CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : TRIAL BU/68

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BOULDER APARTMENTS LLC,

Plaintiff,

Index No. 54410/04

DECISION & ORDER

-against-

GREATER NEW YORK MUTUAL
INSURANCE COMPANY,

Defendant.

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BARBARA JAFFE, J.:

In this first-party insurance claim, plaintiff sues defendant for breach of an insurance policy covering commercial property. It seeks damages in the amount of $15,369.44 and attorney fees. In its answer, defendant claims it fully paid plaintiff pursuant to the policy. A bench trial was held before me on December 12 and 14, 2006.

By motion dated January 16, 2007, defendant moves pursuant to CPLR 4401 for an order dismissing the complaint, at the close of plaintiff's case, on the ground that having signed and sent a sworn statement in proof of loss to defendant in the amount of $24,940.80, and having received from defendant that amount less the policy's $1,000 deductible, plaintiff signaled an accord and satisfaction of its claim. (Notice of Motion, dated Jan. 16, 2007).

~~The parties submitted written closing statements.~~

I. FINDINGS OF FACT

Testifying for plaintiff were David Amster, Janice P. Reeves, and Leonard Sarver. Jerome Konsker and Mitchell Gregory Siegel testified for defendant.

Plaintiff owns a 40-year-old apartment building at 1133 Midland Avenue, Yonkers, New York that is insured for losses resulting from fire by defendant. The policy was produced for plaintiff by Kaye Insurance Associates, Inc. (Kaye) and was effective from January 30, 2002 to

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January 30, 2003. (Pl. Exh. 22).

Pursuant to subdivisions E(3)(a)(2) and (3) of the policy's "Building and Personal Property Coverage Form (CP 00 10 06 95), in the event of a loss, the insured must provide the insurer with prompt notice of the loss and a description of it and "set the damaged property aside and in the best possible order for examination." (Pl. Exh. 22). Subdivisions six and seven require that the insured permit the insurer to inspect the property as often as reasonably required and send to the insurer a signed, sworn proof of loss containing information requested by the insurer to investigate the claim. In subdivision E(4), as pertinent here, the insurer agrees that in the event of a covered loss or damage, it will pay the value of the damaged property or pay the cost of repairing it, not including increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property. (*Id.*). Pursuant to subdivision A(1)(a), although the electrical system is not part of the building, the equipment is. Additional coverage is provided for "collapse." (*Id.*).

On November 2, 2002, late in the evening, the building lost power. A licensed electrical contractor, CW Carl Electrical Contractors, Inc. (CW Carl), was immediately called to the scene which was inspected several hours later by its principal, Leonard Sarver, a licensed electrician for 35 years. Notice also went out to MGS Adjusters, Inc. (MGS), defendant's adjuster.

Sarver observed damaged wiring within feeder cables. The cables, which were insulated with cotton fabric, entered the building via two disconnects housed in a box located in the building's basement. The fabric appeared burned.

Sarver's employees tried unsuccessfully to remove the damaged wires from the conduits leading into the building. As the wiring entered the building through conduits embedded in the building's concrete foundation, those conduits were abandoned. The property line box from which the utility company sends out its wiring to connect with the building's wiring was located some 10 to 15 feet underground. It took two to three weeks for the utility company to find it.

Sarver hired an excavator to unearth the conduits leading from the building, some 15 feet

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underground, to the property line box. His employees cut the conduits before they entered the building, and removed the wiring from the disconnect box. Sarver testified that the wiring bore signs of heat and carbon deposits. He supervised the installation onto the side of the building of three new conduits and wiring and two new disconnects in the basement. While one of the conduits appeared undamaged, Sarver believed that it had to be replaced in anticipation of future building settlement and in order to comply with code requirements. He denied that the replacement of the undamaged conduit constituted an upgrade or preventative maintenance, claiming that safety and code requirements mandated its replacement and that it entailed no addition to the system's power or voltage. Sarver believed that the utility company would not reconnect the system if he did not replace it.

Sarver's work took approximately six weeks. He visited the site twice, took no photographs or notes of his observations, testified entirely from memory, and expressed hope that he would be paid for his testimony (Tr., at 150, line 12). The work was billed to plaintiff in six invoices totaling $44,881.10:

1) December 31, 2002, for work performed from November 3, 2002 to December 31, 2002 ($18,261.78);

2) January 7, 2003, for materials used from November 3, 2002 to December 31, 2002 ($8,836.16);

3) February 3, 2003, for materials supplied from January 1 to January 31, 2003 ($4,470.37);

4) February 14, 2003, for work performed from January 2 to January 31, 2003 ($5,818.44);

5) February 14, 2003 ($5,566.76); and

6) February 21, 2003, for materials supplied from February 1 to February 12, 2003 ($1,927.59).

(Pl. Exhs. 3-8).

On November 20, Siegel, MGS's Vice-President, visited the site to evaluate the damages. He met with the building's superintendent and property manager and observed that temporary lines had been run to the disconnect box in the basement. At defendant's request, Siegel hired

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Jerome Konsker to determine the loss, evaluate the extent of the damages, and issue a report.

On November 25, 2002, Konsker, a licensed master electrician, president of Konsker Electric Corporation since 1961, and an expert in electrical contracting and constructing (Def. Exh. C), visited the site at Siegel's request in order to determine the scope of damage to the building's electrical system, to evaluate it for repair or replacement, and to report his findings to MGS. He took photographs (Def. Exhs. E-O), and spoke to someone from CW Carl at the site.

Konsker observed three feeder lines running from the property line box. The lawn had been excavated to four feet deep, exposing a damaged conduit which, Konsker saw from above, was cut and contained no wiring. (Def. Exh. I). Although the other two conduits had not yet been excavated, the electrician at the site told Konsker that they were operational. Konsker spent 90 minutes at the site. Later, he reviewed CW Carl's invoices in order to determine what parts of its work pertained to an insurable loss. He separated the temporary from the emergency work.

In Konsker's expert opinion, the damage was caused by a short circuit within a conduit which required that the segment of the conduit be replaced along with the wiring from the property line box to the building. He discounted the possibility of a fire given the absence of sufficient oxygen underground and believed that the black substance on the disconnect box was dirt, not fire soot. (Def. Exh. G). He observed no damage to the building.

Konsker also testified that any work performed after November 25 on the other two functional conduits had nothing to do with the covered loss, and had the workers discovered that the conduits had been damaged and that the damage was the result of the incident, plaintiff would have informed Siegel who would have instructed him to do a supplemental inspection. However, he was never asked to do that and in his view, the balance of the work reflected on CW Carl's invoices was for upgrades. Konsker also testified that although the invoices reflect that work was performed on the other two conduits, there is no indication on them as to why the work was performed.

From CW Carl's invoices, Konsker valued the temporary and emergency work at $12,454.16. He estimated the permanent repair at $12,486.64 including sales tax. Konsker sent

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his report to Siegel.

David Amster is President of Prime Locations Inc. (Prime), a large real estate brokerage and management company which, in January 2003, began managing the subject premises. (Pl. Exh. 1). Amster has had many years of experience handling insurance claims for water and fire damage to properties he managed and had received informal training in their handling. When Amster took over the management of plaintiff's building, he learned that an insurance claim had already been submitted to defendant by plaintiff's former management company and that it remained pending.

Amster became personally involved with the claim when Stacey Berry, Prime's property manager, resigned, although there were two other property managers in place after Berry left. Berry had submitted CW Carl's invoices to defendant on February 13, 2003 and May 5, 2003 (Pl. Exhs. 11, 12). Amster signed six checks in payment of CW Carl's invoices. (Pl. Exh. 10[a-f]).

Upon receiving Konsker's report and the invoices attached to Berry's May 5 letter (Pl. Exh. 12), Siegel orally conveyed to Kaye's claims representative, Janis Reeves, his offer to settle the claim for $24,940.80, minus the $1,000 deductible.

By letter dated May 20, 2003, which plaintiff received on May 23, 2003, Siegel forwarded to plaintiff, with a copy to defendant, a "Proof of Loss" form for the claim which he asked that plaintiff sign, notarize, and return to him. (Pl. Exh. 14; Def. Exh. Q). Siegel stated in the letter that the net amount of the proof of loss was $23,940.80, and he prepared the form by filling in the following information: "1. . . . The cause and origin of the said loss were: Electrical feeder cable reportedly burned out. . . . 8. The Whole Loss and Damage was $24,940.80. . . . 9. The Amount Claimed under the above numbered policy is Less $1,000 policy deductible $23,940.80." (Pl. Exh. 13; Def. Exh. Q).

Immediately below it reads:

> . . . Any other information that may be required will be furnished and considered a part of this proof.
>
> The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any [illegible] rights.

