SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X TRIAL/IAS PART 21

GPS ADJUSTMENTS CO., INC.,

Plaintiff,

- against -

TAMARA CARMEL a/k/a TAMARA SILVER,

Defendant.

Index No. 26258/09
Mot. Seq. # 1
Mot. Date 1/6/11
Submit Date 2/10/11
XXX

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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Defendant moves by notice of motion for an order granting summary judgment pursuant to CPLR 3212.

On or about January 27, 2005 and again on December 15, 2005, defendant's principal residence, insured by Allstate Insurance ("Allstate"), sustained significant damages. On or about August 22, 2006, defendant retained the services of plaintiff to act as a public adjuster to assist in negotiating a settlement with Allstate.

Plaintiff commenced the underlying action requesting a judgment declaring that plaintiff is entitled to $23,635.95, a 10% fee of the total of $236,359.50 offered by Allstate, and a declaration that Allstate may pay that fee to the plaintiff with the remainder to be paid to the homeowner/defendant.

Defendant states that the parties agreed to the negotiated fee as evidenced in a written agreement as follows:

> "The insured agrees to pay the adjuster a fee of 10% of the amount of the building loss above 230k when adjusted or otherwise recovered from the insurance companies."

As testified to at a deposition by plaintiff's witness, Gary Sirico, a public adjuster and president of GPS Adjustment Co., Inc ("GPS"), Mr. Sirico agreed to the fee over $230,000.00. Therefore, defendant argues that plaintiff's attempt to impose a 10% contingency ($23,635.95) fee on the total recovery amount ($236,359.50) rather than on the total recovery amount less the contractually agreed upon offset of $230,000.00 is erroneous. The clear terms and conditions of the agreement as negotiated between the parties provided that the plaintiff's fee, if any, was to be 10% of the amount of the building loss recovered above $230,000.00, as confirmed by plaintiff's deposition testimony.

Moreover, defendant argues that plaintiff's claim seeks 10% of the total recovery amount, despite plaintiff conceding that portions of the total recovery amount were agreed upon between defendant and Allstate prior to the plaintiff even being retained.

Since plaintiff's sole claim is contradicted by the subject written agreement between the parties and plaintiff's deposition testimony, defendant argues she is entitled to summary judgment as a matter of law.

Plaintiff opposes the motion claiming that the written agreement is ambiguous, therefore it is necessary to "go outside the four corners of the contract in order to determine the intent of the parties."

Plaintiff submits an affidavit from Gary Sirico, the president of GPS and an experienced public adjuster. Mr. Sirico explains the course of negotiations between the parties which led up to the execution of a written agreement. He avers that defendant's husband marked the agreement and chose to express the agreement in the terms included therein. The court notes that Mr. Sirico and the defendant signed the fee agreement as modified allegedly by defendant's husband.

In reply, defendant points out that plaintiff has not articulated what is ambiguous about the written fee agreement entered into between the parties. The fact that plaintiff introduced a host of extraneous issues and self-serving statements in its opposition papers in the hope of obfuscating the plain meaning of the contract should not be countenanced by this court. Plaintiff has failed to introduce admissible evidence that supports its contention that the words "10% of the building loss above 230k" should be reinterpreted to mean "10% of the entire amount once the threshold of $23,000 is met."

Based on the foregoing, the decision of the court is as follows:

On a motion for summary judgment, it is incumbent upon the movant to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 A.D.3d 326 [2nd Dept. 2005]; *Roberts v Carl Fenichel Community Servs.*, Inc., 13 A.D.3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (see *Kris v Schum*, 75 N.Y.2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy (*Rudnitsky v Robbins*, 191 A.D.2d 488, 489 [2nd Dept. 1993]).

On this record, the defendant has made a prima facie showing that it is entitled to summary judgment dismissing the complaint. Consequently, the burden shifts to the plaintiff to raise an issue of fact sufficient to defeat the motion.

Even viewing the evidence in the light most favorable to the plaintiff (*Judice v DeAngelo*, 272 A.D.2d 583 [2nd Dept. 2000]; *Robinson v Strong Memorial Hospital*, 98 A.D.2d 976 [4th Dept. 1983]), the plaintiff has not sustained its burden of proof. The court finds that plaintiff has not come forward with extrinsic proof in admissible form sufficient to defeat the motion. "Bald conclusory assertions, even if believable, are not enough." (*Kramer v. Harris*, 9 A D 2d 282, 283; *P. D. J. Corp. v. Bansh Props.*, 23 N Y 2d 971; *Rafner v. Toplis & Harding, Inc.*, 25 A D 2d 826; *Di Sabato v. Soffes* , 9 A D 2d 297). The self-serving and conclusory statements offered in the affidavit of Gary Sirico, the person who negotiated and executed the contract with defendant, is not sufficient to overcome the documentary evidence submitted by defendant, to wit: the Compensation Agreement attached to defendant's motion as Exhibit "C".

Accordingly, it is

ORDERED, that defendant's application pursuant to CPLR 3212 for an order dismissing the complaint is **GRANTED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
February 17, 2011

ENTER:

HON. JEFFREY S. BROWN
J.S.C.
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