BR 10th St. Partners LLC v Seneca Specialty Ins. Co.
2025 NY Slip Op 31122(U)
March 31, 2025
Supreme Court, New York County
Docket Number: Index No. 651712/2024
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

---X

BR 10TH STREET PARTNERS LLC

Plaintiff,

- v -

SENECA SPECIALTY INSURANCE COMPANY,

Defendant.

---X

INDEX NO. 651712/2024

MOTION DATE 02/26/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 36, 37

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Defendant's motion for leave to amend its verified answer is granted.

Background

This breach of contract case is about whether plaintiff BR 10th Street Partners LLC ("10th Street") is entitled to a larger payout from defendant Seneca Specialty Insurance Company ("Seneca") for damage to 10th Street's building located at 37-10 10th Street in Queens ("the building"). The building was damaged when the sprinkler system was activated, but there is a dispute over whether there was a fire or the sprinklers simply malfunctioned. Although not explicitly stated in the papers, it appears that the building was a Holiday Inn that the Department of Homeless Services ("DHS") used as a shelter (NYSCEF Doc. No. 33).

In this motion, Seneca seeks to amend its verified answer to include an affirmative defense based upon the "concealment, misrepresentation or fraud" provision of the insurance policy. Seneca's contention is that 10th Street represented the damage to its building was caused by fire, but, in fact, there was no fire.

10th Street reported a fire loss to Seneca on December 8, 2023. Seneca inspected the property, and its investigation purportedly revealed no evidence of a fire. Seneca paid 10th Street the $250,000 sublimit coverage contained in the policy for the water damage. 10th Street alleges it is entitled to at least an additional $1,481,242.18 with interest from December 8, 2023 for proposed building repairs, water remediation, and lost rent. 10th Street alleges that the loss was caused by fire and therefore that the loss does not fall under the $250,000 limitation to coverage.

During discovery, Seneca obtained a recorded statement from Police Officer Steven Burgos stating that he did not observe any signs of smoke or fire damage at the building. Seneca also points to a report from the New York City Fire Department from December 8, 2023, the same day the incident occurred, which states that the sprinklers were activated due to a malfunction (NYSCEF Doc. No. 24).

Based upon this information, Seneca sought to amend its answer to add three more affirmative defenses. 10th Street objects only to the tenth affirmative defense based upon the "concealment, misrepresentation or fraud" provision of the policy ("tenth defense"). Essentially, Seneca's contention is that 10th Street claimed the building was damaged by fire but that there was no fire, and 10th Street was therefore dishonest and should be barred from further recovery.

10th Street argues that the tenth defense is totally devoid of merit and therefore leave to amend should be denied. 10th Street relies on several pieces of evidence that suggest the sprinklers may have gone off due to smoke or fire. 10th Street first points to a report from the New York City Department of Homeless Services ("DHS") dated December 11, 2023 – three days after the incident (NYSCEF Doc. No. 30). In that report, DHS reports that "Room 1130 offline due to water sprinkler being activated due to smoke alarm being activated from Residents attempting to cook inside the facility" (*id.* at 3). The report states that room checks uncovered

"…items such as Hot plates, Metal utensils, cooking pots, [and] tools" (*id.* at 2). The report further notes under comments and concerns "[s]ecurity allowing Hot pots, Slow cookers, Electric pots into the facility" (*id.* at 9).

10th Street points out that the recorded interview of Police Officer Burgos is not a part of this record and that he was not under oath nor was he shown a copy of his report to refresh his memory as to his prior representations. 10th Street argues that "…Mr. Burgos stated that he was told by staff at the building that there were cooking devices in use in the unit when the sprinkler system was triggered, so at a minimum there is at least some evidence that the sprinkler system went off from a smoke/fire condition" (NYSCEF Doc. No. 29 at ¶ 6).

10th Street also points to its own internal report dated December 14, 2023 – six days after the incident – which identifies a slow cooker as triggering the sprinkler system (NYSCEF Doc. No. 31). The report states, "[i]t was later reported that the alarm went off due to cooking with a slow cooker in room 1130 which activated the sprinkler head" (*id.* at 1). The report mentions that room 1130 and the hallway were flooded and refers to other "flooded rooms" (*id.*). 10th Street provides photographs of the suspected illicit cooking device at NYSCEF Doc. No. 32. 10th Street also provides photos, seemingly taken between January and March of 2024, of numerous other cooking devices allegedly found in the building at NYSCEF Doc. No. 33.

10th Street lastly argues that Seneca has waived the right to assert the fraud provision pursuant to New York Insurance Law § 3420(d)(2), which requires an insurer to provide its insured with written notice of its disclaimer or denial of coverage as soon as is reasonably possible when a claim falls within the coverage terms but is denied based on a policy exclusion.

Discussion

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Y.A. v Conair Corp*., 154 AD3d 611, 612, 62 NYS3d 116 [1st Dept 2017]). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion" (*Natl. Recruiting Group, LLC v Bern Ripka LLP*, 183 AD3d 831, 832 [2d Dept 2020]). Courts have found that a proposed amendment is not palpably insufficient or patently devoid of merit where the proposed amendment alleges facts which set forth a cognizable cause of action (*see Ciminello v Sullivan*, 120 AD3d 1176 [2d Dept 2014]).[1]

10th Street does not argue that it will be prejudiced or has been surprised by the addition of the tenth defense, only that the tenth defense lacks merit. To show that the proposed defense lacks merit, 10th Street points to purported evidence that suggests the sprinkler went off because of smoke or fire: the DHS report, its own internal report, and photographs of contraband cooking devices found in the building.

On the other hand, Seneca claims that the damage was not caused by fire and produces its own evidence: the report from the New York Fire Department stating that the sprinklers malfunctioned, the statement of Police Officer Burgos which claims that he did not observe any sign of fire or smoke damage, and Seneca's internal investigation which also concluded that the damage to the building was not caused by fire damage.

10th Street's argument is that there is "…at least some evidence that the sprinkler system went off from a smoke/fire condition" and that Seneca's proposed defense is therefore totally without merit (NYSCEF Doc. No. 29 at ¶ 6). 10th Street does not allege that its evidence proves

[1] Although it was not raised by the parties, CPLR 3016 requires that a defense based upon misrepresentation or fraud be stated with particularity.

beyond all doubt that the building was damaged by fire – only that there is some evidence that the sprinklers went off due to smoke or fire. The Court therefore finds that 10th Street has failed to show that Seneca's tenth defense is palpably insufficient or patently devoid of merit.

10th Street's reliance on Insurance Law § 3420(d)(2) is unavailing. "By its plain terms, § 3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy" (*KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, 587 [2014]). Here, as the claim involves damage to property, this provision of the Insurance Law is not applicable.

Summary

Because 10th Street has failed to show that Seneca's proposed amendment is palpably insufficient or patently devoid of merit, and 10th Street has not even alleged that the proposed amendment will cause prejudice or surprise, the Court grants Seneca's motion to amend its verified answer.

Accordingly, it is hereby

ORDERED that defendant's motion to amend its answer is granted and it is further

ORDERED that Seneca upload and label the amended answer to NYSCEF (it is now only an exhibit) within 7 days of this decision.

See NYSCEF Doc. No. 35 concerning the next conference.

3/31/2025
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
	X	**GRANTED**	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**