Potamkin Cadillac-Buick-Chevrolet-Geo, Ltd. v Allianz Global Corp. & Specialty Mar. Ins. Co.
2016 NY Slip Op 31507(U)
August 8, 2016
Supreme Court, New York County
Docket Number: 651150/2013
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 48
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POTAMKIN CADILLAC-BUICK-CHEVROLET-GEO, LTD., PMC LLC and PAGI HOLDINGS, INC.,

Plaintiffs,

-against-

ALLIANZ GLOBAL CORPORATE & SPECIALTY MARINE INSURANCE COMPANY a/k/a AGCS MARINE INSURANCE COMPANY, and D&P HOLDINGS, INC. d/b/a DIVERSIFIED INSURANCE FACILITIES a/k/a D&P HOLDINGS OF TEXAS,

Defendants.

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Index No.: 651150/2013

Mtn Seq. No. 002

DECISION AND ORDER

JEFFREY K. OING, J.:

In this action involving a dispute over insurance coverage, affiliated plaintiffs Potamkin Cadillac-Buick-Chevrolet-Geo, Ltd., PMC LLC and Pagi Holdings, Inc. (collectively, "plaintiffs" or "Potamkin") move, pursuant to CPLR 3212, for summary judgment against defendants Allianz Global Corporate & Specialty Marine Insurance Company a/k/a AGCS Marine Insurance Company ("Allianz") and D&P Holdings, Inc. d/b/a Diversified Insurance Facilities ("Diversified").

Allianz cross-moves, pursuant to CPLR 3212, for summary judgment dismissing Potamkin's complaint.

Background

The following facts are derived from Plaintiffs' complaint and the parties' pleadings, which are generally undisputed,

except as otherwise stated herein. This lawsuit involves Potamkin's subsequent efforts to obtain insurance payment under its automobile dealer's floor plan policy (the "Policy") in which Allianz is the insurer and Diversified is the insurance program's administrator-marketer and designer-owner. In that regard, Diversified enlists insurers, such as Allianz, to insure the specialty insurance program that it designed. Because of fluctuations in a automobile dealer's inventory, the Policy has a "weather coverage endorsement" that permits the dealer, such as Potamkin, to seek up to 25% of additional coverage above the stated policy limit, contingent upon the dealer's reporting monthly inventory values and paying the adjusted premiums.

As a result of Hurricane Sandy in October 2012, Potamkin lost a large number of vehicles that it stored at its Brooklyn facility. In Sandy's aftermath, Allianz inspected Potamkin's loss and, on January 9, 2013, prepared a loss statement which Ralph Gilmore, Allianz's regional adjuster, sent to Potamkin via email. In the statement, Allianz adjusted and determined Potamkin's total loss at $9,216,628, and after subtracting a deductible of $133,800, left a loss net of deductible of $9,082,828. Under the Policy, the stated coverage limit for Potamkin's Brooklyn storage location was $7,076,000, which was paid to Potamkin by Allianz. If the 25% additional coverage

($1,769,000) were taken into consideration, the increased policy limit would be $8,845,000, instead of $7,076,000.

Pursuant to a provision in the Policy, as discussed fully below, Allianz demanded Potamkin to provide it with storm-damaged vehicles to dispose of as salvage, in an amount equal to the pre-destruction sum of $7,076,000. Allianz recovered $1,758,568 from such salvaged vehicles, and incurred an expense of $32,754 in connection therewith, resulting in a net payment on the loss in the amount of $5,350,187. The remainder of the storm-damaged vehicles not picked up by Allianz were sold for salvage by Potamkin, resulting in $1,068,202 recovery, and when this amount is added to the $7,076,000 Allianz payment, Potamkin was left with $938,627 of its $9,082,828 loss as "uncompensated" (the "uncompensated loss").

In the complaint, Potamkin asserts two causes of action: breach of insurance contract and fraud. The breach of contract claim is against Allianz, which seeks a recovery of $1,769,000 (representing the alleged additional 25% coverage), plus interest. The fraud claim is against both Allianz and Diversified in the sum of $1,769,000 as compensatory damages, and $5,307,000 as punitive damages.

After the January 14, 2014 oral argument, this Court granted that branch of Allianz's pre-answer motion to dismiss the fraud

cause of action, but denied that branch seeking dismissal of the breach of contract claim (NYSCEF Doc. No. 30). With respect to the breach of contract claim, this Court found the existence of an issue regarding whether Allianz, in its letter to Potamkin dated January 18, 2013 amounted to a waiver of the Policy's requirement for Potamkin to submit the so-called "monthly premium and inventory report" such that Potamkin would be entitled to the additional 25% coverage even though it indisputedly did not submit the monthly reports and adjusted premiums.

In the instant motion, Potamkin does not seek to pursue its breach of contract claim based upon the allegation that Allianz failed to pay the 25% additional coverage of $1,769,000 under the Policy. Instead, Potamkin relies on the "made whole" doctrine seeking a money judgment in its favor in the amount of $938,627, the uncompensated loss.

Analysis

I. Potamkin's motion

Potamkin argues that under the "made whole" doctrine that has been adopted by the New York courts Potamkin must be made whole for its loss from both parties' combined salvage recovery before Allianz is entitled to receive any benefit from such recovery, and that because Potamkin has not been fully compensated for its loss Allianz must pay Potamkin an additional

sum of $938,627 to make up for the shortfall. In making this argument, Potamkin relies principally on Winkelmann v Excelsior Ins. Co., 85 NY2d 581 (1995).

In Winkelmann, the issue was whether under the principle of subrogation an insurer who has fully satisfied its insurance policy obligation is precluded from pursuing claims against third-party tortfeasors before its insured has done so (Id. at 582). In deciding the issue, the Court of Appeals first explained that subrogation is "the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss," but that "an insurer has no right of subrogation against its insured when the insured's actual loss exceeds the amount it has recovered from both the insurer and the wrongdoer" (Id. at 581 [emphasis added]).

With respect to the disputed issue, the Court of Appeals concluded that "permitting the insurer to sue ... as equitable subrogee does not affect the insured's right to sue for the amount of the loss remaining unreimbursed" and that there would be "time enough to determine plaintiffs' rights vis-a-vis defendant's when and if it is determined that the third-party tortfeasor is unable to pay the remainder of their loss" (Id. at 582-584 [emphasis added]).

Fourteen years later, in Fasso v Doerr, 12 NY3d 80 (2009), the Court of Appeals added that "the insurer may seek subrogation against only those funds and assets that remain after the insured has been compensated," and that application of the made whole doctrine "assures that the injured [insured] party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer" (Id. at 87 [emphasis added]).

Based on the foregoing, the subrogation principle clearly permits an insurer to sue a third-party tortfeasor to recoup the amount of insurance payment it paid to the insured, and the made whole doctrine assures that the insured's claim and recovery against the tortfeasor is superior to the insurer's subrogation rights when the recovery from such tortfeasor is inadequate to fully compensate the insured for its loss.

Here, there is indisputedly no third-party tortfeasor. Thus, invocation of the subrogation principle, contractual or equitable, is inapplicable to the instant facts, and Potamkin's reliance upon Winkelmann and its progeny is misplaced. Correlatively, the made whole doctrine is equally inapplicable. That doctrine governs the priority of the parties' entitlement to the proceeds recovered from a third-party tortfeasor when the recovery is inadequate to compensate for the insured's loss. Here, Hurricane Sandy is clearly not a third party that can be

held "legally responsible for the loss" (Winkelmann, 85 NY2d at 581, supra).

Potamkin nonetheless argues that the "subrogation theory is but a specie of salvage recovery," and that both are "subject to the same rules of application" because, according to Potamkin, "subrogation and salvage are interrelated concepts by which an insurer seeks to recover from third party sources what it has paid to its insured" (Potamkin's moving brief at pp. 18-19). In that regard, Potamkin cites to the following excerpt from Couch on Insurance for support: "the insurer, when it has paid to the insured the amount of the indemnity ... is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss" (Phoenix Ins. Co. of Brooklyn v Erie & Western Transp. Co., 117 US 312, 321 [1886], quoting Couch on Insurance, 3rd Ed. § 222:8 [emphasis added]). That argument is unavailing. Contrary to Potamkin's reasoning, the quoted excerpt favors the insurer because it expressly states that the insurer is entitled to the benefit of the salvage when it has paid the insured the amount of indemnity under the insurance contract.

Likewise, Potamkin's reliance on the Eighth Circuit's decision, in First Missouri Bank & Trust Co. v. Bayly, Martin & Fay Aviation Ins. Servs., 739 F2d 348 (8th Cir 1984), is

misplaced. The First Missouri Bank case involved an airplane's insurance policy, and the insurer argued that the airplane's $5,500 salvage value should be offset against the $35,000 policy limit, such that the insurer only needed to pay $29,500. The Eighth Circuit disagreed. Noting that the policy stated that if the airplane was mortgaged, "any loss covered hereunder is payable as interest may appear to the Assured and [the bank]," and because the bank's lien on the airplane exceeded the policy limit after deducting the salvage value, the Eighth Circuit ruled that the bank was entitled to the full policy limit of $35,000 (Id. at 350). Thus, the Circuit Court's ruling merely reflected the enforcement of parties' contractual rights because the bank's lien on the airplane exceeded the policy limit and the airplane's policy contractually provided that any loss would be payable to the bank.

Here, there is no dispute that Allianz has paid Potamkin the stated policy limit of $7,076,000 (without considering whether the additional 25% insurance coverage, as argued by Potamkin, is applicable), and the terms of the Policy do not provide for an allocation of the salvage recovery to the insured (as opposed to the insurer). Notably, paragraph XI of the Policy states, in relevant part:

> B. In the event of loss to a covered Vehicle ... 1. We may, at Our option ... c. Take all or part of the

> damaged or stolen Vehicle at an agreed or appraised value ....

(Policy, § XI.B.1.c.). Again, there is no dispute that, pursuant to this provision, Potamkin provided to Allianz storm-damaged vehicles equal to the amount of the Policy limit for salvage recovery.

Yet, Potamkin argues that because this provision does not set forth the priority between the insured and the insurer for a salvage recovery, and that the Policy does not even mention the word "salvage," the provision is "insufficient to alter" the made whole rule (Potamkin's moving brief at p. 22, citing SR Intl. Bus. Ins. Co. v World Trade Ctr. Props., LLC, 2008 WL 2358882 [SD NY 2008], affd 343 Fed Appx 629 [2d Cir 2009]).

To begin, Potamkin's reliance on SR International case is misplaced because that case did not involve a salvage recovery dispute (the subject matter of Potamkin's instant motion), but dealt with subrogation claims against third-party tortfeasors (Id. at *2 ["The issue here is whether the subrogation clause ... is binding on and applicable to the Allianz Policies and, if so, whether Allianz has priority of recovery over the Silverstein Insureds in the Recovery Litigation against third party tortfeasors").

In any event, its "insufficient to alter" argument is unavailing because the subrogation and made whole rules are

inapplicable here as there is no tortfeasor for the parties to seek recovery against, which renders the argument inapposite as a matter of law and fact. As explained by the District Court in SR International, supra, the subrogation doctrine "is to prevent the insured from recovering twice for the one harm ... [and] is liberally applied to protect its natural beneficiaries, the insurers" because their subrogation right "is completely derivative and limited to the rights of the insured against the third party for its default or wrongdoing" (Id. at *3 [emphasis added]). Here, Potamkin received payment under the Policy for the storm-damaged vehicles which it delivered to Allianz for salvage. Permitting Potamkin to have priority over Allianz in the salvage funds for the same vehicles is akin to allowing Potamkin to recover twice for the same harm.

SR International also states that: "[w]hile subrogation is the right of the insurer to sue the third party who caused the loss, salvage is the equitable right of the insurer to the residual value of property for which the insurer has paid following a total loss" (Id. at *7 [emphasis added]). Notably, Potamkin failed to address these stated principles in its reply brief.

The Policy includes provisions and endorsements that address the calculation of payment for a loss caused by weather

conditions such as flood, windstorm or earthquake, and an attempt to invoke the made whole doctrine as an equitable defense or limitation to the subrogation rights, in the absence of a tortfeasor, is unwarranted under these circumstances.

II. Allianz's Cross Motion

Allianz in its pre-answer dismissal motion argued, inter alia, that because Potamkin did not comply with the terms of the Policy (including, in particular, the weather coverage endorsement, effective May 1, 2012) which required Potamkin to submit monthly premium and inventory reports as a condition to receiving the additional 25% coverage of the stated limit, and because it was undisputed that no such reports were ever submitted, the complaint alleging a breach of contract claim (i.e., Allianz not paying the additional 25%) must be dismissed. Specifically, Section IV of the Policy provides: "If the participating dealer's inventory at the time of 'loss' exceeds the limits shown on their evidence of coverage," Allianz will pay the greater of the "[a]dditional amount not to exceed Twenty Five Percent (25%) of the participating dealer's actual inventory value reported to us on the most recently received Monthly Premium and Inventory Report" or "[t]he limit shown on the participating dealer's evidence of coverage" (Yusko Aff., Ex. 5). Section IX of the Policy also provides: "If as of the time of

'loss' a participating dealer has failed to submit the required reports and premium ... our liability will not exceed the 'vehicle value' included for the participating dealer in the last report submitted to us."

At the January 10, 2014 oral argument, this Court focused on the letter, dated January 18, 2013, and written by Allianz's regional adjuster, Ralph Gilmore, which informed Potamkin of the Policy's coverage for the claimed damages sustained by Potamkin at its Brooklyn storage facility due to Hurricane Sandy. The letter stated, in relevant part: "During our investigation into the coverage surrounding the claim, it was determined that Potamkin Storage was not required to report [inventory] values on a monthly basis" (Yusko Aff., Ex. 9 [emphasis added]). This Court denied the motion because in light of the "not required" language used in the letter there was a "sufficient basis to determine that perhaps [there] may have been a waiver of that monthly inventory report" (NYSCEF Doc. No. 30 at p. 22). This Court also noted that the Policy does not contain a no-waiver clause, an integration clause, a merger clause or a no modification clause, which contributed to the basis for denying the motion (Id.).

In the instant cross motion, Allianz's proffered arguments are substantially similar to those raised in its prior pre-answer

motion to dismiss. Without proffering new evidence, Allianz relies upon the affidavit of Ralph Gilmore, dated June 11, 2015, wherein he stated that his January 2013 letter was intended to advise Potamkin that during his investigation into Potamkin's claim Allianz "discovered that Plaintiffs possessed the option to submit the monthly reporting values concerning premium inventory, but were not mandated to do so under the Policy" (Gilmore Aff., ¶ 16). He also stated that by not submitting the monthly reports, "[p]laintiffs did not exercise their option for enhanced coverage under the Weather Coverage Amendment Endorsement" (Id. at ¶ 17). Allianz further explained that the "not required" language in the January 2013 letter was "a poor choice of words intended to reflect that the additional 25% enhanced limit available through the Weather Coverage Endorsement was an option to Potamkin," but Potamkin "did not invoke its rights in this regard by failing to file the required monthly reports" (Allianz's brief at p. 25). Repeatedly citing in its prior and current briefs Albert J. Schiff Assoc., Inc. v Flack, 51 NY2d 692 (1980), Allianz argues that "waiver does not apply to create coverage that otherwise does not exist" (Id. at 26).

To begin, the "poor choice of words" explanation is remarkably insufficient to support the relief sought herein. In the absence of new factual evidence, the present record does not

add to or change Allianz's prior argument or position in its pre-answer dismissal motion. As noted supra, this Court determined that there was a sufficient showing that the "not required" language in the January 2013 letter might likely be considered a waiver of the monthly inventory reports requirement. The "poorly worded" excuse, together with Potamkin's allegation that Allianz's policy administrator, Diversified, had wanted to have Potamkin's sizeable annual premium paid up front (rather than in monthly installments) for cash flow purposes and thus waived the monthly inventory reports are disputed facts. Potamkin also alleges that it has made extensive discovery demands upon Allianz, which have not been responded to, and that no depositions have been taken.

Based on the foregoing, a material issue of fact exists as to whether there was a waiver of the monthly inventory reporting requirement.

Accordingly, Allianz's cross motion for summary judgment is denied.

Conclusion

Accordingly, it is

ORDERED that plaintiffs', Potamkin Cadillac-Buick-Chevrolet-Geo, Ltd., PMC LLC and Pagi Holdings, Inc., motion for summary judgment is denied; and it is further

ORDERED that defendant's, Allianz Global Corporate & Specialty Marine Insurance Company a/k/a AGCS Marine Insurance Company, cross motion for summary judgment is denied; and it is further

ORDERED that counsel are directed appear in Part 48 for a status conference on September 14, 2016, at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/8/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.