New York Prop. Ins. Underwriting Assn. v Bean
2019 NY Slip Op 31599(U)
June 4, 2019
Supreme Court, New York County
Docket Number: 156059/17
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Plaintiff,

-against- Index No.: 156059/17

ANGELA BEAN, Administrator of the Estate of ROSELYN PRATT BEAN, NATIONSTAR MORTGAGE, LLC, SPECIALIZED LOAN SERVICING, THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2003-BC1, THE BANK OF NEW YORK AS SUCCESSOR IN INTEREST TO CHASE BANK, NA AS TRUSTEE FOR CWHEQ 2005-D, AND PARADIGM PUBLIC ADJUSTERS, INC.,

Defendants.

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COHEN, DAVID B., J.

In making the determination below, on this motion, motion sequence number 002, the e-filed documents listed by NYSCEF as document numbers 36-47, 49, 52-69, 70, 72 were read.

Defendants seek to recover insurance proceeds that were deposited with the court by plaintiff, New York Property Insurance Underwriting Association, an insurance underwriting association (insurance association). The insurance association issued a property insurance policy (policy), with coverage for fire damage, to the "Estate of Roselyn Pratt Bean care of Angela Bean as administrator" (the Estate) (Cavanaugh affirmation, exhibit K) covering the home located at 1348 College Avenue in the Bronx (the property). On March 1, 2017, there was a fire at the

home on the property. By order dated February 26, 2018, the insurance association's unopposed motion on its interpleader action was granted (sequence no. 001), and plaintiff was permitted to, and did, deposit $159,742 in insurance proceeds from the policy with the court.

Defendant Paradigm Public Adjusters, Inc. (Paradigm), a public adjuster, claims that it is entitled to a portion of the deposited insurance proceeds for its expenditures for work on the insured home. Paradigm seeks to amend its original pleading, denominated as an answer and counterclaim, which contains a cross claim against "Angela Bean, Administrator of the Estate of Roselyn Pratt Bean" (pleading), to increase the compensation it seeks from $16,149.64 to $67,277.60. Paradigm also moves for an order granting summary judgment, in its favor, for $67,277.60. Defendant Nationstar Mortgage LLC is the servicing company for defendant the Bank of New York Mellon fka the Bank of New York as trustee for the Certificateholders of CWABS, Inc., Asset-backed Certificates Series 2003-BC1 (Mellon I, together with Nationstar, Nationstar). The Nationstar defendants allege that Mellon I holds a first position mortgage on the property and cross-move for an order granting summary judgment in their favor for the $159,724 in insurance proceeds. Defendant Angela Bean, administratrix of the Estate (Bean), opposes both motions.

In 2002, Roselyn Pratt Bean, now deceased, executed a mortgage on the property in order to secure a note in the sum of $175,000. The policy was purchased on October 16, 2016, and its coverage period is December 12, 2016 to December 12, 2017. Although the Estate is the policy's insured, the policy also lists "Nationstar Mortgage LLC" as the "First Mortgagee or Loss Payee as applicable." The $159,724 of insurance proceeds deposited with the court reflect the policy's $175,000 limit of liability from its "Coverage A," dwelling coverage, after the insurance

association's deduction for its costs in this action.

Paradigm's Motion to Amend its Pleading

As a threshold issue, Paradigm moves to amend its pleading, and that motion is granted without opposition. Specifically, Paradigm seeks to amend its pleading to reflect its claim that it is now due $67,277.60 from the "building settlement in the first instance, or from the settlement of Bean's content [coverage] claim" (Paradigm proposed amended answer and counterclaim/ cross claim, ¶ 20). Bean agrees to the amendment, provided that the court permits the interposition of a responsive pleading. In the absence of prejudice or surprise, leave to amend a pleading should be freely granted (*see* CPLR 3025 [b]), and Paradigm's proposed amended answer and counterclaim/cross claim is deemed served. Should Bean seek to submit a responsive pleading, she may do so within 30 days.

Summary Judgment

On a motion for summary judgment, the movant must, through admissible evidence, make a prima facie showing of entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and it must be clear that no material or triable issues of fact are presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Only once the movant has demonstrated such entitlement does the burden shift to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial "or [to] tender an acceptable excuse for [the] failure to do so" (*Zuckerman*, 49 NY2d at 560).

In moving for summary judgment, Paradigm submits the affidavit of John Capriles, who

avers that he is the president and sole shareholder of Paradigm and that, on March 14, 2017, Paradigm entered into a Public Adjuster Compensation Agreement (Paradigm Agreement) with Bean to aid in the preparation, negotiation and/or settlement of the insurance claim for the losses caused by the fire. The Paradigm Agreement provides that Paradigm would be paid a fee for its services in the amount of 4% of the amount of the loss. Capriles further avers that, on March 16, 2017, Bean agreed that Paradigm also would be reimbursed for all vendors retained by Paradigm, and that all of the fees due to Paradigm would be paid from the building settlement in the first instance, or from the settlement of Bean's claim under the policy's coverage for the contents of the home, or paid by Bean personally. Of the $67,277.60 judgment amount Paradigm seeks, Paradigm asserts that $57,582.83 is for invoices to Paradigm from vendors it hired on behalf of Bean and $9,694.77 is for Paradigm's 4% fee. Paradigm states that Bean is aware of the charges incurred on her behalf based upon the March 16, 2017 letter agreement,[1] which includes a list of vendors and the respective prices or anticipated charges for most of the vendors (Capriles aff, exhibit 2).

In opposition to Paradigm's motion, Bean argues that while Paradigm is seeking 4% of the loss, there has been no recovery on the loss. Bean also argues that Paradigm's agreement does not comport with the requirements of 11 NYCRR 25.6 (a), as that provision requires that an adjuster agreement consist of the same information and statements that are contained in a specific form, provided at 11 NYCRR 25.13 (a). Bean asserts that the form provides for payment of a fee "when adjusted or otherwise recovered from the insurance companies" (11 NYCRR 25.13 [a]).

[1] Unless stated otherwise, the Paradigm Agreement and the March 16,2017 letter agreement together will be referred to as the Paradigm Agreement.

Without demonstrating that the Paradigm Agreement is signed by a sublicensee, Bean also asserts that 11 NYCRR 25.6 (b) and (c) require that adjustors that are corporations contain the name of, and be signed by, a sublicensee, and that the Paradigm Agreement does not name a sublicensee, or indicate signing authority for the person who signed the agreement.

Bean further argues that a vendor listed on the March 16, 2017 letter agreement that Bean signed, Cipco Boarding Co., Inc. (Cipro), is seeking payment directly from Bean, and points to an invoice that Paradigm submitted in support of its motion, which is addressed to the Estate (Capriles aff, exhibit 4). Bean's counsel avers that Cipco has contacted him for payment, and that Bean authorized the insurance association to pay policy proceeds directly to Cipco which, Bean contends, should have been done long ago. Bean notes that Cipco's work authorization does not show that Cipro has an agreement with Paradigm. Bean's position is that Cipro, other contractors, and Bean, should be paid directly from the insurance proceeds for the reasonable value of their work and expenditures in saving the building.[2] Although she does not move for relief, Bean asserts that the parties should be directed to seek agreement on a restoration plan for the property, funded from the insurance proceeds, pending a final determination of the parties' rights in a Bronx foreclosure action concerning the property.

Bean notes that Paradigm seeks $2,674.77 in fees based upon Paradigm's purported adjustment of $66,869.22 from the policy's contents coverage, but Bean believes that the insurance association disclaimed coverage. Bean contends that it is premature to award summary judgment to Paradigm before it has even filed an amended pleading and Bean has had an

[2] Bean argues that the contractors who have worked to save the structure be paid their reasonable charges without further delay, but none are parties here.

opportunity to answer.

Nationstar also opposes the motion, arguing that Paradigm's motion should be denied as Paradigm is only entitled to the contents coverage portion of the policy, and not the dwelling coverage. In support, Nationstar points only to Paradigm's statement that there remains a question as to Bean's entitlement to a payout on the contents portion of the policy, and that Paradigm seeks leave to amend its answer to seek compensation from the proceeds of a settlement on that portion of the policy.

Paradigm's motion for summary judgment is denied. The March 16, 2017 letter requires that the amounts due to Paradigm be taken first from the building settlement, and if that was not possible, from settlement of the contents coverage of the insurance policy. Paradigm has not addressed whether or not Bean received such a settlement. While Bean states that she believes that the insurer disclaimed coverage, the basis of this statement is not disclosed. In any event, it is Paradigm which carries the burden of demonstrating the absence of material facts on its motion, not the Estate.

Paradigm submits a charge of $2,674.77 for its work in adjusting a claim of $66,869.22, presumably relating to the policy's "Coverage C" contents coverage, but submits nothing to demonstrate that a settlement was reached with the insurance association concerning that coverage, or that any payout was made. Capriles' assertion that adjustment services were provided is conclusory.[3] Exhibit 3 to Capriles affidavit, upon which Paradigm relies, is merely an invoice for the original $16,149.64 in fees sought in the original pleading, which does not

[3] Paradigm's counsel uses the phrase "her policy" in describing the policy (Lia moving affirmation, ¶ 4), but the only policy in the record is issued to the Estate.

demonstrate that the services were provided. Paradigm does not sufficiently address Bean's contention that the Paradigm Agreement does not comport with the requirements of 25 NYCRR 25.6 (a).

In addition, Paradigm offers no argument or authority to demonstrate that, under the law or the policy, it has a claim to any portion of the insurance proceeds that is superior to that of Nationstar, or any other defendant seeking the same proceeds. To the extend that Paradigm relies on Bean's failure to submit a pleading responsive to Paradigm's cross claim to prove its case, none was required, as CPLR 3011 requires such an answer only where the cross claim contains a demand for same.

Nationstar, to support its cross motion, and in opposition to Paradigm's motion, provides the affidavit of its representative, who avers that Nationstar holds a mortgage on the property, that is the first position mortgage lien, and that when Nationstar filed its motion papers, a sum of at least $309,308.46 was due on the loan, with interest continuing to accrue, and other unspecified amounts also recoverable. Nationstar's counsel affirms that the fire at the property resulted in a loss to the property, exceeding the $175,500 liability limit of the policy's dwelling coverage,[4] and that the other lender defendant in this action has a second position mortgage lien on the property, that is junior to Nationstar's mortgage.

Nationstar correctly argues that a standard mortgagee clause in a homeowner's fire insurance policy creates an independent, separate insurance of the mortagee's interest (*Syracuse Sav. Bank v Yorkshire Ins. Co., Ltd.*, 301 NY 403, 407 (1950); *see White Rose Food Corp. v New York Prop. Ins. Underwriting Assn.*, 98 AD2d 614, 614 [1st Dept 1983]). Nationstar further

[4] The dwelling coverage is "Coverage A" in the policy.

argues that the mortgagee clause of the policy denotes that the insurance proceeds are to be paid to the *first* mortgagee named in the Policy, relying upon Section O of the policy which states that:

> "[i]f a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you [the insured Estate], as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages"

(Cavanaugh affirmation, exhibit K [exhibit A to Morgan aff]). Nationstar is listed on the policy as the "First Mortgagee or Loss Payee as applicable" in the policy's declarations.

Nationstar contends that the mortgage also makes clear that any miscellaneous insurance proceeds are to be paid to the lender, as it provides that:

> "All Miscellaneous Proceeds are assigned to and will be paid to 'Lender'
>
> If the Property is damaged, such Miscellaneous Proceeds will be applied to restoration or repair of the Property, if (a) the restoration or repair is economically feasible, and (b) Lender's security given in this Security Instrument is not lessened. During such repair and restoration period, Lender will have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect the Property to verify that the work has been competed to Lender's satisfaction"

(Clopton aff, exhibit C at 10 of 17). Nationstar argues that there is no dispute that a fire loss occurred at the property, which exceeded the $175,000 policy limits, and states that Bean's answer provides that the fire loss was a "'total loss' of the Property" (Cavanaugh affirmation, ¶ 39).[5] Nationstar states that, because the amount of the mortgage loan exceeds the insurance proceeds, it is entitled to the entirety of the $159,724 in insurance proceeds.

In opposition, Bean argues that Nationstar misstates Bean's pleading as stating that the property is a total loss and has been blocking payment of the proceeds for the home's restoration

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[5] Nationstar does not establish the admissibility of a letter from the insurance association's counsel to Bean's counsel, to demonstrate that Nationstar is entitled to payment. Consequently, the letter is not being considered.

or repair for a year prior to March 2018. Bean's counsel states that none of the lenders have inspected the damage or made efforts to save the structure, when it is the best interest of the parties that the property be preserved.

Bean asserts that Nationstar omits from its submission that the note and mortgage on the property have been the subject of Nationstar's foreclosure action in the Bronx. Bean's counsel asserts that he is counsel for Angela Bean and her brothers in that action, and that they have interposed defenses relating to the existence and amount of the Nationstar loan claim, and have asserted grounds to demonstrate that the purported assignment from the original lender to Nationstar is invalid, which, Bean contends, could obviate Nationstar's claims here. Bean also asserts that a hearing is scheduled in the Bronx, in 2018, concerning whether sanctions should be imposed for misconduct committed by the former attorneys for the plaintiff in the Bronx action in 2012. Bean asserts that a possible outcome of that hearing is dismissal of the foreclosure action, which would affect the amount that Nationstar is claiming (opposition, ¶ 11).

Nationstar neither mentioned the Bronx foreclosure action in moving, nor submitted a reply to Bean's assertions about it, and no party has updated this court as to the outcome of that proceeding or the sanctions proceeding. Nationstar states that it seeks the insurance proceeds to aid in satisfying the loan debt. While Nationstar had an insurable interest on the date of the fire, if the property sale has already occurred, Nationstar's interests, the debt owed, and Nationstar's entitlement to insurance proceeds may be impacted. As explained in *Sportsmen's Park v New York Prop. Ins. Underwriting Assn.* (97 AD2d 893, 894-95 [3d Dept 1983], *affd* 63 NY2d 998 [1984]):

> "The cases make clear, however, that where, as here, there has been an intervening judgment of foreclosure and sale and the mortgagee has purchased the property at the sale, the entire transaction, although subsequent to the fire, will affect the extent of the mortgagee's interest and, thus, the amount it is entitled to receive out of the proceeds of the policy. If the mortgagee has bid in the full amount of its secured debt at the sale, it thereby satisfies its lien and loses all entitlement to any [insurance] proceeds. If the mortgagee bids in for less than the mortgage debt, but fails to obtain a deficiency judgment for the balance, this likewise results in the full satisfaction of the debt and a forfeiture of any rights to share in the proceeds"

(*id.* [citations omitted]; *see Builders Affiliates v North Riv. Ins. Co.*, 91 AD2d 360, 362 [1st Dept 1983] ["ordinarily, the rights of a mortgagee named in the standard mortgagee clause of a fire policy are determined as of the time of the loss, where, subsequent to the fire, the debt has been satisfied in full by purchase at a foreclosure sale, either by the mortgagee or a stranger, the mortgagee's insurable interest terminates and it may not recover under the policy"]). The status of the foreclosure action, or the sale of the property, of which Bean's counsel affirms that he has personal knowledge, was not addressed here by Nationstar. Where Nationstar does not dispute, or even address, plaintiff's counsel's averment of a prior pending matter, which may have already affected Nationstar's interest, or the debt owed, summary judgment is properly denied on this record.

In addition, Nationstar predicates its motion, in part, upon its assertion that Bean, in her answer, conceded that the fire resulted in a total loss. This is not what the answer states (NYSCEF document No. 13, ¶¶ 41-43 [stating that the structure was in danger of collapse and total loss, that the Estate had retained a contractor to stabilize the structure and needed "the insurance proceeds to prevent additional significant damage, and even total loss of the building"]). Presuming that the property is not a total loss, as is required on this motion,

Nationstar's moving papers are devoid of argument as to whether or not it would be entitled to the insurance proceeds.[6]

The parties also do not address the policy's definition of "Miscellaneous Proceeds" as "any compensation, settlement, award of damages, or proceeds paid by any third party (*other than Insurance Proceeds, as defined in, and paid under the coverage described in Section 5*) for: (i) damage to, or destruction of, the Property" (Clopton affidavit, exhibit C at 2 of 17, ¶ M [emphasis supplied]). Section 5 of the mortgage requires that the mortgagor obtain insurance coverage for buildings on the property, including for fire damage. Section 5 also requires that the policy include a "Standard Mortgage Clause" to protect the lender, naming the lender as mortgagee or as an additional loss payee, that property or hazard insurance proceeds would be used to restore the property, except under certain circumstances, and other provisions concerning the lender's holding of the proceeds and payment to an public adjuster (*id.* at 6-7). Section 5 provides for instances where insurance proceeds would be used to reduce the debt owed, but depending on whether the house was sold, and circumstances associated with the sale, there may be no remaining debt. No party has been heard concerning this provision, and. as discussed above, summary judgment is not warranted as the movant did not sufficiently address or eliminate material issues of fact.

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[6] Under the "Miscellaneous Proceeds" section of the mortgage, upon which Nationstar relies in moving, Nationstar was to permit the proceeds to be applied to restoration or repair of the property unless it was economically unfeasible to do so, or the lender's security would be impaired.

Conclusion

In light of the foregoing, it is

ORDERED that the motion of defendant Paradigm Public Adjusters, Inc. to amend its answer, counterclaim and cross claim is granted and the proposed amended answer, counterclaim and cross claim submitted by Paradigm with its moving papers in this motion is deemed served; and it is further

ORDERED that defendant Paradigm Public Adjusters, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendants Nationstar Mortgage, LLC's and The Bank of New York Mellon fka The Bank of New York as trustee for the Certificateholders of CWABS Inc., Asset-Backed Certificates Series 2003-BC1's cross-motion for summary judgment is denied.

Date: JUNE 4, 2019

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.