

551 Deergrow Holdings, LLC v Omni Agency, Inc.

2020 NY Slip Op 31640(U)

May 26, 2020

Supreme Court, Kings County

Docket Number: 516965/2017

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

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551 DEERGROW HOLDINGS, LLC,

Plaintiff,

Decision and Order

-against-

Index No. 516965/2017

THE OMNI AGENCY, INC.,

Defendant.
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Plaintiff's motion seeking an Order for an extension of time to move for summary judgment on good cause shown pursuant to CPLR 3212(a), and for partial summary judgment against defendant on the issue of liability pursuant to CPLR 3212(e), is granted in part and denied in part. Plaintiff has timely moved for partial summary judgment, but said motion is denied on the merits.

Defendant insurance broker was employed by plaintiff to procure and maintain insurance for plaintiff's property, a building located at 312 Tompkins Avenue, County of Kings, NY. Defendant obtained an insurance policy on the building through National Union Fire Insurance Company of PA. The insurance policy became effective on July 17, 2013 and was to run through July 17, 2016. However, the insurance carrier cancelled the insurance policy as of November 14, 2013, as a result of plaintiff's failure to comply with its loss control recommendations. On February 23, 2015, an action was commenced in Queens Supreme Court against plaintiff for damages by an individual who sustained personal injuries allegedly while performing alterations in plaintiff's building on August 29, 2014. Plaintiff alleges that it was only then, after that personal injury action was commenced and plaintiff had requested defendant

notify the insurance carrier about it, that defendant, on July 6, 2015, notified plaintiff for the first time that the insurance policy was not in force and effect at the time of the alleged incident on August 29, 2014. Plaintiff alleges that it was only by a Disclaimer of Coverage letter dated July 11, 2015 from the insurance carrier that it learned for the first time that the policy had been cancelled, that defendant had obtained no other insurance for plaintiff, and that the building was uninsured. Plaintiff brought this action for broker malpractice seeking to recover damages sustained as a result of defendant's alleged failure to procure insurance for its building, causing plaintiff to incur substantial expenses and attorneys' fees as a result of the personal injury action brought against it. Plaintiff moves for partial summary judgment as to liability on the grounds that defendant was negligent and careless toward plaintiff, breaching both its duty as an insurance broker and its contract with plaintiff to procure insurance for its building.

Plaintiff's instant motion for partial summary judgment was brought within 60 days of completion of discovery, and as such is timely pursuant to Brill v. City of New York, 2 N.Y.3d 648 (2004).

Plaintiff moves for summary judgment on its cause of action for liability on the basis of documentary evidence, including emails between the parties and the testimony of defendant's witness, which plaintiff argues shows that defendant was solely responsible for plaintiff's building being uninsured. Plaintiff specifically argues that, as an insurance broker, it was defendant's duty and obligation to secure and maintain an insurance policy for plaintiff's building, and that defendant acted negligently in failing to maintain the policy or inform plaintiff about the insurance carrier's loss control recommendations.

In opposition, defendant raises several issues of fact. Defendant argues that plaintiff was, in fact, aware of the cancellation of its insurance policy, as demonstrated by cancellation notices

sent by the insurance company directly to the plaintiff on August 16, 2013 and October 9, 2013, which are contained in plaintiff's own Exhibit M to its motion papers. Defendant argues that plaintiff also knew that, among the several loss control recommendations, it would have to provide updated Certificates of Insurance for each of the commercial tenants in its building, but that it had only provided Certificates of Insurance for two of its three tenants. Defendant argues that plaintiff's partial production of Certificates of Insurance shortly after the loss control recommendations were first issued on August 16, 2013, including, within days of its issuance, and defendant being in communication with plaintiff about the need for compliance with the Certificates of Issuance, create a material question of fact as to plaintiff's knowledge of the loss control recommendations. Defendant points out that plaintiff's Exhibit M also shows that, on August 29, 2013, defendant asked plaintiff for the missing certificate, after receiving partial responses to the request for Certificates of Insurance, and that according to defendant's deposition witness, plaintiff did not produce the missing certificate for over a year. While plaintiff denies receiving the multiple Notices of Cancellation, defendant notes that in an email sent by plaintiff on October 2, 2013, contained in plaintiff's Exhibit L, plaintiff states that "[w]e received another Notice of Cancellation form from National Union Fire Insurance..."

Plaintiff, in its motion papers, also repeatedly interprets an email defendant sent to plaintiff on August 4, 2015 stating that it will "...take responsibility..." to be an admission of liability, but defendant in opposition characterizes this as a complete misrepresentation. Defendant highlights that, within that email chain, defendant had told plaintiff that it was "...fighting like hell..." to restore plaintiff's insurance coverage, and that defendant's stating it would take responsibility to do so and to "...do what needs to get done..." to restore coverage is not an admission of guilt and is a question of fact for a jury to decide.

This Court finds that plaintiff has failed to make a *prima facie* showing that defendant is liable for damages plaintiff has sustained due to its building being uninsured. The documentary evidence submitted in support of its motion for partial summary judgment, in and of itself, clearly raises material issues of fact. See, Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

This constitutes the Decision and Order of the Court.

Dated: May 26, 2020



Hon. Edgar G. Walker, J.S.C.