

2020 WL 3124237 (N.Y.Sup.), 2020 N.Y. Slip Op. 31814(U) (Trial Order)
Supreme Court of New York.
New York County

****1** Michael STEIN, Plaintiff,

v.

NATIONAL GENERAL INSURANCE COMPANY, Defendant.

No. 651065/2020.

June 9, 2020.

Decision + Order on Motion

Present: Hon. Nancy M. Bannon, Justice.

MOTION DATE 03/06/2020

MOTION SEQ. NO. 001

*1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 were read on this motion to/for DISMISS.

In this insurance coverage dispute, the defendant, National General Insurance Company, moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against it. The plaintiff, Michael Stein, opposes the motion. The motion is granted.

On February 26, 2018, a water pipe burst caused extensive water damage within the interior of the plaintiff's home at 245 East Street, Unit 8, in Manhattan. Pursuant to an applicable 'all risk' insurance policy issued by the defendant for the term of January 9, 2018 to January 9, 2019, the plaintiff reported the claim and was assigned claim number 3288384. The defendant inspected the loss through its third-party administrator, JS Held, and on April 15, 2019, the defendant paid the plaintiff a total of \$30,519.82 for his loss.

The plaintiff, believing the payment was inadequate to compensate the loss, engaged a public adjuster, Scott Modlin. Modlin and his company, Sovereign Adjustments East, inspected the loss and estimated the claim at \$404,977.78 to fully compensate the plaintiff for damage caused by the burst pipe. Modlin thereafter notified the defendant JS Held of the discrepancy. The defendant refused to enter into an appraisal based upon Modlin's estimate and, on July 9, 2019, sent a demand to the plaintiff for a signed sworn proof of loss to be provided within 60 days. By correspondence dated October 24, 2019, the defendant partially disclaimed coverage **2 for the plaintiff's loss based upon, *inter alia*, the plaintiff's failure to a signed sworn proof of loss within 60 days.

The plaintiff then brought the instant action on February 28, 2020, alleging breach of contract and breach of the covenant of good faith and fair dealing. The plaintiff also sought consequential damages and attorneys' fees. The plaintiff withdrew his attorneys' fees claim in his opposition to the instant motion.

Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st

Dept. 2014). When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026.

*2 In support of its motion, the defendant submits, *inter alia*, the subject insurance policy, which contains a Conditions section requiring a party claiming coverage under the policy to "send to [the defendant] within 60 days after [their request] signed sworn proof of loss which sets forth to the best of [the claimants'] knowledge and belief a) the time and cause of loss, b) the interests of all insured and all others in the property involved and all liens on the property, c) other insurance which may cover the loss, d) changes in title or occupancy of the property during the term of the policy, e) specifications of damaged buildings and detailed repair estimates, f) the inventory of damaged personal property, and g) receipts for additional living expenses incurred and records that support the fair rental value loss." The defendant also submits its July 9, 2019 demand for sworn proof of loss to the plaintiff and the applicable **3 delivery receipt, and the October 24, 2019 disclaiming coverage based upon, *inter alia*, the plaintiff's failure to respond to the defendant's demand within 60 days.

These submissions conclusively resolve all factual issues as a matter of law and conclusively disposes of the plaintiff's claims for breach of contract and breach of the duty of good faith and fair dealing inasmuch as it is well settled that a plaintiff's "failure to file proof of loss within 60 days after receipt of defendant's notice is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense." Hunter v Seneca Ins. Co., 114 AD3d 556, 557 (2014) *citing* Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn., 63 NY2d 201, 209--210 (1984).

In opposition, the plaintiff argues (i) that the defendant's motion pursuant to CPLR 3211(a)(1) relies upon the plaintiff's deposition testimony, and therefore is not properly founded upon documentary evidence, and (ii) the defendant should not be permitted to disclaim coverage as it only sent the demand to the plaintiff, not his insurance adjuster. The plaintiff's contentions are without merit. Contrary to the plaintiff's first contention, the defendant's submission of its demand of proof, with service, and the subsequent disclaimer of coverage are sufficient to establish the plaintiff's failure to respond within the 60-day time limit. See Hunter v Seneca Ins. Co., *supra*. Moreover, on a motion to dismiss pursuant to CPLR 3211(a)(1), documentary evidence may be supplemented by affidavits or deposition testimony that are not disputed. See Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Grp. NA, LLC, 146 AD3d 489 (1st Dept. 2017). As the plaintiff does not dispute, in his deposition testimony or his opposition papers, that he did not timely respond to the defendant's demand, the court may properly rely on such evidence. See *id.*

Furthermore, to the extent that the plaintiff contends that the defendant's failure to serve its demand on his adjuster constitutes a defense to this motion, such an argument is contrary to the plain language of New York Insurance Law § 3407, which only requires service of the demand be made upon the insured. Therefore, the plaintiff fails to rebut the documentary evidence submitted by the defendant, and dismissal pursuant to CPLR 3211(a)(1) is granted.

As the action is dismissed pursuant to CPLR 3211(a)(1), the court does not reach the portion of the defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211(a)(7).

**4 Accordingly, it is hereby,

ORDERED that the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(1), and the remainder is denied; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

6/9/2020

DATE

<<signature>>

NANCY M. BANNON, J.S.C.

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