Five Towns Mason Materials, Inc. v Hermitage Ins. Co.
2016 NY Slip Op 32444(U)
November 4, 2016
Supreme Court, Nassau County
Docket Number: 603021/2013
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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FIVE TOWNS MASON MATERIALS, INC. a/k/a, and d/b/a FIVE TOWNS MASON MATERIAL,

Plaintiff,

-against-

HERMITAGE INSURANCE COMPANY,

Defendants.

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TRIAL PART: 7

NASSAU COUNTY

INDEX NO: 603021/2013

MOTION SEQ #: 3, 4

SUBMIT DATE: 11/1/16

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3
Order to Show Cause.....4

Defendant moves herein for an order granting it summary pursuant to CPLR §3212, dismissing Plaintiff's complaint in its entirety. Plaintiff opposes the motion. In addition, Defendant has submitted an order to show cause requesting a stay of the trial until the within summary judgment motion has been decided. For the following reasons, Defendant's summary judgment motion is granted in its entirety, the complaint herein is dismissed, and Defendant's request for a stay pursuant to CPLR §2201 is hereby denied as moot.

As a preliminary matter, although Defendant's papers speak only generally as to the allegations of Plaintiff's second and third causes of action, seeing as they have moved to dismiss Plaintiff's entire complaint, this court will address the sufficiency of all three of Plaintiff's causes of action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1968). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.

Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id., *See also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

Defendant's moving papers, and Plaintiff's opposition, focus on Plaintiff's breach of contract claim, asserted as its first cause of action. In order to establish a breach of contract, a party must show formation between the parties, performance by one party, failure to perform by the other party, and resulting damage. Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 921 NYS2d 260 (2nd Dept., 2011). Any ambiguity in coverage, including an exclusionary clause, should be construed in favor of the insured. Cragg v. Allstate Indemnity Corp., 17 NY3d 118, 926 NYS2d 867 (2nd Dept., 2011). An unambiguous policy provision must be accorded its plain and ordinary meaning and the court may not disregard this plain meaning of the policy's language in order to find an ambiguity where none exists. Guachichulca v. Laszlo N. Tauber & Associates, LLC, 37 AD3d 760, 831 NYS2d 234 (2nd Dept., 2007).

In the instant case, Defendant has established its entitled to judgment as a matter of law by presenting a true and correct copy of the policy, which is undisputed by Plaintiff, as well as deposition testimony and an affidavit of its engineering expert. These submissions, when taken together, make clear that the damage to the buildings was either pre-existing to Superstorm Sandy, or the result of flooding from it, which was expressly excluded from coverage by the policy. In opposition, Plaintiff has failed to raise a triable issue of fact sufficient to defeat summary judgment. Plaintiff has not established that the excluded peril was the dominant and proximate cause of the damage to Plaintiff's buildings. Album Realty Corp. v. American Home Assurance Co., 80 NY2d 1008, 592 NYS2d 657 (1992). Although Plaintiff's witnesses suggest that wind, which is covered under the policy, was the primary cause of the damage to its two buildings, the evidence submitted by Defendant overwhelms this position, thus leaving no question of fact to be resolved at trial. Therefore, Plaintiff's first cause of action is hereby dismissed.

Plaintiff's second cause of action alleges a breach of the covenant of good faith and fair dealing. For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant

sought to prevent performance of the contract or to withhold its benefits from the plaintiff. Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce, 265 AD2d 513, 697 NYS2d 128 (2nd Dept., 1999). Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied duty of good faith and fair dealing when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the benefit of its bargain. Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc., 97 AD3d 781, 949 NYS2d 115 (2nd Dept., 2012). Here, Defendant has not acted in a manner that would deprive Plaintiff the right to receive the benefits of the agreement unjustifiably; rather, the express provisions of the contract deny Plaintiff the right to recover insurance proceeds otherwise available in the contract given the causation of Plaintiff's loss. Therefore, Plaintiff's second cause of action is also properly dismissed.

Plaintiff's third cause of action is for a violation of New York General Business Law §349, alleging that Defendant engaged in deceptive business practices by: first, materially misleading Plaintiff that it would be reimbursed and indemnified for damages sustained; and second, denying and underpaying claims timely brought under the insurance policy. In order to succeed on a claim of violation of NY GBL §349, Plaintiff must establish that the Defendant has engaged in consumer oriented conduct that is materially misleading and that plaintiff suffered injury as a result of the allegedly deceptive act or practice. N. State Autobahn, Inc. v. Progressive Ins. Group. Co., 102 Ad3d 5, 953 NYS2d 96 (2nd Dept., 2012). Although the alleged conduct of Defendants appears to be sufficiently consumer oriented (*see* Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 623 NYS2d 529 [1995]), the Plaintiff failed to provide sufficient evidence that the alleged conduct of Defendant was materially misleading (Stutman v. Chemical Bank, 95 NY2d 24, 709 NYS2d 892 [2000]). It appears to the Court that the only support of the allegation are conclusory statements of Plaintiff. Therefore, Plaintiff's third cause of action is dismissed as well.

Finally, Defendant has requested by separate order to show cause that the within action be stayed from moving forward to trial until a decision on its summary judgment motion has been rendered. Given the foregoing, the temporary stay put in place with the signing of the order on October 4, 2016, is hereby lifted, and the motion is denied herein as moot.

Defendant shall serve a copy with notice of entry of the within Order of the Court upon

Plaintiff within twenty (20) days from the date of this order

This hereby constitutes the decision and order of this Court.

ENTER

DATED: November 4, 2016

HON. ARTHUR M. DIAMOND

J. S.C.