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(*Id.*). Schedule B of the form, a "Statement of valule [sic], loss and claim" reflects no information as to how Siegel calculated the loss. (Pl. Exh. 13). According to Siegel, in confirmation of his conversation with Reeves, this form was sent to plaintiff as an offer of settlement, and given Reeves's involvement, he did not include a breakdown of the claim on schedule B.

Amster testified that as Kaye employees Alex Seeman and Reeves had assisted plaintiff in submitting the instant claim to defendant, he sought to rely on them for advice on how to handle the proof of loss, and that he recalled speaking to someone at Kaye who told him that the insurance company must receive the proof of loss form and that without it, defendant could deny the claim. Amster also determined from his review of plaintiff's records that the amount set forth by Siegel on the form was accurate.

By letter dated June 23, 2003, labeled "Second and Final Request," Siegel enclosed the same proof of loss form and again requested that plaintiff sign, notarize, and return it to him. (Def. Exh. R).

By letter dated July 21, 2003, labeled "Final Request," and received by plaintiff on July 24, 2003, Siegel enclosed the same proof of loss form and again requested that plaintiff sign, notarize, and return it to him. (Pl. Exh. 15). Amster left numerous telephone messages for Siegel but never sent him a letter or fax requesting an explanation of the proof of loss. Amster signed the form before a notary on August 25, 2003. (Pl. Exh. 13).

Amster offered a variety of reasons why he signed the claim. First, he testified that he believed that because plaintiff had paid CW Carl only through March 11, the claim was not ripe, although there was sufficient evidence that plaintiff had already sent defendant all of the invoices. He also testified that as Siegel had furnished no calculations leading to his determination that the claim was worth $23,940.80, the claim could not have been fully determined. And finally, having failed to reach Siegel, Amster testified that he feared that his failure to execute the form would result in the claim's denial. According to Amster, he believed that defendant would continue to pay additional invoices on the claim and did not believe that the

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proof of loss constituted a final settlement of the claim. Although he also believed that the statement on the form that "[a]ny other information that may be required will be furnished and considered a part of this proof" relates to defendant's continuing duty to pay on the claim, the statement does no such thing. He also allegedly thought that by executing and submitting a sworn proof of loss, he was simply acknowledging the accuracy of the original claim submitted by Berry and that executing the form constituted a condition precedent to receiving an initial payment on the claim. Without any advice from plaintiff or from Kaye, Amster executed the form and did not object to its contents.

On August 26, 2003, Amster sent Siegel the proof by certified mail. It was signed for by Siegel's office on September 5, 2003. (Pl. Exh. 16).

Reeves had never seen the form and although she had discussed the claim with Siegel, she was unaware that defendant would not pay the entire claim. Given Reeves's involvement, Siegel did not speak with Amster about the claim.

By letter dated September 4, 2003, Siegel wrote to Berry asserting that he had not yet received the executed proof of loss from plaintiff and advising that he would be "recommending to [defendant] that their file be closed without payment at this time." (Pl. Exh. 17). Amster re-sent his August 26 letter to Siegel. (Pl. Exh. 18). It was signed for by Siegel's office on September 8. (*Id.*).

By letter dated September 22, 2003, Reeves forwarded to plaintiff defendant's check in the amount of $23,940.80. She wrote that the check was "in settlement of" the claim. (Pl. Exh. 19). Plaintiff deposited the check; Amster continued to think that it represented an initial payment on the claim.

By letter dated October 27, 2003, Sarver advised plaintiff that some of the work he performed valued at $4,570.86 was not associated with the repairs to the electrical service. (Pl. Exh. 21).

Being pressed for payment by CW Carl, Amster again tried unsuccessfully to reach Siegel. He then contacted Kaye for information concerning the status of the remaining unpaid

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invoices. Plaintiff paid the balance due to CW Carl on December 11, 2003.

In response to Amster's request for an explanation of why no further payments were made on the claim, Reeves sent him, by facsimile dated September 29, 2004, a copy of Siegel's statement of loss. (Pl. Exh. 20). The statement reflects that the claim presented by plaintiff was for $42,953.51 and that the loss was $12,454.16 for emergency and temporary repairs and $12,486.64 for permanent repairs. (*Id.*). Amster testified that upon seeing the statement, he learned that defendant had disallowed the balance of the claim on the ground that it constituted unreimburseable upgrades. Plaintiff calculates that defendant owes it an additional $15,369.44, representing the balance of its claim. According to Siegel, as plaintiff had never before asked for a breakdown or explanation of his handling of the claim, he had no obligation to send it.

