Harrison v Allstate Indem. Co.
2017 NY Slip Op 30433(U)
March 3, 2017
Supreme Court, Steuben County
Docket Number: 2013-0452 CV
Judge: Marianne Furfure
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State of New York **Supreme Court**
County of Steuben

CHARLES HARRISON and
KATHRYN HARRISON,
Plaintiffs,

vs.

ALLSTATE INDEMNITY COMPANY and
TAMI L. DOWDLE, Allstate Insurance Agent,
and TLC PAYROLL PLUS, INC.,
Defendants.

DECISION

Index No. 2013-0452 CV

Appearances: *Welch, Donlon & Czarples, PLLC,* Corning *(Anna Czarples* of counsel*) for Plaintiffs*

Chelus Herdzik Speyer & Mont, P.C. Buffalo *(Katy M. Hedges, of counsel) for Allstate Indemnity Company*

Wilson, Elser, Moskowitz, Edelman, & Dicker LLP (Sheryl Parker, of counsel*) for Tami L. Dowdle*

This motion for summary judgment is filed by Allstate Indemnity Company (Allstate) asking the Court to dismiss plaintiffs' complaint and all cross-claims filed against Allstate. Allstate claims that it validly disclaimed liability for fire damage to property insured by Allstate because plaintiffs did not reside at the property at the time of the fire, as required by the terms of the policy. Allstate also contends that plaintiffs failed to notify the insurance agent that other people were living at the Pine Hill residence during plaintiffs' absence, in violation of plaintiffs' obligation to advise Allstate of a change in title, use, or occupancy at the insured premises.

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Plaintiffs oppose Allstate's motion for summary judgment and file a cross-motion for an order granting plaintiffs summary judgement on the complaint claiming that the term "reside" as used in the insurance policy is undefined and ambiguous and, therefore, the policy language should be interpreted against Allstate, thus requiring Allstate to cover plaintiffs' insurance claim. Plaintiffs also claim that Allstate should be equitably estopped from disclaiming liability because it's agent, the Dowdle Agency, was aware of plaintiffs' living arrangements and the insurance agent indicated that the property would continue to be covered during plaintiffs' absence. Additionally, plaintiffs claim that the Dowdle Agency was negligent in failing to secure additional insurance plaintiffs had specifically requested.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact *(Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the proponent fails to make this showing, the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial *(Gonzalez v. 98 Mag Leasing Corporation,* 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, Id.). In reviewing a motion for summary judgment, the evidence must

be considered in the light most favorable to the opponent and that party is given the benefit of every reasonable inference to determine whether any triable issues of fact exist (*Houston v. McNeilus Truck and Manufacturing, Inc.*, 124 AD3d 1210 [4th Dept. 2015]; *Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

It is axiomatic that "(i)nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" *(Dean v. Tower Ins. Co. of N.Y., 19 NY3d 704, 708 [2012]; Cragg v. Allstate Indem. Corp.*, 17 NY3d 118,122 [2011]; *Korson v. Preferred Mut. Ins. Co.*, 55 AD3d 879, 881 [2nd Dept. 2008]; *Auerbach v. Otsego Mut. Fire Ins. Co.*, 36 AD3d 840, 841 [2nd Dept. 2007]; *Canfield v. Peerless Ins. Co.*, 262 AD2d 934 [4th Dept. 1999]). In cases in which the insurer wants to exclude or except certain coverage from its policy obligations, the exclusionary language must be "specific and clear in order to be enforced. Exclusions and exceptions are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311 [1984]). It is the insurer's burden to establish that the exclusions or exemptions apply to the facts of the case and that the insurer's interpretation of the policy language is the only fair and reasonable one (*Dean v. Tower Ins. Co. of N.Y.*, Id; *Cragg v. Allstate Indem. Corp.*, Id.; *Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co. v. Gillette Co.*, 12 NY3d 302, 307 [2009], citing *Breed v. Insurance Co. If N.A.*, 46 NY2d 351, 353 [1978]; *Matter of Mostow v. State Farm Ins. Co.* 88

NY2d 321, 326 [1996]; *Seaboard Sur. Co. v. Gillette Co.*, Id.). If insurance policy language is doubtful or uncertain, this creates an ambiguity which must be resolved in favor of the policy holder (*Auerbach v. Otsego Mut. Fire Ins. Co.*, Id.). Whether or not a contract is ambiguous is a question of law for the courts to decide (*Innophos, Inc., v. Rhodia, S.A.*, 10 NY3d 25, 29 [2008]).

In this case, certain facts are undisputed. Plaintiffs had a homeowner policy on their Pine Hill residence with Allstate since 2004. In 2009, Mrs. Harrison moved to the Dodge Avenue home which was approximately 5 to 6 miles from their residence to help care for her gravely ill mother. Mr. Harrison joined her approximately six weeks later, after it became apparent that his wife was going to be gone longer than plaintiffs had initially anticipated. About a year later, because plaintiffs were still living on Dodge Avenue, Mr. Harrison changed his driver's license address, and the plaintiffs' mailing address from Pine Hill to Dodge Avenue. (Defendant's Ex. L, pg.84). Mrs. Harrison changed her driver's license address sometime later. In July of 2010, Mr. Harrison spoke to Kimberly Hughes, an employee of the Dowdle Agency, to inform them that plaintiffs were living at the Dodge Avenue address. As a result of that contact, the billing address for policy renewals was changed to the Dodge Avenue address, but no other changes were made to the policy itself. Since 2010, plaintiffs have filed their income taxes using the Dodge Avenue address (Defendant's Ex. L, pg.61). While plaintiffs were staying at the Dodge Avenue address, their two sons, a cousin, and a friend

stayed at the Pine Hill property at different times and for various amounts of time. The house was destroyed by a fire on August 30, 2012. After plaintiffs filed a claim for insurance coverage, Allstate disclaimed liability on the grounds that, as plaintiffs had not resided in the home for more than two (2) years, it was not covered as a dwelling.

Plaintiffs' insurance policy provides coverage for fire damage for the "residence premises" which the policy defines as "the dwelling, other structures and land" located at the address as it appears in the insurance policy. The term "dwelling", in turn, is defined as "a one, two, three or four family building structure" located at the residence premises where the insureds "reside" and which they use as their residence. However, the term "reside" is not defined in the contract. The issue here is whether plaintiffs, who admittedly had not been living at Pine Hill for over two (2) years prior to the fire, nevertheless, met the residency requirements set forth in the insurance policy.

The standard for determining residency "requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (*Dean v. Tower Ins. Co. of N.Y.*, Id, citing *Government Empls. Ins. Co. v. Paolicelli*, 303 AD2d 633 [2nd Dept. 2003]; *Matter of Aetna Cas. & Sur. Co. v. Gutstein,* 80 NY2d 773, 775 [1992]; *Matter of Allstate Ins. Co. v. Rapp,* 7 AD3d 302, 303 [1st Dept. 2004]). A person may have more than one residence (*Yaniveth R. v. LTD Realty Co.*, 27 NY3d 186, 194 [2016]; *Allstate Ins.*

Co. v. Rapp, Id. ; *Matter of Prudential Prop. & Cas. Ins. Co. (Galioto),* 266 AD2d 926 [4th Dept. 1999]; *Canfield v. Peerless Ins. Co.*, Id.). However, "that does not mean that every place in which a person spends time constitutes a residence" (*Yaniveth R. v. LTD Realty Co.*, Id).

Allstate claims that, not only had plaintiffs not been living at the insured property for almost three years prior to the fire, but also that they had no intention of returning to the residence. Allstate claims that plaintiffs changed the mailing address on their insurance policy and driver's licenses and filed income tax using the Dodge Avenue address. Allstate claims that plaintiffs told the insurance adjuster after the fire that they were planning on giving the property to their son and had no intention of moving back to Pine Hill (Defendant's Ex. M, pgs 59-62). Further, Allstate alleges the plaintiffs had transferred the utilities at Pine Hill to their son.

Plaintiffs claim that they have continuously resided at the insured premises for over seventeen years (Defendant's Ex. K, pgs 37-38), they were only temporarily away from the property because they were caring for Mrs. Harrison's mother (Defendant's Ex. L, pgs 20-23, 66, 73), and they always intended to return to the property once Mrs. Harrison's mother recovered or passed away (Defendant's 's Ex. L, pg 86). Plaintiffs claim that, when they moved to Dodge Avenue, they left all of their possession behind and took only changes of clothing because they believed that they would return to Pine Hill in a short time

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(Defendant's Ex. L, pg.22- 24). Mr. Harrison testified that, during the first year they were away, he went back to the residence every day to pick up the mail and check on the property (Defendant's Ex. K, pgs 22, 65-70; Ex. L, pgs 22-24). However, because of back pain associated with a pre-existing back injury, he stopped going to the property every day and reduced his trips to one or two days a month when he would stay overnight (Defendant's Ex. K, pg 67). He testified that, approximately one week before the fire, he was at Pine Hill, to spend time with his son, who was living at the house at the time, and his cousin who had moved in a couple of months before the fire (Defendant's Ex. K, pg. 52). They watched movies, talked, worked on cleaning up brush on the property, and "a wide variety of things" (Defendant's Ex. K, pg. 52). Plaintiffs claimed that they continued to pay taxes on the property and never charged rent to anyone staying there. They also deny that they changed the utilities into their son's name.

In this case, the term "reside" is not defined in the policy and, therefore, it is possible that under the circumstances of this case, plaintiffs may be found to have resided at Pine Hill for insurance policy purposes even while they were caring for Mrs. Harrison's mother on Dodge Avenue for an extended period of time. While residency does require some temporary or physical presence, a degree of permanence and intention to remain at the property is a necessary component (*Government Empls. Ins. Co. v. Paolicelli,* id.; *Yaniveth R. v. LTD Realty Co.*, Id; *Dean v. Tower Ins. Co. of N.Y.*, Id. at 708-709; *Auerbach v. Otsego Mut. Fire Ins. Co.*, Id.). It is possible that, despite the length of time plaintiffs spent

at the Doge Avenue home, the average person might assume that regular maintenance and visits to the Pine Hill property during that time satisfied the policy's requirements (*Dean v. Tower Ins. Co. of N.Y.,* Id. at 708-709). Plaintiffs' evidence that they had always intended that their absence from Pine Hill to be temporary and that they planned to return as soon as possible, coupled with the fact that they left all of their possessions at Pine Hill, continued to pay the taxes and make improvements to the property raises a question of fact whether, under these circumstances, plaintiffs have satisfied the insurance policy requirement that they reside in the insured premises. This question of fact precludes a grant of summary judgment to both parties (*Dean v. Towner Ins. Co. of N.Y.*, Id; *cf. Vela v. Towner Ins. Co. of N.Y.,* 83 AD3d 1050 [2nd Dept. 2011]; *New York Cent. Mut. Fire Ins. Co. v. Kowalski*, 222 AD2d 859, 860 [3rd Dept. 1995]).

Allstate also claims that plaintiffs' complaint must be dismissed because, they failed to advise Allstate that other people would be staying at the house while plaintiffs were away. Allstate claims that this lack of notification violated that part of the insurance policy which requires insureds to notify Allstate of changes in the title, use, or occupancy of the residence, and justifies Allstate's disclaimer of coverage. Allstate contends that, although the notice provision does not state that there is a penalty for failure to inform Allstate of changes in title, use, or occupancy, in order to give meaning to the phrase, as required by New York Courts, the phrase must be construed to imply a coverage consequence for failure to report said changes.

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Plaintiffs claim that the title, use or occupancy of the residence did not change because plaintiffs continued to reside in the home, they were temporarily away, and that at the time they went to stay with plaintiff's mother, a family member was living in the home and that family members and an invited guest stayed in the home for other periods over the years. Therefore, the title, use and occupancy of the property did not change.

The term "occupancy", like the term "reside", is also not defined in the contract. Under the circumstances of this case, it is fair to assume that the average insured person may reasonable believe that notification is not necessary if the insureds, while residing at the property, have friends and family stay over for an extended and indefinite time. Before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemption apply in the particular case, and that they are subject to no other reasonable interpretation (*Dean v. Tower Ins. Co. of N.Y.*, Id.; citing *Seaboard Sur. Co. v. Gillette Co.*, Id.). The burden is on the insurance company to show that there is no material question of fact that the notification requirement applies in this case. Allstate has not met that burden because there is a question of fact, in the first instance, whether plaintiffs met the insurance policy requirement of residence and whether the presence of their sons, a cousin, and a family friend constitutes a change in the occupancy of the residence sufficient to trigger the notification obligation (*Dean v. Towner Ins. Co. of N.Y.*, Id). Therefore, Allstate's

motion for summary judgment dismissing the complaint on the grounds that plaintiffs breached the insurance contract is denied.

Allstate also moves to dismiss plaintiffs' causes of action against it alleging negligence or equitable estoppel on the grounds that plaintiffs misrepresented their stay at Dodge Avenue as temporary. Therefore, Allstate argues it's agent had no duty to secure additional insurance coverage nor was their any duty to advise plaintiffs of the need for additional coverage. Plaintiffs have cross moved for summary judgment claiming that Allstate is bound by the knowledge acquired by its agent and that plaintiffs did convey sufficient information to the insurance agent and relied upon Allstate's agent to secure any additional coverage necessary.

Allstate claims that plaintiffs have failed to come forward with proof that plaintiffs requested specific insurance coverage that was not provided. Allstate's Exclusive Agent, Tami Dowdle, stated that Allstate's agents are trained to assess customers' needs, and that the need for a new policy is decided on a "case-by-case basis" (Defendant's Ex. N, pg. 91). Ms. Dowdle testified that, in this case, the agent who met with plaintiffs, but who passed away before this action was commenced, would have written a new policy, if she felt that a new policy was necessary to protect plaintiffs' interests (Defendant's Ex. N, pgs 78-79).

Insurance brokers have a duty to obtain requested coverage for clients within a reasonable time or inform them of their inability to do so but have no continuing duty to advise, guide or direct an insured to obtain additional coverage

(*American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012]). To support a cause of action sounding in negligence, plaintiffs must show that a specific request was made for coverage that was not provided in the policy and the broker or agent failed to obtain the requested coverage (*Voss v. Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, Id). A general request for additional insurance coverage is not sufficient (*Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [2006]; *Moutafis Motors, Ltd. v. MRW Group, Inc.*, 144 AD3d 1000, 1001 2nd Dept. 2016]; *M&E Manufacturing Company, Inc. v. Reis, Inc.*, 258 AD2d 9, 12 [3rd Dept. 1999).

Plaintiffs claim that they advised the Allstate agent that they had been absent from the insured premises for an extended period of time and they wanted to make sure that their Pine Hill residence "was going to be covered so that (they) didn't have to do something different for (their insurance)" (Defendant's Ex K, pgs 41, 79-80). Plaintiffs allege that when Mr. Harrison advised the Dowdle Agency they had been staying with their in-laws for a prolonged period, the woman he spoke to told him she would make sure that whatever changes that were necessary would be made. Defendant's records indicate that normal protocol when a mailing address change was made was to "question insured about use of property and if they were aware of insured not living there or letting others live there they would have changed to LPP policy or discussed second residence" (Plaintiffs' Ex. J, August 31, 2012 entry). This is sufficient to raise a question of

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fact as to what plaintiffs advised the agent and whether there was a failure by Allstate's agent to follow company protocol or notify Allstate of the change in use, given their move to the Dodge Avenue residence for that prolonged period of time (*Voss v. Netherlands Ins. Co.,* Id. At 734; see generally *Rodenhouse v. American Casualty Co. of Pennsylvania,* 20 AD2d 620 [4th Dept. 1963]). Therefore, a grant of summary judgment to either party on this claim is also precluded.

Based upon the above, Allstate's motion for summary judgment is denied and plaintiffs' motion for summary judgment is also denied.

Plaintiffs' counsel to submit order.

Dated: March 3, 2017.

ENTER:

Hon. Marianne Furfure
Acting Supreme Court Justice