Jahangir v Tri-State Consumer Ins. Co.
2019 NY Slip Op 30888(U)
February 20, 2019
Supreme Court, Queens County
Docket Number: 700248/2017
Judge: Salvatore J. Modica
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 37

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MOHIUDDUN JAHANGIR, et al.,

Plaintiff,

-- against –

TRI-STATE CONSUMER INSURANCE COMPANY

Defendant.

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DECISION AND ORDER
Index Number 700248/2017
HON. SALVATORE J. MODICA

Motion Sequence No. 2

The following papers numbered E56 to E70 were read on this motion by defendant seeking clarification of the court's prior order, dated July 23, 2018, pursuant to CPLR 2221(d), and cross motion by plaintiffs for leave to reargue the denial of their previous motion, dated July 23, 2018, which motion sought summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	NYSCEF Document Nos. 56-62
Notice of Cross Motion - affirmations	NYSCEF Document Nos. 63-65
Answering and Reply Affirmation - Exhibit	NYSCEF Document Nos. 66-67
Reply Affirmation - Exhibit	NYSCEF Document Nos. 68-70

SALVATORE J. MODICA, J.:

Plaintiffs were the owners of property known as 87-39 143rd Street, Briarwood, Queens County, New York, which was damaged in a fire on February 26, 2016. At the time of the fire, said premises and its contents were insured under a homeowner's policy issued by defendant. Plaintiffs filed a claim for the damage, which was paid by defendant to the extent of the building damage and additional living expense claims. Defendant contested plaintiffs' claim for personal property, which has not been paid, pursuant to an alleged breach of the fraud/concealment conditions of the subject policy. Plaintiffs commenced an action to recover for the personal property.

Defendant, upon the foregoing papers, moved for summary judgment dismissing the complaint and for judgment on its counterclaim. Plaintiffs cross-moved for summary judgment. On July 23, 2018, this Court granted defendant's motion, finding, also, that plaintiffs violated the cooperation clause of the insurance agreement, and dismissed the complaint. Plaintiffs' cross motion was denied. Defendant now moves for clarification of

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the court's July 23, 2018 decision as it regards defendant's counterclaim, and for reargument of such claim, if necessary. Plaintiffs move for leave to reargue said denial of their cross motion, and, upon the granting of reargument, for summary judgment.

Defendant's motion "for clarification of the Court's Order dated July 23, 2018, regarding whether summary judgment was granted with respect to (defendant's) counterclaim" is, if necessary, a motion to reargue its support of that portion of the prior motion, pursuant to CPLR 2221 (d) (*see Matter of Billeris v Incorporated Vil. of Bayville*, 154 AD3d 844 [2d Dept 2017]; *Sence v Atoynatan*, 142 AD3d 603 [2d Dept 2016]).

Defendant contends that the Court's decisional language, *i.e.*, that "[t]he motion by defendants for summary judgment dismissing the complaint is granted in all respects," denotes that each and every branch of the motion has been granted, including the counterclaim. Defendants further conclude that the court's finding that plaintiffs had verified only "20 percent of the amount demanded" signifies that plaintiffs "breached the "Concealment or Fraud" condition (of the Insurance Policy) as a matter of law." Plaintiffs, not surprisingly, contend that the court granted only that branch of the motion "dismissing the complaint," and did not intend to grant defendant's counterclaim. As there appears to be a genuine need for clarification herein, defendant's motion seeking leave to reargue the branch of its motion seeking judgment on its counterclaim is granted.

At this juncture, it would be prudent to address plaintiffs' cross motion for leave to reargue the denial of their motion for summary judgment, and, upon reargument, for summary judgment in their favor. Initially, defendant opposes this cross motion on the ground that such cross motion was untimely made. Defendant's contention is without merit. While a motion seeking reargument "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]), and the instant cross motion was served beyond such period, the court has discretion and jurisdiction to reconsider its prior order "[r]egardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see HSBC Bank U.S.A. N.A. v Halls*, 98 AD3d 2012 [2d Dept 2012]).

Here, the fact that plaintiffs' cross motion to reargue was timely "made ... after (the) filing of a notice of appeal but prior to the perfection of the appeal, the granting of reargument was an appropriate exercise of the court's discretion" (*Leist v Goldstein*, 305 AD2d 468, 469 [2d Dept 2003]; *see Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2d Dept 2005]; *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163 [1st Dept 2004]). As such, plaintiffs' cross motion is timely made.

Plaintiffs seek leave to reargue, pursuant to CPLR 2221(d), maintaining that the

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Court misapprehended the facts, and accordingly, misapplied the law, with regard to defendant's "fraud" claim; its requests to perform an inspection; and plaintiffs' failure to grant access to the premises to conduct searches for the personal property (*see Bigun v Ahmed*, 150 AD3d 1186 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964 [2d Dept 2016]; *Markovic v J&A Realty, LLC*, 124 AD3d 846 [2d Dept 2014]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014]).

However, cross-movants have failed to establish that the court overlooked or misapprehended any such relevant facts or misapplied any controlling principle of law, or for some reason mistakenly arrived at its earlier decision, as required by CPLR 2221 (d) (*see Caring Professionals, Inc. v Landa*, 152 AD3d 738 [2d Dept 2017]; *Gonzalez v Arya*, 140 AD3d 928 [2d Dept 2016]; *Hackshaw v Mercy Medical Center,* 139 AD3d 798 [2d Dept 2016]; *Vaccariello v Meineke Car Care Center, Inc.*, 136 AD3d 890 [2d Dept 2016]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888 [2d Dept 2015]). Consequently, plaintiffs are not entitled to leave to reargue, and their motion is denied.

Defendant moves for leave to reargue the branch of its motion seeking summary judgment on its counterclaim for damages arising from plaintiffs' alleged breach of the homeowner's policy. Such relief is granted, as aforementioned. Upon reargument, it is noted that "CPLR 3019 (d) provides, in pertinent part, that '[a] cause of action contained in a counterclaim ... shall be treated, as far as practicable, as if it were contained in a complaint." Thus, in cases where the plaintiff's action against the defendant is dismissed on the merits, the court may still adjudicate counterclaims against the plaintiff." (*Ballen v Aero Mayflower Tr. Co.*, 144 AD2d 407, 410 (2d Dept 1988]; *see In re Eshaghian*, 144 AD3d 1154 [2d Dept 2016]; *Hawkins v Bond*, 48 AD3d 417 [2d Dept 2008]).

Contrary to plaintiffs' contention, defendant's counterclaim sufficiently stated a cause of action in fraud, in compliance with the pleading requirements of CPLR 3016 (b). Further, plaintiffs' argument that the counterclaim "sets forth no claim for monetary damages whatsoever," is incorrect, as said counterclaim alleged not only a "breach of the concealment and/or fraud condition of the insurance policy," which would "not provide coverage for an insured who ... has intentionally concealed or misrepresented a material fact ... or engaged in fraudulent conduct," and that "Plaintiffs have claimed a substantial amount of items on their contents claim that was never ... proved to exist in any way," but also alleged that "[b]ased on the contents list submitted by Plaintiffs the jewelry in question consists of 17 pieces and is worth over $35,000."

While defendant's counterclaim does not specifically contain a demand for the relief sought at its end, such undemanded, but ascertainable, relief may be granted pursuant to

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CPLR 3017 (a), which authorizes the Court to entertain such issue, and "grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded," provided that, as in the case at bar, the counterclaim gave appropriate notice of the cause of action and its material elements, and no prejudice to plaintiffs has been demonstrated (*see State of New York v Barone*, 74 NY2d 332 [1989]; *A&F Hamilton Hgts. Cluster, Inc. v Urban Green Mgt., Inc.*, 146 AD3d 502 [1st Dept 2017]).

However, defendant's assertion that it is entitled to summary judgment denying plaintiffs any recovery against the insurance policy, thereby requiring a return of the moneys already paid by defendant for damage to the premises, is without merit, as such theory is not substantiated by the terms of the subject policy.

Resolution of disputes regarding insurance coverage begin with an examination of the language of the policy (*see, Lend Lease [U.S.] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675 [2017]). "Where, by the same policy, different classes of property ... are insured ... the contract is severable," and a breach as to one type of property subject to insurance does not affect the policy as to the others "unless it clearly appears that such was the intention" (*Donley v Glens Falls Ins. Co.*, 184 NY 107, 111 [1906]; *see Garcia v Government Employees Ins. Co.*, 151 AD3d 1020 [2d Dept 2017]). Here, the subject policy provision, unlike in the matters of *Christophersen v Allstate Ins. Co.*, 34 AD3d 515 (2d Dept 2006) and *Fiore v State Farm Fire & Cas. Co.*, 135 AD2d 602 (2d Dept 1987), the insurance policy does not specifically provide that the "entire policy shall be void" for any proven fraud, concealment of material misrepresentation. As such, defendant has failed to show that the subject policy language was clearly intended to render the provision indivisible, such that a single alleged fraudulent misrepresentation would void the entire contract.

With regard to defendant's motion for summary judgment on its counterclaim, now specifically referable only to the insurance claim for the alleged missing jewelry, defendant's insistence that the court's finding, in the Decision and Order, dated July 23, 2018, *i.e.*, that plaintiffs had violated the "cooperation clause" of the subject insurance policy (also determined solely with respect to the "claimed missing jewelry") was the equivalent of finding a violation of the "concealment or fraud" clause of the policy, is incorrect. Defendant's reference to the Second Department case of *Azzato v Allstate Ins. Co.*, 99 AD3d 643 (2012), in support of the branch of its motion demonstrating that plaintiffs possessed the requisite "fraudulent intent" to have violated the concealment or fraud condition of the policy, is, factually, of no avail to defendant.

Although that decision correctly states that "an inference of fraudulent intent" may be "raised by proof that the insured's claimed losses were grossly overvalued (and) 'becomes

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conclusive where it is shown that the difference between the amounts claimed in the proof of loss and those actually proved to have been destroyed are grossly disparate and the explanation tendered is so unreasonable or fantastic that it is inescapable that fraud has occurred" (*at 646*, quoting *Saks & Co. v Continental Ins. Co.*, 23 NY2d 161, 165 [1968]), the facts in that case included proof that plaintiff submitted documents that were "made to look like an actual receipt provided to him by the store on the date that he originally purchased the appliance ... (which) evinced his intent to deceive the defendant" (*Azzato v Allstate Ins. Co.*, 99 AD3d at 647). No such obvious intent to defraud existed in this case.

Fraudulent intent, sufficient to violate a "concealment or fraud" clause of, and vitiate recovery under, an insurance policy, does not include unintentional fraud, false swearing, or a mistaken opinion as grounds (*see, Walker v Tighe*, 142 AD3d 549 [2d Dept 2016]). Defendant's submissions have failed to eliminate all triable issues of fact as to whether the plaintiffs intended to defraud the insurance company in this matter, and its motion for summary judgment on its counterclaim is, therefore, denied (*see, Gray v Tri-State Consumer Ins. Co.*, 157 AD3d 938 [2d Dept 2018]; *Christophersen v Allstate Ins. Co.*, 34 AD3d 515 [2d Dept 2006]).

Since defendant has failed to establish its prima facie entitlement to judgment on its counterclaim as a matter of law, the court need not address the sufficiency of plaintiffs' opposition thereto (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the motion by defendant seeking clarification of the court's decision dated July 23, 2018, made pursuant to CPLR 2221(d), for leave to reargue, is granted, and upon reargument, said motion for summary judgment on defendant's counterclaim is denied.

The cross motion by plaintiffs, seeking reargument of the denial of summary judgment in the July 23, 2018 decision, is denied.

This constitutes the decision and order of this Court.

Dated: Jamaica, New York
February 20, 2019

Honorable Salvatore J. Modica
J.S.C.