Reeves, an experienced insurance examiner, took over plaintiff's file in late March 2003. At plaintiff's request, she completed the claim, sent it to defendant along with the invoices she had received from plaintiff, monitored its progress, but played no role in settling the claim. She testified that a sworn proof of loss contains information concerning the coverage, property in question, type of claim, and details regarding how much would be paid on the claim and the policy deductible, and that it is intended to outline the settlement amount and event, and induce payment by the insurer. She acknowledged that some proofs of loss may be characterized as "hostile" in that the insured indicates on it any disagreement it may have with the settlement amount proposed by the insurer, that some proofs provide for a payment in advance of a full settlement, and that there exists a proof of loss in which the insured reserves its right to seek additional benefits without disputing the settlement amount. She also allowed that an insured may negotiate the proof with the insurer prior to submitting it.

Reeves also testified that notwithstanding that the form submitted by plaintiff had been filled out by Siegel, it was not a hostile proof of loss, nor did it provide for any advance payments on the claim. Rather, it appeared to her to be a settlement of the claim as agreed to by the parties.

II. MOTION TO DISMISS

Defendant moves for an order dismissing the action on the ground that plaintiff's

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executed proof of loss and acceptance of its check constitutes an accord and satisfaction as a matter of law. Plaintiff denies that defendant has established an accord and satisfaction.

Proof of loss statements are not conclusive upon an insured as to the amount of loss. Rather, they "may be shown by other evidence to be erroneous or incomplete, or to be the result of mistake, misinformation, or inadvertence," and they may be amended. (NY Jur 2d, Insurance § 1884; *see Frees v Nat. Ben Franklin Fire Ins. Co.*, 163 AD 57 [3d Dept 1914] [amount of loss stated in proof of loss is "strong evidence" that plaintiff's damages do not exceed that amount, but is not conclusive]).

Generally, the acceptance of a check "in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim." (*Merrill Lynch Realty/Carll Burr, Inc. v. Skinner*, 63 NY2d 590, 596 [1984]). In order to be enforceable, the party receiving the check must have been "clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim." (*Id.*).

Amster's claim that his execution of the proof of loss was inadvertent need not be addressed as he not only executed the proof of loss which reflects an amount substantially less than the sum of the invoices (of which plaintiff cannot disclaim knowledge), but Amster also accepted defendant's check from his agent who informed him in a writing accompanying the check that the check was in settlement of the claim. Although the proof of loss is not conclusive, it constitutes evidence that plaintiff had at least resigned itself to the amount set forth therein. (*Frees*, 163 AD 57). That evidence, in conjunction with plaintiff's haphazard approach to every aspect of the claim process, and in light of Amster's knowledge and experience in handling insurance claims, warrants my rejection of Amster's testimony that he did not believe that the claim was disputed.

I also reject Amster's testimony that he believed that accepting the check did not constitute a settlement of the claim. Rather, I find that the proof of loss sufficiently communicated to plaintiff that the claim was in dispute and I reject Amster's claim that he believed that defendant would continue to issue checks. I also find that even if the proof of loss

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did not clearly inform plaintiff that it was offering the $24,940.80 in settlement, Reeves's transmittal letter did.

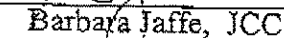
In determining whether the claim was "legitimately" disputed, I observe that Sarver's testimony that he hoped to be paid by plaintiff for his testimony warrants an inference that he was motivated to color it to ensure his fee for testifying. He also testified almost entirely from his memory of work he did over four years ago. I thus find that Sarver's interest in the case and the questionable basis for his recall, in light of Konsker's testimony which I find sufficiently reliable, render Sarver's testimony an insufficiently reliable basis upon which to find that the claim was not legitimately disputed by defendant.

For all of these reasons, defendant's motion for an order dismissing the action on the ground of an accord and satisfaction is granted. If I were not dismissing the action, I would find for defendant, given the unreliability of Sarver's testimony and the reliability of Konsker's concerning the extent of the insured loss.

III. CONCLUSION

Accordingly, judgment is granted in favor of defendant and the claim is dismissed. The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.



Barbara Jaffe, JCC
HON. BARBARA JAFFE

DATED: March 15, 2007
New York, New York

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