

Nationwide Prop. & Cas. Ins. Co. v Johnson
2020 NY Slip Op 30989(U)
April 20, 2020
Supreme Court, New York County
Docket Number: 155247/2017
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X

NATIONWIDE PROPERTY & CASUALTY
INSURANCE CO. a/s/o Diane Rodriguez,

Plaintiff,

INDEX NO. 155247/2017

MOTION DATE _____

MOTION SEQ. NO. 001

- v -

TIMOTHY JOHNSON,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 23, 24

were read on this motion to DISMISS.

Law Office of Charles F. Harms, Jr., Mineola, NY (Angelo Capalbo of counsel), for plaintiff.
Law Offices of Karen L. Lawrence, Brooklyn, NY (Rebecca S. Casas of counsel), for defendant.

Gerald Lebovits, J.:

This motion arises out of a subrogation action stemming from an apartment fire. Diane Rodriguez, the subrogor of plaintiff, Nationwide Property & Casualty Insurance Company, owned a residential condominium unit in 380 Lenox Avenue in New York County. Johnson owned, and resided in, a unit two floors above Rodriguez. In June 2016, a fire broke out in Johnson's apartment, which among other things inflicted approximately \$42,000 of property damage on Rodriguez's apartment. Nationwide paid that amount in full (less a \$1000 deductible) to Rodriguez under a property-insurance policy. Nationwide then brought this action as Rodriguez's subrogee to recover the balance from Johnson.

The note of issue was filed in March 2019. Johnson now moves to dismiss under CPLR 3211 (a) (1) and (a) (7). Alternatively, Johnson moves for leave to amend his answer under CPLR 3025 (b) to add the affirmative defense of documentary evidence. The motion to dismiss under CPLR 3211 (a) (7) is granted; the motion for leave to amend is denied as academic.

Discussion

On a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. We 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." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) Where a motion to dismiss is based on documentary evidence pursuant to CPLR 3211

(a) (1), the claim will be dismissed “if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Id.* at 88.) A motion to dismiss under CPLR 3211 (a) (7), for failure to state a cause of action, must be denied if the factual allegations contained within ‘the “pleadings’ four corners . . . manifest any cause of action cognizable at law.” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002] [internal quotation marks and citations omitted].)

I. Timeliness of Johnson’s CPLR 3211 Motion

Johnson, relying on language in the condominium’s bylaws, argues that this subrogation action is subject to dismissal under both CPLR 3211 (a) (1) and (a) (7). In opposition, Nationwide argues first that both branches of Johnson’s motion to dismiss are untimely. Nationwide is correct as to the branch of the motion seeking dismissal under CPLR 3211 (a) (1). A defense under CPLR 3211 (a) (1) is waived unless raised in the answer or raised in a pre-answer motion to dismiss. (*See* CPLR 3211 [e].) Here, Johnson did neither.

This court does not, however, agree with Nationwide’s assertion that the branch of Johnson’s motion for dismissal under CPLR 3211 (a) (7) also is untimely. This court’s preliminary-conference order provided that “dispositive motions” were to be filed within 60 days of filing of the note of issue. Nationwide claims that this provision of the order required all dispositive motions of any type to be brought within 60 days of the note of issue. Nationwide’s claim, though understandable, is incorrect.

This court’s authority to set dispositive-motion deadlines derives from CPLR 3212, governing summary-judgment motions. That provision expressly permits the court to depart from the CPLR’s default 120-day period in which to move for summary judgment and set a shorter filing deadline—here, 60 days from the note of issue. (*See* CPLR 3212 [a].) CPLR 3211, on the other hand, which governs motions to dismiss, does not confer such deadline-setting authority. To the contrary, a motion to dismiss, like this one, that is brought under CPLR 3211 (a) (7) may be brought before the answer or “at *any* subsequent time.” (CPLR 3211 [e] [emphasis added].) Thus, consistent with the CPLR, the 60-day deadline imposed by the preliminary-conference order here applied only to summary judgment motions under CPLR 3212, not motions to dismiss for failure to state a cause of action under CPLR 3211 (a) (7). Johnson’s motion to dismiss was timely.

II. Whether Nationwide’s Action is Barred by a Waiver of Subrogation

Subrogation is an equitable doctrine that “allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse.” (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997].) Johnson contends that Nationwide’s subrogation action here is subject to dismissal because article V, § 2 of the condominium by-laws provides that “[u]nit owners shall not be prohibited from carrying other insurance for their own benefit provided that all such policies shall contain waivers of subrogation.” This court agrees.

Nationwide argues that Johnson has not introduced the applicable insurance policies, and therefore has failed to show that the policies contain a waiver of subrogation that would bar Nationwide's action. This argument, though, is beside the point: given the language of the by-laws here, the presence or absence of a subrogation waiver from the applicable insurance policies is immaterial.

Condominium by-laws are, "in essence, an agreement among all of the individual unit owners," which "set forth the respective rights and obligations of unit owners." (*Schoninger v Yardarm Beach Homeowner's Assn.*, 134 AD2d 1, 6 [2d Dept 1987].) Where a condominium by-law mandates that any resident-obtained insurance policy contain a subrogation waiver, the presence of that obligation alone suffices to bar subrogation actions—whether or not the policy in fact contains the required waiver. (*See Agostinelli v Stein*, 17 AD3d 982, 984-985 [4th Dept 2005], *modifying* 2003 WL 25759585, at *2 [Sup Ct, Monroe County Oct. 14, 2003]; *Allstate Indemnity Co. v Virfra Holdings LLC*, 2013 NY Slip Op 33924 [U], at *3 (Sup Ct, NY County July 3, 2013, *aff'd* 124 AD3d 528 [1st Dept 2015].¹).

Nationwide misplaces its reliance on the decision of the Appellate Division, First Department in *St. Paul Fire & Marine Ins. Co. v L.E.S. Subsurface Plumbing Co.* (266 AD2d 139, 140 [1st Dept 1999]), which is inapposite here. In *L.E.S. Subsurface*, the First Department declined to give effect to a subrogation-waiver endorsement to an insurance policy because the language of the waiver was not self-executing, and instead contemplated that it would "only occur at the instance of the insured." (*Id.*) In this case, on the other hand, although the condominium by-law permitted rather than required residents to obtain additional insurance policies, it expressly conditioned that permission on the inclusion of a subrogation waiver in all such additional policies, rather than leaving the presence or absence of a waiver to an insured's discretion. That condition thus was not a mere "endorsement" of a subrogation waiver, as Nationwide would have it.² And the by-law's mandate of a subrogation-waiver bars Nationwide's subrogation action here.³

Accordingly, it is hereby

¹ See also e.g. *New York Marine & Gen. Ins. Co. v 320 Parsonage Lane, LLC* (2016 NY Slip Op. 31064 [U], at *2 [Sup Ct, NY County June 8, 2016]); *Greater N.Y. Mut. Ins. Co. v Nasarre* (2009 NY Slip Op 31420 [U], at *6 [Sup Ct, NY County June 26, 2009]); *Wise Underwriting Agency v Tranel* (2007 NY Slip Op 32568 [U], at *6-*9 [Sup Ct, NY County Aug. 8, 2007]).

² Nationwide also cites *Admiral Indemnity v Onetti* (2008 NY Slip Op. 33710 [U], at *6-*7 [Sup Ct., NY County Nov. 17, 2008]), which denied a motion for summary judgment that relied on language in a condominium by-law. But the condominium by-law in *Onetti* was subtly, yet crucially different from the one in this case—it provided that all "policies of physical damage insurance shall contain, to the extent obtainable, waivers of subrogation," thereby contemplating circumstances in which an owner could have complied with the by-law yet obtained an insurance policy lacking a subrogation waiver. (*Id.* at *8 [emphasis in original].) That is not true here.

³ Given this court's grant of Johnson's motion to dismiss under CPLR 3211 (a) (7), the court does not reach Johnson's alternative request for leave to amend his answer under CPLR 3025 (b).

ORDERED that the branch of defendant’s motion seeking to dismiss the complaint under CPLR 3211 (a) (1) is denied; and it is further

ORDERED that the branch of defendant’s motion seeking to dismiss the complaint under CPLR 3211 (a) (7) is granted with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the branch of defendant’s motion seeking leave to amend his answer under CPLR 3025 (b) is denied as academic; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

04/20/20
DATE


HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES
TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE