Tamm Consulting v Cincinnati Ins. Co.
2023 NY Slip Op 35082(U)
November 24, 2023
Supreme Court, Bronx County
Docket Number: Index No. 300124/2018E
Judge: Fidel E. Gomez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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TAMM CONSULTING AND EINAR TAMM,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 300124/2018E

THE CINCINNATI INSURANCE COMPANY, TURNER FORENSICS, TURNER ENGINEERING, P.C., DANIEL D. TURNER, TROY MCCLURE, JOHN DOES, JOHN DOE COMPANIES, AND JOHN DOE INSURANCE COMPANIES, JOHN DOES, JOHN DOE COMPANIES, AND JOHN DOE INSURANCE COMPANIES ARE PEOPLE AND COMPANIES WHOSE NAMES ARE UNKNOWN AND WHO MADE EVALUATIONS, DECISIONS, AND PAYMENT OR NON-PAYMENT DECISIONS, INCLUDING BUT NOT LIMITED TO CLAIMS, DAMAGE, LIABILITY, SUBROGATION, AND/OR REINSURANCE,

Defendants.

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Plaintiffs' motion seeking renewal and reargument of the Court's (Gomez, J.) Decision and Order dated July 18, 2023, which granted defendant The Cincinnati Insurance Company (Cincinnati)'s motion for reargument and, upon reargument, granted its motion for summary judgment dismissing Count 10 of the complaint (the Prior Decision), and upon renewal and/or reargument, an Order vacating the Prior Decision and reinstating Count 10 of the complaint is denied.

BACKGROUND

As relevant here, the complaint alleges the following: In or around June through July 2015, Plaintiffs leased 4 units at a self-storage building: units #131, 138, 148, and 162. Cincinnati insured Plaintiffs under a commercial insurance policy (the Policy) effective April 26, 2013 through April 26, 2016. Under the Policy, Cincinnati is required to reimburse Plaintiffs for

"loss, damage, repair or replacement of its computer equipment, computer data, computer software, and other property, as well as, among other things, resulting expenses and losses." In the summer of 2015, Plaintiffs suffered two "water intrusion [d]amage [i]ncidents" at the warehouse housing the units, which was undergoing demolition and remodeling. On or around July 16, 2015, Plaintiffs discovered, *inter alia,* water damage, dust/debris damage and contamination of racks of computers and other property, and toxic demolition debris falling from the ceiling. Plaintiffs filed Claim #1 and Claim #2 with Cincinnati for reimbursement in connection with those damage incidents. Claim #1 is referenced in the complaint as "Loss discovered on July 16, 2015," and Claim #2 is referenced as "June 26, 2015 Loss" concerning units #131, 138, 148 and 162. Cincinnati made a "partial" payment in the amount of $289,219.87 on Claim #1, but has not yet satisfied a $276,877.99 "limited [r]elease with 10% interest note" (the Release). Cincinnati has not made any payments on Claim #2. Plaintiffs list a number of allegedly unpaid items, which include Valuable Papers and Records (VPR) and Fine Arts (FA) proofs of loss (POLs). Cincinnati and Einar Tamm, not Tamm Consulting & Einar Tamm, signed a Release on July 7, 2017 in which Cincinnati promised to pay $276,877.99 to Einar Tamm only, within 30 days, or be subject to a 10% note (the Release). The Release was only for "bodily and personal injury," and does not apply to property damages for Claims #1 and #2.

The complaint alleges, *inter alia,* the following causes of action, denominated as counts, against Cincinnati: Count 1 - breach of contract for failing to pay in full under the Policy for damage incident #1; Count 3 - breach of contract for failing to pay in full under the Policy for damage incident #2; and Count 10 - breach of contract for failing to pay in accordance with the Release.

On July 29, 2020, Cincinnati filed a motion to dismiss the complaint. On January 25, 2022, the Court (McShan, J.) rendered a decision granting the motion, in part, dismissing most of Plaintiffs' causes of action. Indeed, the only count remaining against Cincinnati was Count 10. Thereafter, Plaintiffs filed a motion to renew and reargue Cincinnati's motion to dismiss.

On September 27, 2022, the Court (Gomez, J.) granted Plaintiffs' motion, in part, and reinstated Counts 1 and 3.

