Filasky v Andover Cos.
2022 NY Slip Op 35231(U)
June 13, 2022
Supreme Court, Nassau County
Docket Number: Index No. 614012/2021
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

PETER L. FILASKY and CHRISTA N. FILASKY,

Plaintiffs,

- against -

THE ANDOVER COMPANIES, CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, BAY STATE INSURANCE COMPANY and MERRIMACK MUTUAL FIRE INSURANCE COMPANY,

Defendants.

Index No.: 614012/2021
Motion Seq. No.: 01
Motion Date: 01/28/2021
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Statement of Material Facts	**1**
Affirmation in Opposition and Exhibits and Counter-Statement of Material Facts	**2**
Reply Affirmation and Exhibits	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(1), (5) and (7), for an order dismissing plaintiffs' Verified Complaint; and move, pursuant to CPLR § 8303-a, for an order granting costs and sanctions for the alleged frivolous conduct by plaintiffs. Plaintiffs oppose the motion.

In support of the motion, counsel for defendants submits, in pertinent part, that, "[a]t the outset, defendant CAMBRIDGE submits that pursuant to the ***applicable*** policy of insurance, the suit period is 1 year from the date of loss.... Therefore, the statute of limitations expired in

February 2016. This November 2021 action is untimely.... Next, even wrongfully assuming the statute of limitations period is three (3) years for property damages commencing on the date of loss February 2015, pursuant to CPLR §214(4) - the action is *still* untimely. Third, even wrongfully assuming, under New York law, that the general statute of limitations applicable to the contractual dispute herein is six years and accrues, 'at the time of the breach' -- the action *remains* untimely. [citations omitted]. Therefore, even wrongfully assuming a six (6) year statute of limitations from the date of loss in February 2015, plaintiff Filasky's causes of action expired in February 2021. The herein action was filed nine (9) months later in November 2021. Therefore, the subject action is untimely and should be dismissed, under any and all time periods." *See* Defendants' Affirmation in Support Exhibit C.

Counsel for defendants further asserts, in pertinent part, that, "[p]laintiff Filasky filed the herein action on November 5, 2021, in Supreme Court, Nassau County against defendants THE ANDOVER COMPANIES, CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, BAY STATE INSURANCE COMPANY and MERRIMACK MUTUAL FIRE INSURANCE COMPANY for three (3) causes of action sounding breach of contract, breach of implied good faith and fair dealing, and fraud.... Plaintiff effectuated service on defendant ANDOVER on/about November 15, 2021, via personal service on November 15, 2021.... Plaintiff Filaksy alleges that on February 3, 2015, certain losses were sustained as the result of property damage stemming from a fire at 2 Chestnut Street, Hicksville, New York 11801 (the 'Subject Premises'), owned by plaintiff Filasky.... Defendant CAMBRIDGE issued to Plaintiffs a homeowner's insurance policy on the Plaintiffs' residence, the real property and improvements thereon known as 2 Chestnut Street, Hicksville, New York 11801, which policy was in full force and effect at all times pertaining to the subject fire on February 3, 2015.... The defendant CAMBRIRDGE's policy of insurance was in effect on February 3, 2015, at which time the Subject Premises sustained property damage due to a house fire. A certified copy of the

CAMBRIDGE policy of insurance with plaintiff Filasky with a policy period of November 7, 2014 through November 7, 2015 and encompassing the date of the subject fire is annexed hereto as Exhibit 'C'. Plaintiffs' Complaint within ¶7 & 27, alleges the following date of loss of February 3, 2015:... Pursuant to the applicable policy of insurance, the suit period is one-year from the date of loss.... Based on the CAMBRIDGE certified policy of insurance ..., defendants THE ANDOVER COMPANIES, BAY STATE INSURANCE COMPANY and MERRIMACK MUTUAL FIRE INSURANCE COMPANY are each improper parties to the instant action and should be dismissed." *See* Defendants' Affirmation in Support Exhibits A-D.

Counsel for defendants argues, in pertinent part, that, "[h]ere, CAMBRIDGE has established a defense as a matter of law by demonstrating with documentary evidence that the subject policy included a one-year suit limitation period and that Filasky commenced this action after expiration of that period. [citations omitted]. It is well established that parties to a contract may agree on a shorter period to commence action than is provided in the applicable statute of limitations. [citation omitted]. It is uncontroverted that contractual limitation of two years after loss for the commencement of suit on a policy of insurance is enforceable. [citations omitted]. Therefore, based on a fire loss date of February 2015 and a commencement date of this action in November 2021, the action is clearly beyond the one-year suit limitations period. As such, this action should be dismissed.... Pursuant to CPLR 3211(a)(1), defendant CAMBRIDGE has conclusively established a defense to the asserted claims as a matter of law by submitting documentary evidence that the policy contains a one-year limitations period and that plaintiffs' action was commenced after the expiration of that period. [citations omitted]. Plaintiffs' contention that they were unaware of the contractual limitations clause because of the length of the policy is insufficient to raise a factual issue as to the applicability of the contractual limitations period, since 'an insured has an obligation to read his or her policy and is presumed to have consented to its terms.' [citation omitted]. Defendant was under no obligation to call plaintiffs' attention to the limitations clause. [citations omitted]. 'An action to recover damages for injury to property must be commenced within three years of the date of the injury and the cause of action accrues 'when the damage is apparent.'' [citations omitted]…. Next, assuming the statute of limitations period is three (3) years for property damages commencing on the date of loss February 2015, pursuant to CPLR §214(4) – this action still time-barred. CPLR 214(4) states, 'the following actions must be commenced within three years: 4, an action to recover damages for an injury to property except as provided in section 214-c.' Here, even under this longer time frame – which is **NOT** applicable – plaintiff's (*sic*) filing is tardy and should be dismissed. These causes of action accrued in February 2015 and this action was not filed until November 2021. Under New York law, the general statute of limitations applicable to contractual dispute is six years. [citations omitted]…. Therefore, assuming a six (6) year statute of limitations, plaintiff Filasky's causes of action expired in February 2021. The herein action was filed nine (9) months later in November 2021. Therefore, the subject action is untimely and should be dismissed." *See* Defendants' Affirmation in Support Exhibit A.

In further support of the motion, defendants submit the Affidavit of Andrew Sarsfield, Claims Examiner for defendants. *See* Defendants' Affirmation in Support Exhibit D.

