Hon v Allstate Indem. Co.
2011 NY Slip Op 32977(U)
October 18, 2011
Supreme Court, New York County
Docket Number: 603182/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _Hon Joel A. Weller_

Justice

PART _II_

Index Number : 603182/2009

HON, D.O., JOHN

VS.

ALLSTATE INDEMNITY COMPANY

SEQUENCE NUMBER : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this 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 annexed Memorandum Decis. + Order._

FILED

NOV 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _October 18, 2011_

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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
JOHN HON, D.O.,

                              Plaintiff,   Index No. 603182/09

        - against -

                                                  FILED
ALLSTATE INDEMNITY COMPANY and
ALLSTATE INSURANCE COMPANY,
                                                  NOV 09 2011
                              Defendants.
--x   NEW YORK
HON. JOAN A. MADDEN, J.:   COUNTY CLERK'S OFFICE
        In this action for coverage under a homeowners insurance

policy, defendants Allstate Indemnity Company and Allstate

Insurance Company (collectively, "Allstate") move, for renewal

and/or reargument of their prior motion seeking to dismiss the

complaint as barred by the limitations period contained in the

policy. Plaintiff, John Hon, D.O., opposes the motion.

                            BACKGROUND

        Plaintiff commenced this action to recover under a Deluxe

Homeowners-Primary Residence Policy, Policy No. 90326 8383,

issued by Allstate. The policy insured plaintiff's residence

located at 132-07 41st Road, Flushing, New York (the "insured

premises"), for the period July 16, 2003 to July 16, 2004, and

outlined the losses that were covered and excluded thereunder.

Section 1, ¶12 of the policy states that any action against

Allstate "must be brought within two years after the inception of

loss or damage" (Policy, Not of Mot, Exh A, p. 21).

        On February 12, 2004, the insured premises sustained damages

as a result of ongoing excavation work at an adjoining premises.

Plaintiff submitted a written claim of loss to Allstate, which

undertook an investigation of the loss. By letter dated March 16, 2004, Allstate disclaimed coverage on the ground that the loss was excluded under certain policy exclusions.

In October 2009, plaintiff commenced this action seeking to recover damages from Allstate for disclaiming coverage for the loss. The complaint alleges causes of action for breach of the insurance policy (first cause of action); unjust enrichment (second cause of action); breach of the implied covenant of good faith (third cause of action); and unfair claim settlement practices (fourth cause of action).

Allstate's answer includes general denials of the allegations in the complaint and numerous affirmative defenses, including that plaintiff did not commence the action within the policy's two-year limitations period.

Allstate moved to dismiss the action as untimely. By decision and order dated October 15, 2010 ("the original decision"), the court denied the motion, finding that while the shortened statute of limitations periods, like the one in the policy, are generally enforceable, that "the record raises triable issues of fact as to whether Allstate may avail itself of the benefit of the shortened limitations period, as opposed to the general six-year Statute of Limitations for an action upon contract applies" (original decision, at 4). In reaching this conclusion, the court relied on an affidavit from plaintiff indicating that he did not receive a copy of the insurance policy setting forth the two-year contractual statute of limitations.

In reply, Allstate stated that "a request for documentation" regarding materials sent directly to plaintiff by Allstate has been made. Upon receipt of such documentation, your affirmant will supplement these reply papers." At oral argument held on May 27, 2010, the court permitted Allstate to submit its "supplemental reply." When the court inquired as to whether these supplemental papers included an affidavit from an Allstate employee, counsel for Allstate indicated no, and then requested an adjournment to submit an affidavit from an employee. The court denied the adjournment indicating that Allstate's counsel had months to submit the affidavit previously and noting that "what is troubling to this court is that you are making this request only after the court's question to you as to whether you had an affidavit from an employee" (Transcript May 27, 2010 argument, at 4). The court then gave plaintiff time to respond to Allstate's supplemental reply.

Allstate then purported to serve plaintiff with the Supplemental Affidavit in Opposition on June 1, 2010. During oral argument on June 17, 2010, the Court denied Allstate's request that plaintiff be required to accept the supplemental affidavit. In the original decision, the court reaffirmed its refusal, finding that the supplemental affidavit was in effect, an improper sur-reply. CPLR 2214; <u>Flores v Stankiewicz</u>, 35 AD3d 804 (2d Dept 2006).

Allstate now moves for reargument and/or renewal, asserting that it has now attached an affidavit of mailing from Linda

Sisson, which "rectifies the issue of serving an improper sur-reply." Allstate further argues that the affidavit creates a presumption that plaintiff received the policy, and that plaintiff's mere denial of receipt is insufficient to rebut this showing.

Plaintiff opposes the motion, arguing that Allstate has not provided a sufficient basis for granting reargument or renewal and that even if the court were to consider Ms. Sisson's affidavit that it does not establish that plaintiff received the policy containing the shortened limitations period.

DISCUSSION

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979).

CPLR 2221(e) sets for the elements of a motion for leave to renew. "A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination; and (3) shall contain a reasonable justification for the failure to present such facts on the prior motion."

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the

court's attention." <u>Tishman Constr. Corp. of New York v. City of New York</u>, 280 AD2d 374, 376 (1ˢᵗ Dept 2001)(citations omitted).

Here, Allstate does not specify whether it is seeking reargument or renewal. However, evidence previously submitted, but not previously accepted is considered "new evidence" and thus a motion based on such evidence is "properly construed as a motion to renew" <u>Kasem v. Price-Rite Off. & Home Furniture</u>, 21 AD3d 799, 801-802 (1ˢᵗ Dept 2005).

It is well settled that the party seeking renewal must provide a reasonable excuse for failing to provide the evidence in connection with the original motion. <u>Taub v. Art Students League of New York</u>, 63 AD3d 630 (1ˢᵗ Dept 2009). Moreover, the First Department has recently noted that "[r]enewal is granted sparingly...; it is not a second chance freely given to parties who have not exercised due diligence in their first factual presentation." <u>Henry v. Peguero</u>, 72 AD3d 600, 602 (1ˢᵗ Dept), <u>appeal dismissed</u>, 15 NY3d 820 (2010), <u>reconsideration denied</u>, 16 NY3d 726 (2011)(internal citation and quotation omitted).

Here, Allstate asserts that it only became aware that plaintiff was relying on the failure to obtain the policy of insurance upon receipt of plaintiff's affirmation in opposition and that counsel "acted rapidly to obtain the necessarily information." It further asserts that it obtained the affidavit of Ms. Sisson "shortly before the motion date for oral argument" but that the court refused to permit the supplemental reply.

Notably, however, Allstate's version of the events is belied

by the record which shows that Allstate was given an additional opportunity to provide a supplemental reply to the plaintiff's opposition but failed to submit an affidavit of a person with knowledge of Allstate's mailing procedures in connection with these supplemental papers. The record also shows that Allstate only requested that it be given an opportunity to submit an affidavit after the court inquired whether it provided one. Under these circumstances, Allstate has not satisfied its burden of showing it has a reasonable excuse for failing to provide the affidavit with its supplemental reply or that it used due diligence to obtain the affidavit, and renewal should be denied. Taub v. Art Students League of New York, 63 AD3d at 484.

In any event, even if the court were to consider Ms. Sisson's affidavit, it would not be insufficient to warrant a grant of summary judgment in Allstate's favor. Ms. Sisson states in her affidavit that her duties at Allstate include "searching computer records for mailing of policies and cancellations" and that with respect to the policy she "performed a search of the policy history and determined that a new business policy and declaration were mailed to [plaintiff's] agent...on the 3rd day of July 2002 and an additional new business policy and declaration were mailed to [plaintiff] on the 11th day of July." Sisson Aff., at ¶'s 2,3. She also explains the procedure for mailing as follows: "documents are run through an insert machine, then put an envelope, the machine seals the envelope, and then places the correct amount of postage by weight. The process

machine reads the bar code on the bottom of the document and updates computer information as to delivery to the post office personnel who pick up the documents for mailing" (Id, ¶ 5).

However, Ms. Sisson does not attempt to explain the information in the mailing package computer generated exhibit she references as support for her statements. Notably, the mailing package lacks any record identifying the insured, nor does it indicate any address. Consequently, neither the record nor Ms. Sisson's affidavit provide proof as to the address to which the policy was allegedly mailed. Thus, while, in general, routine office practice regarding mailing of notices by insurance companies create a presumption of receipt that must be rebutted by the insured Thibeault v. Travelers Ins. Co., 37 AD3d 1000 (3d Dept 2007), this presumption does not apply here as there is no proof as to whether the policy was mailed to plaintiff at the correct address.

Under these circumstances, and as plaintiff has denied receiving the policy, even were the court to grant renewal, it would adhere to its original decision finding that there are triable issues of fact as to whether plaintiff received the policy containing the shortened statute of limitations, such that Allstate could avail itself of the shortened limitations period. See 1303 Webster Ave. Realty Corp. V. Great American Surplus Lines Ins. Co., 63 NY2d 227 (1984); Medical Facilities v. Pryke, 62 NY2d 716, 717 (1984); Teitelbaum v. New York Prop. Ins. Underwriting Assn., 126 Misc2d 240, 242 (Sup Ct. Queens Co.

1984).

In view of the above, it is

ORDERED that Allstate's motion to renew and reargue is denied; and it is further

ORDERED that the parties shall appear on ~~November~~ December 15, 2011 at 9:30 am for a compliance conference in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: October _8_, 2011

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J.S.C.

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