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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JOHN DESIDERIO,

Plaintiff,

-against-

GEICO GENERAL INSURANCE COMPANY,

Defendant.

---x

Index No. 004718/12

Motion Submitted: 02/22/16
Motion Sequence: 007,008,009,010

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXXX
Answering Papers.....XXXX
Reply.....XXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Upon the foregoing papers, it is hereby ordered that the branch of the application interposed by Geico General Insurance Company [hereinafter Geico], seeking an order staying execution and enforcement of a judgment granted in favor of the plaintiff, is hereby denied; that branch of Geico's application seeking renewal and re-argument of this Court's decisions dated January 22, 2015 and June 23, 2015, and upon such renewal and re-argument, "reversing" the portions thereof awarding the plaintiff costs and counsel fees, is hereby denied (Sequence #007); the application interposed by the plaintiff seeking the imposition of additional sanctions against Geico pursuant to 22 NYCRR §130.1-1 for its frivolous conduct in interposing the within application, is hereby denied (Sequence #008); the application interposed by Geico for an order granting summary judgment dismissing the plaintiff's complaint, is hereby granted solely as to the issue of punitive damages and denied in all other respects (Sequence #009); and, the application interposed by the plaintiff, which seeks an order granting summary judgment on the complaint, is hereby denied (#010).

The plaintiff, an insured of Geico, sustained physical injuries when a vehicle crashed through the front of his home and landed on top of the bed in which he was sleeping. The plaintiff filed a claim with Geico, to which he was awarded $100,000 by an arbitrator. The plaintiff thereafter commenced the underlying action on April 13, 2013, alleging that Geico breached the insurance contract by acting in bad faith in failing to investigate, settle and pay his claim prior to arbitration and that Geico's actions are part of a larger pattern in which the defendant regularly engages warranting an award of consequential, extra contractual and punitive damages.

Pursuant to a notice dated, October 25, 2013, the plaintiff sought to depose claims manager, Dennis Lovrecich, after the witness previously produced by Geico was not possessed of sufficient knowledge to provide meaningful testimony. Geico subsequently moved for a protective order asserting its prior witness provided adequate responses to all questions posed and the plaintiff cross moved to compel the production of Mr. Lovrecich. By Decision and Order dated April 16, 2014, this Court granted the plaintiff's cross motion and directed Geico to produce Mr. Lovrecich no later than May 16, 2014, which the defendant failed to do.

The plaintiff then moved pursuant to CPLR §3216 for an order striking the defendant's answer in opposition to which Geico asserted, for the first time, that Mr. Lovrecich had retired. As established by the plaintiff's reply papers, this information was conveyed to plaintiff's then counsel by letter dated, May 16, 2014, however, this correspondence was not actually mailed until May 22, 2014, after the deadline mandated by this Court for the production of this witness.

In an attempt to resolve the plaintiff's application, the matter was set down for a conference on October 23, 2014 at which time this Court was orally advised by Geico that Mr. Lovrecich suffered a "brain injury." In addition to not substantiating that condition with corroborative medical documentation, Geico did not offer Mr. Lovrecich's last known address or provide the name of another employee who could meaningfully testify at a deposition. Inasmuch as the plaintiff's motion was not susceptible to resolution, by Decision and Order dated December 5, 2014, this Court scheduled a hearing for the purposes of ascertaining when this witness retired, his last known address and whether Geico had any control over its purported former employee. Several days prior the hearing, and notwithstanding having previously maintained that Mr. Lovrecich was no longer under its control, this Court received a letter from Geico's counsel reciting several dates in January and February on which this witness was now available to be deposed.

On January 20, 2015, a hearing was held during which Geico's human resources director testified Mr. Lovrecich had an effective retirement date of November 1, 2013,

thus establishing he was still employed when the plaintiff served a notice to depose this witness. After considering the hearing testimony, together with the storied discovery history of the within action, this Court found the defendant's conduct to be willful and contumacious and on January 22, 2015 issued an order conditionally granting the plaintiff's motion to strike Geico's answer if it failed to produce the witness as directed. The Court further found Geico's conduct "in failing long ago to produce Mr. Lovrecich for [a] deposition * * * frivolous," justifying the imposition of costs and counsel fees pursuant to 22 NYCRR § 130-1.1. This Decision and Order was appealed by the plaintiff, who asserted that the order of preclusion should have been unconditional, as well as by Geico, which contended its failure to produce Mr. Lovrecich was neither willful nor contumacious.

Subsequent to the issuance of the January 22, 2015 Decision and Order, counsel for the parties agreed Mr. Lovrecich would be deposed on March 4, 2015. However, by letter dated March 2, 2015, plaintiff's then counsel informed defendant's counsel that he had been relieved. On March 3, 2015, one day prior to the scheduled deposition, the plaintiff, now appearing pro se, left a message at approximately 5:45 p.m. indicating he did not intend to depose Mr. Lovrecich. The minutes provided by Geico establish the witness appeared as ordered but that the plaintiff did not appear. Given Geico's production of the witness, by Decision and Order dated, June 23, 2015, this Court denied the plaintiff's motion to strike the defendant's answer. Additionally, and premised upon "former counsel's affirmation," this Court fixed the amount of costs and counsel fees as $45.00 and $5,976.25 respectively, which had been previously awarded in the January 22, 2015 Decision and Order. The plaintiff was directed to submit a Judgment on notice as to these costs and fees [hereinafter the Judgment]. The Decision and Order dated June, 23, 2015, was appealed by Geico, which specifically challenged the award of costs and fees.

On September 9, 2015, Geico moved by order to show cause seeking an order staying execution of the Judgment pending a hearing of the within application, which was granted by Justice McCormack, as well as an order staying execution of the Judgment pending the determination of the appeal and cross appeal of this Court's January 22 and June 23, 2015 Decision and Orders, which was denied.

In moving for renewal and/or reargument of the Decision and Orders issued on January 22 and June 23, 2015, Geico contends that as the plaintiff's motion to strike its answer was ultimately denied, the imposition of costs and fees was unwarranted. Geico further posits that notwithstanding the lack of any obligation to produce Mr. Lovrecich, it nonetheless acted in a "diligent and timely manner" in locating and ultimately producing the witness and as such the award for costs and fees was patently inappropriate. Geico maintains the Court erred in relying upon the "willful and contumacious" standard in

awarding these costs and fees with respect to which the plaintiff failed to provide "any proof" substantiating the amount thereof. Finally, Geico contends it will prevail on its appeal to have the award vacated and if "forced to pay costs and fees in advance" of an appellate determination, it will suffer irreparable harm thus warranting an order staying enforcement of the Judgment. The application is opposed in its entirety by the plaintiff who cross moves for additional sanctions arguing that the defendant's within application is frivolous.

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision" (***Viola v City of New York***, 13 AD3d 439, 440 [2d Dept 2004]; ***Carrillo v PM Realty Group***, 16 AD3d 611, 611[2d Dept 2005]). A motion seeking leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR § 2221[d][3]). Alternatively, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR §2221[e][2]).

In moving herein, Geico has not established the existence of new facts or a change in the law where either or both of which would alter this Court's prior determinations and accordingly that portion of the defendant's application seeking renewal of the Decisions and Orders dated January 22 and June 23, 2015 is Denied (CPLR §2221[e][2]).

As to that branch of Geico's motion specifically seeking leave to reargue the Decision and Order dated January 22, 2015, such application is untimely. Here, service of a copy of the relevant order with notice of entry was effected on March 3, 2015, yet the defendant's application was not interposed until September 9, 2015, and well beyond the thirty day time frame mandated by the statute (CPLR §2221[d][3]). However, even assuming the application was timely, leave to reargue would be unwarranted. While Geico argues the award of cost and fees was premised upon a "willful and contumacious standard," the decision clearly indicates the Court predicated same upon 22 NYCRR 130-1.1. Moreover, in a convoluted attempt to eschew the consequences of its well documented recalcitrance in conducting court ordered discovery, Geico conflates two separate, albeit related, courses of conduct, to wit: its *ultimate* production of Mr. Lovrecich on March 4, 2015 and the plaintiff's election to forego that deposition. Here, Mr. Desiderio's refusal to depose Mr. Lovrecich does not function so as to relieve Geico of the consequences of its own demonstrated obstinance leading up to the production of Mr. Lovrecich, which was brought about only after significant Court intervention.

Accordingly, this Court did not err and was justified in assessing costs and fees pursuant to 22 NYCRR 130-1.1, the imposition of which was precipitated solely and exclusively by Geico's frivolous conduct throughout the discovery process by failing to long ago produce a relevant witness.

As to that branch of the defendant's motion seeking leave to reargue the Decision and Order dated June 23, 2015, as specifically noted therein, the award of fees and costs was predicated upon "former counsel's" affirmation. Thus, Geico's bold assertion that the amount of fees and costs awarded was not based upon any "proof" is without merit and leave to reargue is accordingly denied (***Viola v City of New York***, *supra* at 440).

Turning to that branch of the defendant's application seeking a stay, CPLR §5519(c) provides, in pertinent part, that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal." A stay under this section of the statute "lies entirely in the court's discretion" (***Siegel***, NY Prac § 535, at 954 [5th ed]), and in considering such an application the court "will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party" (***Reilly***, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5519:4); ***Matter of Rosenbaum v Wolff***, 270 AD 843, 843 [2d Dept 1946]).

After carefully reviewing the significant record, the relevant portions of which are recited above, the Court finds the merits of the defendant's pending appeals to be lacking (***id.***). Moreover, this Court is unpersuaded by the assertion urged by Geico, a large insurer, that it will somehow suffer irreparable injury by having to pay $45.00 in costs and $5,976.25 in counsel fees (***id.***). Accordingly, Geico's application seeking an order staying execution of the Judgment pending appellate review is denied.

The Court now turns to the summary judgment applications respectively interposed by the plaintiff and defendant. As noted above, the plaintiff alleges Geico breached the insurance contract by acting in bad faith in failing to investigate and pay his claim prior to the arbitration and that this was part of a larger pattern involving other insured's warranting an award of punitive, as well as extra-contractual damages in the form of counsel fees incurred by the arbitration.

In moving for summary judgment, Geico asserts the record is devoid of sufficient evidence establishing it acted in bad faith and as such the within complaint must be dismissed. Geico relies principally upon the plaintiff's deposition wherein he identified the sole basis upon which his bad faith claim was premised as Geico's failure to pay the claim prior to arbitration, specifically testifying "[h]ad they done so, we would not have

been going to arbitration." As to the consequential damages demanded by the plaintiff, Geico contends that same are not recoverable as they were not contemplated by the parties as a probable result of a breach. Finally, Geico posits that as the plaintiff's bad faith claim is not a tort independent of the within breach of contract action, the claim for punitive damages must be dismissed.

In opposition, as well as in support of his cross motion, the plaintiff asserts that given the testimony of Ms. Allwood, who was repeatedly characterized by Geico as a satisfactory witness notwithstanding her lack of knowledge, Geico cannot mount a defense to the within action. The plaintiff stresses that based upon Ms. Allwood's testimony, Geico "does not know for a fact whether they conducted an investigation" and it is thus incapable of coming forth with any evidence which raises triable issues of fact thereby warranting summary judgment on the complaint. The plaintiff further contends that Geico's conduct in relation to his claim was part of a pattern clearly evidenced by a series of arbitration decisions rendered in unrelated insurance claims wherein the arbitrator consistently found in favor of Geico's insureds. In relying thereon, the plaintiff maintains this Court has already found such decisions to be a "sufficient" basis upon which to predicate summary judgment when it previously denied his motion to compel additional documentation from Geico.

"As in all contracts, implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims'" (***Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.***, 10 NY3d 187, 194 [2008] *quoting* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 318 [1995]). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 514 [2d Dept 1999]; ***Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.***, 89 AD3d 913, 915 [2d Dept 2011]). A claim premised upon a breach of the implied covenant of good faith and fair dealing is not a separate cause of action and gives rise to a claim for breach of contract (***New York Univ. v Continental Ins. Co.***, *supra* at 319-320).

As a general proposition, "an insured cannot recover his legal expenses in a controversy with a carrier over coverage, even though the carrier loses the controversy and is held responsible for the risk" (***Sukup v State of New York***, 19 NY2d 519, 522 [1967]). Rather, such an award "would require more than an arguable difference of opinion between carrier and insured over coverage to impose an extra-contractual liability for legal expenses" and would necessitate "a showing of such bad faith in denying

coverage that no reasonable carrier would, under the given facts, be expected to assert it" (*id.*). Further, "[p]unitive damages are available where the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious * * * to warrant the additional imposition of exemplary damages" (***Rocanova v Equitable Life Assur. Socy. of U.S.***, 83 NY2d 603, 613 [1994]).

Having reviewed Geico's submissions, the Court finds the defendant has failed to demonstrate entitlement to judgment, dismissing the plaintiff's claim premised upon breach of the insurance contract (***Zuckerman v City of New York***, 49 NY3d 557, 562 [1980]). As the moving party, Geico bears the burden of coming forward with admissible proof establishing the absence of material issues of fact (*id.*). However, the defendant's "burden on a motion for summary judgment cannot be satisfied merely by pointing out gaps in the plaintiff's case" (***Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.***, 81 AD3d 223, 230 [2d Dept 2011]; ***Shafi v Motta***, 73 AD3d 729, 730 [2d Dept 2010]). In moving herein, Geico provides no proof setting forth the details underlying the processing of the plaintiff's claim by proffering an affidavit from an individual with knowledge thereof and rather improperly relies upon the plaintiff's failure to establish the requisite elements of his bad faith claim (*id.*). However, regarding the plaintiff's claim for punitive damages, as the underlying action clearly sounds in breach of contract in connection to which there is no tort duty, an award of punitive damages is precluded (***New York Univ. v Continental Ins. Co.***, *supra* at 319-320). Accordingly, Geico's motion for summary judgment is Granted to the limited extent that the plaintiff's claim for punitive damages is dismissed.

As to the cross motion interposed by the plaintiff, while the Court agrees Ms. Allwood's testimony was lacking in probative value, it merely establishes that she herself did not know how the subject claim was handled and does not demonstrate the absence of factual issues as to whether or not an investigation was actually undertaken and, if so, what it entailed (***Zuckerman v City of New York***, *supra* at 562). Accordingly, the plaintiff's cross motion is denied. The Court notes that while such information could have been elicited from Mr. Lovrecich, this deposition was deliberately thwarted by the plaintiff himself who, on the eve of this scheduled deposition, personally elected not to question this witness. Regarding the arbitration decisions, in finding same to be "sufficient" and thus previously denying the plaintiff's request for additional documentation from Geico, this Court relied on the affirmative representation of plaintiff's former counsel, who specifically moved for summary judgment on these very documents arguing that same constituted more than adequate evidence warranting such relief. This Court did not examine the substance of these decisions in rendering its determination and made no ruling with respect thereto.

All applications not specifically addressed are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 16, 2016
Mineola, N.Y.

Karen V. Murphy
J. S. C.