September 28, 2016. Plaintiff asserts claims for negligence, breach of contract, and indemnification. Plaintiff seeks to recover its damages caused by its non-coverage under the excess liability policy. The primary carrier, Star Indemnity, filed an action in Supreme Court, New York County for rescission of its policy based upon misrepresentation as to “uncorrected fire code violations” (Index No. 651045/13). Although Star’s action is still pending, there appears to be no dispute that plaintiff’s damages in the present action are limited to \$750,000, i.e. the amount by which the settlements exceed the limit of the primary policy, \$900,000, less the \$150,000 received from Great American.

By order dated June 26, 2017, the court denied defendant’s motion to compel discovery of the source and tax treatment of the settlement proceeds in the Frias and Barillas actions. Defendant argued that, to the extent that the settlements were paid by Mott, Dorchester did not suffer any damages. However, in denying the motion to compel, the court reasoned that Dorchester suffered damages, regardless of Mott’s contributing the settlement funds, and tax benefits are not an offset against plaintiff’s out-of-pocket damages (**BRSW v W.R Grace**, 156 AD2d 249 [1st Dept. 1989]).

On November 16, 2017, defendant conducted a deposition of Evelyn Gillespie, plaintiff’s designated representative. Gillespie lacked knowledge as to whether “improvements” had been made to the St. Paul’s building and whether the building had been

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“subdivided” into single room occupancy. Based upon the court’s June 26, 2017 order, Gillespie refused to answer questions about the source and tax treatment of the funds used to fund the Frias settlement.

By notice of motion dated January 19, 2018, defendant moves to compel plaintiff to produce Bradford Mott for a deposition on the issues as to which Gillespie lacked knowledge and to compel a further deposition of Gillespie on the source and tax treatment of the settlement funds, the matters as to which she refused to answer. Defendant argues that the information is material and necessary to defending the action because “it formed the basis for Great American’s rescission of its policy...and addresses Dorchester’s claim for damages” (Memo of Law at 11).

In opposition, plaintiff argues that collateral estoppel bars relitigation of the issues of upgrades to the electrical system and single room occupancy. Plaintiff argues that the source and tax treatment of the settlement funds is not relevant to the issue of damages, and in any event, discovery on these issues has previously been denied by the court.

Generally, insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or to inform the client of the inability to do so. However, the broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage (**Murphy v Kuhn**, 90 NY2d 266, 270 [1997]). Unlike someone receiving services from a doctor or a lawyer, the recipient of the services of an insurance broker is not at a “substantial disadvantage” to question the actions of the provider of services (Id at 273).

However, “particularized situations” may arise in which insurance agents “through their conduct or by express or implied contract with customers and clients,” may assume or acquire duties in addition to those fixed at common law (**Voss v Netherlands Ins**, 22 NY3d 728, 735 [2014]). The question of whether such additional responsibilities should be given legal effect is best determined on a “case-by-case” basis (Id). In **Voss**, the Court of Appeals identified three “exceptional situations” that may give rise to a “special relationship” and an “additional duty of advisement”: 1) the agent receives compensation for consultation apart from payment of the premiums, 2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent, or 3) there was a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on (Id).

The present case involves not a failure to obtain coverage, but rather the obtaining of coverage which the insurer was ultimately able to rescind on the basis of misrepresentation. Clearly, Mott, as the sole member of Dorchester, was aware of the single room occupancy

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at St Paul's and the failure to upgrade the electrical system of the building. Nevertheless, a special relationship may have arisen between Dorchester and Herzka, which might have required Herzka to advise Dorchester as the need to acquire a higher risk policy.

Under the doctrine of issue preclusion, or collateral estoppel, a party will be precluded from re-litigating an issue if 1) the identical issue was necessarily decided adversely in the prior action and is decisive in the present action, and 2) the precluded party must have had a full and fair opportunity to contest the prior determination (**Montoya v JL Astoria Sound, Inc.**, 92 AD3d 736 [2d Dept. 2012]). While Judge Hellerstein necessarily decided the issue of misrepresentation from the point of view of the insurer, he clearly did not reach the issues surrounding the relationship between the insured and the broker. Thus, defendant is entitled to explore the relationship between Dorchester and Herzka by conducting a deposition of Bradford Mott, the sole member of the company. However, for reasons previously discussed, the source and tax treatment of the settlement funds is not subject to discovery.

Accordingly, defendant's motion to compel a deposition of Bradford Mott is **granted**. The deposition shall be held at the courthouse, or at such other location as may be agreed to by counsel, at 9:30 a.m. on March 14, 2018. The deposition shall continue from day-to-day and may not be adjourned without the prior approval of the court. Defendant's motion to compel a further deposition of Evelyn Gillespie is **denied**.

So ordered.

Date: FEB 27 2018


J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE