

Richman v Harleysville Worcester Ins. Co.

2010 NY Slip Op 33811(U)

November 1, 2010

Supreme Court, New York County

Docket Number: 600467/06

Judge: Emily Jane Goodman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

GAYLE GRENADIER RICHMAN

INDEX NO. 600467/06

MOTION DATE _____

v.

MOTION SEQ. NO. 013

MOTION CAL. NO. _____

HARLEYSVILLE WORCESTER INSURANCE COMPANY, AWALL CORP., f/k/a ALEXANDER WALL CORP. and ALL CLEANING A.V. Inc.

FOR THE

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits

FILED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion by Plaintiff to amend the verified complaint, to assert a claim for bad faith/consequential damages, based on two 2008 Court of Appeals cases, is granted. Although Plaintiff moves under CPLR 3025 (c), because the trial has been recently adjourned, the motion is granted under CPLR 3025(b). Defendant opposes the motion alleging prejudice, claiming that it did not have the opportunity seek discovery regarding the allegations of bad faith and consequential damages, nor have the opportunity to move to dismiss same. Defendant further complains about the lateness in moving to amend, and states that the motion is "patently devoid of merit" because Plaintiff has not identified consequential damages, aside from attorneys fees (noting some allegations are based on information and belief), and because the evidence does not support allegations of bad faith.

In Bi-Economy v. Harleysville (10 NY3d 187, 195 [2008]), the Court of Appeals held that where the insurer "failed to promptly adjust and pay the loss" and the insured "suffers additional damages as a result of the insurer's excessive delay or

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

improper denial, the insurance company should stand liable for these damages.” The damages, which are consequential damages (which, in Bi-Economy were damages from the collapse of Plaintiff’s business resulting from Defendant’s failure to pay business interruption coverage) are recoverable if reasonably foreseeable. Id. at 195-96; see also Panasia Estates v. Hudson Insurance Co., 10 NY3d 200 [2008]).

Contrary to Harleysville’s argument, there is no further discovery needed. Exhaustive discovery has been taken, and the facts evidencing bad faith stem from Harleysville’s own actions or inactions. Moreover, contrary to Harleysville’s argument that no evidence exists regarding bad faith, the Court, in denying Harleysville’s motion for summary judgment, previously found that “under the circumstances here, there is at the very least, a question of fact as to whether Harleysville’s request for a sworn statement was in good faith.” Further, discovery has already revealed that despite a 10/10/04 inspection of the home, by Harleysville’s independent adjuster, indicating more racoon damage than originally thought, and a suggested reserve of \$100,000 on the house and \$10,000 on the contents, Harleysville only issued a check of \$43,991.85 on 2/14/05.

Contrary to Harleysville’s argument, consequential damages, other than attorney’s fees, have been sufficiently identified (e.g., Plaintiff’s costs of renting another home, which Harleysville allegedly approved). Further, attorney’s fees could be recovered. Defendant cites Mighty Midgets, Inc. v Centennial Ins. Co (47 NY2d 12, 21 [1979] [“[i]t is the rule in New York that such a recovery may not be had in an affirmative action brought by an assured to settle its rights...but only when he has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations”]) and further note that Bi-Economy v. Harleysville did not involve the issue of attorney’s fees.¹ However, in

¹Defendant acknowledges that in Sukup v State of New York (19 NY2d 519, 522 [1976]), an exception exists if the insurer acted in bad faith in denying

Panasia Estates v. Hudson Insurance Co. (10 NY3d 200 [2008]), the Court of Appeals held that it was proper for the court below to deny a motion to dismiss allegations of bad faith and claims of consequential damages, including attorney's fees, where plaintiff alleged that the insurance company failed to properly investigate the loss and improperly determined that the loss was not covered. The Court reiterated its holding in Panasia: that consequential damages are recoverable for breach of the covenant of good faith and fair dealing in an insurance contract if the damages were within the contemplation of the parties, as the probable result of a breach at the time of, or prior to, contracting. Id. at 203. Accordingly, the 2008 Court of Appeals cases have ended the question of whether attorneys fees may be recovered in the breach of insurance contract context, whether it is a first party or third party action.

It is hereby

ORDERED that the motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint in the proposed form attached to the motion as Exhibit A shall be deemed served upon Defendants upon service of a copy of this Decision and Order, with notice of Entry; and it is further

ORDERED that Defendants shall serve an answer to the amended complaint or otherwise respond within 10 days from the date of service.

Dated: November 1, 2010
New York, New York



EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT POST

Check if appropriate: REFERENCE SETTLE/SUBMIT ORDER/JUDGMENT

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coverage, which is alleged here.