

Multani v Castlepoint Ins. Co.
2020 NY Slip Op 34390(U)
December 24, 2020
Supreme Court, Queens County
Docket Number: 705105/16
Judge: Leonard Livote
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QUEENS COUNTY

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

-----x
MANJIT L. MULTANI,
Plaintiff,

Index No: 705105/16

-- against --

Motion Date: 9/1/20

CASTLEPOINT INSURANCE COMPANY,
Defendant
-----x

Seq. No:5

The following papers numbered 158-201 read on this motion by Defendant for an Order (1) Compelling compliance with the discovery demand dated December 17, 2019, pursuant to CPLR § 3124; (2) Compelling attendance at the Examination Before Trial after complying with the discovery demands, pursuant to CPLR § 3124; and, the cross-motion by plaintiff for (1) Partial summary judgment as to liability on the first cause of action in accordance with CPLR § 3212(b) and/or CPLR § 3211(e), remanding the matter for an appraisal and staying causes of action #2 and #3 pending the appraisal; (2) Partial summary judgment as to Plaintiff's prima facie case in accordance with CPLR § 3212(g) as to cause of action #1; (3) Ordering an immediate trial on the issue of Defendant affirmative defense as to material misrepresentation in accordance with CPLR § 3211(c), as to cause of action #1.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	158-190
Cross Motion, Affirmation, Affidavits and Exhibits.....	191-199
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Upon the foregoing papers, the motion is granted and the cross-motion is denied.

On May 24, 2014, a fire occurred at the premises owned by plaintiff and insured by defendant. By letter dated March 18, 2016, defendant disclaimed coverage of the claim. The Disclaimer

advised that because the Premises was not configured as a two-family dwelling (it was at least a three-family dwelling) at the time of the loss, it did not qualify as a covered "residence premises" as defined by the Policy. Defendant also disclaimed on the grounds that plaintiff's attempts to disguise and/or conceal the true nature of the Premises during Castlepoint's claim investigation triggered the Policy's Concealment or Fraud clause, which stands as a distinct and independent cause for denial. Plaintiff commenced this action alleging causes of action for breach of contract, violation of GBL § 349, and bad faith.

Defendant moves for summary judgment. Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

The first cause of action alleges breach of contract. The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (*Dee v Rakower*, 112 AD3d 204, 208-09 [2d Dept 2013]).

In the instant case, the contract of insurance states:

"COVERAGE A -
Dwelling
We cover:

1. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling."

Thus, the grant of coverage is limited to a "residence premises," which is defined as:

"8. "Residence premises" means:

a. The one family dwelling, other structures, and grounds; or

b. That part of any other building; where you reside and which is shown as the "residence premises" in the Declarations. "Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations."

Defendant submitted evidence which establishes that the premises were configured as a five-family house and was being used as a three-family at the time of the fire. This is sufficient to establish that plaintiff did not perform under the contract and establish defendant prima facie entitlement to summary judgment.

Plaintiff does not contest these factual assertions. Rather, plaintiff argues that the multiple dwelling defense requires the defendant to prove a material misrepresentation in the procurement the insurance policy.

Where a defendant insurer seeks to rescind an insurance policy, the insurer must prove a misrepresentation by the insured, so as to render the policy void *ab initio* (see, e.g. *Estate of Gen Yee Chu v Otsego Mut. Fire Ins. Co.*, 148 AD3d 677, 677 [2d Dept 2017]). The failure to prove a misrepresentation does not prevent an insurer from disclaiming coverage on the grounds that the insured breached the multiple dwelling clause in the contract (see *Elshazly v Castlepoint Ins. Co.*, 49 Misc 3d 1216(A) [Sup Ct 2015]). Thus, plaintiff has failed to raise an issue of fact and the motion to dismiss the breach of contract claim is granted.

The second cause of action alleges a violation of GBL § 349. Section 349(a) of the General Business Law prohibits "[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." A party seeking to recover under GBL § 349 must allege that the

defendant's acts or practices have a broad impact on consumers at large (*Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 [1999]). " '[P]rivate contract disputes unique to the parties ... would not fall within the ambit of the statute' " (see *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320,, quoting *Oswego*, 85 N.Y.2d 20, 25). Plaintiff's claim is a private contractual dispute which does not allege a broad impact on consumers at large. Accordingly, defendant is granted summary judgment on the second cause of action.

The third cause of action, which purports to be for bad faith, is duplicative of the breach of contract claim. Thus, the motion for summary judgment is granted as to this claim.

Accordingly, the defendant's motion for summary judgment is granted, the plaintiff's cross-motion is denied, and it is,

ORDERED, that the complaint is dismissed.

This constitutes the Order of the Court.

Dated: December 24, 2020


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Leonard Livote, A.J.S.C.

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