In opposition to the motion, counsel for plaintiffs asserts, in pertinent part, that, "[i]nitially, Defendants assert that the subject insurance policy (the 'Policy') in effect at the time there was a fire at Plaintiffs' home containing a condition precedent to bringing a lawsuit against Defendants which provides that '[n]o action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.'… establishes Plaintiffs' defense to this action 'as a matter of law'…. Plaintiffs respectfully submit that this premise is erroneous and, as set forth below, fails as a matter of contractual interpretation and public policy. With respect to the loss of a dwelling, which is the case here, the Policy provides that such losses are settled as follows: '. . .at replacement cost without deduction for depreciation, subject to the following. . . [w]e will pay no more than the actual cash value of the damage *until actual repair or replacement is complete.*' Policy at Section 1 - Conditions 3(b)(4).… [emphasis added][.] Therefore, the Policy imposes a condition precedent to the commencement of an action (i.e., replacement of the property) that, as explained herein, could not possibly be met within one year from the date of the loss as the Policy mandates. '[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but *reasonable*, period within which to commence an action is enforceable' [citation omitted]. [emphasis added]. However, the limitation period in this case is <u>not</u> reasonable as it requires an action to be commenced within one years (*sic*) from the date of the loss, while requiring replacement of the property within that same one-year period as a condition precedent to such an action. 'A limitation period that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim.' [citation omitted]. Here, the limitations period is unreasonable. It is well settled in the Appellate Division, Second Department that the rule governing a contractual limitations period shorter than the statutory limitations period is that the shortened limitations period must afford the plaintiff a 'reasonable opportunity to commence its action within the period of limitation' [citation omitted]. In this case, the unreasonableness of the one-year limitation imposed by the Policy is borne out by the fact that, to this day, the insured property has not been replaced for reasons beyond the control of the Plaintiffs. Plaintiffs' Verified Complaint in this action dated November 5, 2021 alleges that the acts of Defendants' agents herein have resulted 'in Plaintiffs' home not being adequately repaired and restored.'… Plaintiff, Peter Filasky's sworn deposition testimony in a related third-party action in which Peter Filasky sued Defendants' agents (<u>Peter Filasky v. Friedman Public Adjusters, et al.</u>, Nassau County Supreme Court Index No. 603273/2016; the '<u>Companion Action</u>') is that damage from the fire at his home in February of 2015 has not been repaired and that there is still a tarp on his home's roof to prevent leaking…. Further evidence of the unreasonableness of the one-year limitation on a lawsuit under the circumstances of this case is an estimate dated November 16, 2017 … that Plaintiffs secured in connection with repairing faulty restoration to the Plaintiffs' home, approximately two years and nine months after the loss, indicating the home had not been repaired or replaced at that time…. The causes of action interposed in Plaintiffs' complaint are (i) breach of contract; (ii) breach of the implied covenant of good faith and fair dealing: and (iii) fraud. Therefore, [the] argument, … that Plaintiff's (*sic*) Complaint is barred by CPLR § 214-4 (statute of limitations governing claim for property damage) appears to be inapposite. Regarding Plaintiffs' cause of action sounding in breach of contract, this claim arises from the acts and omissions of the agents of Defendants' agents, James H. Mason's Sons., Inc. ('Mason's Sons') and Terry Walker ('Walker') for which Defendants are yicariously liable. These acts and omissions constituting Defendants' breach of contract, which involve inspections of the Plaintiffs' home that were to be performed by Masons' (*sic*) Sons and Walker, took place took place after December 29, 2015, and within the applicable statute of limitations. Plaintiffs' causes of action arise from their claims that said inspections never took place. Annexed hereto at Exhibit D is correspondence dated December 29, 2015 from Mason's Sons to Friedman Public Adjusters ('Friedman'), the public adjusters retained by Plaintiffs. By Mason's Sons own account, their own inspection had not taken place as of the date of this correspondence. This inspection (the 'Holdback Inspection') being a condition precedent to the release of certain funds to Friedman…. Walker, in his deposition in the Companion Action, testifies that the Holdback Inspection (which Plaintiffs maintain never took place; and the claim underlying Plaintiffs' breach of contract cause of action) was conducted on January 27, 2016…. As set forth herein, Plaintiffs' breach of contract claim in this action is that the Holdback Inspection was never conducted; yet the holdback funds were, nevertheless, released by Defendants' agents. According to Walker's testimony, the Holdback Inspection was conducted on January 27, 2016. Therefore, this is the date of the accrual of Plaintiffs' breach of contract claim and the date from which the statute of limitations should be measured. The statute of limitations on this claim did not expire until January 27, 2022, two months and 22 days after Plaintiffs filed their complaint in this action. Therefore, this action is timely. Defendants' position that the statute of limitations on this breach of contract should be measured from the date of the fire at Plaintiffs' home is, respectfully, illogical. For the same reasons that Plaintiffs' breach of contract claim was timely filed, Plaintiff's (*sic*) claim sounding in breach of the covenant of good faith and fair dealing - governed by a six-year statute of limitations - is, likewise, timely. Regarding Plaintiffs' cause of action sounding in fraud, the statute of limitations for claims based on fraud is 'the greater of six years from the date the cause of action accrued or two years from the time plaintiff discovers the fraud, or could with reasonable diligence have discovered it.' [citation omitted]. Here, Plaintiffs' claim based upon fraud accrued on January 27, 2016 and, therefore, this claim was also timely filed." *See* Plaintiffs' Affirmation in Opposition Exhibits A-F.

In reply to the opposition, counsel for defendants argues, in pertinent part, that, "[p]aragraphs 9-15 of Filaksy's (*sic*) opposition argues the reasonableness of the limitations period, while simultaneously ignoring the fact that the Complaint was not filed until over six (6) years after the subject fire. Indeed defendants' motion anticipated this argument and notes that the instant action is untimely regardless of the time period employed by the Court. The Court does not need to make a conclusion of law as to the suit limitations period in order to dismiss the Complaint as untimely.... According to the 4-Corners of the Complaint, there are three (3) causes of action for: (1) Breach of Contract Against, (2) Breach of Implied Covenant of Good Faith and Fair Dealing, and (3) Fraud. The words 'replaced' is NOT contained in the Complaint. Plaintiff (*sic*) alludes to the home not being adequately 'repaired and restored'. However, the defendants are insurance carriers. They are not in the business of performing repairs. Nevertheless, the home was repaired to plaintiff's (*sic*) 'Satisfaction.'.... Paragraph 13 of the Opposition notes that the property is not repaired. This has nothing to do with the defendant insurance carriers. In essence, plaintiff (*sic*) argues that the failure to repair the property over the past six years somehow tolls the statute of limitations. Also, defendants note that it is *per se* 'unreasonable' to fail to repair said property for this amount of time. Moreover, plaintiff Filasky already signed a Satisfaction Letter 'that all fire repairs have been completed to my satisfaction at the property,' which is contained with the motion practice of the Separate Action,…" *See* Defendants' Reply Affirmation Exhibits E-G.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired." *Singh v. New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.)*, 107 A.D.3d 780, 970 N.Y.S.2d 33 (2d Dept. 2013); *Macaluso v. Del Col*, 95 A.D.3d 959, 944 N.Y.S.2d 589 (2d Dept. 2012); *Romanelli v. Disilvio*, 76 A.D.3d 553, 907 N.Y.S.2d 258 (2d Dept. 2010). Thereafter, the burden "shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period." *Singh v. New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.)*, *supra* at 781. *See also Benjamin v. Keyspan Corp.*, 104 A.D.3d 891, 963 N.Y.S.2d 128 (2d Dept. 2013).

Based upon the arguments detailed above, the Court finds that defendants have met their burden of proving, *prima facie*, that the time in which plaintiffs had to sue has expired. Furthermore, plaintiffs have failed to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period. Thus, the

Court finds that claims asserted by plaintiffs are indeed barred by the applicable statutes of limitations.

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;..." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Lift Ins. Co. of NY.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard,* 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1, supra, citing* SIEGEL, PRACTICE COMMENTARIES; MCKINNEY'S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendants in their moving papers resolves all factual issues as a matter of law and conclusively disposes of the claims at issue in the Verified Complaint.

Therefore, based upon the above, defendant's motion, pursuant to CPLR § 3211(a)(1) and (5), for an order dismissing plaintiffs' Verified Complaint, is hereby **GRANTED**.

22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part,

> "(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart....
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both....
> (c) For purposes of this Part, conduct is frivolous if:
>> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>> (2) it is undertaken primarily to delay or prolong the

> resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, Including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

"Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct." *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). "Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false." *Id. quoting Mascia v. Maresco*, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). "The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion." *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and guided by the foregoing precepts hereby declines to award costs and sanctions to defendants. *See id.*

Accordingly, the branch of plaintiffs' motion (Seq. No. 06), pursuant to CPLR § 8303-a, for an order granting costs and sanctions for the alleged frivolous conduct by plaintiffs, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

ENTERED
Jun 14 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
June 13, 2022