

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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PRONAB BHATTACHARYYA and :  
GARGI BHATTACHARYYA, : By: PRICE, J.  
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 :  
 : Plaintiffs, :  
 : INDEX NO. 21398/03  
 :  
 - against - :  
 :  
 : Dated: December 15, 2004  
 :  
 QUINCY MUTUAL FIRE INSURANCE :  
 COMPANY, :  
 :  
 : Defendant. :  
 :  
-----x

APPEARANCES:

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ARNOLD N. PRICE IA Part 6  
Justice

PRONAB BHATTACHARYYA, et al.	x	Index Number <u>21398</u> 2003
- against -		Motion Date <u>October 12,</u> 2004
QUINCY MUTUAL FIRE INSURANCE CO.	x	Motion Cal. Number <u>2</u>

The following papers numbered 1 to 18 read on this motion by plaintiffs for an order granting leave to amend their complaint and deem it served on the defendant. Defendant cross-moves in opposition and seeks an order granting summary judgment dismissing the complaint, based upon the first, second, third, fourth and fifth affirmative defenses asserted in its answer.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-6
Notice of Cross Motion - Affidavits - Exhibits (A-Z, AA) .	7-14
Affidavits in Opposition - Exhibits (A) .....	15-18
Defendant's Memorandum of Law .....	

Upon the foregoing papers it is ordered that these motions are decided as follows:

Plaintiffs Pronab Bhattacharrya and Gargi Bhattacharyya commenced this action on September 9, 2003, and allege that on September 14, 2002 they left their home at 2 P.M. and returned at 7 P.M., at which time they discovered that the front door and the door to their apartment had been broken into, that their home had been burglarized and that the apartment was in disarray. Plaintiffs called the police shortly after returning home. The police report states that \$20,000.00 in cash, jewelry worth \$50,000.00, and clothing worth \$5,000.00 had been stolen; that a computer, fax machine and official records had been destroyed; that three Rolex watches and one Tourneau watch was stolen as well as a Canon AE 1 camera; a Sony video camera; sterling silver utensils,

powder box and photo frame; old passports and bank statements; and that most of the furniture and equipment had been destroyed. The police listed the total value of the watches and household items as \$25,000.00. Neither the plaintiffs nor the police took any photographs. Plaintiffs submitted a statement to the insurer dated October 16, 2002 and a claim dated November 23, 2002, which included a detailed list of the items that they assert were stolen or damaged. Plaintiffs claimed that their leather living room sofa, love seat and recliner had deep slashes and cuts, that there was a large crack in the middle of the dining room table and that dining chairs were broken. In addition to the items set forth in the police report, plaintiffs reported as stolen a sterling silver cutlery set; a china closet; three oriental rugs worth \$9,800.00; four oil paintings worth \$5,900.00; a Sony DVD player with upright speakers; a desk computer; a laptop computer; 15 Indian silk brocade sarees worth \$8,000.00; 12 Indian silk pants suits worth \$4,000.00; seven pure wool men's suits worth \$3,000.00; a fax machine; a color printer; a powder box and photo frames. The plaintiffs also submitted an additional list of stolen items to the police. The list of stolen items provided to the police and the list of stolen items provided to the insurer are not identical.

On October 8, 2002, Quincy Mutual contacted Donald Bucalo, an independent claims adjuster, to investigate the plaintiffs' claim. The claims adjuster spoke to the insureds on October 11 and 14, 2002 and he visited them at their home on October 16, 2002. Mr. Bucalo states in his affidavit that the plaintiffs told him that most of their furniture had been destroyed, that they had discarded the damaged furniture, and moved the furniture, rugs and paintings from the upstairs apartment into their apartment, as they no longer had an upstairs tenant. Mr. Bucalo stated that he inspected the upstairs apartment and that based on his inspection of the wall to wall carpeting, there was little evidence of impressions from furniture being there, and that although plaintiffs showed him an area on a wall where a rectangular painting had been stolen, it seemed that from the discoloration on the wall, the oval that was hanging there had been there for a long time.

Richard McMullen was also hired by Quincy Mutual to investigate plaintiffs' claims. He states in an affidavit that the plaintiffs claimed that they placed the damaged furniture in front of their house with the regular garbage pickup, and that Mr. Bhattacharyya claimed to have given the sanitation men some money to cart away the furniture. Mr. McMullen states that he questioned the sanitation men assigned to plaintiffs' block at the time of the loss, and that he learned that trash was picked up every Wednesday and Saturday, and only five large pieces of bulk

trash would be picked up on Saturdays. Mr. McMullen states that the sanitation men did not recall picking up discarded furniture from plaintiffs' house and that they did not accept any money from the insureds.

Quincy Mutual's property claims examiner determined that it was necessary to conduct an Examination Under Oath of the insureds, and counsel was engaged for this purpose. The subject homeowners' policy requires the insured to send the insurer, within 60 days after the insurer's request, a signed, sworn proof of loss. The policy also sets forth in detail the information and evidence which the insured is required to include in the proof of loss statement. Counsel for Quincy Mutual, in a letter dated November 26, 2002, demanded that the insureds provide a completed signed and notarized Sworn Statement of Proof of Loss, within 60 days from the receipt of the letter. This letter was sent by certified mail, return receipt requested and was returned to the law firm, with a notation that it was "refused." On December 14, 2002 plaintiffs were personally served with a letter from the insurer dated December 10, 2002, demanding that they provide the insurer with a completed signed and notarized Sworn Statement of Proof of Loss along with proof of loss, and appear for an Examination Under Oath. The 60-day period thus expired on February 15, 2003. The December 10, 2002 letter advised the insureds that they were to produce at the examinations the original receipts for the allegedly damaged and stolen property, proof of purchase of those items, photographs of the claimed items, copies of their monthly bank statements and credit card statements for the period of September 1, 2001 up to and including December 31, 2002, the local usage dialing records for telephones in the insured premises for the period of July 1, 2002 and up to and including November 1, 2002 and any other documents that relate to the alleged loss, to their ownership of the stolen items and their insurance.

Pronab Bhattacharyya appeared for an Examination Under Oath, which was conducted on February 27, 2003. Gargi Bhattacharyya appeared for an Examination Under Oath which was conducted on March 6 and 21, 2003. Plaintiffs' counsel was present at both these examinations. Quincy Mutual's counsel, in letters dated March 14, March 23 and April 2, 2003, advised plaintiffs that they were obligated under the policy of insurance to return executed copies of the Examination Under Oath, and to provide the previously requested documents. Plaintiffs' counsel in a letter dated May 2, 2003 provided the insurer with authorizations for three bank accounts, receipts of purchases made to replace allegedly stolen items, and stated that the sworn statement of proof of loss would be forwarded shortly. The insurer's counsel in a letter dated June 4, 2003 stated that the insureds had failed to produce their

executed Examinations Under Oath transcripts and all of the information and documentation called for at their respective Examinations Under Oath and set forth a list of 24 documents and information the insureds were required to provide to the insurer, and stated that the failure to produce the documents would be deemed a breach of the policy 's cooperation clause and would result in a denial of the claim. Plaintiffs' counsel provided Quincy Mutual with a Sworn Statement of Proof of Loss, dated June 23, 2003, along with a letter dated June 20, 2003, which Quincy Mutual's counsel received on July 3, 2003. The insureds also provided executed transcripts of the Examinations under Oath and responses to some questions, as well as some of the documents and authorizations that had previously been requested. Counsel for Quincy Mutual, in a letter dated July 8, 2003, informed the insureds' counsel that it had received the transcripts and that it was rejecting and returning the sworn statements of proof of loss as untimely. The insurer' s counsel also stated that certain responses provided by plaintiffs' counsel were improper, as they were not set forth in an affidavit sworn to by the insureds, that other responses were inadequate, and that the insureds were required to produce the requested documents. Counsel stated that the insureds' obligations under the policy's cooperation clause could not be fulfilled until they completed the Examinations Under Oath, which included returning all documents and information called for therein. Counsel stated that the insureds would be given one further opportunity to comply with their policy and produce all of the documents and information demanded at the Examinations Under Oath, within 10 days of receipt of the demand, and the failure to comply would constitute a material breach of the cooperation clause of the insurance policy, and would result in a denial of the claim.

Plaintiffs' counsel in a letter dated September 4, 2003 stated that his client would commence an action for breach of contract, based upon the return of the statement of proof of loss, and the failure to pay the claim. Counsel asserted that the insureds had provided all of the documents requested by the insurer. Plaintiffs commenced the within action prior to any determination by the insurer to deny the claim.

Plaintiffs' motion for leave to amend the complaint is denied. Although CPLR 3025 provides that leave to amend a pleading shall be freely granted, leave to amend should not be granted "upon the mere request of a party without a proper basis" (Morgan v Prospect Park Assocs. Holdings , 251 AD2d 306 [1998]; see Citarelli v American Ins. Co., 282 AD2d 494 [2001]). Rather, it is incumbent upon the movant to make "some evidentiary showing that the claim can be supported" (Morgan v Prospect Park Assocs. Holdings, supra, at 306, citing Cushman & Wakefield v John David, Inc.,

25 AD2d 133, 135 [1996]; see Joyce v McKenna Assocs., 2 AD3d 592, 594 [2003]; Monteiro v R.D. Werner Co., 301 AD2d 636, 637 [2003]). In determining whether to grant leave, a court must examine the underlying merit of the proposed claims, since to do otherwise would be wasteful of judicial resources (see Scavo v Allstate Ins. Co., 238 AD2d 571, 572 [1997] McKiernan v McKiernan, 207 AD2d 825 [1997]). Here, the only affidavit submitted in support of the plaintiffs' motion is from their attorney, who clearly lacks personal knowledge of the underlying facts (see Frost v Monter, 202 AD2d 632, 633 [1994]; Mathiesen v Mead, 168 AD2d 736, 737 [1990]). The affidavit submitted by plaintiff Pronab Bhattacharyya is in opposition to defendant's cross motion to dismiss the complaint and does not set forth any factual basis for the proposed causes of action. Although the proposed amended complaint is verified by the plaintiffs, it is devoid of facts. In addition, plaintiffs have failed to proffer any explanation for the delay in seeking this amendment (Morgan v Prospect Park Associates Holdings, L.P., supra). Plaintiffs' assertion in their reply papers that the delay was caused by defendant's failure to pay the claim is clearly insufficient.

The court further finds that plaintiffs' proposed second cause of action to recover damages for the intentional infliction of emotional distress arising out of the defendant's failure to pay plaintiffs' claim under the insurance policy is meritless. The contract of insurance does not create a relationship out of which "springs a duty to the plaintiff separate and apart from the contractual obligation" (Warhoftig v Allstate Ins. Co., 199 AD2d 258, 259 [1993]). Plaintiffs' proposed allegations are insufficient to give rise to a separate and distinct duty owed by defendant apart from the relationship as insurer/insured (see Fischer v Maloney, 43 NY2d 553, 557 [1978]; Luciano v Handcock, 78 AD2d 943, 944 [1980]). To the extent that plaintiffs' proposed second cause of action sounds in bad faith, this claim also lacks merit, as plaintiffs failed to allege and cannot demonstrate the existence of any duty extraneous to the contract that was violated by the defendant, giving rise to an actionable tort (see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Rocanova v Equitable Life Assur. Socy., 83 NY2d 603, 615 [1994]; Saidai v Sec. Ins. Co., 9 AD3d 420, 421 [2004]; Scavo v Allstate Ins. Co., supra).

As regards the proposed third cause of action, "[i]t is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy [of insurance]" (New York Univ. v Continental Ins. Co., supra, at 324; see also Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21 [1979]; Gold v Nationwide Mut. Ins. Co., 273 AD2d 354, 354-355 [2000]; Cunningham v Security Mut.

Ins. Co., 260 AD2d 983, 983-985 [1999]; Chase Manhattan Bank v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 AD2d 1 [1999]; Mazzuocolo v Cinelli, 245 AD2d 245 [1997]). Plaintiffs, therefore, may not amend the complaint in order to add a third cause of action to recover attorney's fees arising from the insurer's alleged breach of contract.

Finally, neither the astronomical amount of damages sought in the proposed causes of action, nor the mere use of the words willful and malicious transforms either of the proposed claims into one for punitive damages. In any event, plaintiffs may not seek to recover punitive damages for a breach of contract (see Rocanova v Equitable Life Assur. Socy., *supra*, at 613; see also New York Univ. v Continental Ins. Co., *supra*; Sweazey v Merchants Mut. Ins. Co., 169 AD2d 43 [1991], *lv dismissed* 78 NY2d 1072 [1991]). Plaintiffs, thus, are not entitled to amend the complaint in order to assert a cause of action for the tort of intentional infliction of emotional distress, or for bad faith or for punitive damages.

Turning now to defendant's cross motion for summary judgment dismissing the complaint, it is well settled that an insured's failure to submit a sworn proof of loss within 60 days after receiving a demand to do so by its insurer, accompanied by blank proof of loss forms, provides a complete defense to an action for payment on an insurance policy (see Insurance Law § 3407; Marino Constr. Corp. v INA Underwriters Ins. Co., 69 NY2d 798, 800 [1987]; Iqbara Realty Corp. v New York Prop. Ins. Underwriting Assn., 63 NY2d 201, 216 [1984]). Defendant hand delivered the proof of loss letter and forms to the plaintiffs on December 14, 2003. The insurer acknowledged receiving plaintiffs' proof of loss dated June 23, 2003, by mail on July 3, 2003, some five months beyond the 60-day period established by defendant's December 14, 2003 demand. In opposition to defendant's cross motion, plaintiffs merely assert that they did not timely provide the proof of loss statement, as it took some time to assemble. The proof of loss statement was clearly untimely, and plaintiffs have not presented a triable issue of fact as to their failure to meet the 60-day deadline. As regards plaintiffs' claim of waiver, it is settled law that "[e]vidence of communications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel" (Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 [1988]; see Midway Paris Beauty Schools v Travelers Ins. Co., 204 AD2d 521 [1994]; Warhoftig v Allstate Ins. Co., *supra*). "Waiver is an intentional relinquishment of a known right and should not be lightly presumed"

(Frank Corp. v Federal Ins. Co., *supra*, at 968; *see* Blitman Constr. Corp. v Insurance Co., 66 NY2d 820 [1985]). Plaintiffs have offered no evidence from which a clear manifestation of intent by the defendant to relinquish the protection of the contractual limitations period could be reasonably inferred. Nor do the facts show that defendant, by its conduct, otherwise lulled the plaintiff into sleeping on its rights under the insurance contract (Cibao Corp. v Royal Indem. Co., 205 AD2d 658, 658-659 [1994]). Defendant, therefore, is entitled to summary judgment on its first affirmative defense as plaintiffs failed to submit a sworn proof of loss within 60 days after receiving a demand to do so by defendant.

Defendant also seeks to dismiss the complaint on the grounds asserted in the second through fifth affirmative defenses, namely that plaintiffs failed to cooperate with the insurer's investigation of their claim, in violation of the insurance policy. Insurance policies "almost universally require, as a condition precedent to performance of the promise to indemnify, that the insured cooperate with the insurer in the investigation of the loss. The failure of an insured to do so is a material breach of the contract and a defense to a suit on the policy" (Dyno-Bite, Inc. v Travelers Companies, 80 AD2d 471, 473 [1981], *appeal dismissed* 54 NY2d 1027 [1982]; *see also* Lentini Brothers Moving & Storage Company v New York Property Insurance Underwriting Association, 76 AD2d 759, 761 [1980], *affirmed* 53 NY2d 835 [1981]). Insurers are entitled to promptly obtain all of the facts material to their rights to enable them to decide upon their obligations and, to protect them against false claims. The "failure to comply with the provision of an insurance policy requiring the insured to submit to an examination under oath and provide other relevant information is a material breach of the policy, precluding recovery of the policy proceeds ... (as) an insurance company is entitled to obtain information promptly while the information is still fresh" (Argento v Aetna Casualty & Surety Company, 184 AD2d 487 [1992]; *see also* Somerstein Caterers of Lawrence, Inc. v Insurance Company of State of Pennsylvania, 262 AD2d 252 [1999]; Pizzirusso v Allstate Insurance Company, 143 AD2d 340 [1988], *appeal dismissed* 73 NY2d 808 [1988]; Cabe v Aetna Casualty & Surety Company, 153 AD2d 653 [1989]; Maurice v Allstate Insurance Company, 173 AD2d 793 [1991]). Moreover, the "right to examine under the cooperation clause of the insurance policy ... is much broader than the right of discovery under the CPLR. By its terms, the insured promises to render full and prompt assistance to discover the facts surrounding the loss and anything less results in a breach of contract" (Dyno-Bite, Inc. v Travelers Companies, *supra*, at 474). The insurer's burden of proving willfulness has been termed "a heavy one" (Levy v Chubb Ins., 240 AD2d 336, 337 [1997]; *see* Ausch

