Barese v Erie & Niagara Ins. Assn.
2021 NY Slip Op 33195(U)
October 22, 2021
Supreme Court, Ulster County
Docket Number: Index No. EF2016-2097
Judge: Christopher E. Cahill
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER
JUAN C. BARESE,

Plaintiff,

-against-

Decision & Order
Index No. EF2016-2097

ERIE AND NIAGARA INSURANCE ASSOCIATION
and NACCARATO INSURANCE,

Defendants.

Supreme Court, Ulster County
Motion Return Date: July 10, 2020
RJI No.: 55-18-00970

Present: Christopher E. Cahill, JSC

Appearances:

MELVIN T. HIGGINS, ESQ.
Attorneys for Plaintiff Juan C. Barese
195 Wall Street
Kingston, New York 12401

CABANISS CASEY LLP
Attorneys for Defendant Erie and Niagara Insurance Association
4 Tower Place, Suite100
Albany, New York 12203
By: Brian D. Casey, Esq.

LAW OFFICES OF CHRISTOPHER P. FOLEY, ESQ.
Attorneys for Defendant Naccarato Insurance
51 Bedford Road
Katonah, New York 10536
By: Christopher P. Foley, Esq.

Cahill, J.:

Defendant Erie and Niagara Insurance Association ("Erie") moves for summary judgment pursuant to CPLR 3212 seeking the dismissal of plaintiff's complaint which seeks coverage under his Landlords Package Policy issued to him by plaintiff for a September 4, 2014 fire loss. Plaintiff and co-defendant Naccarato Insurance ("Agent') oppose the motion. Plaintiff also cross-moves for summary judgment against both defendants and seeks the striking of their answers and affirmative defenses and the scheduling of a hearing to assess damages. Erie and the Agent oppose the plaintiff's cross-motion, and the Agent cross-moves for summary judgment dismissing plaintiff's complaint. Erie and the plaintiff oppose the Agent's motion. Erie also moves for leave to amend and/or supplement the second affirmative defense in its answer. The plaintiff and the Agent oppose the motion to amend.

In 2002, Eric and Michelle Selke purchased real property located at 119 West Camp Church Road, Saugerties, New York (described in the application as "119 Church Road"). The plaintiff loaned the Selkes funds to purchase the home, and the Selkes executed a mortgage to the plaintiff. The Selkes resided in the home from 2002 to 2014. In 2013, the Selkes failed to make the required mortgage payments, and the plaintiff commenced a foreclosure proceeding. In July 2014, approximately two months before the fire loss, the plaintiff obtained title to the property by foreclosure.

Prior to the plaintiff obtaining title, the Selkes had obtained homeowners insurance through the Agent with Adirondack Insurance Exchange. On August 20, 2013,

Adirondack Insurance issued a cancellation notice based on the Selkes' failure to pay the policy premiums, and on September 10, 2013, Adirondack Insurance cancelled the policy. As the mortgagee, the plaintiff sought to obtain insurance on the property with the Agent. The Agent obtained for the plaintiff a Landlord's Package Policy with Security Mutual Insurance Company. The Selkes continued to reside at the property. On October 28, 2013, Security Mutual issued a cancellation notice to plaintiff because of dogs on the premises and the presence of asbestos, and on November 30, 2013, Security Mutual canceled the policy and the insurance coverage lapsed. The Selkes continued to reside at the property as the foreclosure action proceeded.

On December 3, 2013, shortly after cancellation of the Security Mutual police, the plaintiff appeared at the office of the Agent seeking new insurance coverage for the property. The Agent prepared an application for coverage with Erie and again sought a Landlord's Package Policy for the plaintiff. Erie issued the Landlord's Policy based upon the assertions of the plaintiff and the Agent in the application. On July 9, 2014, the Selkes vacated the property. On September 4, 2014, the vacant property sustained a fire, and on September 8, 2014, the plaintiff filed a claim for his property loss. After a lengthy investigation, Erie denied the claim on December 3, 2015, determining that the fire was an intentional act of arson as gasoline was discovered on the floors of the structure. Erie also denied the claim on the grounds of misrepresentation, concealment, and fraud. On August 9, 2016, the plaintiff commenced the instant action for breach of contract against Erie and for negligence against the Agent.

