National Compressor Exch., Inc. v Hanover Ins. Co. Inc.
2019 NY Slip Op 33523(U)
October 23, 2019
Supreme Court, Queens County
Docket Number: 703116/15
Judge: Janice A. Taylor
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

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

----------x

NATIONAL COMPRESSOR EXCHANGE, INC.,

Plaintiff(s),

- and -

HANOVER INSURANCE COMPANY INC. And
USI INSURANCE SERVICES,

Defendant(s).

----------x

Index No.: 703116/15

Motion Date: 7/23/19

Motion Cal. No.: 26

Motion Seq. No: 5

The following papers numbered 1 - 13 read on this motion by defendant Hanover Insurance Company, Inc. ("Hanover"), to dismiss the second amended complaint, in so far as asserted against it, pursuant to CPLR 3211 (a)(1), (5) and (7); and cross motion by plaintiff to re-plead its reformation cause of action and to impose costs and sanctions against counsel for Hanover pursuant to 22 NYCRR 130-1.1.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law.....	5
Notice of Cross Motion-Memorandum of Law.....	6 - 7
Exhibits-Service.....	8 - 9
Reply Memorandum - Service.....	10 - 11
Reply Memorandum - Service.....	12 - 13

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

Plaintiff in this breach of contract action, seeks damages for loss of business income it allegedly incurred when it had no telephone service at its offices on certain days in June and July of 2013. Plaintiff presented a claim to defendant Hanover under a commercial property insurance policy Hanover had issued to plaintiff between December 22, 2012 and December 22, 2013 ("the Hanover Policy"), for lost business income, and Hanover compensated plaintiff in the amount of $12,069.88. Hanover contends that plaintiff was fully compensated in accordance with the terms and

FILED
OCT 28 2019
COUNTY CLERK
QUEENS COUNTY

conditions of the Hanover Policy, which contained a 100% co-insurance requirement. Plaintiff disagreed, and commenced the instant action alleging one count of breach of contract against Hanover, one count of breach of contract against its broker, USI Insurance Services, LLC ("USI"), and one count of negligence against USI.

Plaintiff commenced this action on or about April 1, 2015. Thereafter, plaintiff filed an Amended Complaint on July 8, 2015. By Order dated March 22, 2019, and entered April 1, 2019, this court granted plaintiff's motion for leave to file a Second Amended Complaint, based upon the submissions of the parties. On April 1, 2019, four years after it commenced this action, plaintiff filed its Second Amended Complaint in which is asserts a claim of negligence against USI, breach of contract against both USI and Hanover, and a new claim against Hanover for reformation of the subject Policy. In lieu of answering plaintiff's Second Amended Complaint, Hanover filed the instant pre-answer motion to dismiss. Plaintiff opposes the motion and cross moves for leave to re-plead it reformation cause of action, and for sanctions and costs pursuant to 22 NYCRR 130-1.1, for frivolous conduct pertaining to the motion to dismiss. The cross motion is opposed by Hanover.

Motion

On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, "the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 63 [2d Dept 2013]). The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d at 87; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]).

A claim for reformation of a written agreement must be grounded upon either mutual mistake or *fraudulently induced* unilateral mistake (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986] (emphasis added); *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 1000 [1998]). "A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Phillips v Phillips*, 300

AD2d 642, 643 [2d Dept 2002]). Absent fraud, "the mistake shown must be one made by both parties to the agreement, so that the intentions of neither are expressed in it" (*Migliore v Manzo*, 28 AD3d 620, 621 [2d Dept 2006]; *see Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [1st Dept 2003]; *Matter of Shaw*, 202 AD2d 433, 434 [2d Dept 1994]). In the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement (*Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 800 [3d Dept 2004]; *New York First Ave. CVS v Wellington Tower Assoc.*, 299 AD2d 205 [1st Dept 2002], *lv denied* 100 NY2d 505 [2003]).

Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other. (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 159 [2d Dept 1983]). Nor may it be used to relieve a party from "a hard or oppressive bargain." (*Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the counseled parties: "[T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007], quoting *South Fork Broadcasting Corp. v Fenton*, 141 AD2d 312, 314 [1st Dept 1988], *appeal dismissed*, 73 NY2d 809 [1988]). Reformation is not available where a party simply wishes to escape the terms of a contract (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29 [1st Dept 1992], *lv denied*, 81 NY2d 782 [1993] (citations omitted)). Moreover, a bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation (*Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644, 646 [1989]; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 218-219 [1978]).

Here, plaintiff failed to state a cause of action for reformation of the contract based on mutual mistake. A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Here, both the plaintiff's second amended complaint and the affidavit of its president, whether read separately or together, fail to state a cause of action alleging reformation based on the mistake of both parties. As for the claim of mutual mistake and scrivener's error, the second amended complaint fails to allege the existence of a single mistake, much less a mutual one, or to identify what was agreed upon that is not contained in the challenged writing (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29-30 [1st Dept 1992]). While the

plaintiff's president may have unilaterally misunderstood the parties' agreement, such does not provide a basis for reformation. "One who enters into a plain and unambiguous contract cannot avoid the obligation by merely stating that he erred in understanding its terms" (*Aventine Inv. Mgt., Inc. v Can. Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999], *quoting Touloumis v. Chalem*, 156 AD2d 230, 232 [1st Dept 1989]).

The record also does not disclose any fraudulent or negligent misrepresentation on the part of Hanover, such that a claim of unilateral mistake is established. On the contrary, there is no clear allegation that defendant was ever requested to change the policy coverage from the 100% coinsurance requirement that was originally provided and existed for many years, to a new Policy without the co-insurance requirement. The clear wording of the Policy militates strongly against the claims now asserted. As the document discloses, the parties had mutually agreed to the 100% co-insurance requirement. Most significantly, the prior policies with Hanover, dating back to 2009, all contain the 100% co-insurance requirement. Plaintiff had the policy in its possession for many months prior to the outage but raised no objection. Plaintiff received the policy which it ordered and had ample opportunity to correct it after its issuance and before the loss.

Moreover, a claim of reformation based on unilateral mistake coupled with fraud must be plead with the high degree of particularity mandated by CPLR 3016[b] *(see Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 1198 [2d Dept 2011] ("[I]n the absence of legally sufficient allegations of fraud on the part of Allstate or its agent, Sutton Park's alternative theory of unilateral mistake could not survive the motion for summary judgment."); *Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 aD3d 441, 443 [1st Dept 2007] ("Plaintiffs . . . fail to state a claim for unilateral mistake, as the complaint does not allege fraud with the sufficient particularity."); *Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644, 646 [1989] ("A bare claim of unilateral mistake by plaintiff, unsupported by legally sufficient allegations of fraud on the part of defendants, does not state a cause of action for reformation."). What is required is a showing of unilateral mistake induced by the other party's fraudulent representations (*Kadish Pharmacy v Blue Cross and Blue Shield of Greater NY,* 114 AD2d 439 [2d Dept 1985], *appeal dismissed,* 68 NY2d 641 [1986]). Further, in order to state a cause of action for fraud, plaintiff must allege (I) that Hanover misrepresented a material existing fact; (ii) falsity; (iii) scienter) (iv) deception and (v) injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Plaintiff's Second Amended Complaint does not meet these pleading requirements. Accordingly, the court grants the branch of defendant's motion pursuant to CPLR 3211(a) which is to dismiss the reformation cause of action in the second amended complaint (*see Diecidue v Russo*, 142 AD3d 686, 687-88 [2d Dept

2016]; *Schultz v 400 Coop. Corp.*, 292 AD2d 16, 17 [1st Dept 2002]; *Casolaro v Krupka*, 281 AD2d 504 [2d Dept 2001]).

The branch of the motion which is to dismiss the breach of contract cause of action insofar as asserted against Hanover, is granted, as unopposed and otherwise on the merits.

Cross Motion.

The branch of the cross motion which is for leave to re-plead the reformation cause of action in the Second Amended Complaint, is denied. A cause of action seeking reformation of an instrument on the ground of mistake is governed by the six-year statute of limitations pursuant to CPLR 213(6), which begins to run on the date the mistake was made (*Taintor v Taintor*, 50 AD3d 887, 888 [2d Dept 2008]; *see Amalgamated Dwellings, Inc. v Hillman Housing Corp.*, 299 AD2d 199, 199 [1st Dept 2002]; *Wang v Wong*, 163 AD2d 300, 301-302 [2d Dept 1990], *appeal denied* 77 NY2d 804 [1991], *cert. denied* 501 U.S. 1252, 111 SC. 2893, 115 L. Ed.2d 1058). The date of the mistake is the date that the agreement at issue was executed (*see Stidolph v 771620 Equities Corp.*, 103 AD3d 705, 706-07 [2d Dept 2013]). Here, plaintiff alleges that an "error" occurred on December 22, 2012, the date that the Subject Policy was issued. Therefore, plaintiff had until December 22, 2018, to bring its claim for reformation. Plaintiff did not interpose the reformation claim until April 1, 2019, when it filed its Second Amended Complaint, more than six years after when the subject policy was issued, which was also when the alleged mistake or wrongful act occurred. Accordingly, leave to re-plead the reformation cause of action is denied.

The branch of the cross motion which is for sanctions and fees is denied. Pursuant to 22 NYCRR 130-1.1, sanctions and/or costs may be imposed against a party or the party's counsel for frivolous conduct (*see Genco v Genco*, 124 AD3d 580, 580 [2d Dept 2015]). Conduct is frivolous if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (*see* 22 NYCRR 130-1.1 [c]; *Tso-Horiuchi v Horiuchi*, 122 AD3d 918, 918 [2d Dept 2014]). "[T]he decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, is generally entrusted to the court's sound discretion" (*Coccia v Liotti*, 129 AD3d 763, 764 [2d Dept 2015] [internal quotation marks omitted]). Here, plaintiff failed to establish that Hanover's making of instant motion to dismiss the Second Amended Complaint and other alleged conduct of Hanover and/or its attorney in this proceeding were frivolous within the meaning of 22 NYCRR 130-1.1 (*see Congregation Ahavas Moische, Inc. v Katzoff*, 134 AD3d 934, 934-35 [2d Dept 2015]; *5000, Inc. v Hudson*

One, Inc., 130 AD3d 678, 680 [2d Dept 2015]).

Accordingly, the motion to dismiss is granted. The cross motion for leave to re-plead the reformation cause of action, and for sanctions, is denied.

Dated: October 23, 2019

JANICE A. TAYLOR, J.S.C.

H:\Decisions - Part 15\Decisions - 2019\Law Department\703116-15_NationalCompressor_HanoverInsurance_dismiss_lawdept_sfo.wpd

FILED
OCT 28 2019
COUNTY CLERK
QUEENS COUNTY