On March 25, 2022, Cincinnati filed a motion for summary judgment dismissing Count 10 of the complaint. By Decision & Order dated October 11, 2022, the Court (Gomez, J.) denied Cincinnati's motion for summary judgment. Thereafter, Cincinnati moved for reargument, which motion was granted by the Court and, upon reargument, the Court dismissed Count 10 of the complaint.

Plaintiffs now seek renewal and reargument of the Court's October 11, 2022 Decision & Order and, upon renewal and/or reargument, the reinstatement of Count 10.

Renewal

Plaintiffs' motion for renewal is denied. Significantly, plaintiffs' motion is not based on new facts not offered on the prior motion that would change the Court's determination. Also, plaintiffs have failed to provide a reasonable, or, indeed, any, justification for their failure to present the alleged "new" facts on the prior motion.

An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court (CPLR § 2221[e]; *Foley v Roche,* 68 AD2d 558, 594 [1st Dept 1979]). Pursuant to CPLR § 2221(e)(2) and (e)(3), a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Matter of Beiny,* 132 AD2d 190, 210 [1st Dept 1987]; *Foley* at 594).

In support of renewal, Plaintiffs allege the following "new" facts: (1) the Court lacked jurisdiction to render the Prior Decision because Cincinnati had perfected its appeal before the date the motion was made; (2) Cincinnati omitted and failed to account for and prove payment for all "expenses necessary to protect covered property;" and (3) Cincinnati failed to account for

and prove payment of remaining unknown payment obligations given the "incomplete Policy" and inadequate discovery responses.

First, none of the foregoing are "new" facts or information which could not have been readily and with due diligence made part of Plaintiffs' opposition to the prior motion. With respect to items (2) and (3) above, those arguments were raised by plaintiffs and considered by the Court in determining the prior motion and, therefore, they are not "new facts." With respect to item (1) above, plaintiffs submit a copy of Cincinnati's appellate brief which was stamped "FILED" on April 27, 2023, well before the submission date of the prior motion. Appellate briefs are public records, which were available to plaintiffs at the time they filed their opposition to the prior motion. Notably, plaintiffs offer no explanation for not submitting this document or this information in opposition to the prior motion. In any event, plaintiffs' claim that the Court lacked jurisdiction to entertain the motion because an appeal had been perfected when the motion was made lacks merit. Significantly, CPLR § 5517, titled "Subsequent orders," presumes that subsequent orders may be made by Supreme Court in a case while an appeal is pending, and addresses the affect of such subsequent orders. Significantly, CPLR § 5517 provides, in pertinent part, that

> . . . [a]n appeal shall not be affected by . . . the granting of a motion for reargument or the granting of an order upon reargument making the same or substantially the same determination as is made in the order appealed from; or . . . the denial of a motion, based on new or additional facts, for the same or substantially the same relief applied for in the motion on which the order appealed from was made.

Further, CPLR § 5501 (c) provides that "[t]he appellate division shall review questions of law and questions of fact . . . on an appeal from an order of the supreme court . . . The notice of appeal from an order directing summary judgment . . . shall be deemed to specify a judgment upon said order entered *after* service of the notice of appeal and *before* entry of the order of the appellate court upon such appeal" (emphasis added).

Read together, these sections evince that a motion for reargument may be made after a notice of appeal is filed and before an order is issued by the appellate division. Prevailing case

law supports this interpretation (*Bray v Gluck,* 235 AD2d 72, 74 [3d Dept 1997] ["Another exception is that a motion for reargument may be brought after the time to appeal has expired if a notice of appeal has been timely filed and the motion is brought prior to the submission of the appeal or at the latest before the appeal is determined, because at that point Supreme Court no longer has discretion to reconsider its order as it is then an order of the appellate court."]; *Bermudez v New York City Housing Authority,* 199 AD2d 356, 357 [2d Dept 1993] ["Contrary to the Authority's contention, Millar's motion for reargument was properly granted based on governing decisional law. Since a notice of appeal has been timely filed, reargument did not serve as a substitute for failure to take a timely appeal." [internal citations omitted]; *see also Aridas v Caserta,* 41 NY2d 1059, 1061 [1977] ["Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made."]; *McMahon v. City of New York,* 105 AD2d 101, 104 [1st Dept 1984] [same]; Siegel, N.Y. Prac. § 532, at 835 [2d ed]).