In support of its motion for summary judgment, Erie relies on its affirmative defenses, the first and third of which assert that the plaintiff intentionally set the fire or intentionally caused the fire to be set. Erie's second affirmative defense asserts that the plaintiff participated in "misrepresentation, concealment and fraud" in the policy application which invalidates the coverage. Erie points out that the application prepared by the Agent and signed by the Agent and the plaintiff was for a Landlord's Package Policy, which is available to owners of rental property but not to mortgagees. Erie maintains that the plaintiff and the Agent misrepresented critical information in that the plaintiff was not the owner, that he was the mortgagee, that there was a pending foreclosure proceeding and that prior policies of insurance, i.e. the Selkes' Adirondack Insurance Policy and the Security Mutual policy, had been cancelled. Erie also alleges that if it had known that the plaintiff's application was false and fraudulent, it would not have issued the policy, and that the denial of plaintiff's claims was warranted by the terms and conditions of the policy. Erie also states that residential coverage is available for mortgagees, but that type of policy is not available if, as here, the mortgage is in foreclosure. In sum, Erie maintains that the plaintiff was ineligible for any policy of insurance for the premises. The plaintiff, in opposition to Erie's motion and in support of his cross-motion, contends that Erie's second affirmative defense alleging fraud or willful misrepresentation was not detailed with sufficient particularity as required by CPLR 3016 (b). He also contends in support of his cross-motion that Erie's disclaimer is untimely under Insurance Law § 3420. Furthermore, in opposition to Erie's motions, the plaintiff

denies that he made any willful misrepresentations to Erie, denies any knowledge of the fire, and asserts that the Agent, as the representative of Erie, prepared the application.

Specifically, he first contends that he told the Agent and the Agent's employees that he did not own the property and that he was the holder of the mortgage. Second, the plaintiff contends that he relied upon the Agent to obtain suitable insurance for the property as he had been a customer for over thirty years. Third, he alleges that the Agent and his employees were responsible for providing the inaccurate information to Erie, that he advised the Agent that he had commenced a mortgage proceeding against the Selkes, and that the application of insurance was mistakenly prepared by the Agent in that the Agent failed to provide the correct information to Erie that he did not own the property and that he was the holder of the mortgage. Fourth, he contends that Erie is bound by the acts of the Agent. Finally, he also claims that since Erie paid a claim for vandalism to the property in 2014, it should not have denied his claim for the fire loss.

In opposition to Erie's summary judgment motion, and in support of its cross-motion to dismiss the plaintiff's action, the Agent claims that it played no role in the arson and that its employee who handled the application mistakenly believed that the plaintiff, as the mortgagee, was the owner of the property because it was in foreclosure, and, therefore, concluded that the plaintiff had an insurable interest in the property and was qualified as an owner for insurance purposes.

In opposition to plaintiff's assertion that the second affirmative defense failed to comply with the requirements of CPLR 3016 (b), Erie states that its second affirmative

defense repeated verbatim the provisions of the policy that related to misrepresentation, concealment, or fraud, and that its answer to interrogatories stated specific acts of misrepresentation, concealment, or fraud on the part of the plaintiff. In addition, Erie states that depositions of two of its employees were held and they testified in detail in regard to the specific acts of plaintiff's misrepresentation, concealment, and fraud. Erie also points out that CPLR 3016 (b) does not apply to contractually based affirmative defenses such as this and that even if it did, Erie's defense was pleaded with sufficient particularity by quoting verbatim the controlling insurance policy language. Nevertheless, Erie moves to amend and/or supplement its second affirmative defense pursuant to CPLR § 3025 (b) to cure any technical defects in the pleading. Erie believes that the motion to amend is not necessary but is made "in an abundance of caution." Erie also maintains that neither the plaintiff nor the Agent moved for a more definite statement upon receipt of its answer. The plaintiff and the Agent oppose the motion to amend.

Leave to amend a pleading rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit (see CPLR § 3025; Ramos v Baker, 91 AD3d 930 [2nd Dept 2012]). Whether to grant or deny leave to amend is committed to the Supreme Court's discretion to be determined on a case-by-case basis (Capezzano Const. Corp. v Weinberger, 150 AD3d 811 [2nd Dept 2017]. Leave to amend may be denied where the opposing party has been or would be prejudiced by a delay in seeking the amendment (Fahey v County of Ontario, 44 NY2d 934 [1978]). The parties

opposing the amendment bear the burden of establishing that they have been prejudiced and must show that they have been hindered in the preparation of their case or otherwise prevented from taking measures in support of their defense (Noble v Slavin, 150 AD3d 1345 [3rd Dept 2017]).

A cause of action alleging fraud and misrepresentation must be pled with particularity pursuant to CPLR 3016 (b). The purpose underlying CPLR 3016 (b) is to inform a party of the complained of incidents. (Eurycelia Partners LP v Seward & Kessel LLP, 12 NY3d 553 [2009]). "CPLR 3016 (b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (Pace v Raisman & Associates, Esqs. LLP, 95 AD3d 1185 [2nd Dept 2012]). In certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud (Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486 [2018].

The court finds that Erie more than satisfied the requirements of CPLR 3016 (b) as its answer placed the plaintiff on notice of the defense of misrepresentation and fraud and quoted verbatim the relevant provision of the policy that provides for the denial of a claim. As stated above, Erie expanded its allegations of misrepresentation and fraud in its answer to plaintiff's interrogatories. Moreover, two of Erie's employees testified at their depositions in regard to the fraudulent acts of the plaintiff, and the Agent and its attorneys had the opportunity to cross-examine the two witnesses relating to that issue. When considering the allegations of misrepresentation and fraud, the court may consider evidentiary material including affidavits, deposition transcripts and other documents that

support the allegations (Old Williamsburg Candle Corp. v Seneca Ins. Co., 66 AD3d 656 [2nd Dept 2009)].

Although this motion is not necessary, as CPLR § 3016 (b) does not, as Erie has argued, apply to contractually based defenses, the court will utilize its discretion (see CPLR § 2001; CPLR § 3025 (b); Betz v Blatt, 160 AD3d 689 [2nd Dept 2018]) and grant Erie's motion for leave to file its amended answer with the proposed amended second affirmative defense (see Exhibit A), as the granting of leave to amend will not prejudice or surprise the plaintiff or the Agent (Berman v Children's Aid Society, 151 AD3d 180 [2nd Dept 2017]). Indeed, it is the preference of New York courts that cases should be decided on the merits (Henry v Datson, 140 AD3d 1120 [2nd Dept 2016].

Returning to the summary judgment issues, the plaintiff, and according to Erie, the Agent, argue that Erie's motion for summary judgment must be denied pursuant to Insurance Law § 3420 as Erie's denial of coverage was untimely. Erie correctly alleges, however, that the statute does not apply as it only provides for coverage for claims by third parties against an insured for personal injuries, but plaintiff's complaint alleges that the denial was of first-party coverage for a fire loss suffered by him as the insured. As a result, the plaintiff is not entitled to the dismissal of Erie's motion for summary judgment on this theory as he sought insurance coverage for property damage pursuant to the policy. In any event, the plaintiff has failed to show that Erie's investigation or its disclaimer letter was untimely. Indeed, plaintiff has not provided any details of the investigation in support of his claim, and the details of the investigation and disclaimer as

provided by Erie show no unreasonableness. Accordingly, plaintiff's cross-motion must be denied as must co-defendant Naccarato's cross-motion to dismiss plaintiff's action to the extent it also relies on Insurance Law § 3420 to assert that the disclaimer was untimely.

Turning to the remaining, it is well established that: "Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (McDay v State, 130 AD3d 1359 [3rd Dept 2016]). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination (Barr v County of Albany, 50 NY2d 247 [1980]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (Winegard v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers (Voss v Netherlands Ins. Co., 22 NY3d 728 [2014]). In addition, it is well-established that to rescind an insurance policy, the insurer must show that the insured made a material misrepresentation of fact when he or she obtained the policy (see Interboro Ins. Co. v Fatmir, 89 AD3d 993 [2d Dept 2011]). It is also well-settled that a misrepresentation is material if the insurer would not have issued he policy had it known of the misrepresentation (Interboro, at 994; Insurance Law § 3105 [b][1]). Ms. Sugg,

plaintiff's Personal Lines Underwriting Manager, substantiates in her supporting affidavit that the misrepresentations that Mr. Barese was the owner and that there was no mortgage, let alone a mortgage in foreclosure, were material. Any claim to the contrary is without merit.

As to plaintiff's assertion in support of his cross-motion that since Erie paid a claim for vandalism to his property in July 2014, Erie ratified the Agent's issuance of the policy and, therefore, should be required to provide coverage for the fire, it is unfounded. At the time of the claim for vandalism, Erie believed, in good faith, that the plaintiff was entitled to coverage under the Landlord's Package Policy. Subsequently, it was discovered when the adjustment company investigated the vandalism claim that the information provided by the plaintiff was fraudulent. According to the affidavit of independent insurance adjuster, Judie Blundell, she investigated the claim for Erie on behalf of Blundell Adjustment Company and met with the plaintiff at the property on July 16, 2014. At the meeting, the plaintiff informed the adjuster that he was the owner of the property since 2000, that the Selkes were his tenants since 2000 and since they had not paid rent since May 2013, he had commenced an eviction proceeding as the rental arrears totaled $12,000.00. Ms. Blundell states that during her investigation, the plaintiff never told her that the Selkes were the owners of the property and that he was the mortgagee. Ratification requires knowledge of material facts (see Cologne Life Reinsurance Co. v Zurich Reinsurance, 286 AD2d 118 [2d Dept 2001]), but here Erie was denied knowledge

of material facts by the plaintiff and there is no proof that Erie had reason to believe that it did not have all the facts. Accordingly, this claim is without merit.

Next, the submissions show that, as with the vandalism claim, the plaintiff did not inform Erie that he was not the owner, that he was instead a mortgagee and that he had commenced a foreclosure proceeding against the Selkes for failure to pay the mortgage. In addition, both the plaintiff and the Agent knew that a prior policy of Landlord insurance for the premises had been cancelled and that the Selkes' insurance policy had been cancelled. Erie's Landlord's Package Policy was intended for property owners and not mortgagees. Erie maintains that had the misrepresentations in the application been known, it would not have issued the policy. While it is well settled that ordinarily credibility is a question of fact for a jury to decide (see e.g. Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435 [3d Dept 2003]), the plaintiff's claim that he played no role in the application for insurance coverage, and that he did not adequately understand English is unconvincing as a matter of law as demonstrated by his lengthy history of dealing with co-defendant and by his own testimony at his examination under oath (EUO) as detailed in defendant Erie's submissions in which he acknowledged that he read the application submitted to Erie by Naccarato Insurance (see Finley v Erie & Niagara Ins. Assn., 162 AD3d 1644 [4th Dept 2013]); Home Mutual Ins. Co. v Lapi, 192 AD2d 927 [3rd Dept 1993]). In addition, plaintiff is bound by his signed application (see Curanovic, supra, at 437). Furthermore, even if his misrepresentations were unintentional or innocent, such as an anticipation that he would become the owner through foreclosure,

this is no defense to voiding the policy (see Curanovic, at p. 436). As to the Agent, Ms. Cafaldo testified at her deposition that she asked for information from Mr. Barese that would go into the applications to Erie on December 3, 2013 and he provided it. But as recently as October 31, 2013, she had made a note about Security Mutual's intention to cancel. The note also documented that she had advised the plaintiff of Security Mutual's intentions and that he in turn had made it clear that he did not want to be "uninsured" and that he held an interest as "private mortgagee."

An insurance company may be liable for the wrongful or negligent acts and misrepresentations of its agent's authority, although the acts or statements exceeded the agent's actual authority or disobeyed the principal's general or express instructions to the agent (Gleason v Temple Hill Assocs., 159 AD2d 682, 683 [2d Dept 1990]); but this general rule of vicarious liability is inapplicable when the agent acts for his or her own purposes (Gleason v Temple Hill Assocs. 159 AD2d at 684). The knowledge of the agent is not imputed to the principal where the circumstances plainly indicate that the agent will not perform his duty and will not reveal information to the principal (Hurley v John Hancock Mut. Life Ins. Co., 247 AD at 551).

