

U.S. Underwriters Ins. Co. v Greenwald

2010 NY Slip Op 33843(U)

October 14, 2010

Sup Ct, New York County

Docket Number: 111375/08

Judge: Joan A. Madden

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PRESENT: Hon. Joan A. Madden

PART 11

Index Number : 111375/2008 *Justice*

U.S. UNDERWRITERS INSURANCE

vs

GREENWALD, JAMES

Sequence Number : 002

DISMISS

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

The following papers, numbered _____ motion to/for _____

PAPERS NUMBERED

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

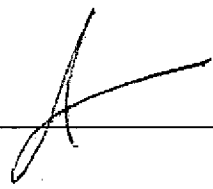
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached Memorandum Decision + Order*

Dated: October 14, 2010



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
U.S. UNDERWRITERS INSURANCE COMPANY,
as subrogee of 200 EAST 69TH STREET, LLC,

Plaintiff,

-against-

Index No. 111375/08

JAMES GREENWALD and THEODORA CORSELL,

Defendants.

-----X
JAMES GREENWALD,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590043/10

200 EAST 69TH STREET, LLC, JOSEPH ARMATO
and JOSETTE ARMATO,

Third-Party Defendants.

-----X
Joan A. Madden, J.:

Motion sequence numbers 002 and 003 are consolidated herein for purposes of disposition.

In sequence number 002, plaintiff U.S. Underwriters Insurance Company, as subrogee of 200 East 69th Street LLC, moves, pursuant to CPLR 3211 (a) (1, 3, 6, and 7), for an order dismissing the counterclaims and the third-party complaint, and to compel defendants to adhere to an expedited discovery schedule in the main action. In sequence number 003, third-party defendants 200 East 69th Street LLC (the Company), and Joseph Armato and Josette Armato (together, the Armatos) move, pursuant to CPLR 3211 (a) (1 and 7), for an order dismissing the

counterclaims and third-party complaint. Defendant/third-party plaintiff James Greenwald cross-moves for an order permitting him to supplement the record on motion sequence 002, and denying that branch of the motion to dismiss the third-party claims.

In this subrogation action, U.S. Underwriters seeks to recover insurance proceeds that it paid to its subrogor, the Company, for property damage to apartment 9-E in the Trump Palace building, located at 200 East 69th Street in Manhattan. The apartment and personal property inside were damaged on December 28, 2007, at about 3:10 a.m., as the result of a fire allegedly started by a Christmas candle left burning unattended on the dining room table (*see* New York City Fire Department Incident Report, Incident No. 1-0041-0).

U.S. Underwriters alleges that, at the time of the fire, the apartment and the furnishings inside were owned by the Company, its insured and the subrogor. However, Greenwald alleges that, at that time, the apartment was owned by the Company and Josette Armato. Josette Armato and her husband, Joseph Armato, initially owned the apartment jointly; however, in June 2006, Joseph Armato transferred his interest to the Company. He had formed the Company in March 2006, and presently holds the office of president. The parties dispute whether Josette Armato also transferred her interest in the apartment, or retained it.

There is no dispute that Greenwald leased the apartment, furnished, pursuant to a written lease for the period commencing May 1, 2007 and ending September 15, 2007. Josette Armato executed the lease with Greenwald in her own name, as owner. However, the Company and the Armatos allege that she signed the lease as agent for the Company, an undisclosed principal on the lease.

Greenwald admittedly made the \$6,000 monthly rent payments required by the written

lease, but allegedly never occupied the apartment. Greenwald alleges that the apartment was occupied solely by defendant Theodora Corsell, at all relevant times. After expiration of the lease term, and with Josette Armato's express consent, Corsell continued to occupy the apartment on a month-to-month basis. U.S. Underwriters, the Company, and the Armatos allege that Greenwald continued to pay the monthly rent as a month-to-month tenant, after expiration of the lease term, and was present in the apartment at the time of the fire. They also allege that Corsell was present in the apartment as Greenwald's guest, rather than as a tenant.

Prior to the fire, the Company had purchased an insurance policy from U.S. Underwriters insuring the apartment and the personal property within it against loss and damage. Neither Joseph Armato nor Josette Armato is a named insured on the policy. After the fire, the Company filed a claim under the policy to recover for fire and smoke damage to the apartment and the furnishings within it. U.S. Underwriters retained Independent Adjustment Company (IAC), which, in turn, retained Thomas J. Russo Consultants, Ltd., Maxons Restorations, Inc., J.S. Held, Inc., and Art Conservation Associates, Inc. to investigate, evaluate, and provide repair and replacement estimates. In settlement of the claim, U.S. Underwriters paid the Company insurance proceeds totaling \$201,958.00.

Subsequently, U.S. Underwriters commenced this subrogation action against Greenwald and Corsell to recover the insurance proceeds paid to the Company, alleging that they negligently failed to properly use and supervise lit candles within the apartment, and that they breached the lease agreement by failing to properly maintain, use, and occupy the leased premises in a safe and reasonable manner.

In his amended answer and affirmative defenses, Greenwald denies all allegations of

wrongdoing, and alleges, among other things, that U.S. Underwriters and the Company lack standing to assert any claims against him; that the lease is void and unenforceable; that he was not present in the apartment at the time of the fire; that the damage was the result of the Company's failure to supply working smoke detectors; and that the actual damage was minimal, amounting to no more than \$5,000 to \$10,000.

Greenwald asserts counterclaims for fraud and negligence based on allegations that U.S. Underwriters, acting in concert with Joseph Armato, fraudulently substantially inflated the Company's claim and intentionally overpaid on it. He also asserts a counterclaim for breach of the lease by charging him amounts that U.S. Underwriters knew that he did not owe under the lease terms. Greenwald also seeks judgments declaring that he was not a tenant of the apartment on the date of the fire, and that U.S. Underwriters lacks standing to assert a breach of lease claim against him.

Greenwald impleaded the Company, Joseph Armato, and Josette Armato. In the third-party action, Greenwald asserts claims against them for fraud, indemnification, breach of the lease, and negligence by intentionally falsifying and inflating the fire damage repair expenses, and by failing to supply functioning smoke detectors. He also asserts a claim for unjust enrichment by improperly failing to return the security deposit at the expiration of the written lease term.

In her answer, Corsell denies all allegations of wrongdoing, and alleges that Greenwald was neither a tenant nor an occupant of the apartment and paid no rent, on the date of the fire. Corsell asserts affirmative defenses similar to Greenwald's.

Counterclaims

In sequence number 002, U.S. Underwriters seeks to dismiss Greenwald's counterclaims on the procedural ground that counterclaims may not be asserted in a subrogation action.

In opposition, Greenwald contends that the counterclaims are properly asserted because they are based on allegations that the insurance adjuster hired by U.S. Underwriters to investigate the claim conspired with, or was unduly influenced by, Joseph Armato, and fraudulently inflated the claim.

To the extent that the counterclaims are otherwise legally viable, they may be maintained by Greenwald against U.S. Underwriters only as an offset to the damages demonstrated by the insurer. "It is well settled that '[a] subrogee acquires all rights, defenses and remedies of the subrogor and is subject to any claims or defenses which may be raised against the subrogor'" (*Peerless Ins. Co. v Michael Beshara, Inc.*, ___ AD3d ___, 2010 NY Slip Op 05850, *2 [3d Dept 2010], quoting *Servidori v Mahoney*, 129 AD2d 944, 945 [3d Dept 1987]). Thus, when an insurer commences a subrogation action, it steps into the shoes of its subrogor, succeeding to the benefits which such status might bring, but chargeable to the extent of the subrogor's liabilities (*id.*; *Travelers Indem. Co. v Zeff Design*, 23 Misc 3d 1121[A], *2, 2009 NY Slip Op 50878[U] [Sup Ct, NY County 2009]). Therefore, the alleged tortfeasor defendant's claims against the insurer may be interposed as counterclaims in a subrogation action; however, they are considered as set-offs only, and cannot effect an affirmative recovery by the defendant against the subrogated carrier (*id.*; *Allstate Ins. Co. v Babylon Chrysler Plymouth Inc.*, 45 AD2d 969, 969 [2d Dept 1974]).

Next, U.S. Underwriters seeks to dismiss the first counterclaim for fraud and the second

counterclaim for negligence on substantive grounds.

In the fraud counterclaim, Greenwald alleges that the Armatos fraudulently inflated the Company's damages claim, with the knowledge that U.S. Underwriters would seek reimbursement from Greenwald. Greenwald also alleges that, "upon information and belief, one or more employees of plaintiff insurance company participated along with Mr. Armato and Ms. Armato in a scheme to inflate the claim to be made by 200 LLC, reimbursement for which would, in turn be sought from Mr. Greenwald" (Greenwald Amended Answer, Counterclaims, Third-Party Complaint, ¶ 46). In the negligence counterclaim, Greenwald alleges that U.S. Underwriters bears a duty of care to Greenwald that requires it to properly supervise and control its employees and outside contractors in the adjustment and payment of claims for which indemnification will be sought from a third party (*see id.*, ¶ 57).

To the extent that the fraud and negligence counterclaims are based on allegations of improper internal adjusting policies and practices by U.S. Underwriters, the counterclaims are fatally defective. The misconduct, as alleged, occurred between U.S. Underwriters and the Armatos and may be held by the trier of fact to constitute, at most, insurance fraud directed at U.S. Underwriters by its employees or agents and Joseph Armato. As alleged, the misconduct was not directed at Greenwald, and, inasmuch as he can be held directly liable only for property damage caused by his own actions, as a tortfeasor, or vicariously liable, as a leaseholder, he can have sustained no damages as a result of the alleged misconduct.

While Greenwald may, perhaps, incur incrementally greater defense costs in defending a subrogation claim based on intentionally inflated or inaccurate damages, he is not entitled to recover those costs in the circumstances presented here. A litigant may not recover litigation

expenses, in the absence of an agreement or statute to the contrary. "[A]ttorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]).

In addition, Greenwald has failed to plead the fraud counterclaim with particularity sufficient to satisfy the CPLR pleading requirements.

To state a prima facie claim for common-law fraud, the plaintiff must allege in sufficient detail facts demonstrating the existence of a representation of a material existing fact, falsity, scienter, deception, and injury (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 [1999]; see CPLR 3016 [b]).

In pleading these elements, the plaintiff must comply with New York procedural law, set forth in CPLR 3016 (b), that requires that the plaintiff's allegations be sufficiently particularized so as to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). The section provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]).

Significantly, in the fraud counterclaim, Greenwald prefaces the factual allegation regarding U.S. Underwriters' fraudulent conduct with the phrase, "upon information and belief" (see Greenwald Amended Answer, Counterclaims, Third-Party Complaint, ¶ 46). Factual allegations of fraud based entirely upon "information and belief," without any indication of the sources of the allegations, are insufficient to fulfill the statutory pleading requirements

(Apfelberg v East 56th Plaza, Inc., 78 AD2d 606, 607 [1st Dept 1980], *appeal dismissed* 54 NY2d 680 [1981]). Greenwald has failed to allege any facts from which an inference may be drawn that Joseph Armato was working on the alleged fraudulent scheme in concert with a U.S. Underwriters employee or agent, nor has he identified any such individual. Although Greenwald alleges that Adjustrite Inc. and, its employee, Brett Joseph, were somehow associated with Joseph Armato and his company, Executive Adjustment Bureau, and assisted in the alleged fraud, those allegations, even if proven, do not implicate U.S. Underwriters in the alleged scheme. It appears that the Company and/or the Armatos initially retained Adjustrite to prepare a report in support of the Company's sworn statement of proof of loss and claim, and it does not appear that U.S. Underwriters retained that company, or relied upon its January 2, 2008 report in settling the claim.

Rather, the record demonstrates that U.S. Underwriters retained IAC to conduct the claim investigation, and that IAC retained Russo Consultants to evaluate the cause and origin of the fire, Maxons to evaluate the cleanup costs, Held Inc. to evaluate the structural damage to the building, and Art Conservation Associates to evaluate the damage to the personal property in the apartment caused by the fire.

For these reasons, the branches of the motion to dismiss the first and second counterclaims asserted against U.S. Underwriters are granted, and these counterclaims are dismissed.

Next, U.S. Underwriters seeks to dismiss Greenwald's third counterclaim for a judicial declaration that Greenwald was not a tenant at the time of the fire and Greenwald's fourth counterclaim for a judicial declaration that U.S. Underwriters lacks standing to assert a claim for

breach of the lease.

These branches of the motion are granted, and the third and fourth counterclaims are dismissed. These counterclaims are more properly asserted as affirmative defenses and, in fact, duplicate the third and fourth affirmative defenses asserted by Greenwald in response to U.S. Underwriters' claims for breach of the lease.

U.S. Underwriters seeks to dismiss the fifth counterclaim for breach of the written lease agreement by attempting to charge Greenwald for amounts that it knew, or should have known, were not actually due under the lease between Greenwald and Josette Armato and/or the Company.

This branch of the motion is granted, and the fifth counterclaim is dismissed. While, as discussed above, the insurer-subrogee stands in the shoes of the insured-subrogor, here, the fifth counterclaim is not based on any alleged misconduct by the Company or the Armatos, but is, instead, based on allegations of misconduct by U.S. Underwriters, which is not a party to the lease. Therefore, the counterclaim is fatally defective on its face.

Third-Party Action Claims

Next, U.S. Underwriters seeks to dismiss the third-party complaint on a variety of grounds.

In opposition, Greenwald contends, first, that U.S. Underwriters lacks standing to move to dismiss the impleader action, and, second, that the counterclaims are properly pleaded.

The branch of U.S. Underwriters' motion to dismiss the third-party action is denied on the ground that the insurer lacks standing to seek such relief. U.S. Underwriters is not a party to the third-party action, and has failed to demonstrate any basis for its claim of authority to assert

arguments on behalf of the Company, Joseph Armato, or Josette Armato. Pursuant to CPLR 3211 (a), "[a] party may move for judgment dismissing one or more causes of action *asserted against him*" (emphasis added). In addition, a third-party defendant is considered adverse to all other parties, and holds the right to move on its own behalf (*Rodriguez v Scovill, Inc.*, 171 Misc 2d 840, 842 [Sup Ct, Kings County 1997]; CPLR 1008). Here, the Company and the Armatos are represented by counsel separate from U.S. Underwriters' counsel and have made their own motions to dismiss the claims asserted against them.

In sequence number 003, the Company and the Armatos seek to dismiss the third-party action on a variety of grounds, first, contending that Greenwald lacks standing to assert a third-party action against them. With respect to the Company, Greenwald, as the alleged tortfeasor defendant, may seek affirmative relief by commencing an independent action against the insured subrogor, or by impleading the insured subrogor (*see Peerless Ins. Co. v Michael Beshara, Inc.*, ___ AD3d ___, 2010 NY Slip Op 05850, at *2; CPLR 3019). With respect to the Armatos, there is no dispute that neither Joseph Armato nor Josette Armato are named insureds under the policy, and that neither is U.S. Underwriter's subrogor on the underlying claim. Therefore, Greenwald has no standing to assert claims against them, and the court will consider whether the claims against the Company are sufficient.

The Company seeks to dismiss the first cause of action for fraud on the ground that the factual allegations do not support a legally viable fraud claim.

The fraud claim is fatally defective on its face. "Essential to a fraud cause of action is the existence of a material misrepresentation made with the intention of inducing the plaintiff's reliance thereon" (*MS Partnership v Wal-Mart Stores, Inc.*, 2 AD3d 1482, 1484 [4th Dept 2003]).

In the fraud claim, Greenwald alleges that Joseph Armato and the Company "committed fraud in connection with the submission to [U.S. Underwriters] of [the Company's] claim for damages" caused by the fire, which resulted in the commencement of the instant subrogation action (Greenwald Amended Answer, Counterclaims, Third-Party Complaint, ¶ 83). However, Greenwald does not allege that the Company or Joseph Armato made any misrepresentations directly to him, that they intended him to rely on such misrepresentations, or that he relied upon such misrepresentations.

In addition, Greenwald once again bases each of the factual allegations of fraud entirely upon "information and belief" (*see id.*, ¶¶ 34-46, 82, 83). "[M]ere conclusory language, absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a [legally viable] cause of action for fraud" (*Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2005]; *see CPLR* 3016 [b]). The third-party action fraud claim is dismissed.

That branch of the motion to dismiss the second cause of action for indemnification asserted against the Company in the third-party action is granted, and the claim is dismissed. Greenwald has failed to allege the existence of an indemnification agreement between himself and the Company, nor has he made a payment for which he might seek indemnification (*see McDermott v City of New York*, 50 NY2d 211, 216, *rearg denied* 50 NY2d 1059 [1980]).

The third cause of action is for breach of the lease. In the claim, Greenwald alleges that, assuming a valid contractual arrangement is demonstrated to have existed on the date of the fire between himself and the third-party defendants, then such defendants breached express and

implied terms of the lease by fraudulently falsifying or inflating the Company's insurance claim "so as to cause Mr. Greenwald to have to pay them (or their subrogor) money he did not owe them under the lease" (Greenwald Amended Answer, Counterclaims, Third-Party Complaint, ¶ 92).

Greenwald's allegations are sufficient to support a claim for breach of the implied covenant of good faith and fair dealing. "Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that - although not expressly forbidden by any contractual provision - would deprive the other party of receiving the benefits under their agreement" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]).

Therefore, that branch of the motion to dismiss the third cause of action asserted in the third-party complaint is denied.

The fourth cause of action in the third-party complaint is for negligence. In the negligence claim, Greenwald alleges that the Company (and Josette Armato) failed to provide functioning smoke detectors in the apartment, in violation of the Administrative Code of the City of New York § 27-2045 and in breach of the lease, whether written or oral, in effect on the date of the fire. Greenwald further alleges that, as a result of defendants' misconduct, he suffered monetary damages equal to the amount of attorneys' fees that he incurs in defending this subrogation action.

In New York City, owners of residential buildings consisting of three or more dwelling units are obligated by ordinance to install a working smoke detector in each unit (*Jamison v 157-61 West 105 St. Hous. Dev. Fund Corp.*, 15 Misc 3d 1106[A], 2010 NY Slip Op 50519[U] [Civ

Ct, NY County 2007], citing Administrative Code of the City of New York § 27-2045 [a] [1]).

"[T]he ordinance . . . is designed to protect the occupants from being injured in a fire. Its purpose is not to prevent damage to property" (*id.* at *3). Here, Greenwald repeatedly denies his presence in the apartment at the time of the fire and does not allege that he sustained any personal injury as a result of the alleged failure to provide a working smoke alarm. Therefore, this claim is fatally defective on its face, and is dismissed.

The fifth, sixth, and seventh causes of action are for breach of the lease agreement, unjust enrichment, and money had and received by failing to return the security deposit.

These branches of the motion are denied. Assuming, without deciding, that Greenwald is found to have made rent payments, and that those payments are found to have effected a continuation of all relevant terms of the written lease through the date of the fire, then, pursuant to those terms, the Company may have the right to permanently retain the security deposit for use in repairing the damage caused by the fire (*see* Lease, Arts. 6, 10, 11). However, should Greenwald's tenancy be found to have terminated with the natural expiration of the written lease term on September 15, 2007, then Greenwald may be entitled to return of the deposit, as of that date and prior to the fire that occurred some three months later.

Discovery Issues

U.S. Underwriters, the Company, and the Armatos also move to compel Greenwald to appear for deposition expeditiously because of his age and ill-health.

In opposition, Greenwald contends that he is of sound mind and excellent health, and has submitted an affidavit dated April 19, 2010 by his personal physician, nonparty Paul A. Bienstock, M.D., in support of his contentions.

This branch of the motion is granted to the extent that the parties are directed to appear for preliminary conference before Part 11 to schedule all outstanding discovery, including Greenwald's deposition.

Cross Motion

Greenwald cross-moves to supplement his opposition to sequence number 002 to submit additional affidavits in support of his claims of fraud.

In opposition, U.S. Underwriters, the Company, and the Armatos contend that the cross motion is procedurally improper and that, therefore, it may not be considered by the court.

Inasmuch as Greenwald did not seek permission from the court to submit what is, in effect, a "sur-reply," to motion sequence number 002, the cross motion is improperly made (*see Flores v Stankiewicz*, 35 AD3d 804, 805 [2d Dept 2006]; CPLR 2214).

In any event, and assuming that the cross motion was procedurally proper, the court notes that nothing in the affidavits submitted on Greenwald's behalf in either motion by Maria Tarazona, formerly the Armatos' and Corsell's housekeeper, by Henry Cordoba, a cleaner hired by Corsell after the fire, by Corsell, or by Greenwald regarding events that, if proven, might constitute insurance fraud by Joseph Armato indicates that U.S. Underwriters, its agents or employees was aware of, or participated in, any fraudulent scheme to inflate the Company's claim against the policy.

Accordingly, it is

ORDERED that motion sequence 002 is granted and the first, second, third, fourth, and fifth counterclaims asserted by defendant James Greenwald are severed and dismissed; and it is further

ORDERED that motion sequence 003 is granted to the extent that the to the extent that the third-party complaint is severed and dismissed as against Joseph Amato and Josette Armato and the first, second, and fourth causes of action asserted in the third-party complaint against 200 East 69th Street, LLC are severed and dismissed; and it is further

ORDERED that the third, fifth, sixth, and seventh causes of action asserted in the third-party complaint shall continue; and it is further

ORDERED that 200 East 69th Street, LLC, is directed to serve an answer to the third-party complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion is denied in its entirety; and it is further

ORDERED that counsel is directed to appear for a preliminary conference in Room 351 on October 28, 2010, at 9:30 a.m.

Dated: October 14, 2010

ENTER:



J.S.C.