Nationwide Mut. Fire Ins. Co. v Sears Holdings Corp.
2015 NY Slip Op 31415(U)
July 14, 2015
Supreme Court, Suffolk County
Docket Number: 22503/2009
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER INDEX NO. 22503/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY a/s/o Robert Marmon and other interested insureds under the policy of insurance,

Plaintiff,

-against-

SEARS HOLDINGS CORPORATION, SEARS ROEBUCK and CO., KENMORE, MARSHALL GAS CONTROLS, INC., W. C. BRADLEY, CO. and MIKE'S SUPER CITGO,

Defendants.

- -

MIKE'S SUPER CITGO,

Third-Party Plaintiff,

-against-

PARACO GAS CORPORATION and BAGATTA ASSOCIATES, INC.,

Third-Party Defendants.

ORIG. RETURN DATE: JANUARY 28, 2010
FINAL SUBMISSION DATE: APRIL 10, 2014
MTN. SEQ. #: 002
MOTION: MOT D

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Upon the following papers numbered 1 to 6 read on this motion _____ FOR DISMISSAL _____.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by third-party defendant BAGATTA ASSOCIATES, INC. ("Bagatta"): (1) for an Order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the third-party complaint, in its entirety; (2) requesting that since there are allegedly no questions of material fact presented, that the Court treat the motion as one for summary judgment pursuant to CPLR 3211 (c); alternatively (3) in the event that this Court denies Bagatta's motion to dismiss, for an Order, pursuant to CPLR 603, severing the third-party action against Bagatta from the main action, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received opposition to this application from defendant/ third-party plaintiff MIKE'S SUPER CITGO ("Mike's").

This subrogation action arises out of a fire loss that occurred on July 16, 2006, at the residence of Robert Marmon ("Marmon") located at 321 Columbus Avenue, West Babylon, New York. Plaintiff NATIONWIDE MUTUAL FIRE INSURANCE COMPANY ("Nationwide") was the first-party insurer for Marmon and paid Marmon in excess of $122,000.00 in connection with the property damage due to the fire.

Nationwide commenced this action on or about July 14, 2009, against SEARS HOLDINGS CORPORATION, SEARS ROEBUCK and CO., KENMORE, MARSHALL GAS CONTROLS, INC. ("Marshall"), W. C. BRADLEY, CO. and Mike's to recover the monies paid out to Marmon as a result of an alleged malfunction of a regulator, tank seal, and/or defective component in a gas barbeque grill and/or propane tank. Nationwide alleges that Marmon purchased a liquid propane gas barbeque grill for his residence that was designed, manufactured, distributed and/or sold by the SEARS defendants. Nationwide further alleges that Marshall designed, manufactured, sold and distributed the gas regulator used for Marmon's grill, which allegedly malfunctioned and was a cause of the fire at Marmon's residence.

Mike's commenced a third-party action on October 29, 2009, against PARACO GAS CORPORATION ("Paraco") and Bagatta. Mike's asserts a cause of action against Paraco for indemnity or contribution, alleging that Paraco was negligent in the ownership, maintenance, filling, delivery, stocking and supplying of the filled propane tanks to Mike's. In addition, Mike's asserts a cause of action against Bagatta seeking indemnification based upon Bagatta's alleged negligence and breach of contract in "negligently issu[ing] [Mike's] a 'garage non-dealer's liability policy' . . . which policy contained a *specific exclusion* for 'any and all liability' arising out of the sale, distribution, manufacture or serving of food and beverages or any *non-automotive related products*" (emphasis supplied). Mike's alleges that Bagatta issued such policy despite having inspected Mike's business premises during the application process and having actual knowledge of Mike's business activities which overwhelmingly consist of sales of non-automotive related products. Mike's extended Bagatta's time to answer, move or otherwise respond to the complaint to December 28, 2009, by stipulation.