Here, there is no issue of fact that Naccarato Insurance violated its duty to Erie and Niagara by (1) stating in the application that plaintiff was the property owner, (2) stating that plaintiff became the owner in May 2011, (3) stating that no mortgage existed and failing to indicate that the mortgage was in foreclosure, (4) indicating that tenants were paying rent, and (5) that denying that no coverage had been cancelled, even though

plaintiff was applying for coverage with Erie and Niagara because Security Mutual had just cancelled coverage. Against this factual background, the Agent's belief that plaintiff had an insurable interest in the property by virtue of the foreclosure proceeding loses its steam. The only conclusion which can be reached was that the Agent was acting to obtain coverage for the plaintiff, a long-time client, which he was not entitled to receive, thereby negating vicarious liability on the part of Erie. Accordingly, Erie is entitled to summary judgment dismissing the plaintiff's complaint (see Gleason v Temple Hill Assocs. 159 AD2d 682 [2nd Dept 1990]).

In reaching this conclusion, the affidavit of Ms. Sugg, Erie's Personal Lines Underwriting Manager, puts to rest the Agent's contention that other coverage was available to the plaintiff from Erie. Ms. Sugg states that had accurate information been provided to Erie, Erie would not have written any coverage for the plaintiff. In any case, the insurer must only show that if accurate information had been provided, it would not have issued the policy applied for by the insured (Curanovic, supra, at 437). As to the Agent's cross-motion for summary judgment dismissing the complaint, it also must be granted. Plaintiff's complaint alleges only "negligence" against the Agent. As the court has found that plaintiff's misrepresentations were fraudulent as a matter of law, that his placing all blame on the Agent was not credible as a matter of law, and that the Agent unfortunately, as described above, "let matters pass" so to speak to aid a longstanding client, plaintiff simply has no claim of negligence against the Agent.

Accordingly, it is

ORDERED that Erie's motion to amend the second affirmative defense is granted, Erie's motion for summary judgment against the plaintiff and the Agent's cross-motion against the plaintiff are granted, and the cross-motion of the plaintiff is denied.

This shall constitute the Decision and Order of the court. The original is being uploaded to NYSCEF for electronic entry and filing by the Ulster County Clerk. Upon such entry, counsel for the plaintiff shall promptly serve notice of entry on all other parties entitled to such notice and is not relived from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme Court and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means.

SO ORDERED.

Dated: Kingston, New York
October 22, 2021

ENTER,

CHRISTOPHER E. CAHILL, JSC

PAPERS CONSIDERED:

1. Notice of Motion dated February 28, 2020; Affidavit of Michael S. O'Shei dated
2. February 21,2020 with exhibits A & B; Affidavit of Ruthann Sugg dated February 21, 2020 with exhibits A-C; Affirmation of Brian D. Casey Esq., dated February 28, 2020 with exhibits A-T; Memorandum of Law dated February 28, 2020;

2. Notice of Cross-Motion dated May 15, 2020; Affirmation of Melvin T. Higgins, Esq., dated May 15, 2020 with exhibits A-W; Affidavit of Juan C. Barese dated May 15, 2020 with exhibits A-O; Memorandum of Law dated May 15, 2020 with exhibits A-U;
3. Notice of Cross-Motion dated June 1, 2020; Affidavit of Dina M. Cafaldo dated May 14, 2020; Affirmation of Christopher P. Foley, Esq., dated May 15, 2020; Affirmation of Christopher P. Foley, Esq., dated June 1, 2020; Memorandum of Law dated July 1, 2020;
4. Affidavit of Joseph Myers, Sr., dated June 3, 2020 with exhibits A-C; Affidavit of Michael S. O'Shei dated June 10, 2020 with exhibits A-H; Affidavit of Judie Blundell dated June 15, 2020 with exhibits A-C; Affirmation of Brian D. Casey, Esq., dated June 18, 2020; Memorandum of Law dated June 18, 2020;
5. Affirmation of Christopher P. Foley, Esq., dated July 8, 2020;
6. Affirmation of Melvin T. Higgins, Esq., dated July 9, 2020;
7. Notice of Motion dated June 17, 2020; Affirmation of Brian D. Casey, Esq., dated June 17, 2020 with exhibits A-G; Memorandum of Law dated June 17, 2020;
8. Affirmation of Melvin T. Higgins, Esq., dated July 3, 2020;
9. Agent's Memorandum of Law dated July 3, 2020;
10. Affirmation of Brian D. Casey, Esq., dated July 8, 2020; Memorandum of Law dated July 8, 2020.