Reargument

Plaintiffs' motion for reargument is denied. First, as noted above, Cincinnati previously filed a motion for summary judgment dismissing Count 10 of the complaint - breach of contract for failing to pay in accordance with the Release. By Decision & Order dated October 11, 2022, the Court (Gomez, J.) denied Cincinnati's motion for summary judgment. Thereafter, Cincinnati moved for reargument, which motion was granted by the Court and, upon reargument, the Court dismissed Count 10 of the complaint. Plaintiffs now seek renewal and reargument of the Court's October 11, 2022 Decision & Order and, upon renewal and/or reargument, the reinstatement of Count 10. Insofar as the issue of whether Cincinnati satisfied the Release has been the subject of argument before this Court on two prior occasions, the Court declines to consider it once again. At this juncture, plaintiffs must avail themselves of the appeals process concerning this issue. For this reason alone, the motion must be denied.

Were the Court to consider the motion, it would still be denied because plaintiffs have not established that the Court overlooked or misapprehended a matter of law or fact in determining the prior motion.

"A motion for leave to reargue is addressed to the sound discretion of the Supreme Court" (*Rides Unlimited of New York, Inc. v Engineered Energy Solutions, LLC,* 184 AD3d 695, 695 [2d Dept 2020]; *Bueno v Allam,* 170 AD3d 939, 940 [2d Dept 2019]; *Foley v Roche,* 68 AD2d 558, 567 [1st Dept 1979]).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. However, reargument may not serve to provide a party an opportunity to advance arguments different from those tendered on the original application. Nor may it be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. . . . 'A motion for reargument is not an appropriate vehicle for raising new questions'" (*Foley* at 567-568; *see also DeSoignies v Cornasesk House Tenants' Corp.,* 21 AD3d 715, 718 [1st Dept 2005] ["Reargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced'"]).

As noted above, Count 10 of the complaint alleges a cause of action for breach of contract. Plaintiffs allege that Cincinnati failed to pay in accordance with the Release. In the Prior Decision, the Court determined that Cincinnati made full payment in accordance with the Release.

In opposition to the prior motion, plaintiffs advanced various arguments which, essentially, include the following: (1) the intent of the Release was a 10% percent note/annuity paying $27,687.79 in perpetuity toward Plaintiffs' medical and other expenses for past/present/future bodily and personal injuries and hospital and medical charges caused by Cincinnati misrepresenting the toxic contamination in the storage units, (2) the motion was premature as critical discovery had not been provided, and (3) issues of fact exist as to the nature of the payments made by Cincinnati to plaintiffs.

In support of the instant motion, plaintiffs contend that the Court misunderstood the following issues: (1) At the time of Cincinnati's motion for summary judgment, there had been

no preliminary conference in the case and Cincinnati has refused to produce certain documents; (2) The Release does not contain a detailed recital or itemization of past consideration and obligations released as mandated by Insurance Law § 216 and General Obligations Law § 5-1105; (3) Cincinnati did not produce the settlement agreement referenced in the Release or a complete copy of all checks with pay stubs; (4) Cincinnati made a payment to Tamm Consulting in the amount of $12,341.88 after the Release was executed indicating that the Release did not apply to Claim # 1; (5) Cincinnati has made no payments for personal injuries; (6) the Release did not specifically refer to the property in Claim # 1; (7) the Release is ambiguous regarding future obligations of payment by Cincinnati; (8) Many of the checks produced by Cincinnati were not paid within 30 days of the Release and, therefore, they do not qualify as a "payment" under the Release; (9) Cincinnati's attorney has stated different amounts paid by Cincinnati indicating there is a disputed issue of material fact; (10) Cincinnati did not explain why it did not use its standard property release; and (11) Cincinnati pursued subrogation for more than the damages paid to Tamm Consulting indicating more was still owed to Tamm Consulting in 2018.

The vast majority of the foregoing issues were argued by plaintiffs, and rejected by the Court, on the prior motion, and therefore, they may not be considered on this motion. To the extent that plaintiffs make new arguments not previously advanced, those arguments may also not be considered, as "[a] motion for reargument is not an appropriate vehicle for raising new questions" (*Foley* at 567-568; *William P. Pahl Equipment Corp. v Kassis,* 182 AD2d 22, 27 [1st Dept 1992] ["Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted."]). Accordingly, it is hereby

ORDERED that plaintiffs shall serve a copy of this Decision and Order upon all defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
November 24, 2023

Hon. FIDEL E. GOMEZ, J.S.C.

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