v St. Paul Fire & Mar. Ins. Co., 125 AD2d 43, 45-46 [1987], lv denied 70 NY2d 610 [1987]) and requires a showing that the insured's attitude "was one of willful and avowed obstruction" (Baghaloo-White v Allstate Ins. Co., 270 AD2d 296 [2000], quoting Physicians' Reciprocal Insurers v Keller, 243 AD2d 547 [1997]) involving a "pattern of noncooperation for which no reasonable excuse [is] offered" (Argento v Aetna Cas. & Sur. Co., 184 AD2d 487, 488 [1992]; see also Ingarra v General Accident/PG Ins. Co., 273 AD2d 766, 767-768 [2000]).

Here, although the plaintiffs submitted to the examinations under oath, they failed to supply the information and documents requested at the examinations, despite the insurer's requests of June 4, 2003, and July 8, 2003. These documents include plaintiffs' local usage detail statements from the telephone service provider; mortgage statements for the period of September 1, 2001 through December 31, 2002; car lease statements; checking account statements as regards the purchase of an oil painting for \$2,000.00, in 1999, which was alleged to have been paid for by check; the Macy's credit card statement for the period of September 1, 2001 through December 31, 2002; business tax returns for the period of 2001 and 2002; and credit card statements for the furniture the plaintiffs claimed to have purchased for the second floor apartment, which was alleged to have been moved into plaintiffs' apartment following the burglary. Plaintiffs also failed to exhibit the allegedly damaged property to the insurer.

Despite plaintiffs' claim to have provided the insurer with all requested documents, it is clear that they have failed to provide the insurer with the requested documents, although they were given ample opportunity to do so. Plaintiffs' present submission of copies of their 2000 and 2001 federal income tax returns, which were previously provided at the Examination Under Oath, is insufficient to raise an issue of fact as to whether plaintiffs cooperated with the insurer. The wilful refusal by the plaintiffs to produce appropriate records, including credit card records pertaining to the purchase of items claimed to have been stolen or destroyed, certain tax records, mortgage records, business tax returns, car lease statements, and telephone local usage detail statements, where, as here, the circumstances of the claim may reasonably appear suspicious, defeats the right of the insurer to obtain relevant information to enable it to decide upon its obligations under the policy and to protect against false claims. The court, therefore, finds that plaintiffs' continued failure, without reasonable explanation or excuse, to provide the requested information, constitutes a material breach of the policy precluding recovery by the plaintiffs (Johnson v Allstate Ins. Co., 197 AD2d 672 [1993]; Evans v International Ins. Co., 168 AD2d 374

[1990]; Cabe v Aetna Casualty & Surety Co., 153 AD2d 653 [1989]; see also Argento v Aetna Cas. & Sur. Co., supra; Pizzirusso v Allstate Ins. Co., 143 AD2d 340 [1988], appeal dismissed 73 NY2d 808 [1988]; Averbuch v Home Ins. Co., 114 AD2d 827 [1985]).

In view of the foregoing, plaintiffs' motion for leave to amend the complaint is denied in its entirety, and defendant's cross motion to dismiss the complaint is granted, as plaintiffs breached their contractual duty to timely provide the insurer with sworn proof of loss, and breached their duty to cooperate with the insurer's investigation of the claim.

Dated: December 15, 2004

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J.S.C.