Environmental Appraisers & Bldrs., LLC v Praetorian Ins. Co.

2020 NY Slip Op 33675(U)

November 4, 2020

Supreme Court, New York County

Docket Number: 651699/2019

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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ENVIRONMENTAL APPRAISERS AND BUILDERS, LLC,883 EAST 165TH STREET HDFC

Plaintiff,

- v -

PRAETORIAN INSURANCE COMPANY,

Defendant.

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INDEX NO. 651699/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY .

Upon the forgoing documents, defendant's motion for summary judgment is denied for the reasons set forth herein.

Background

In this insurance coverage dispute, plaintiffs Environmental Appraisers and Builders, LLC ("EAB") and 883 East 165th Street HDFC ("883,"collectively with EAB, "Plaintiffs") seek monetary damages from defendant Praetorian Insurance Company ("PIC"), under a theory of breach of contract, to recover additional insurance proceeds to reimburse Plaintiffs for "code upgrade repairs."

The facts are as follows: 883 owned a building located at 883 East 165th Street, Bronx, NY ("the Building"). PIC issued a policy of insurance to 883 bearing policy number H140000448-03, wherein PIC agreed to insure the Building for various losses ("the Policy"). On or about March 23, 2017, the Building sustained fire damage. Subsequently, 883 made a claim to PIC under the Policy for first party property coverage. PIC paid the claim in the amount of approximately $855,000.00.

On or about April 30, 2017, Plaintiffs entered into an agreement whereby EAB agreed to repair the fire damage at the Building, which allegedly included doing code upgrade repairs ("the Agreement"). The Agreement provides that 883 "hereby assigns all his [sic] rights, title and interest in and to all checks or drafts from said insurance carrier for emergency services and fire damages repairs for building claim only." (NYSCEF Doc. No. 23).

Plaintiffs allege that EAB submitted a repair plan to the New York City Department of Buildings, which included code upgrades allegedly required by the New York City Building Code. Allegedly, the Department of Buildings accepted the repair plan. Plaintiffs further allege that at some point EAB completed the work.

On September 7, 2017, pursuant to the "Ordinance or Law" coverage of the Policy, which affords code upgrade coverage, Gary Schwartz ("Schwartz"), an adjuster acting on 883's behalf, emailed Mark T. Jeacoma ("Jeacoma"), the field adjuster retained on PIC's behalf, stating that he wished to discuss the code upgrade work that was allegedly necessary for the Building. The following day, Jeacoma responded to the email stating, "all fees and code upgrades are paid when incurred. Please submit all paid invoices and proper support for the upgrades." (NYSCEF Doc. 24).

Thereafter, on June 21, 2018, Schwartz provided Jeacoma with EAB's invoice for all fees and costs incurred as a result of the code upgrade work, totaling $130,132.25. Plaintiffs allege that in response Jeacoma requested that a description of the necessary code upgrades be provided in writing by the Department of Buildings. Plaintiffs further allege that Schwartz responded to said request by explaining that the Department of Buildings does not provide such a writing.

Subsequently, by letter to Jeacoma dated August 27, 2018, Schwartz demanded an appraisal pursuant to the Policy as to the open issue of coverage and payment under the Policy's "Ordinance or Law Coverage" provision for code upgrade repairs. By letter dated August 30, 2018, PIC denied Plaintiffs' demand for appraisal and denied Plaintiffs' claim for the code upgrade repairs.

On December 12, 2018, Plaintiffs initiated a special proceeding to compel the appraisal pursuant to Insurance Law § 3404, 3408, and the Policy ("the Prior Proceeding"). On January 29, 2019, PIC moved to dismiss the Prior Proceeding. In support of its motion to dismiss, PIC argued that the petition failed to state a cause of action, as appraisals are not available once repairs have already been made. In addition, PIC argued that the alleged assignment provision of the Agreement was not an assignment of 883's claim for code upgrade repairs, and thus, EAB lacked standing. By Order dated May 2, 2019, the Honorable Louis L. Nock dismissed the Prior Proceeding stating "[t]he petitioner's petition to compel an insurance appraisal is DISMISSED, for the reasons set forth in respondent's papers and as respondent's counsel articulated on the record today."

Prior to the May 2, 2019 Order, Plaintiffs initiated the instant suit seeking to recover $130,132.26, plus consequential damages, attorney's fees, interest from March 23, 2017, and costs and disbursements, essentially seeking reimbursement for the code upgrade repairs.

PIC now moves, pursuant to CPLR 3212, for summary judgment to dismiss this suit in its entirety, or alternatively, to dismiss EAB and its cause of action from the instant suit.

<u>Discussion</u>

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim …mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

Claim Splitting

PIC argues that due to the Plaintiffs' initiation of the Prior Proceeding seeking to compel appraisal for the code upgrade work, Plaintiffs have impermissibly divided their claim, thereby violating New York's rule against splitting causes of action. PIC also argues that the May 2, 2019 Order dismissing the Prior Proceeding has collateral estoppel effect, precluding EAB from participating in the instant suit.

In opposition, Plaintiffs argue that they have not split their causes of action because although the Prior Proceeding and the instant suit originate from the same loss, they actually represent completely different causes of action and seek very different relief. The Prior Proceeding was an attempt to compel appraisal on the outstanding issue of 883's code upgrade claim, based upon PIC's failure to abide by Insurance Law § 3404 and 3408. Plaintiffs argue that the Prior Proceeding did not allow for a plenary action to be brought in the same proceeding, as the Prior Proceeding was statutorily limited in scope to enforce a statutory remedy provided under the Insurance Law. Plaintiffs also note that the breach of contract causes of action were not previously litigated in the Prior Proceeding.

Splitting a cause of action is an "application of general res judicata principals to the particular area of an initial lawsuit that seeks less relief than it might have, followed by a second lawsuit for the remainder." 10 New York Civil Practice: CPLR (Weinstein Korn & Miller) P 5011.15 (2020). For example, "a claim for equitable relief will bar a subsequent claim for legal relief when both could have been sought in the original action." Id. Restatement (Second) of Judgments § 26 lists several exceptions to the general rule against claim splitting, which includes the inability of the plaintiff in the first action to include a theory or demand because of limitation on the power of the court. Id. This Court notes that in a CPLR Article 78 proceeding, the damages recoverable are statutorily limited to those damages that are "incidental to the primary relief sought." CPLR 7806.

Here, Plaintiffs initiated the Prior Proceeding to compel PIC to conduct an appraisal, which, pursuant to the Policy and the Insurance Law, is essentially a way to determine the value or the amount of loss. Had Plaintiffs succeeded in the Prior Proceeding they would have been permitted to compel an appraisal and thus have their claim for code upgrade repairs valued and subsequently paid out by PIC. In the instant action, Plaintiffs are seeking monetary and compensatory damages for PIC's alleged breach of contract based not upon PIC's failure to participate in an appraisal but upon PIC's failure to pay out the claim. In the Prior Proceeding, the claim for code upgrade repairs could not have been awarded prior to an appraisal taking place; thus, the code upgrade claim could not have been awarded to Plaintiffs as incidental

damages in the Prior Proceeding had Plaintiffs prevailed as an appraisal is seemingly a condition precedent to payment.

While it is true that the language of Insurance Law § 3408(c) states that an insured *may* apply to the court in the manner provided in Insurance Law § 3408 (a), Plaintiffs could not have obtained the monetary and compensatory damages within the context of an Insurance Law § 3408 special proceeding seeking to compel an appraisal because the relief requested therein was limited by statute and did not include a monetary award.

Accordingly, this Court finds that this action is not barred by claim splitting.

EAB's Lack of Standing

As stated above, PIC argues that the May 2, 2019 Order dismissing the Prior Proceeding has collateral estoppel effect, precluding EAB from participating in the instant suit. Plaintiffs disagree.

The Agreement provides that 883 "hereby assigns all his [sic] rights, title and interest in and to all checks or drafts from said insurance carrier for emergency services and fire damages repairs for building claim only." (NYSCEF Doc. No. 23). This Court agrees with Plaintiffs that the above language is sufficient to create an assignment of the claim, as assigning checks is substantively the same as assigning the claim.

A review of the May 2, 2019 Prior Proceeding transcript illustrates that Hon. Louis L. Nock did not squarely address this issue in his ruling. Furthermore, due to law office failure, Plaintiffs were not present when Judge Knock heard arguments from PIC and made his ruling. Thus, this Court finds that the May 2, 2019 Order does not collaterally estop EAB from being a plaintiff in the instant action.

Accordingly, this Court finds that EAB has standing.

Conclusion

Motion for summary judgment denied.

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11/4/2020	
DATE	ARTHUR F. ENGORON, 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