Jones v State Farm Fire & Cas. Co.
2020 NY Slip Op 33180(U)
September 21, 2020
Supreme Court, Kings County
Docket Number: 518268/2018
Judge: Carolyn E. Wade

At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 21st day of September 2020

PRESENT:
HON. CAROLYN E. WADE,
Justice

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TYRANA JONES, AVIANCA CARTER, IMANI JONES, RICHARD LUGO, TAREMA CARTER, SHANIA LUGO, SOMAE BUSCH, a minor by her parent and natural guardian IMANI JONES, ZURI PARNELL, minor by her parent and natural guardian TAREMA CARTER, WYNTAH HENEGAN, a minor by her parent and natural guardian TAREMA CARTER, and TYREEM CARTER, a minor by his parent and natural guardian TAREMA CARTER,

Plaintiffs,

-against-

STATE FARM FIRE & CASUALTY COMPANY, 174 MADISON, LLC, SHELL NY CONSTRUCTION, INC, BROOKLYN B COMPANY GROUP, INC., and JOHN/JANE DOES,

Defendants.

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BROOKLYN B COMPANY GROUP, INC.,

Third-Party Plaintiff,

-against-

MORGAN SERVICES GROUP CORP.,

Third-Party Defendant.

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Index No. 518268/2018

Seq 4 and 5

DECISION and ORDER

Recitation, as required by CPLR '2219(a), of the papers considered in the review of defendant State Farm Fire & Casualty Company's motion to modify (seq. #4) and defendant/third-party Plaintiff Brooklyn B. Company Group's motion to consolidate (seq. #5):

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	1,2
Cross-Motion and Affidavits/Affirmations	
Answering Affidavits/Affirmations	3,4
Reply Affidavits/Affirmations	5
Memorandum of Law	6,7,8

Upon the foregoing papers and after oral argument, defendant State Farm Fire & Casualty Company moves, pursuant to CPLR 6314, to modify this Court's Order, dated December 24, 2018, by ordering that State Farm's obligation to pay for Plaintiffs' temporary housing costs shall terminate no later than June 24, 2020. Defendant/third-party Plaintiff Brooklyn B. Company Group moves, pursuant to CPLR 602, to consolidate a second action, under index number 525101/2019, into this instant action.

RELEVANT FACTS

The underlying action arises out of property damage to a residential building located at 172 Madison Street, Brooklyn, New York ("Subject Premises"). Tyrana Jones, the property owner, holds a homeowners' insurance policy, bearing policy number 56-CP-3764-0 (the "Policy") (Majkowski, exhibit "4") with defendant State Farm Fire & Casualty Company ("State Farm"). Plaintiffs are the residents of the Subject Premises. On June 20, 2018, defendants 174 Madison, LLC, Shell NY Construction, Inc., and Brooklyn B Company Group, Inc. (collectively, the "Tort Defendants") were excavating on an adjacent vacant plot of land located at 174 Madison Street. Plaintiffs allege that the Tort Defendants caused a large Hitachi backhoe to strike their home's foundation and walls, which incurred damage. They also assert that the Tort Defendants failed to underpin, shore or brace the Subject Premises.

On June 24, 2018, the New York City Department of Buildings issued a Full Vacate Order, requiring Plaintiffs to move out of the Subject Premises due to the damage. Pursuant to the Additional

Living Expense ("ALE") provision on page 4 of the Policy, State Farm began paying for Plaintiffs' housing accommodations on June 24, 2018. The ALE provision reads as follows:

> "**COVERAGE C - LOSS OF USE Additional Living Expense**. 1. Additional Living Expense. When a Loss Insured causes the residence premises to become uninhabitable, we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months. Our payment is limited to incurred costs for the shortest of: (a) the time required to repair or replace the premises; (b) the time required for your household to settle elsewhere; or (c) **24 months.** This coverage is not reduced by the expiration of this policy."

On September 7, 2018, State Farm advised Plaintiffs that it was disclaiming coverage under the "Earth Movement" exclusion on page 11 of the Policy[1]. Thereafter, Plaintiffs commenced the instant action, and filed an Emergency Order to Show Cause, for an Order directing State Farm to continue to pay the housing costs.

By an order dated December 24, 2018 (the "December 24, 2018 Order"), this Court directed State Farm to continue to pay for Plaintiffs' temporary housing costs until the resolution of this matter, or further Order of this Court. The decision was premised on the findings that Plaintiffs would be homeless and irreparably harmed, and that they were entitled to continued coverage under the Policy's ALE provision. In a subsequent order, dated June 25, 2019, State Farm's motion to dismiss was granted to the extent that Plaintiffs' third cause of action, a bad faith denial of insurance claim, was dismissed on the ground that "[t]here is no separate tort for bad faith refusal to comply with an insurance contract" (citing *Johnson v Allstate Ins. Co.*, 33 AD3d 665, 666 [2d Dept 2006]; *Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005]). The second cause of action for breach of implied covenant of good faith and fair dealing remain intact. The instant motions ensued.

[1] §1, ¶2 of the Policy reads: "Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, mudslide, sinkhole, subsidence, erosion or movement resulting from improper compaction, site selection or any other external forces . . ."

State Farm's motion to modify the December 24, 2018 Order (sequence # 4)

ARGUMENTS

In support of its motion, State Farm asserts that the Policy explicitly limits payment of ALE to 24 months, which would expire on June 24, 2020. It also argues that there is no alternative ground " to base a provisional remedy of continued payment of Plaintiffs' additional living expense by State Farm after its coverage exhausts on June 24, 2020." State Farm notes that it sharply contests Plaintiffs' allegations, and that its adversaries have not presented extraordinary circumstances to justify granting a preliminary injunction. Thus, it avers that this Court's December 24, 2018 Order should be modified to terminate its payment of Plaintiffs' temporary housing costs.

Plaintiffs, in opposition, claims that State Farm disclaimed insurance coverage in bad faith, as it failed to perform an adequate investigation as to whether the physical impact caused by the Hitachi backhoe constituted a covered loss. Thus, they request that the ALE be extended beyond the 24-month policy limit to remediate the damages. Plaintiffs assert that the temporary housing payments do not constitute an ultimate relief, and that if it is terminated, they will be homeless and irreparably harmed.

In reply, State Farm contends that requiring it to continue to pay Plaintiffs' ALE after the expiration of the two-year limit set forth in the insurance policy would not only amount to a re-writing of the contract, but also would be an improper provisional remedy. It adds that it issued a bona fide disclaimer premised on the "Earth Movement" exclusion in the contract; and that Plaintiffs have not presented extraordinary circumstances necessary for a provisional remedy.

ANALYSIS

A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court, and may be granted upon "compelling or changed circumstances that render continuation of the injunction inequitable" (*Thompson v 76 Corp.*, 37 AD3d 450, 452-53 [2d Dept 2007]; see also CPLR 6314). In this respect, "a court has 'inherent power to modify its equitable directives' " (*id., citing Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 AD2d 411, 411 [1st Dept 2003]).

This Court's December 24, 2018 ruling was premised, *inter alia*, on the Policy's ALE provision, and Ms. Jones' averment that she and her family would be homeless if their temporary housing was terminated[2] (Aff of Tyrana Jones, dated Sep 8, 2018, NYSCEF Doc #19). Here, the sole issue before the Court is whether State Farm should continue payment of the Additional Living Expense beyond the 24-month period (June 24, 2020) set forth in the Policy.

First, the Court has been mindful of the 24-month limit set forth in the Policy's ALE provision. Over the past two years, numerous status conferences and settlement conferences were held with counsel to address the most significant issues in this matter, and facilitate a resolution. However, due to the number of the parties involved, and the multitude of contested issues, this case continues to proceed at a dilatory pace.

Second, Plaintiffs cite, *inter alia*, *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187 [2008], *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200 [2008] and *Woodworth v Erie Ins. Co.*, 743 F Supp 2d 201 [WDNY 2010], to argue that consequential damages can be recovered beyond the limits of the policy. However, the sole issue before this Court is whether State Farm should continue to provide housing costs, as a preliminary injunctive relief, beyond the time limit provided in the subject ALE provision of the insurance policy – not whether consequential damages can be sought and ultimately recovered (*see Woodworth*, 743 F Supp 2d 201, 218 [addressing an insurer's motion for summary judgment, "the Court finds that, pursuant to *Bi–Economy*, Plaintiffs could potentially pursue their claim for additional living expenses as consequential damages, and that Plaintiffs would not be barred from doing so by the policy's twelve-month limit on such expenses"] [emphasis added]). None of the cases cited by the Plaintiffs establish that they are entitled to the continued payment of their temporary housing costs, beyond the policy's limit, as a provisional remedy.

Third, "[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 [2d Dept

[2] ¶9: "This bad-faith behavior by State Farm will render me and the grandkids homeless this week."

2009]). Since the 24-month timeframe prescribed by the ALE provision in the Policy has expired, State Farm's continued payment of Plaintiffs' temporary housing would not serve as a preservation of the status quo, rather it would constitute an immediate payment of consequential damages, which is an ultimate relief that has yet to be decided (*see Woodworth*, 743 F Supp 2d 201, 218).

Lastly, nearly seventeen months after the December 24, 2018 Order was issued, Plaintiffs continue to rely on a single, conclusory statement in Ms. Jones' affidavit, that her family would be homeless[3], without providing further explanation or supporting evidence (Aff of Tyrana Jones, dated May 20, 2020, NYSCEF Doc #257). Particularly, Plaintiffs, which include six adults, have not stated their sources of income, employment status, savings, assets, *etc.*, in affidavits or any other admissible forms of evidence. Absent this showing, the Court is unable to conclude that the continuation of a preliminary injunction is warranted (*see Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995] ["irreparable harm must be shown by the moving party to be imminent, not remote or speculative"]); *see also Lawrence v Town of Brookhaven Dept. of Hous., Community Dev. & Intergovernmental Affairs*, 07CV2243(JS)(WDW), 2007 WL 4591845, at *24 [EDNY Dec. 26, 2007], affd, 393 Fed Appx 791 [2d Cir 2010], holding that the plaintiff showed a realistic prospect of homelessness by testifying that she has no current source of income; and that she will have to live in a shelter without the resumption of her Section 8 benefits).

Under these circumstances, a modification of this Court's order directing State Farm to continue payment for temporary housing is warranted. While the granting of temporary relief is within the Court's discretion, it would be inequitable to mandate State Farm to continue paying Plaintiffs' temporary housing given the factual and legal disputes in this matter, as well as the expiration of the 24-month limit unambiguously set forth in the Policy (*see Fieldston Prop. Owners Ass'n, Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 265 [2011]; *see also 456 Johnson, LLC v Maki Realty Corp.*, 177 AD3d 829, 830 [2d Dept 2019]).

[3] ¶11: "If STATE FARM stops paying for the temporary housing, myself, my two daughters, and my four young grandchildren will be homeless."

The Court is aware of the difficulties brought by the COVID-19 pandemic. It is important to note that the instant motion concerns a contractual relationship, not one of landlord-tenant. This Court, in its discretion, mandates that State Farm continues to pay Plaintiffs' temporary housing costs through November 21, 2020, to afford sufficient time for Plaintiffs to make moving arrangements, if they elect to vacate.

Brooklyn B Company Group, Inc.'s motion to consolidate (sequence # 5)

On November 17, 2019, Ivan Jackson, the owner of the property located at 176 Madison Street, Brooklyn, NY 11216, commenced a lawsuit in Kings County Supreme Court, entitled *Ivan Jackson v 174 Madison, LLC et al* (index #525101/2019), against the Tort Defendants for property damages arising from the demolition and excavation activities at 174 Madison Street (the "Jackson Action").

In support of its motion to consolidate, defendant/third-party plaintiff Brooklyn B Company Group, Inc. ("Brooklyn B") contends that both actions arise from the same occurrence.

State Farm, in opposition, notes that it is subject to the court's December 24, 2018 Order, which requires it to continue paying Plaintiffs' temporary housing costs until the resolution of this matter; thus, it would be prejudiced by delays caused by a consolidation. It points out that the two actions concern distinct plaintiffs, properties, damages, repairs, and insurers, and have no common facts other than that they both involve the 174 Madison Avenue construction. It also avers that a consolidation would obscure the key issues in this matter - the applicability of State Farm's insurance coverage, and the factors that contributed to the damage.

Plaintiffs, joining in opposition, argue that the two actions contain substantial differences in fact and law. They also assert that that there are significant distinctions in the evidentiary and discovery issues between the two actions.

In reply, Brooklyn B maintains that judicial economy outweighs any inconvenience to State Farm, and that the damages claimed in both actions arise from the same construction. It asserts that there

will not be any "juror confusion" presented by a consolidation, and suggests that the insurance claims can be separately litigated.

"The trial court has broad discretion in determining whether to order consolidation" (*Hanover Ins. Group v Mezansky*, 105 AD3d 1000, 1000 [2d Dept 2013]). "Where common questions of fact or law exist, a motion pursuant to CPLR 602(a) for consolidation or a joint trial should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Cusumano v Cusumano*, 114 AD3d 633, 633-34 [2d Dept 2014]).

Here, although both actions arise from the same construction operations, this case also involves an insurance coverage dispute that is unrelated to the *Jackson* Action, which will clearly present delays. Since both matters are in different stages of litigation, and have distinct legal issues, this Court, declines to grant a consolidation of both actions.

CONCLUSION

Accordingly, based upon the above, it is

ORDERED that STATE FARM FIRE & CASUALTY COMPANY's Motion to Modify is **GRANTED TO THE EXTENT** that its obligation to pay for Plaintiffs' temporary housing costs shall continue through November 21, 2020, and will then cease. The preliminary injunction previously granted in the December 24, 2018 Order shall also terminate on November 21, 2020; and it is further,

ORDERED that BROOKLYN B COMPANY GROUP, INC.'s motion to consolidate is **DENIED**.

This constitutes the Decision and Order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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