Union Mut. Fire Ins. Co. v Ann Blue Home Health Care Agency, Inc.
2020 NY Slip Op 31723(U)
June 2, 2020
Supreme Court, Kings County
Docket Number: 501277/2017
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

X

UNION MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

-against-

ANN BLUE HOME HEALTH CARE AGENCY, INC.,

Defendant.

X

DECISION / ORDER

Index No. 501277/2017
Motion Seq. No. 3
Date Submitted: 5/18/20

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to renew and reargue

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	24-33 in NYSCEF[1]
Affirmation in Opposition and Exhibits Annexed.....	2
Reply Affirmation.....	34-36

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action brought by plaintiff Union Mutual Fire Insurance Company (Union Mutual) for a declaratory judgment that it has no obligation to provide insurance coverage to its insured, defendant Ann Blue Home Health Care Agency, Inc. [its correct name is Anne Blue Home Health Care Agency Inc.] (ABHHCA), for a loss which occurred on October 7, 2015, at defendant's premises located at 4714 Church Avenue, Brooklyn, NY.[2] Plaintiff Union Mutual previously moved for summary judgment, based on ABHHCA's

[1] Despite defendant's attorney filing a notice of non-consent to e-file on 3/22/17, plaintiff continued to e-file papers in this action.

[2] There is a parallel breach of contract action commenced first by ABHHCA against Union Mutual (Index No. 5262/2016). Both actions were recently reassigned to this court due to the sudden death of the assigned judge, Justice Baynes. A decision and order on the motion for summary judgment in the breach of contract action is issued simultaneously herewith, in a separate decision and order.

alleged failure to provide a timely sworn statement of defendant's proof of loss, as is required by the policy. That motion was denied by Justice Wooten,[3] who is now on the Appellate Division, Second Department, based upon plaintiff Union Mutual's failure to make a prima facie showing of its entitlement to summary judgment, insofar as the plaintiff failed to include in the motion papers any evidence that the proof of loss forms were sent to defendant with a demand to complete them and return them in a timely manner.

Union Mutual now moves to renew and reargue. For reargument, counsel avers that "[I]t is respectfully submitted that this Court overlooked the fact that when the Defendant Ann Blue submitted its Sworn Statement in Proof of Loss it was on the precise form that was provided by Union Mutual in blank form back in November 2015." This branch of the motion, to reargue, is denied as meritless, as the prior motion did not contain the proof of loss forms at all, neither blank ones or completed ones, nor the cover letter that allegedly transmitted them.

The branch of the motion to renew claims that counsel had inadvertently provided the wrong letter as an exhibit in the summary judgment motion—Jeffrey B. Gold, Esq., counsel for movant[4], states in his affirmation in support (Doc. #25) that he acknowledges that the court was provided with (E-File Doc. #9) a letter dated November 30, 2015, which notified defendant to attend an examination under oath ("EUO"). That letter, which only mentions the demand for proof of loss on page two, says:

> If additional time is needed to provide us with this documentation, we will be pleased to consent to an adjournment of the examination under oath for that purpose. Similarly, if you both provide us with the

[3] His cases were assigned to Justice Baynes when he left Supreme Court.

[4] In the prior motion, Mr. Gold provided an affidavit, stating that he is a partner of Gold and Benes, LLP, attorneys for Union Mutual, while an associate of the firm provided the affirmation in support. In this motion, Mr. Gold provides an affirmation.

> documentation requested and the Sworn Statement in Proof of Loss demanded by letter of even date, we will move forward the examination.

Defendant Hyacinth Blue brought the notarized Sworn Statement in Proof of Loss forms with her to the examination under oath held on March 31, 2016. Plaintiff subsequently sent her attorney a letter dated July 20, 2016, disclaiming insurance coverage, which states that her submission was too late, as it was not submitted within 60 days of receipt of the letter transmitting the forms, as was specified in the demand letter, and thus was rejected. Plaintiff's letter disclaiming coverage is E-file doc #10.[5] The insured's breach of contract suit was filed shortly thereafter, in August of 2016. This declaratory judgment action was commenced in January 2017.

Counsel for plaintiff, Jeffrey B. Gold, states at ¶29 of his affirmation in support (E-file Doc. #25) that both letters were signed by him on the very same date. Each was sent by Certified Mail, Return Receipt Requested and by First Class Mail. He has now provided (E-file Doc. 29) a copy of the other letter, with the same date, the one which demands a "Sworn Statement in Proof of Loss", and a set of blank proof of loss forms, which he states was provided with the demand letter. This is what he states in support of the branch of the motion to renew due to law office failure:

> The version of the November 30, 2015 letter that was inadvertently inserted as the exhibit to Union Mutual's motion papers, however, was the wrong exhibit. The correct version of our November 30, 2015 letter demanding that the Defendant serve its Sworn Statement in Proof of Loss (Ex. D hereto) had been sent simultaneously with the November 30, 2015 letter that was included with our original motion papers. The insertion of the wrong November 30, 2015 letter as an exhibit was due to law office failure, that is a former attorney of this firm improperly inserted the Examination

[5] The letter also states a second reason for denying coverage, but there is no mention of that issue in plaintiff's prior motion or in this one. Thus, the court does not address it. Mr. Gold stated in paragraph 4 of his affidavit submitted with the first motion "that issue is not right for adjudication." Presumably he meant "ripe."

Under Oath demand letter rather than the Sworn Statement in Proof of Loss demand letter sent the same day.

Mr. Gold argues in his affirmation in support (E-file Doc. 25) that the court should grant plaintiff leave to renew the motion, consider the motion *ab initio*, and grant plaintiff summary judgment and issue a declaratory judgment that plaintiff need not cover the fire loss claim as defendant failed to timely return the ”Sworn Statement in Proof of Loss.”

Background

ABHHCA was the owner of the subject premises located at 4714 Church Avenue, Brooklyn, New York 11203 at all relevant times herein. Plaintiff insured the premises. While the two letters at issue are addressed to the correct address, they reference an erroneous address as the property which was insured, as does the complaint and all of the motion papers. The application and the policy have the correct address. The premises comprise a commercial space on the ground floor, which was used for a school run by ABHHCA for home health aides, and two floors above of residential space. There was a fire in the front room of the second-floor apartment on the date of loss. Ms. Blue testified at her EUO that the building was managed by her husband, John Blue, and his assistant, Fitzpatrick Sampson. Apparently, Ms. Blue ran the school for home health aides until some point after the loss occurred, as, she testified, she had a stroke and her health failed.

The premises were partially damaged in the fire on October 7, 2015, which took place during the term of the subject fire insurance policy. ABHHCA, through its insurance broker, sent a Property Loss Notice on November 4, 2015. Union Mutual contends that on November 30, 2015, through its counsel, it sent a letter demanding that ABHHCA provide a “Sworn Statement in Proof of Loss” within 60 days, along with a blank proof of loss form, as

required by the policy (Gold affirmation and exhibit A thereto).[6] At her examination under oath, Hyacinth Blue identified the signature on a (single) return receipt card as that of one of her employees at the school, and acknowledged that a letter so received would have been given to her or her husband. She also testified that she had no recollection if she had actually received either letter, as she had a stroke and other health issues sometime after the date of the fire. As stated above, at Hyacinth Blue's examination under oath, held on March 31, 2016, the notarized proof of loss form was handed to United Mutual's attorney, Keri Joeckel. Ms. Joeckel took the submission at that time, expressly indicating that it did not constitute a waiver of the deadline (EUO transcript at pages 46-48).

The Parties Contentions

Union Mutual contends that it is entitled to reargument because the court overlooked the fact that the Sworn Statement in Proof of Loss submitted by ABHHCA was the form used by Union Mutual at the time and that ABHHCA did not dispute in its opposition to summary judgment that it was served with a blank proof of loss form with the demand for same. Further, Union Mutual contends it is entitled to renewal because its attorney inadvertently annexed the wrong letter, also dated November 30, 2015, to ABHHCA, which demanded defendant to appear at an examination under oath. The letter provided merely referenced the sworn statement in proof of loss. Mr. Gold claims plaintiff intended to include as the exhibit a separate letter of the same date, which actually demanded a Sworn Statement in Proof of Loss and included blank proof of loss forms. Union Mutual now

[6] The pertinent Policy language, [Ext A, Building and Personal Property Coverage Form at page 8, Section(E)(3)(a)(7), provides that in the event of a loss, the policy holder must "Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms."

provides a copy of the other November 30, 2015 letter, with blank proof of loss forms, and contends it has now addressed the only deficiency in its proof that the court cited in the prior decision, which found that Union Mutual failed to meet its burden of proof for summary judgment. Plaintiff argues that ABHHCA does not dispute having received the blank proof of loss forms. Consequently, Union Mutual maintains that the motion for leave to renew should be granted, and upon renewal, it should be granted summary judgment.

ANHHCA counters that Union Mutual has failed to establish that it is entitled to renewal based upon new facts not available at the time of the prior motion papers, and that plaintiff does not offer a reasonable justification for its failure to present such facts in the prior motion. Defendant's counsel claims that the question about whether the letter with the proof of loss forms was sent, and when it came into ANHHCA's possession, is not a new fact or a change in the law, it is an exhibit, and its absence prevented Union Mutual from meeting its burden of proof on summary judgment.

Further, ANHHCA argues that law office failure is not a reasonable justification for the failure to have proved a fact for purposes of renewal, and that Union Mutual does not include an affidavit from the attorney who allegedly included the wrong letter in the motion papers. The court notes that Mr. Gold is listed in E-file as the attorney who e-filed the motion papers. Further, as to reargument, ANHHCA contends that the court could not have overlooked or misapprehended something that was not included in the prior motion papers in the first place in coming to its determination.

Conclusions of Law

Failure of an insured to file timely proof of loss as required in an insurance policy is an absolute defense for the insurer in an action on the policy unless there has been a waiver of the requirement by the insurer or conduct on its part estopping its assertion of the

defense (*Igbara Realty Corp*., 63 NY2d 201, 216 [1984]; *Caterpillar Ins. Co. v Metro Const. Equities*,130 AD3d 856, 858 [2d Dept 2015]; *Bailey v Nationwide Mut. Fire Ins. Co.*, 133 AD2d 915, 916 [3d Dept 1987]; C*.F.C. Realty Corp. v Empire Fire & Mar. Ins. Co*. 110 AD2d 508, 509 [1st Dept 1985]).

Whether or not the policy so provides, Insurance Law § 3407 provides that the failure to produce proof of loss will not invalidate the claim unless the insurer gives a written notice to the insured, demanding same and provides blank forms with the demand (*Caterpillar Ins. Co. v Metro Const. Equities*, 130 AD3d at 858). "The purpose of Insurance Law § 3407 is the protection of the insured from the consequences of oversight in failing to timely file a proof of loss which is a condition precedent to recovery" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting, Assn*., 63 NY2d at 216). The insurer must, therefore, make a written demand for proof of loss and provide blank forms before it can deny recovery based on failure to provide proof of loss (id.).[7]

Regarding reargument, as is explained in *McGill v Goldman* (261 AD2d 593, 594 [2d Dept 1999] [internal citations omitted]):

> A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant

[7] Insurance Law 3407(a) provides:
(a) The failure of any person insured against loss or damage to property under any contract of insurance, issued or delivered in this state or covering property located in this state, to furnish proofs of loss to the insurer or insurers as specified in such contract shall not invalidate or diminish any claim of such person insured under such contract, unless such insurer or insurers shall, after such loss or damage, give to such insured a written notice that it or they desire proofs of loss to be furnished by such insured to such insurer or insurers on a suitable blank form or forms. If the insured shall furnish proofs of loss within sixty days after the receipt of such notice and such form or forms, or within any longer period of time specified in such notice, such insured shall be deemed to have complied with the provisions of such contract of insurance relating to the time within which proofs of loss are required. Neither the giving of such notice nor the furnishing of such blank form or forms by the insurer shall constitute a waiver of any stipulation or condition of such contract, or an admission of liability thereunder.

> facts or misapplied any controlling principle of law. It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.

Regarding renewal, as stated in *Morrison v Rosenberg* (278 AD2d 392 [2d Dept 2000] [internal citations and quotation marks omitted]):

> A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and, therefore, were not known to the court. Although leave to renew may be granted in the trial court's discretion even where the additional facts were known to the party seeking renewal at the time of the original motion, leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application. While law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion (*see,* CPLR 2005), the movant must submit supporting facts to explain and justify the default and mere neglect is not accepted as a reasonable excuse. (*See also Caronia v Peluso*, 170 AD3d 649, 650 [2d Dept 2019].)

Further, reargument and renewal are properly considered by another justice where the case has been reassigned and the justice who decided the original motion is no longer available (see CPLR 2221 (a); *C & N Camera & Elecs. v Public Ser v Mut. Ins. Co.*, 210 AD2d 132, 133 [1st Dept 1994]; *see e.g. Mauro v Countrywide Home Loans, Inc*., 116 AD3d 930, 932 [2d Dept 2014] [reargument]; *Tomoko Watabe v Ci Labo USA, Inc*., 168 AD3d 518 [1st Dept 2019] [renewal]).

While ABHHCA may not have contested that it received the blank forms in its opposition to the first motion, neither the demand letter with blank forms nor the filled-out Sworn Statement in Proof of Loss was an exhibit to the prior summary judgment motion, and, as is clear from the case decisions cited above, it was Union Mutual's burden on summary judgment to show that the blank proof of loss form was sent to the insured along with the demand, before the court looked to ABHHCA's opposition papers. Since Union Mutual failed to make a prima facie showing of entitlement to summary judgment, it was not error for the court to deny summary judgment, even if plaintiff did not raise the issue, nor

deny receipt of the forms in its opposition, as the failure to make a prima facie case for summary judgment requires the denial of the motion without regard to the papers in opposition.

With regard to renewal, it is a flexible doctrine and has been used at times to allow an attorney to correct an error or omission in moving papers, provided it was not a strategic error nor mere neglect (*see e.g. State Farm Fire & Cas. v Parking Sys. Valet Serv*., 85 AD3d 761, 764 [2d Dept 2011] [renewal should have been granted where "State Farm's attorney stated that Baron's deposition transcript was annexed, and the attorney actually quoted from Baron's deposition, but a different deposition transcript was mistakenly annexed to the motion papers in the place where Baron's deposition transcript should have been affixed"]; *Nwauwa v Mamos*, 53 AD3d 646, 648 [2d Dept 2008] [denial of renewal was improvident exercise of discretion where prior attorney inadvertently omitted two exhibits from prior motion papers during reproduction]; *Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796, 796–97 [2d Dept 2015] [improvident exercise of discretion to deny renewal where, annexed to their original papers was "a copy of a stipulation extending the parties' time to file a motion for summary judgment, rather than the "so-ordered" version of it"]; *Kugler v Kugler*, 174 AD3d 876, 878 [2d Dept 2019] ["in her request for leave to renew, the plaintiff provided a reasonable excuse for her failure to annex certain billing invoices to her original application, as law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion" [internal quotation marks omitted]; *Cruz v Castanos*, 10 AD3d 277, 278 [1st Dept 2004] [given plaintiffs' reasonable excuse of law office failure for the inadvertent omission of several exhibits referenced in the affidavit opposing defendant's motion for summary judgment on the issue of "serious injury" and the

absence of a showing of prejudice to defendant, plaintiffs' motion to renew based on submission of these exhibits should have been granted]).

Here, where two letters were sent out on the same date concerning the claim, the error in attaching the wrong letter, the one seeking an EUO that mentions the Sworn Statement in Proof of Loss, rather than the letter that actually demanded the Sworn Statement in Proof of Loss and enclosed the blank proof of loss forms, as was referenced in the affidavit of Union Mutual's attorney in the prior motion (Gold Affidavit at ¶ 2, E-File Doc. #7) is the type of oversight that may be corrected with a motion for leave to renew.

However, even with the correct letter provided, Union Mutual has failed to make a prima facie showing of its entitlement to summary judgment. Plaintiff has provided no evidence that it sent the demand for a Sworn Statement in Proof of Loss with the blank claim forms to ABHHCA (*see Caterpillar Ins. Co. v Metro Const. Equities*,130 AD3d at 858). Mr. Gold does not provide an affidavit of service from the person in his office who mailed them, or an affidavit as to the firm's practices with regard to sending such notices, nor does he provide the green return receipt cards or the Certified Mail receipts for mailing either letter. He does not provide the Certified Mail item numbers either. Union Mutual's reliance on Hyacinth Blue's testimony at her examination under oath to prove mailing is inadequate to determine that the item was mailed, as a matter of law, as is required for the court to grant summary judgment. While Ms. Blue did identify the signature on the return receipt card shown to her at the EUO as that of a secretary at the school, and while she did acknowledge that a letter signed for by this person would have been given to her or to her husband (EUO TR. Pages 20-23), this does not establish which of the two letters were sent in connection with that return receipt card, particularly given Union Mutual's acknowledgement that a demand for an examination under oath was sent on the same date

albeit in a separate envelope (*see New York Presbyterian Hosp. v Allstate Ins. Co.*, 29 AD3d 547, 548 [2d Dept 2006] ["Contrary to the plaintiffs' contentions, the certified mail receipt and the United States Postal Service "Track and Confirm" printout do not prove that the particular claim alleged in the second cause of action was actually received where, as here, there is no evidence that this claim was mailed to Allstate under that certified mail receipt number and no signed certified mail return receipt card has been produced"]; *Hertz Corp. v Active Care Med. Supply Corp.,* 124 AD3d 411 [1st Dept 2015] ["Although plaintiff's counsel's affidavit did not state that he personally mailed the particular notices of the EUOs, or describe his office's practice and procedure for mailing such, objective proof of mailing was provided by the EUO notices, which contained the same certified mail number in their captions that was reflected on the certified mail return receipts and the United States Postal Service 'Track & Confirm' report" (internal citations omitted)]; *Turkow v Erie Ins. Co.*, 20 AD3d 649, 798 N.Y.S.2d 768 [3d Dept 2005]; *Bailey v Nationwide Mut. Fire Ins. Co.*, 133 AD2d 915 [3d Dept 1987]).

Indeed, Union Mutual's attorney's claim that he signed the demand for a Sworn Statement in Proof Loss and attached the blank forms is insufficient without any proof of mailing or other evidence as to his office's normal mailing practices (*see Progressive Advanced Ins. Co. v McAdam*, 139 AD3d 691, 692–93 [2d Dept 2016] ["plaintiff failed to submit proof of mailing or evidence from someone with personal knowledge of the mailings of the EUO requests"].

In light of Union Mutual's failure to make a prima facie showing of its entitlement to summary judgment, it is unnecessary to reach ABHHCA's contentions. However, the court notes that a finding that Union Mutual did not meet its burden of proof on the prior motion for summary judgment or in this motion, in this declaratory judgment action, is not res judicata

with regard to the issue of whether a Sworn Statement in Proof of Loss was sent and properly demanded (*see McIvor v Di Benedetto*, 121 AD2d 519, 522 [2d Dept 1986]; *Sackman-Gilliland Corp. v Senator Holding Corp*., 43 AD2d 948, 948 [2d Dept 1974]). Further, Union Mutual did not "admit" that it sent the wrong letter, as defendant claims. Rather, Union Mutual claims that the wrong letter was attached to the summary judgment motion.

It is significant that Mr. Gold, the signatory to the two letters, clearly states in his affirmation that the two letters were mailed separately, but at Ms. Blue's EUO, a different counsel for plaintiff, an attorney named Keri Joeckel, describes [EUO Page 21] the return receipt card, one card, as "Union 5, which is the return receipt from the two letters that I had just showed you." Two letters required two cards and two certified mail numbers. Since the EUO, the one card shown to Ms. Blue and identified as "Union 5" seems to have been lost, and there are no Certified Mail numbers indicated in the EUO or in the record, which someone could input into the Postal Service's on-line tracking program to confirm delivery.

To fill in an apparent gap in the facts, that is, how did Ms. Blue get the forms if they were not mailed as claimed by Union Mutual, the court must note that at Ms. Blue's EUO (Tr. pages 20-23) it was discussed that Union Mutual had e-mailed the demand letter and blank Sworn Statement in Proof of Loss forms to Ms. Blue's husband, as well as the other letter and other documents, and the email was shown to Ms. Blue and she was asked about it. It was dated January 29, 2016. This raises an issue as to whether it was these forms which Ms. Blue submitted, also late, signed by her and notarized by her attorney, at her EUO.

In conclusion, there is not one shred of evidence in the record that the letter demanding timely return of the Sworn Statement in Proof of Loss, accompanied by the blank forms, was mailed to Ms. Blue on November 30, 2015.

Accordingly, it is

ORDERED that the court grants plaintiff leave to renew, but upon renewal, the court adheres to the original determination denying summary judgment for movant's failure to make a prima facie case.

Dated: June 2, 2020

E N T E R :

Hon. Debra Silber, J.S.C.