120 Main Hotel LLC v Sompo Am. Ins. Co.
2024 NY Slip Op 34196(U)
November 22, 2024
Supreme Court, New York County
Docket Number: Index No. 651775/2024
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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120 MAIN HOTEL LLC,

Plaintiff,

- v -

SOMPO AMERICA INSURANCE COMPANY,

Defendant.

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INDEX NO. 651775/2024

MOTION DATE 06/13/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant's motion to dismiss is denied and the plaintiff's cross-motion to amend the complaint is granted.

Background

Plaintiff 120 Main Hotel LLC ("Plaintiff" or "120 Main Hotel") owned and operated property located at 120 East Main Street in Rochester, New York (the "Property"). They had purchased an insurance policy (the "Policy") on the Property from defendant Sompo America Insurance Company ("Defendant" or "Sompo"). In early November of 2022, there was a three-alarm fire at the Property which resulted in substantial losses and destruction of real and personal property. Plaintiff requested insurance coverage and provided timely notice to Sompo. Defendant denied coverage based on the grounds that Plaintiff had allegedly failed to comply with the Policy conditions relating to "vacant" and "unoccupied" premises. Defendant also based coverage denial on the grounds that the fire was allegedly caused by "vandalism and malicious mischief" which is not covered for a vacant and unoccupied building under the Policy.

Plaintiff brought the underlying suit alleging that Defendant failed to conduct a timely and fulsome investigation of the fire loss as required under the policy and that the coverage denial was unreasonable and wrongful. They pled breach of contract and breach of the implied covenant of good faith and fair dealing. Defendant opposes and brings the present motion to dismiss pursuant to CPLR § 3211(a)(1) and (7). Plaintiff cross-moves for leave to amend the complaint.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned

which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

Defendant moves to dismiss on the grounds that coverage denial was justified by the terms of the Policy, and that as such there was no breach of contract or breach of the implied covenant of good faith and fair dealing. Plaintiff opposes on the grounds that the Property was not vacant or unoccupied under the terms of the Policy, and therefore the exclusion for vandalism and malicious mischief did not apply.

A preliminary issue here is whether the Property was considered vacant or unoccupied at the time of the fire under the Policy terms. Under Section VII.K of the Policy, an insured building has permission to remain vacant or unoccupied if two conditions are met: "(1) fire protection, watch and alarm services are maintained; and (2) written notice is given to [Sambo] prior to the 120th consecutive day of cessation of business operations, vacancy or unoccupancy at such insured building." The provision continues to state that [a]n insured building is considered vacant or unoccupied when it does not contain adequate covered property to conduct customary business operations."

Insurance policies are "subject to the general rules of contract interpretation" and when deciding a dispute over coverage, courts are to "look to the specific language used in the relevant policies" and "any ambiguities construed against the insurer." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 561 (2021). Here, Defendant argues that the presence of adequate covered property is "necessary but not by itself sufficient for occupancy and non-vacancy." But the problem with this argument is that if the lack of adequate covered property is simply one of several ways of defining "vacant or unoccupied", that necessarily means that there must be other

ways of defining the term. And while the Policy contains a robust Definitions section, nowhere outside the Vacancy-Unoccupancy provision does it define the terms "vacant or unoccupied."

Defendant seems to be arguing that a more colloquial understanding of the definition of "vacant or unoccupied" should control the issue. But the Policy does define some terms that have a colloquial definition, such as collapse in VIII(6) or explosion in VIII(24). It is a reasonable interpretation of the Policy to say that the term "vacant or unoccupied" was not defined in the Definitions section because it was already defined in the Vacancy-Unoccupancy section, as "not contain[ing] adequate covered property to conduct customary business operations." Certainly, as both the insured and the non-movant on a motion to dismiss, Plaintiff is entitled to a favorable inference that the Policy was meant to be interpreted in such a manner.

The issue then becomes whether there was adequate covered property present at the time of the fire to prevent the building from being deemed vacant or unoccupied. Plaintiff alleges, and has submitted sworn affidavits to that effect, that there was adequate covered property at the time of the fire on the Property to conduct customary business operations. The documentary evidence that Defendant has submitted does not utterly refute the contention that the Property was not vacant at the time of the fire under the terms of the Policy. There are disputed issues of fact surrounding the state of the building at the time of the fire, the presence of covered property, and whether Plaintiff had, as they attest to in the Molenda Affidavit, engaged in customary business operations on site shortly before the fire. Therefore, Defendant has not met their burden on this motion to dismiss. Accordingly, it is hereby

ADJUDGED that the defendant's motion to dismiss is denied; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

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11/22/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE