Swarzman v AIG Prop. Cas. Co.
2017 NY Slip Op 31547(U)
July 20, 2017
Supreme Court, New York County
Docket Number: 653618/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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STEVEN SWARZMAN,

Plaintiff,

Index No. 653618/2016
DECISION AND ORDER
Mot. Seq. 001

- against-

AIG PROPERTY CASUALTY COMPANY,

Defendant.

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Gerald Lebovits, J.:

Defendant, AIG Property Casualty Company, moves to dismiss the complaint as untimely under CPLR 3211 (a) (5) on the ground that the contractually shortened limitations periods in two policies at issue, as explained below, have expired.

Background

Plaintiff-insured made timely claims on two policies: his homeowner's policy number 0004439283 (the Homeowner's Policy) and his excess flood policy number PCG0003953663 (the Excess Policy) for damage to his home at 277 Surfside Drive in Bridgehampton, New York (the Premises), allegedly caused by Superstorm Sandy (Sandy) on October 29, 2012. Chartis Property Casualty Company (Chartis) issued both policies. Chartis is now known as AIG Property Casualty Company (AIG).

The Homeowners Policy has a dwelling coverage limit of $4.8 million and contents coverage of $1.1 million, with additional "guaranteed rebuilding cost" coverage (complaint, ¶ 15) and no flood-exclusion clause. The excess Flood Policy provides an additional $955,781 for flood damages that does not apply "until the amount of loss exceeds the primary and underlying insurance limits" (Excess Policy at 1). That policy defines "Primary and Underlying Insurance as "the standard flood insurance policy issued by the Primary Insurer . . . and any excess flood insurance that is in place" (*id.*).

Plaintiff's counsel states that plaintiff, through a corporate entity named 277 Surfside Drive LLC, brought suit against Stillwater Insurance Company (Stillwater) under its National Flood Insurance Program's flood policy in the United States District Court for the Eastern District of New York. Plaintiff's counsel states that the case settled in May 2016. Plaintiff submits the affirmation of Brian H. Brick, an attorney who represented Stillwater in that case. Brick does not discuss the amount of the settlement. In any event, plaintiff states that less than two months after that case settled, it filed this action on July 11, 2016.

After plaintiff filed his claim, AIG inspected the Premises in December 2012 and advised

plaintiff that the wind damage to the Premises did not exceed the applicable deductible. On September 27, 2013, AIG conducted another inspection of the Premises and, by letter dated October 16, 2013, advised plaintiff that the amount AIG had determined plaintiff was entitled to was $171,319.32 (complaint, exhibit F, the Muldoon Letter).

On March 17, 2014, plaintiff provided AIG with a report by a professional engineer, Michael Tracey, who evaluated the damage to the Premises. By letter dated August 20, 2014, AIG advised plaintiff that it did not agree that the Premises had suffered the structural damage claimed by plaintiff's engineer.

The parties have submitted no other evidence beyond August 20, 2014.

The Homeowners Policy provides in Part IV, under the heading "Conditions," subdivision L, as amended by the "Homeowners Amendatory Endorsement New York," that the policyholder agrees to "bring any action against us within two years after a loss occurs, but not until thirty (30) days after proof of loss has been filed and the amount of loss has been determined" (Spinella aff, exhibit B, the conditions).

The Excess Policy provides for a one-year limitations period and also contains the same two conditions as in the Homeowners Policy (Spinella aff, exhibit C).

This action was commenced on July 11, 2016. AIG argues that this action is untimely because both conditions in the limitations provision were satisfied within the two-year period and because plaintiff commenced this case more than two years from the date of the physical loss.

Discussion

AIG's motion is denied.

On a motion under CPLR 3211 (a) (5) based on untimeliness under the applicable statute of limitations

> "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period."

(*Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085-1086 [2d Dept 2016] [internal quotation marks and citations omitted]).

Contractually shortened limitations periods in insurance contracts are enforceable (see CPLR 201; *Duke Plastics Corp. v New York Prop. Ins. Underwriting Ass'n*, 86 AD2d 818, 819

[1st Dept 1982]). Even one-year limitation periods in insurance policies are allowed (*see Proc v Home Ins. Co.*, 17 NY2d 239, 246 [1966]). Also enforceable are agreements to shorten the statute of limitations: "An agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 551 [1979]; *accord Exec. Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 [2014]).

The First Department has stated as follows:

> "It has been settled law in this State for almost a century that where a policy provides that suit must be brought within a designated period after 'loss or damage' occurs, that period is computed not from the time of the occurrence of the physical loss, the casualty or the event insured against, but from the time that liability accrues under the provisions of the policy. Admittedly, policies of insurance may specify a period of limitations running from the occurrence of a casualty or event insured against. When this language is clear it is given effect."

(*Margulies v Quaker City Fire & Mar. Ins. Co.*, 276 AD 695, 700 [1st Dept 1950] [citations omitted].)

Neither policy uses the exact phrase used in *Margulies*, "after loss or damage," but only "after a loss occurs." "Loss" is not a defined term in the Homeowner Policy, and "occurrence" is defined as "a loss that occurs" (Spinella aff, exhibit B at 1). The rule in *Margulies*, quoted above, is stated in the disjunctive. It means after either loss or damage occurs.

AIG relies on *Costello v Allstate Ins. Co.* (230 AD2d 763, 763 [2d Dept 1996]) for the proposition that insurance policies that contain the terms "date of loss" and "inception of the loss" will be interpreted to set the date of accrual for limitations purposes as the date of the catastrophe insured against: here, October 29, 2012 (defendant's brief at 2). Neither policy at issue contains either of the terms "date of loss" or "inception of the loss." AIG contends that the accrual date to measure the limitations period is the date of Sandy. With respect to the other two conditions, no dispute exists about the filing of a proof of loss.

AIG's reliance on *Costello* is misplaced (*see Fabozzi v Lexington Ins. Co.*, 601 F3d 88, 91-92 [2d Cir 2010] ["*Costello* . . . which summarily assert a new rule, contrary to the principles formulated by the Court of Appeals . . . . This conclusion [in *Costello*] was inaccurate at the time it was made and remains inconsistent with the controlling Court of Appeals decisions . . . ."]). Neither policy contains the language "the date of the loss" or "the inception of the loss." This latter phrase is used in the statutory standard fire policy (*see* Insurance Law § 3404). In any event, *Costello* is not binding on this court.

AIG contends that the amount of the loss was determined on October 16, 2013, the date

of the Muldoon Letter, which unilaterally sets the amount of plaintiff's damage at $171,000. AIG argues that this satisfies the condition that "the amount of loss has been determined."

The court finds the language "and the loss has been determined" vague and ambiguous. It does not say by whom the loss is to be determined or how it is to be determined, and it does not expressly provide for unilateral determination by AIG.

This exact language — "and the amount of loss has been determined" — has been held subject to "at least two different, reasonable interpretations" (*Erlichman v Encompass Ins. Co.*, 4 Misc 3d 1002 [A], * 5, 2004 NY Slip Op 50599 [U], *5 [Sup Ct, Nassau County 2004]). A "'contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Triax Capital Advisors, LLC v Rutter*, 83 AD3d 490, 492-493 [1st Dept 2011] [citation omitted].) Therefore, the following rule applies: "Where the policy is ambiguous, the policy must be narrowly interpreted in favor of the insured" (*MDW Enters. v CNA Ins. Co.*, 4 AD3d 338, 340 [2d Dept 2004]).

In 1950, the standard New York fire policy provided the following:

> "ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided."

(*Margulies*, 276 AD at 697). The unilateral estimation contained in the Muldoon Letter does not satisfy, as a matter of law, that "the amount of the loss has been determined."

AIG has not made a prima facie showing that the action is barred by the contractually shortened limitations clauses.

The Homeowners Policy does not establish an intent to measure the limitations period from the date of the storm "with reasonable clarity," as required by the First Department in *Margulies* (276 AD at 700). Therefore, applying the *Margulies* rule, the limitations "period is computed . . . from the time that liability accrues under the provisions of the policy" (276 AD at 700). AIG has not demonstrated that the provisions of either policy require accrual of liability as of a date that would be untimely under operation of the conditional limitation. AIG has not established, as a matter of law, that the amount of the loss has been determined. Thus, the action is timely under the Homeowners Policy, and the court cannot determine whether the Excess Policy is triggered.

As the First Department stated in *Margulies*, with respect to the Legislature's intention in drafting the standard language of limitation in the mandatory fire policy contained in Insurance Law § 3404, which included the "ascertainment" clause,

> "the intention of the draftsmen of the standard fire insurance policy

> form does not alone suffice unless words are used that fairly and reasonably make that intention clear to the ordinary business man who purchases a policy of insurance."

(*Id.* at 699).

The AIG policies do not meet that standard here.

Even AIG misread its own Homeowners Policy. Robert Muldoon, of Chartis Private Client Group, inaccurately advised counsel for plaintiff, in the Muldoon letter, that the condition in the Homeowners Policy required plaintiff to bring any action "within *one year* after a loss occurs" (Spinella aff, exhibit F [emphasis supplied]), and apparently overlooked "Homeowners Amendatory Endorsement New York," which is added to the Homeowners Policy and which increased the time in which to bring an action to two years.

AIG's motion is denied. It has not established as a matter of law that this action is barred by the contractually shortened limitations clause.

Accordingly, it is

ORDERED that the motion of AIG Property Casualty Company to dismiss the complaint as time-barred under CPLR 3211 (a) (5) is denied; and it is further

ORDERED that defendant AIG Property Casualty Company must serve a copy of this decision and order with notice of entry on plaintiff; and it is further

ORDERED that defendant is directed to serve and file its answer within 20 days of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on October 17, 2017, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: July 20, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.