

Albanese v Mountain Val. Indem. Co.

2022 NY Slip Op 31133(U)

April 6, 2022

Supreme Court, New York County

Docket Number: Index No. 156359/2020

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

JODI ALBANESE,

Plaintiff,

- v -

MOUNTAIN VALLEY INDEMNITY COMPANY and SELECT
PORTFOLIO SERVICING, INC.,

Defendants.

INDEX NO. 156359/2020

03/23/2021,
02/03/2022,
02/14/2022,
02/14/2022

MOTION DATE

MOTION SEQ. NO. 003 004 005
006

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 49, and 77

were read on this motion for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 75, 92, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, and 124

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 72, 73, 74, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, and 94

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 76

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, and upon due consideration, it is ordered that the subject motions are consolidated for disposition and determined as follows.

BACKGROUND

This is a first-party property insurance dispute. In her complaint filed August 13, 2020, and her amended complaint filed on February 16, 2021, plaintiff¹ alleges that defendant Mountain Valley Indemnity Company (“Mountain Valley”) issued to her an insurance policy against certain risks of loss at 2769 Barbara Road, Bellmore, New York, (the “Premises”). According to both complaints, the Premises suffered a covered peril on or about December 29, 2019. Plaintiff alleges further that she timely notified Mountain Valley of the loss, Mountain Valley refused to pay her claim, and that Mountain Valley has, therefore, breached the insurance policy.

By notice of motion filed March 23, 2021, Mountain Valley moved (motion sequence number 003) to dismiss the complaint(s) pursuant to CPLR 3211 (a) (1) (a defense founded on documentary evidence), submitting evidence that Mountain Valley’s attorneys sent to plaintiff a request for a signed Sworn Statement in Proof of Loss on March 5, 2020, and included two blank Proof of Loss forms therewith, and that plaintiff received those materials at both her home, and her preferred, mailing address on March 6, 2020 (*see*, NYSCEF Doc. Nos. 40, 41, 42). Mountain Valley points to the policy’s Conditions of Coverage requiring plaintiff to return a signed Sworn Statement in Proof of Loss within sixty days following her receipt of Mountain Valley’s request therefor (NYSCEF Doc. No. 38 at Form No. DP 00 02 07 88). Those sixty days expired May 5, 2020. Mountain Valley denied the claim by notice of disclaimer dated August 19, 2020 (NYSCEF Doc. No. 39), on the ground that plaintiff never provided a signed Sworn Statement in Proof of Loss, and on other grounds.

¹ Who is currently proceeding *pro se*.

Subsequent to the filing of motion sequence number 003, this court granted a motion by now-defendant Select Portfolio Servicing, Inc. (“Select”) – which is a mortgagee beneficiary of the insurance policy (*see*, NYSCEF Doc. No. 52) – to intervene as a party defendant. Select asserted a cross-claim against Mountain Valley to compel Mountain Valley to cover plaintiff’s alleged loss (*see*, NYSCEF Doc. No. 65). In motion sequence number 004, Mountain Valley moves for summary judgment dismissing the cross-claim on the same basis which forms the predicate of motion sequence no. 003; to wit, plaintiff’s failure to satisfy the coverage condition of returning a signed Sworn Statement in Proof of Loss.

Motion sequence no. 005 presents as a motion by plaintiff *pro se* for summary judgment on her amended complaint. However, at no time does she address the aspect of failure to return a signed Sworn Statement in Proof of Loss as the policy requires (*see*, NYSCEF Doc. No. 73, *passim*).

Finally, motion sequence number 006 appears to be a re-filing of motion sequence number 005.

As discussed hereinbelow, the court grants Mountain Valley’s motion to dismiss the amended complaint (motion sequence number 003), thereby rendering all subsequent motions (sequence numbers 004, 005, and 006) moot.

DISCUSSION

CPLR 3211 (a) (1) permits dismissal of an action where “a defense is founded upon documentary evidence.” “Such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]). A paper qualifies as documentary evidence if it is unambiguous; of undisputed authenticity; and its

contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

Here, the documentary evidence on which Mountain Valley relies – referred to in the Background section of this decision, *supra* – meets those criteria (*see*, NYSCEF Doc. Nos. 38 [at Form No. DP 00 02 07 88, pg. 6 of 9], 39, 40, 41, 42).

Plaintiff's failure to submit a Sworn Statement in Proof of Loss is an absolute defense to liability under the policy. Section 3407 of the Insurance Law allows property insurers to include in their policies a provision requiring an insured to submit a Sworn Statement in Proof of Loss within sixty days of the insurer's written demand. The policy here contains such a provision, which provides:

“CONDITIONS

4. Your Duties After Loss. In case of a loss to covered property, you must see that the following are done:

e. send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth to the best of your knowledge and belief:

- (1) the time and cause of loss;
- (2) your interest and that of all others in the property involved and all liens on the property;
- (3) other insurance which may cover the loss;
- (4) changes in title or occupancy of the property during the term of the policy;
- (5) specifications of damaged buildings and detailed repair estimates;
- (6) the inventory of damaged personal property described in 4c;
- (7) receipts for additional living expenses incurred and records that support the fair rental value loss.”

(NYSCEF Doc. No. 38 [at Form No. DP 00 02 07 88, p. 6 of 9].)

When an insurer provides its insured written notice that it desires a proof of loss, and provides, as Mountain Valley did, a suitable form for such proof, “failure of the insured to file proof of loss within 60 days after receipt of such notice . . . is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense” (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 210 [1984]; *see also, Hunter v Seneca Ins. Co.*, 114 AD3d 556, 557 [1st Dept 2014]; *Lentini Bros. Moving & Storage Co., Inc. v New York Property Ins. Underwriting Assn.*, 76 AD2d 759 [1st Dept 1980], *affd* 53 NY2d 835 [1981]). The fact that Mountain Valley investigated plaintiff’s claim, including conducting an examination under oath of plaintiff (*see, NYSCEF Doc. No. 39*), does not constitute a waiver of the Condition of Coverage requiring plaintiff to return a signed Sworn Statement in Proof of Loss (*see, Lentini Bros., supra*, at 761 [“Defendant’s detailed examination of plaintiff’s books and records did not absolve plaintiff from responsibility to comply with the policy requirements as to written proofs of loss and sworn examination when demanded. The obligation of plaintiff to permit examination of its books and records by defendant is independent of its other obligations under the policy and Insurance Law section 168.”]).

As referenced above to the record, the evidence established that on March 5, 2020, Mountain Valley, through its attorneys, sent to plaintiff’s home, and to her preferred mailing address, a letter demanding a signed Sworn Statement in Proof of Loss, and attached to that letter two blank Proof of Loss Forms. This letter was delivered on March 6, 2020. As a Condition of Coverage, plaintiff was required to send Mountain Valley her signed Sworn Statement in Proof of Loss no later than May 5, 2020 – sixty days after she received it. She did not return any such Statement.

Although plaintiff has filed submissions that are evidently intended as opposition papers (see, NYSCEF Doc. Nos. 45-51), at no time does she refute the import of the documentary evidence submitted by Mountain Valley (summarized above); nor does she deny that she did not return a signed Sworn Statement in Proof of Loss.

Accordingly, the motion by Mountain Valley to dismiss the complaint(s) (motion sequence number 003) is granted.

In view of the foregoing, the remaining motions consolidated herein are denied as moot.

Accordingly, it is

ORDERED that the motion by defendant Mountain Valley Indemnity Company to dismiss the complaint(s) (motion sequence number 003) is granted and, therefore, said complaint(s) is/are dismissed; and it is, accordingly

ORDERED that the remaining motions made in this action (motion sequence nos. 004, 005, and 006) are denied as moot.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>4/6/2022</u> DATE	<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE