

**Litwin v Tri-State Consumer Ins. Co.**

2014 NY Slip Op 33302(U)

December 19, 2014

Supreme Court, New York County

Docket Number: 157367/2013

Judge: Ellen M. Coin

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FRANCINE LITWIN,

Plaintiff,

-against-

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

Index No.: 157367/2013  
Motion Date: Nov. 5, 2014  
Motion Seq.: 001

**DECISION AND ORDER**

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**Ellen M. Coin, J.:**

In this action in which plaintiff Francine Litwin seeks damages arising from defendant Tri-State Consumer Insurance Company's (Tri-State) alleged breach of an insurance policy, Tri-State moves pursuant to CPLR 3211 (a)(1) and (7) to dismiss the complaint.

**I. Background**

Tri-State issued plaintiff a Homeowners Insurance Policy, policy number HOP-117827-05 (policy) (Most affidavit, Ex. A) to cover damage to plaintiff's home. During the policy period, a fire occurred at plaintiff's home which caused extensive damages. Plaintiff proffered the claim to Tri-State. It is not disputed that Tri-State made payments towards the loss. Plaintiff now claims that she is still owed approximately \$150,000 for damages she has proven.

[\* 2]

Tri-State argues that plaintiff failed to meet two conditions precedent to this suit. First, plaintiff is alleged to have breached a condition precedent that she ask for, and participate in, a contractually mandated appraisal process prior to bringing suit, which she did not do. Secondly, Tri-State claims that plaintiff failed to supply Tri-State with a detailed loss inventory, as required by the policy, before any payments could be made, or suit commenced.

Tri-State relies on a provision entitled "Appraisal," paragraph 6, in the "Section I - Conditions" part of the policy. The provision, as pertinent, reads:

If you or we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree on an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the residence premises is located.

Tri-State also relies on paragraph 2 (e), entitled "Your Duties After Loss," which provides that in order to receive compensation for the loss, the insured must "prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory." A "Suit Against Us," provision (paragraph 8) mandates, in pertinent part, that "[n]o action can be brought unless the

policy provisions have been complied with . . . ."

**II. Discussion**

"On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory"

(*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011], quoting *EBG I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007])["[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"]).

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. It is well settled that a contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion"

(*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007][internal quotation marks and citations omitted]).

As plaintiff correctly argues, the use of the word "may" in the "Appraisal" provision indicates, unambiguously, that the appraisal process is not mandatory. There is no other possible reading of the provision.

Tri-State retorts, however, that the "Suit Against Us" provision in the policy "**requires** that 'No action can be brought unless **all of the provisions of the Policy have been complied with**' prior to the filing of suit." Reply memorandum, at 4 (emphasis added). According to Tri-State, reading the policy as an integrated whole, as this court must (see *The Gap, Inc. v Fireman's Fund Ins. Co.*, 11 AD3d 108 [1st Dept 2004]), reveals that "[i]t is . . . impossible, under the terms of the entire Policy, to argue that complying with the 'Appraisal' condition is optional prior to filing the Complaint." Reply memorandum, at 4.

Tri-State is in error. The plain language of the policy shows that there is no obligation that the insured go through an appraisal process prior to filing a suit against Tri-State, and the "Suit Against Us" provision does not serve to change the word "may" into either "shall" or "must." If Tri-State wants a mandatory appraisal process, it can easily change its policy language to accomplish that goal.

Plaintiff has also established that she provided Tri-State with an inventory of losses, as required by the policy. That Tri-State finds the inventory inadequate, or incorrect, is irrelevant on this motion to dismiss. This dispute is the heart of the action.

Moreover, a pre-answer motion to dismiss for failure to state a cause of action may not be predicated on plaintiff's failure to plead "performance or occurrence of a condition precedent in a contract" (CPLR §3015[a]; see also *1199 Hous. Corp. v Intl Fid. Ins. Co.*, 14 AD3d 383,384 [1<sup>st</sup> Dept 2005]). Defendant submits the affidavit of Susan Most as proof of plaintiff's non-performance of the conditions precedent. However, such an affidavit fails to constitute documentary evidence which can support a motion to dismiss pursuant to CPLR 3211(a)(1) (see *Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1<sup>st</sup> Dept 2014], citing *Flowers v 73<sup>rd</sup> Townhouse LLC*, 99 AD3d 431, 431 [1<sup>st</sup> Dept 2012]).

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss brought by defendant Tri-State Consumer Insurance Company is denied; and it is further

ORDERED that defendant Tri-State Consumer Insurance Company is directed to serve an answer to the complaint within 20 days of receipt of a copy of this order with notice of entry.

Dated: 12/19/14

ENTER:



Ellen M. Coin, A.J.S.C.