DeCicco v Elite 1800Adjusters Inc.
2024 NY Slip Op 35415(U)
May 29, 2024
Supreme Court, Queens County
Docket Number: Index No. 700494/2019
Judge: Anna Culley
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ANNA CULLEY IA Part 27
Justice

---X

PETER DeCICCO,

Plaintiff,

-against-

ELITE 1800ADJUSTERS INC.,
DAVID ROMANO,
FIRST RESPONSE CLEANING CORP.,
and CHARLOTTE WALSH,

Defendants.

---X

Index Number 700494 /2019

Motion Date August 22 , 2023

Mot Seq. No. 2

The following numbered papers read on this motion by defendants Elite 1800Adjusters Inc. (Elite) and David Romano pursuant to CPLR 3212 for summary judgment in their favor dismissing plaintiff's complaint as against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 34-41
Answering Affidavits - Exhibits	EF 42-45
Reply Affidavits	EF 46-50

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

Plaintiff commenced this action on January 9, 2019 seeking damages against defendant Elite, his public adjuster, for breach of contract, promissory estoppel, unjust enrichment and fraud, and against Elite's president, David Romano, for fraud.[1]

On or about January 10, 2013, plaintiff's single-family residence located at 85-40 253rd Street, Bellerose, New York (the "Premises") sustained damage as a result of a fire (the "First Fire"). Thereafter, plaintiff retained defendant Elite as a public insurance adjuster to assist him in the adjustment of his claim for reimbursement under his homeowner's policy of insurance. Plaintiff's retainer agreement with Elite specifically sets forth the limited scope of Elite's representation "to act or aid in the preparation, presentation, adjustment and negotiation of or effecting the settlement of the claim...." Plaintiff agreed therein to pay Elite a percentage of the loss (including salvage) when adjusted or otherwise recovered from the insurance company.

Plaintiff entered into a separate contract with defendant First Response Cleaning Corp. (First Response), as the contractor to mitigate the damage caused to the Premises and its contents by the First Fire, and to repair and rehabilitate the Premises. On or about January 23, 2013, plaintiff's insurance company issued a check in the amount of $37,843.56 as a partial payment of plaintiff's insurance claim, made payable to plaintiff and defendant Elite. On or about September 27, 2013, plaintiff's insurer issued a second check, made payable to defendant Elite, in the amount of $2,305.77.

Thereafter, on or about March 24, 2013, a second fire occurred at the Premises (the "Second Fire") which plaintiff alleged was caused by defective electrical wiring installed by the contractor, defendant First Response. Two days after the Second Fire, the plaintiff through counsel, sent written notice that defendant Elite's services were being terminated. The second fire was substantially larger than the first and encompassed at least 75% of the property, while the first fire affected approximately 25% to 33% of the property. Plaintiff testified that after the Second Fire, he recovered additional money from his insurance company enabling him to hire contractors to restore the Premises into the condition it was in before the First Fire. He further testified that those new contractors were paid in full from those insurance funds; that he did not need to spend more than what the insurance company paid him; and that he thereafter sold the Premises.

---

[1]The remaining causes of action in plaintiff's complaint asserted against co-defendants First Response Cleaning Corp. and Charlotte Walsh were discontinued after settlement.

Defendants Elite and Romano now move for summary judgment dismissing plaintiff's complaint as against them.

Defendants Elite and Romano, submitted competent evidence, including the parties' examinations before trial testimony, which established their prima facie entitlement to summary judgment as a matter of law. This evidence established that defendant Elite did not breach its agreement with plaintiff; that there were no damages sustained by plaintiff as plaintiff was fully compensated for all his losses from both fires; that the existence of a contract governing the subject matter, that is, the retainer, precludes recovery in quasi contract against Elite and as such, the promissory estoppel and unjust enrichment causes of action are not viable; that defendant Romano may not be held personally liable merely because of his status as officer of the defendant corporation; that the complaint fails to state causes of action for fraud against Elite and Romano; that the claims of fraud were not plead with specificity as required under CPLR 3016 (b); that there was no fraud on the part of defendants Elite and Romano; that there were no misrepresentations made by defendants Elite and Romano to plaintiff; that plaintiff and defendants Elite and Romano are in agreement that Elite's fee set forth in the subject retainer agreement was 5%; that Travelers' alleged payment of 6% was based on a mistake by Travelers, and not on any fraud or misrepresentation by defendants Elite and Romano.

Plaintiff, in opposition, to the motion failed to raise any triable issues of fact. To the extent that plaintiff alleges that the insurer, Travelers, may have paid a 6% instead of a 5% commission to defendant Elite, plaintiff fails to establish any wrongful conduct on the part of defendants Elite and Romano related thereto. There is also no evidence to support plaintiff's contention that a triable issue exists as to whether Elite kept the proceeds of the $37,843.56 Travelers' check. Defendant Romano testified that the check for $37,843.56 was not deposited into Elite's account, and the account number on the back of the check was not Elite's account. In addition, pursuant to the terms of plaintiff's contract with contractor, defendant First Response, plaintiff agreed to assign and direct Travelers' insurance payments to First Response for its work. Moreover, endorsements on the back of that check for $37,843.56 evidence the check was endorsed over to First Response and the funds therefrom paid by Travelers were used to satisfy plaintiff's obligation to pay First Response for its repair and rehabilitation of the Premises after the First Fire, and prior to the Second Fire.

Plaintiff's assertion that he sustained $40,000.00 in damages is unsupported by any competent proof. Where, as here, plaintiff's self-serving affidavit, submitted in opposition to the summary judgment motion, contradicts plaintiff's own deposition testimony and appears to be tailored to buttress plaintiff's arguments, it is insufficient to raise a triable issue of fact. (*See Hernandez-Vega v Zwanger-Pesiri Radiology Group,* 39 AD3d 710 [2d Dept 2007]; *see also Bennett v Robinson*, 35 Ad3d 643 [2d Dept 2006]; *Gadonniex v Lombardi*, 277 AD2d 281 [2d Dept 2000].) In that affidavit, plaintiff further avers that his attorney was informed by defendant Romano that at the time of the Second Fire, defendant First Response, had only performed $10,000 worth of work. This is hearsay and in any event, insufficient to raise a triable issue to preclude the granting of summary judgment to the moving defendants, Elite and Romano.

Accordingly, the motion by defendants Elite and Romano for summary judgment is granted and plaintiff's complaint against them is dismissed.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.

A. Culley

ANNA CULLEY, J.S.C.

Dated: May 29, 2024

FILED
5/31/2024 TA
COUNTY CLERK
QUEENS COUNTY