

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

2018 NY Slip Op 34081(U)

June 14, 2018

Supreme Court, Nassau County

Docket Number: Index No. 607478/16

Judge: Stephen A. Bucaria

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

INDEX No. 607478/16

Plaintiff,

MOTION DATE: 5/25/18

Motion Sequence 006

-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
- Affirmation in Opposition.....X
- Memorandum of Law in Opposition.....X
- Reply Memorandum of Law.....X

Motion by plaintiff Dorchester, LLC to strike defendant Herzka Insurance Agency's expert disclosure and to preclude defendant from offering any testimony from its expert, Judith F. Goodman, Esq., is **granted**.

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.

DORCHESTER v HERZKA INSURANCE**Index No.: 607478/16**

Dorchester claims that between October 2010 and June 2013, Herzka electronically transmitted 13 insurance applications to Distinguished Programs Insurance Brokers, 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. On March 21, 2012, an application was submitted for four buildings, including the St. Paul's Road property (Doc 188 at ¶ 28). Each application contained language that the buildings were "not eligible" for coverage, if they had not had their electrical systems "updated in the last 25 years" or they included "single room occupancy" (Id at ¶ 31).

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 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 three actions against Dorchester for personal injury and wrongful death, the Frias, Barillas, and Ramirez actions. Mott was named as a defendant in each of the actions.

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 June 23, 2015, at a mediation at which Herzka was present, the Frias action was settled to \$1,750,000 and the Barillas action was settled for \$150,000 (Doc 48 at ¶ 47-48). Although Mott offered more than \$1 million to settle the Ramirez action, his offer was not accepted at the mediation (Id at ¶ 49).

DORCHESTER v HERZKA INSURANCE**Index No.: 607478/16**

In the rescission action, Dorchester moved for summary judgment, claiming that it was unaware of the “contents” of the St. Paul’s insurance application until after the rescission action was filed (Doc 195 at ¶ 21). Herzka did not submit any papers in connection with the summary judgment motion in the rescission action (Doc 179 at ¶ 17).

On August 30, 2016, Judge Alvin Hellerstein granted Great American summary judgment, rescinding the policy based upon misrepresentations with regard to single room occupancy and failure to upgrade the electrical system. Judge Hellerstein found that Dorchester had knowledge of the electrical system not being upgraded and single room occupancy at St. Paul’s Road, that Dorchester’s agent stated otherwise on the insurance application, 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. On February 2, 2017, Dorchester and Great American settled the rescission action, with Great American paying Dorchester \$150,000 (Doc 210). 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. 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.

On April 16, 2018, defendant served its expert disclosure, designating Judith F. Goodman, Esq. as an expert witness (Doc 221). Defendant states that Ms. Goodman is expected to testify that the statements in the insurance application that the St. Paul’s Road building did not have single room occupancy and that the electrical system had been updated in the last 25 years were not in fact misrepresentations. Ms. Goodman would further testify that the failure to raise these arguments as defenses to Great American’s rescission action was the proximate cause of Dorchester’s lack of insurance coverage under the excess liability policy.

By notice of motion dated May 4, 2018, plaintiff moves to strike defendant’s expert disclosure and to preclude Ms. Goodman’s testimony. Plaintiff argues that the issue of

DORCHESTER v HERZKA INSURANCE**Index No.: 607478/16**

whether the insurance application contained misrepresentations is precluded by Judge Hellerstein's order granting summary judgment in the rescission action. Additionally, plaintiff argues that Ms. Goodman's opinion is a "legal conclusion," and the issue of proximate cause is not a proper subject of expert testimony.

In opposition, defendant argues that the issues in the rescission action and the present action are not "identical," the rescission action was not "decisive," and defendant did not have a "full and fair opportunity" to litigate in the rescission action.

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]). The burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate in the prior action (**Ryan v N.Y. Telephone Co.**, 62 NY2d 494 [1984]).

Plaintiff has established that the issue of misrepresentations in the insurance application, based upon failure to upgrade the electrical system within 25 years and the existence of single room occupancy, were identical to the two actions.

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 [the rescission] action" (Doc 56 at 2-3). Judge Hellerstein did not reach the issues of negligence on the part of Herzka, or comparative fault on the part of Dorchester. However, Judge Hellerstein's finding that there was a material misrepresentation in the insurance application was necessary and decisive to his determination to rescind the policy. Plaintiff has carried its burdens with respect to identity and decisiveness of the issue of misrepresentation.

Among the factors to be considered on the question of full and fair opportunity to litigate are the amount of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, differences in applicable law, and the foreseeability of future litigation (**Shaid v Con Ed**, 95 AD2d 610 [2d Dept. 1983]).

DORCHESTER v HERZKA INSURANCE

Index No.: 607478/16

Herzka was not a party to the personal injury/wrongful death actions. However, because Herzka was present at the June 2015 mediation, it was well aware of the extent of plaintiff's claim at the time of Dorchester's summary judgment motion in the rescission action. The forum of the prior litigation was a United States District Court. Although the ruling as to material misrepresentation in the insurance application was made on summary judgment, Herzka had ample opportunity for discovery prior to Judge Hellerstein's ruling. Herzka's lack of initiative in the rescission action, in failing to make a motion to dismiss the third-party complaint, or even to submit papers on the issue of the materiality of the misrepresentation, is not a basis to deny preclusion. Since Dorchester had already filed a third party complaint against Herzka, Herzka clearly had reason to foresee future litigation. For all of these reasons, defendant Herzka has not established that it was denied a full and fair opportunity to litigate the issue of material misrepresentation in the rescission action.

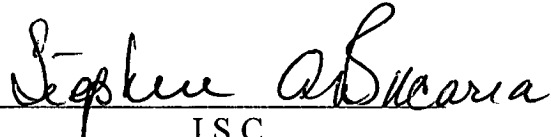
Because Judge Hellerstein did not reach the issue of negligence, his decision is not collateral estoppel on the issue of proximate causation. Expert testimony may be offered to establish a causal relation, which is not within the experience of lay jurors (**Parker v Mobil Oil**, 7 NY3d 434 [2006][illness caused by exposure to toxin]).

Plaintiff's theory of negligence is failure to verify the accuracy of statements concerning the condition of a building in an insurance application, or even to inquire of the insured as to the condition of the premises. Plaintiff claims that defendant's failure to verify or inquire was the "proximate cause" of the lack of insurance coverage. While the obligations of an insurance broker may be a proper subject of expert testimony, Ms. Goodman does not claim to have the necessary qualifications.

Accordingly, plaintiff's motion to preclude defendant from offering any expert testimony from Judith Goodman, Esq. is **granted**.

So ordered.

Date: JUN 14 2018


J.S.C.

ENTERED

JUN 15 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE