

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

2018 NY Slip Op 34080(U)

April 3, 2018

Supreme Court, Nassau County

Docket Number: Index No. 607478/16

Judge: Stephen A. Bucaria

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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: 3/23/18
Motion Sequence 005

-against-

HERZKA INSURANCE AGENCY, INC.,

Defendant.

The following papers read on this motion:

- Order to Show Cause.....X
- Affirmation in Support.....X
- Memorandum of Law in Support.....X
- Memorandum of Law in Opposition.....X

Motion by plaintiff Dorchester, LLC for leave to renew and reargue defendant Herzka Insurance Agency, Inc.'s motion to compel plaintiff to produce its managing member, Bradford Mott, for a deposition is **granted**. Upon reargument, defendant's motion to compel is **granted** to the extent indicated below.

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, including the St. Paul's road property (Id at 6). Each application contained language that the 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).

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 covering the St. Paul's property 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 actions for wrongful death and two personal injury actions against Dorchester. Mott was named as a defendant in three of the actions. In one of the actions in which Mott was named, the Frias action, a mother and her two daughters sued for serious injuries which they received when they attempted to jump out of a third story window in the building (Doc No. 29 at ¶ 30-31). 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 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 (Doc 68 at 7). Judge Hellerstein found that these misrepresentations, "even if made negligently rather than intentionally," were sufficient for rescission" (Id at 8).

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. In its answer, defendant Herzka asserted various defenses, including that plaintiff's damages were caused, in whole or in part, by plaintiff's "affirmative wrongdoing" or negligence.

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. The court reasoned that Dorchester suffered damages, regardless of Mott's contributing the Frias settlement funds. However, because any tax benefit to Mott was not an offset against plaintiff's out-of-pocket damages, (**BRSW v W.R Grace**, 156 AD2d 249 [1st Dept. 1989]), defendant was not entitled to discovery as to the source and tax treatment of the settlement funds.

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On November 16, 2017, defendant conducted a deposition of plaintiff's designated representative, Evelyn Gillespie, who is plaintiff's bookkeeper. Although Gillespie lacked knowledge as to improvements at the St. Paul's building and whether it had been subdivided into single room occupancy, these issues are precluded by Judge Hellerstein's order. Of more relevance, Gillespie testified that although Bradford Mott "rarely" dealt directly with insurance brokers, he would "approve" the policy (Doc 128 at 12-13). 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 order dated February 27, 2018, the court granted defendant's motion to compel a deposition of Bradford Mott, plaintiff's sole member. In order for the insured to maintain a negligence action based upon the insurance broker's failure to advise as to proper coverage, there must be a "special relationship" between the insured and the insurance broker (**Voss v Netherlands Ins**, 22 NY3d 728, 735 [2014]); **Murphy v Kuhn**, 90 NY2d 266, 270 [1997]). Clearly, Mott, as the sole member of Dorchester, was aware of the single room occupancy at St Paul's and the condition of the electrical system. Nevertheless, a "special relationship" may have arisen between Dorchester and Herzka, which might have required Herzka to advise Dorchester as to the need to acquire a higher risk policy, covering the building in its actual condition.

Thus, the court determined that defendant was entitled to "explore the relationship" between Dorchester and Herzka by conducting a deposition of Bradford Mott, the sole member of the company. However, because any tax benefit to Mott was not an offset to plaintiff's damages, the court ruled that the source and tax treatment of the Frias settlement funds was not subject to discovery.

By order to show cause dated March 13, 2018, plaintiff moves for leave to renew and reargue defendant's motion to compel a deposition of Bradford Mott. Plaintiff argues that a "special relationship" is not necessary where its theory of negligence is that defendant failed to review the application for accuracy, and failed to provide the insured with an opportunity to review it for accuracy, prior to submitting it to the insurer.

As noted above, Bradford Mott, as the sole member of Dorchester, must be deemed to have had knowledge of both the single room occupancy at the premises, and also the condition of the electrical system. Indeed, Mott is precluded from denying knowledge of these matters by Judge Hellerstein's order. Furthermore, Dorchester was arguably aware that the St. Paul's Road property was not "eligible" for coverage at the rate provided in the June 27, 2012 certificate of insurance. Since Mott "approved" the insurance policy, he was presumably aware not only of the specific coverage, but also the premium rate. In any event,

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Mott may have been guilty of comparative fault by failing to ascertain the inaccuracy in the insurance application between the issuance of the insurance certificate on June 27, 2012 and the fire on February 19, 2013. Thus, Mott's knowledge of the policy's coverage and premium, as well as his relationship with Herzka, is central to the negligence and causation issues in the case.

As discussed above, any tax benefit which Mott may have realized by providing the Frias settlement funds is irrelevant and not discoverable. However, Mott's knowledge of whether the St. Paul's property was being charged the proper premium and any inaccuracies in the insurance application may be proved by circumstantial evidence (Fisch on NY Evidence 2d Ed § 202). Thus, if Mott provided the settlement funds, without receiving a tax benefit, this action may be probative of his prior knowledge that Dorchester was not paying the proper insurance rate.

Accordingly, plaintiff's motion for leave to renew and reargue defendant's motion to compel a deposition of Bradford Mott is **granted**. Upon reargument, defendant's motion to compel is **granted**. The deposition shall be held at the courthouse at 9:30 a.m. on April 16, 2018 and may not be adjourned without the prior approval of the court. At the deposition, the witness may be asked the question, "Did you receive a tax benefit from contributing the settlement funds for the Frias action?" Following the witness' answer, no further questions may be asked concerning the source and tax treatment of the Frias settlement funds.

So ordered.

Date: APR 03 2018


J.S.C.

ENTERED

APR 05 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE