Pinnacle Prop. Mgt. Corp. v Haylor Freyer & Coon, Inc.
2017 NY Slip Op 33342(U)
July 20, 2017
Supreme Court, Onondaga County
Docket Number: Index No. 2016EF2833
Judge: Thomas D. Buchanan

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

PINNACLE PROPERTY MANAGEMENT CORP.; FRANKLIN PARK APARTMENTS CO., LLC; and PARKSIDE APARTMENTS CO. LLC;

Plaintiffs;

vs. **DECISION AND ORDER**

HAYLOR FREYER & COON, INC. and STEVEN DeREGIS; **Index No. 2016EF2833**

Defendants.

Buchanan, J.:

Defendants have moved pursuant to CPLR 3211(a)(1) & (7) to dismiss the Complaint in this action. Plaintiffs commenced this action in July of 2016 by filing a Summons and Complaint, in which they assert four causes of action labeled as 1) Breach of Contract, 2) Negligence and Professional Malpractice, 3) Negligence and 4) Promissory Estoppel and Detrimental Reliance. The action arises from flood damage that occurred in June of 2015 at properties owned by the plaintiff entities, a loss against which it is alleged that the defendant insurance agency and the defendant individual insurance agent should have procured insurance coverage. In their motion, Defendants allege that there is a complete defense based on documentary evidence and also that the Complaint fails to state a viable cause of action. Plaintiffs oppose the motion. After reviewing the initial motion papers, the Court gave notice to the parties that it would treat this motion as one for summary judgment and allowed time to supplement the record.

Two core events underlie the claims asserted by Plaintiffs and the defenses asserted by Defendants. The first is a meeting that occurred on or about November 26, 2012, among defendant DeRegis, Paula Garell (the wife of Plaintiffs' principal) and Martha Hess (Plaintiffs' office manager). The second is an email from DeRegis to Ms. Garell

concerning the flood coverage which is at the heart of this action. The two sides differ as to the content of the November 26 meeting and the authority of those in attendance. They also differ as to whether the DeRegis email gave notice to Plaintiffs that action was required in order to bind flood coverage. Indeed, Plaintiffs deny receipt of the email.

On a motion to dismiss under CPLR 3211, the pleading at issue is to be given a liberal construction, with the allegations it contains presumed to be true and the plaintiffs afforded every favorable inference. The function of the court considering such a motion is to determine whether the facts alleged fit within a cognizable legal theory (*Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]). However, allegations that are "bare legal conclusions" or are "flatly contradicted by documentary evidence" do not receive such favorable consideration (*Simkin v. Blank*, 19 NY3d 46, 52 [2012]). From the record presented on Defendants' motion, including the parties' divergent views of the November 26 meeting and Defendants' denial of receipt of the November 29 email, it appeared to the Court that information beyond the documentary and testimonial evidence initially submitted was necessary in order to make a final determination of Defendants' motion.

The Court having elected to treat this motion as one for summary judgment, and the parties having made additional submissions, the summary judgment standard now applies, so that Defendants bear the initial burden of making a *prima facie* showing of their entitlement to judgement as a matter of law by submitting sufficient evidence to show that no material issues of fact exist (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If they make the requisite showing, the burden of proof then shifts to Plaintiffs to show the presence of questions of fact requiring trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). The facts must be construed in a light most favorable to Plaintiffs as the non-moving parties (*see e.g. Hanna v. St. Lawrence County*, 34 AD3d 1146 [3d Dept 2006]).

1. Breach of Contract and Professional Malpractice. Defendants' first argument is addressed to both the first and second causes of action. Defendants argue that they fulfilled the duty they owed to Plaintiffs under either theory by attempting to obtain the coverage requested by Plaintiffs and presenting coverage options to them. Defendants further argue that they informed Plaintiffs of the need for authorization to bind coverage, which Plaintiffs failed to give.

The parties agree that the basic duty of an insurance agent is to obtain requested coverage within a reasonable time or to inform the client of their inability to do so (*Murphy v. Kuhn*, 90 NY2d 266 [1997]). The parties further agree that a "special relationship" exception to this rule exists in cases where the plaintiff can show either (1) payment of compensation to the agent other than insurance premiums, (2) interaction between the insured and the agent regarding a question of coverage and reliance by the insured on the expertise of the agent, or (3) a course of dealing over an extended period of time that would put a reasonable agent on notice that their advice was being sought and specially relied upon (*Id.* at 272-73).

Defendants point out that Plaintiffs were informed by their insurer in October of 2012 that flood insurance coverage for the subject properties would not be included in Plaintiffs' policy upon its next renewal. Defendants offer the November 29, 2012 email from DeRegis to Garell as setting forth flood insurance coverage options for the subject properties and seeking Plaintiffs' authorization to bind coverage. In addition to an affirmation from counsel and an affidavit from Mr. DeRegis stating that the email was sent, Defendants submit an affidavit from a cyber security consultant, who states that he examined the Lotus Notes mailboxes used by Defendants and found the November 29 email in the "sent" folder for Mr. DeRegis with an indicator that it was sent on November 29, 2012 at 3:29 p.m.

DeRegis further states that he discussed Plaintiffs' lack of flood coverage at annual review meetings with Plaintiffs in 2012 and 2013. Defendants submit an affidavit from Account Manager Heather Parker, who confirms that such discussion took place at the 2013 meeting, which she attended with DeRegis. Defendants also note that an Insurance Proposal submitted to Plaintiffs by DeRegis for coverage from November of 2014 through November of 2015 listed flooding as one of the exclusions from coverage. Finally, Defendants argue that even if the "special relationship" exception to the common-law duty of insurance agents was found here, Plaintiffs were still required to take action and provide authorization to bind coverage, which they failed to do. On this record, Defendants carry their initial burden of proof.

As noted above, Plaintiffs dispute the content of discussions at the meeting of November 26, 2012. In their affidavits, both Garell and Hess state that they left the 2012

meeting with DeRegis with the impression that flood insurance coverage had been obtained. Plaintiffs' principal Donald Greenwood states in his affidavits that he sought out Defendants specifically to remedy a lack of flood insurance coverage that had existed previously, that he informed Defendants of that fact, and that he relied upon Defendants' continuing representations that flood coverage existed.

Plaintiffs dispute their receipt of the DeRegis email and the efficacy of that email, had it been received. The Garell and Hess affidavits both state that they examined their respective computers for any sign of the DeRegis email having been received, but found none. The Court notes Defendants' argument that the Complaint itself contains an allegation that Plaintiffs received "correspondence" from Defendants on or about November 29, 2012. However, viewed in a light most favorable to Plaintiffs, the record here does not establish that the correspondence referred to in the Complaint was the DeRegis email.

Plaintiffs further argue that Garell was not authorized to make insurance decisions on behalf of Plaintiffs, making any notifications that might have been given to her ineffective as to the plaintiff companies. Plaintiffs submit statements to that effect in affidavits from Garell, Hess and Greenwood. Plaintiffs also submit an affidavit from Jim Leatzow, who is offered as an expert in insurance agent/broker practices. Mr. Leatzow opines that it was "unacceptable in the commercial insurance industry" for DeRegis to email Garell without some written authorization or a sufficient pattern of conduct showing her to be an authorized agent of Plaintiffs, and unacceptable to rely on an email to provide notice to Plaintiffs without a follow-up through formal written correspondence. Leatzow also finds the content of the DeRegis email to be insufficient to serve as notice of a lapse in coverage. While Plaintiffs do not respond directly to statements by DeRegis and Parker that flood coverage was discussed again at the annual review meeting with Garell and Hess in 2013, the argument that neither Garell nor Hess were authorized to act on behalf of Plaintiffs to bind coverage also applies here.

Plaintiffs' averments also serve to blunt another of Defendants' arguments. Defendants point to copies of Insurance Proposals submitted by Defendants to Plaintiffs prior to renewal of the policies for each applicable year. All of these proposals contain a

page entitled "Cause of Loss" which states that the proposed coverage is subject to exclusions. The form then states, "Some exclusion examples are as follows". The ensuing list includes "Flood". The proposals for 2012-2013 and 2013-2014, however, also include proposals for flood coverage, albeit not for the specific properties that are the subject of this action. The proposal for 2014-2015 does not include a proposal for flood coverage, although the record includes statements by both sides that Defendants had placed flood coverage for some of Plaintiffs' property that year. The various affidavits submitted here also indicate that the proposals were discussed at the annual review meetings, but they do not appear to be an "offer" of coverage or an order form to be signed or initialed by Plaintiffs. The proposals themselves, therefore, do not appear to tell the entire story.

Viewing the record in a light most favorable to Plaintiffs, it appears that there are, at a minimum, questions of fact as to the discussions had at the 2012 meeting, whether the DeRegis email was received, whether that email functioned as notice to Plaintiffs that action was required in order to obtain the coverage requested, and whether the exclusion language in the Insurance Proposal documents gave notice to Plaintiffs that they lacked flood insurance coverage on the subject properties.

It is worth noting that Defendants submit their own expert affidavit in response to the Leatzow affidavit, in which defense expert Burl Daniel offers his own analysis of the facts and finds fault with the conclusions reached by Leatzow. The Daniel Affidavit serves to reinforce the presence of factual questions. The differing expert opinions, like the contradictory affidavits as to the receipt of the DeRegis email and Garell's authority to act for Plaintiffs, set up questions of credibility and of fact that are not appropriately resolved on a summary judgment motion (*see e.g. Dillenbeck v. Shovelton,* 114 AD3d 1125 [3d Dept 2014]; *Rosenbaum v. Camps Rov Tov,* 285 AD2d 894 [3d Dept 2001]). It is not necessary to reach the question of whether a special relationship existed between the parties in order to determine that Defendants' motion must be denied as to the first cause of action for breach of contract and the second cause of action for negligence and professional malpractice.

2. Negligence. Defendants argue that Plaintiffs' third cause of action for negligence is cumulative and nonsensical. Defendants' initial memorandum of law points out that

Defendants are not the issuers of insurance coverage and that they do not adjust claims (the failure to do so being the gravamen of this cause of action). However, Defendants offer no factual allegations as to this argument in any of the affidavits submitted in support of their motion. Therefore, Defendants fail to carry their initial burden of proof as to this cause of action and their motion must be denied accordingly.

3. Promissory Estoppel. Likewise, Defendants limit their argument as to Plaintiffs' fourth cause of action for promissory estoppel to their initial memorandum of law. Defendants characterize this cause of action as a "repackaging" of the first cause of action for breach of contract, which must fail for the same reason – Plaintiffs' failure to authorize Defendants to bind coverage in response to the DeRegis email of November 29, 2012. For the same reasons discussed above in relation to the breach of contract claim, Defendants' motion also fails as to this claim.

The parties' remaining contentions have been considered, but do not alter the outcome of this motion. Therefore, in consideration of the foregoing it is hereby

ORDERED, that the motion by Defendants to dismiss the Complaint herein, converted by the Court to a motion for summary judgment, is denied.

Dated: July 20 2017

ENTER.

Thomas D. Buchanan
Supreme Court Justice

Papers considered:

Notice of Motion; Affirmation of Anthony Green, Esq., with exhibits; Memorandum of Law; Affidavit of Hon. Donald Greenwood, with exhibit; Affidavit of Paula Garell; Affidavit of Martha Hess, with exhibits; Memorandum of Law; Affidavit of Steven DeRegis, with exhibit; Reply Memorandum of Law; Affidavit of Gary Haas, with exhibits; Supplemental Affidavit of Steven DeRegis, with exhibits; Corrected Supplemental Affidavit of Steven DeRegis, with exhibits; Affidavit of Burl Daniel, with exhibits; Affidavit of Scott Pellman; Supplemental Memorandum of Law; Affidavit of Robert Connolly, Esq., with exhibit; Supplemental Affidavit of Hon. Donald Greenwood, with exhibits; Affidavit of Jim Leatzow, with exhibit; Affidavit of Robert Galusha.