

Carner v Seneca Ins. Co., Inc.

2012 NY Slip Op 30495(U)

February 28, 2012

Supreme Court, New York County

Docket Number: 111037/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 111037/2011
CARNER, RONALD S.
vs.
SENECA INSURANCE COMPANY
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 111037/11
MOTION DATE 1/12/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 27, were read on this motion to be dismissed

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s). 1-11
Answering Affidavits — Exhibits + Motion | No(s). 12-18
Replying Affidavits + Memo of Law | No(s). 19-27

Upon the foregoing papers, It is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 01 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/29/12


JOAN M. KENNEY J.S.C.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X

RONALD S. CARNER,
Plaintiff,

DECISION & ORDER
Index No.: 111037/11

-against-

SENECA INSURANCE COMPANY, INC.,
SENECA SPECIALTY INSURANCE COMPANY,
RONALD JACKSON, Individually and
doing business as THE JACKSON AGENCY,
INC., THE JACKSON AGENCY,

FILED

MAR 01 2012

Defendants.

-----X

JOAN M. KENNEY, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Ronald Jackson (Ronald Jackson), The Jackson Agency, Inc. and The Jackson Agency (collectively, Jackson) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss all claims and cross claims asserted as against them and, pursuant to CPLR 3211 (c), granting them summary judgment on all such claims and cross claims. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to serve and file an amended complaint, should Jackson's motion be granted.

FACTUAL BACKGROUND

Plaintiff instituted this action alleging an improper denial of coverage for damage sustained to property upon which plaintiff is allegedly a mortgagee.

The complaint alleges that plaintiff asked Jackson to obtain an insurance policy on the property in the amount of \$200,000.00. Complaint, ¶ 8. The complaint goes on to assert that Jackson

advised plaintiff that such a policy had been issued for the property by defendants Seneca Insurance Company, Inc. and Seneca Specialty Insurance Company (together, Seneca). *Id.*, ¶¶ 9-10.

On November 29, 2010, the property was damaged by fire. On April 13, 2011, Seneca disclaimed coverage, stating:

"Based on our information concerning the circumstances of the loss, the conditions of the policy in the event of loss have been violated. Although demanded pursuant to policy terms, you have failed to return a Sworn Statement in Proof of Loss. Additionally you failed to respond to our request for records, all in breach of the aforementioned conditions of the policy."

Motion, Ex. 4.

The complaint asserts two causes of action: (1) declaratory judgment that plaintiff is covered by the insurance policy issued by defendants; and (2) breach of contract. Jackson maintains that neither of these causes of action raise a cognizable claim against them.

According to the affidavit of Ronald Jackson, an insurance broker, submitted in support of the instant motion, on or about November 16, 2010, plaintiff completed an application for insurance for "Sedburg Holding Corp., c/o Ronald S. Carner, Esq." at the following locations: (1) 1 Grey Avenue, Middle Island, NY 11763; (2) 17 Carr Avenue, Medford, NY 11763; and (3) 142 East 3rd Street, My. Vernon, NY 10550." Ronald Jackson Aff., Ex. 1.

That same day, Ronald Jackson spoke to plaintiff to advise plaintiff that he had obtained a quote from Seneca for the

requested coverage. Plaintiff told Ronald Jackson that he was leaving on a trip, but to e-mail him the quotes, and provided Ronald Jackson with the e-mail address of his associate, Gary Vincent (Vincent). *Id.*, Ex. 2.

The next day, Ronald Jackson spoke to Vincent, who advised Ronald Jackson that there was a mix-up in the addresses, and that the correct addresses were: 17 Grey Avenue, Middle Island, NY and 1 Carr Lane, Medford, NY. As a consequence of this conversation, Ronald Jackson e-mailed a revised quote to Vincent. *Id.*, Ex. 3. Vincent responded that he went to inspect the properties and that they were all occupied and renovated. *Id.*

On November 29, 2010, the property identified as 17 Carr Avenue, Medford, NY was allegedly damaged by fire. Notice of the fire was sent to Seneca, which then commenced an investigation of the claim. Allegedly, despite repeated requests from Seneca for information, plaintiff failed to provide the documents so demanded.

Jackson contends that none of the causes of action or allegations support any claim by plaintiff as against Jackson.

In his cross motion, plaintiff argues that it is undisputed that he is a mortgagee of the property located at 17 Carr Avenue, Medford, NY and that he contacted Jackson to obtain insurance coverage for his interest thereon; however, plaintiff says that Jackson obtained a homeowner's policy for him instead of a "forced place insurance policy," which is a policy taken out by a mortgagee

when a mortgagor does not carry insurance on the property.

On August 3, 2011, Seneca again wrote to plaintiff, stating that the policy in question was a commercial insurance policy that provided coverage for property located at 1 Carr Lane, not 17 Carr Avenue, so that the fire did not occur at a covered location. Cross Motion, Ex. B. Additionally, Seneca stated that the application misrepresented the properties as being occupied, whereas, in fact, they were unoccupied, and that Sedburg Holding Corp.'s interest in the property was misrepresented. *Id.* The court notes that the application lists Sedburg Holdings Corp. as the owner of the properties.

Plaintiff argues that Jackson failed to procure the appropriate insurance coverage for him and that any error in the addresses could have been corrected by a simple endorsement, which Jackson failed to do.

Plaintiff requests that, should the main motion be granted, he be granted leave to serve and file an amended complaint, a copy of which he has attached to his cross motion. Cross Motion, Ex. C. The proposed amended complaint asserts four causes of action: (1) negligence in the procurement of the insurance policy; (2) breach of contract in obtaining the wrong insurance; (3) breach of contract in failing to pay on the claim; and (4) declaratory judgment that plaintiff is covered by the insurance policy.

In opposition to the cross motion, and in reply, Jackson

maintains that the documentary evidence supplied demonstrates that Jackson followed the instructions of Vincent, plaintiff's agent, in changing the addresses on the insurance application, and was specifically advised by Vincent that the properties were both occupied and renovated. Further, Ronald Jackson states that the first time that he learned of the mix-up in the addresses was after the fire, at which point he took immediate steps to remedy the situation. Reply, Ex. 1.

Jackson point out that plaintiff does not dispute the contention that he told Ronald Jackson to communicate with Vincent regarding the insurance application. Further, Jackson states that the insurance quotation sent to plaintiff before plaintiff's trip clearly indicates that the named insured was Sedburg Holdings Corp. c/o Ronald S. Carner, that plaintiff was listed as the "mortgage/loss payee," and that plaintiff approved the quotation. A copy of the insurance policy attached to these papers indicates that plaintiff was covered, pursuant to an endorsement, as a loss payee under the policy terms. Reply, Ex. 2. Therefore, maintain Jackson, Jackson cannot be held legally liable for allegedly obtaining the wrong type of coverage.

Jackson oppose the cross motion for leave to amend the complaint by arguing that the proposed amendment lacks merit, based on the documentary evidence attached to the motion and reply.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or
- (7) the pleading fails to state a cause of action;"

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

Jackson's motion is granted and the complaint is dismissed as against them.

The allegations contained in the complaint are directed at Seneca, seeking both a declaratory judgment that plaintiff is covered under the policy issued by Seneca and damages for breach of that insurance policy. Jackson were the insurance brokers, acting as plaintiff's agents, not the agents of Seneca, and, therefore, have no direct relationship with Seneca (*Tower Insurance Company of*

New York v Mike's Pipe Yard & Building Supply Corp., 35 AD3d 275 [1st Dept 2006]). Therefore, the complaint fails to state a cause of action as against Jackson.

Even if the court were to conclude that a cognizable claim is asserted as against Jackson in the complaint, the documentary evidence establishes that Jackson procured the policy as directed by plaintiff.

Insurance brokers have a common-law duty to procure the coverage requested by the client within a reasonable time, but have no continuing duty to advise or direct a client to obtain additional insurance (*People v Wells Fargo Insurance Services, Inc.*, 16 NY3d 166 [2011]; *Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682 [1st Dept 2010]). The documentary evidence submitted demonstrates that Jackson acquired the insurance that they were directed to obtain under instructions from plaintiff and Vincent, plaintiff's agent. The disclaimer letter issued by Seneca states that its determination to disclaim coverage was based on plaintiff's failure to cooperate with Seneca and provide requested documents. Further, plaintiff's argument that the insurance acquired was not the insurance he requested is contradicted by the terms of the policy itself in which plaintiff, as loss payee, is an additional named insured.

Importantly, plaintiff never disputes the facts as presented in the documentary submissions that Vincent was acting as his agent

and that he was provided with all of the information regarding the policy prior to the application being submitted to Seneca (*Curanovic v New York Central Mutual Fire Insurance Company*, 307 AD2d 435, 437 [3d Dept 2003] [an insured has a duty to review the entire application and to correct any errors]; *North Atlantic Life Insurance Company of America v Katz*, 163 AD2d 283, 285 [2d Dept 1990]). Further, Vincent affirmatively wrote to Ronald Jackson that the properties were occupied, even though, in Seneca's follow-up letter to plaintiff, it indicated that the property was, in fact, unoccupied. An insurance broker is not liable for information contained in an insurance application that was reviewed and approved by the insured (*Motor Parkway Enterprises, Inc. v Loyd Keith Friedlander Partners, Ltd.*, 89 AD3d 1069 [2d Dept 2011]; *Sung v Kyung Ip Hong*, 254 AD2d 271 [2d Dept 1998]).

As a consequence, the documentary evidence conclusively establishes a defense to the complaint which plaintiff has failed to rebut. Therefore, based on the foregoing, Jackson's motion is granted.

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.* (83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

Based on the above discussion, the court finds that plaintiff's proposed amended complaint asserting causes of action as against Jackson is patently devoid of merit and, hence, plaintiff's cross motion seeking leave to amend the complaint is denied.

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Ronald Jackson, individually and doing business as The Jackson Agency, Inc. and The Jackson Agency to dismiss the complaint asserted as against them is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that plaintiff's cross motion seeking leave to serve and file and amended complaint is denied; and it is further

ORDERED that the parties appear for a preliminary conference on April 26, 2012 at 9:30 a.m. in room 304 located at 71 Thomas Street NYC 10012

Dated: 2/28/12

FILED

MAR 01 2012

ENTER:



NEW YORK COUNTY CLERK'S OFFICE Joan M. Kenney, J.S.C.