On March 1, 2010, the Court received a Notice of Bankruptcy Proceedings of Marshall. As such, this matter was stayed pursuant to 11 USC § 362. On April 10, 2014, the Court was advised that the bankruptcy case was resolved and Marshall was discharged in bankruptcy. Therefore, the stay of this matter was lifted.

On or about September 17, 2004, a Commercial Insurance Application was prepared by Bagatta for Mike & Hilda Enterprises, Inc. a/k/a Mike's, for the premises located at 675 Sunrise Highway, West Babylon, New York. The Commercial Insurance Application was signed by a representative of Mike & Hilda Enterprises, Inc. Bagatta, by letter dated November 30, 2004, sent a copy of a Garage and Dealers insurance policy to Mike & Hilda Enterprises, Inc., which was written through Lancer Insurance Company ("Lancer Policy"). This policy covered the period from October 29, 2004 to October 29, 2005. Thereafter, by letter dated September 23, 2005, Bagatta sent a copy of the Renewal Policy to Mike & Hilda Enterprises, Inc., covering the period October 29, 2005 to October 29, 2006 ("Renewal Policy"). Bagatta, by affidavit of its controller, claims that Mike's never advised anyone from Bagatta that the Lancer Policy or the Renewal Policy were not the type of policy requested.

Bagatta has now filed the instant motion to dismiss. The Court notes that both Bagatta and Mike's have submitted affidavits and other evidence to support their respective positions herein. Thus, the Court finds that the parties are "deliberately charting a summary judgment course" (*see* CPLR 3211 [c]; *Mihlovan v Grozavu*, 72 NY2d 506 [1988]; *Four Seasons Hotels v Vinnik*, 127

AD2d 310 [1987]). As such, the Court shall deem Bagatta's motion one for summary judgment, pursuant to CPLR 3211 (c), and analyze the application in that context, without opposition from Mike's.

Initially, with respect to the branch of the motion which seeks dismissal on statute of limitations grounds, a moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see e.g. Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]). The Court of Appeals has held that alleged misfeasance of insurance agents and brokers toward their clients is not "malpractice" within CPLR 214 (6) (*see Santiago v 1370 Broadway*, 96 NY2d 765 [2001]; *Chase Scientific Research v NIA Group*, 96 NY2d 20 [2001]). As such, a breach of contract claim against insurance brokers is governed by the six-year statute of limitations pursuant to CPLR 213 (2), while a negligence claim has a three-year limitations period pursuant to CPLR 214 (4) (*Santiago*, 96 NY2d 765).

The Court finds that Bagatta, through the submission of the third-party summons and complaint, established *prima facie* that the claim against Bagatta sounding in negligence is time-barred pursuant to CPLR 214 (4), having been interposed more than three years after the date of injury (*see Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376 [2014]).

Moreover, the Second Department has held that a plaintiff's cause of action to recover damages for breach of contract accrues, and the relevant six-year statute of limitations begins to run, upon the breach, not when a plaintiff allegedly sustained damages arising therefrom (*St. George Hotel Assocs. v Shurkin*, 12 AD3d 359 [2004]; *see* CPLR 213 [2]; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399 [1993]; *National Life Ins. Co. v Hall & Co. of N.Y.*, 67 NY2d 1021 [1986]; *Mauro v Niemann Agency*, 303 AD2d 468 [2003]).

Here, the alleged breach occurred on or about September 23, 2005, when the Renewal Policy covering the date of loss was procured by Bagatta. Using that date for statute of limitations purposes, the third-party action, commenced on October 29, 2009, is within the six-year period. Thus, the Court finds that the portion of Mike's cause of action sounding in breach of contract against Bagatta is timely.

Bagatta contends that Mike's complaint should be dismissed as asserted against it, as there are allegedly no questions of fact as between these

two parties. Bagatta claims that it sent Mike's the Lancer Policy and the Renewal Policy, and Mike's never advised Bagatta that they were not the type of policy requested. Bagatta argues that once an insurance policy has been received, it constitutes presumptive knowledge of its terms and limits, which would defeat a claim for negligence. Furthermore, Bagatta contends that the breach of contract claim must fail, as there was no contract between Mike's and Bagatta.

In opposition hereto, Mike's alleges that it relied upon the representations, recommendations and expertise of Bagatta in procuring the proper policy; that Bagatta promised Mike's that a policy would be "specifically tailored" for Mike's business, i.e., a gas station/convenience store/car wash; and that Bagatta procured a policy from Lancer for a gas station/garage repair shop, leaving Mike's with no coverage for any retail item sold. In support thereof, Mike's has submitted, among other things, an affidavit made by its president and principal shareholder. Mike's argues that an insurance broker may be sued for procuring the wrong coverage, even though an insurance company may not.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

An insurance agent or broker may be held liable under theories of breach of contract or negligence for failing to procure insurance. An insured must show that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or

because it failed to exercise due care in the transaction (*see Siekkeli v Mark Mariani, Inc.*, 119 AD3d 766 [2014]; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792 [2007]; *Mickey's Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.*, 17 AD3d 328 [2005]; *Structural Bldg. Prods. Corp. v Business Ins. Agency*, 281 AD2d 617 [2001]).

The Court finds that Bagatta is not entitled to judgment as a matter of law because it failed to establish, *prima facie*, that it procured the appropriate and adequate coverage that Mike's had engaged it to procure (*see Siekkeli*, 119 AD3d 766; *Jual Constr. Ltd. v A.C. Edwards, Inc.*, 74 AD3d 1150 [2010]; *Trizzano v Allstate Ins. Co.*, 7 AD3d 783 [2004]). Questions of fact exist relative to Bagatta's alleged breach of contract by failing to procure the proper policy of insurance that was "tailor made" to Mike's business operations, as promised by Bagatta. As discussed, a representative of Bagatta personally inspected Mike's business premises and then prepared the necessary application to supposedly obtain the coverage needed. Notwithstanding the foregoing, Bagatta procured a policy of insurance appropriate for a gas station that contains a garage repair shop, instead of one that contains a convenience store and a car wash.

Accordingly, that branch of Bagatta's motion for summary judgment dismissing the third-party complaint is **GRANTED** solely to the extent that Mike's cause of action against Bagatta is dismissed to the extent it asserts a claim for negligence.

With respect to that branch of Bagatta's motion to sever the third-party action, CPLR 603 provides in pertinent part, "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion which should not be disturbed absent a showing of abuse of discretion or prejudice to a substantial right of the party seeking the severance (*see e.g. Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *Mothersil v Town Sports Intl.*, 24 AD3d 424 [2005]; *McCrimmon v County of Nassau*, 302 AD2d 372 [2003]).

" '[I]t is generally recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims' " (*Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 625 [2009], quoting *Christensen v Weeks*, 15 AD3d 330, 331 [2005]; *see also Kelly v Yannotti*, 4 NY2d 603 [1958]; *Chunn v New York City Hous. Auth.*, 55 AD3d 437 [2008]). "The severing of negligence actions

from insurance coverage actions applies to brokers and agents as well as to insurance companies" (*Hoffman v Kew Gardens Hills Assocs.*, 187 AD2d 379, 379 [1992]).

Further, the Second Department has held that it was error to direct a joint trial of a legal malpractice action and an action by one of the defendants against his professional liability insurance agent (*see Johnson v Berger*, 171 AD2d 728 [1991]). The appellate court found that the action did not involve common questions of law or fact and that a joint trial of the actions could result in substantial prejudice to the insurance agent (*id.*; *see also Christensen*, 15 AD3d 330; *Hoffman*, 187 AD2d 379).

Here, the Court finds that it would be prejudicial to Bagatta if the issue of Bagatta's alleged breach of contract relative to procuring the Lancer Policy and the Renewal Policy is tried before the same jury that considers the property damage claims. Moreover, plaintiff's claims for negligence, strict products liability, and breach of contract against the main defendants do not share any common questions of law or fact with the claim against Bagatta. Accordingly, this motion to sever the third-party action against Bagatta from the main action herein is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 14, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION