Azzato v Allstate Ins. Co.
2011 NY Slip Op 33674(U)
September 6, 2011
Sup Ct, Suffolk County
Docket Number: 07-38669
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 07-38669
CAL. No. 09-02080OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-15-11
ADJ. DATE 4-15-11
Mot. Seq. # 003 - MD

RAYMOND AZZATO and TRICIA WILLIAMSON, Plaintiffs, - against - ALLSTATE INSURANCE COMPANY, Defendant.	DOUGLAS J. LEROSE, ESQ. Attorney for Plaintiffs 31 Roberta Lane Syosset, New York 11791 FELDMAN RUDY KIRBY & FARQUAHARSON Attorney for Defendant 410 Jericho Turnpike, Suite 315 Jericho, New York 11753

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs Raymond Azzato and Tricia Williamson, dated March 16, 2011, and supporting papers (including Memorandum of Law dated _____); (2) Affirmation in Opposition by the defendant Allstate Insurance Company, dated March28, 2011, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Allstate Insurance Company for leave to reargue its prior motion for summary judgment dismissing the complaint against it, which was granted by order of this Court dated June 7, 2010, is granted; and it is further

ORDERED that, upon reargument, the motion for summary judgment dismissing the complaint against defendant Allstate Insurance Company is denied.

In this action, plaintiffs Raymond Azzato and his wife, Tricia Williamson, seek reimbursement under a policy of insurance for damage to their rental property and its contents caused by a fire on December 20, 2005. At the time of the loss, the property, occupied by non-party Willie DeAngelis, was covered by a Landlord's Package Policy issued by defendant, Allstate Insurance Company ("Allstate"). The policy names both plaintiffs as insureds. The complaint, alleges, inter alia, that despite providing Allstate with timely notice of the loss, it has wrongfully denied liability under the policy and declared that it would not pay for any part of the loss. On or about December 1, 2009, Allstate submitted a motion for

summary judgment dismissing plaintiffs' complaint. A review of the moving papers and the Court's computerized records did not reveal the submission of any papers opposing the motion. Therefore, the Court considered Allstate's moving papers and by order dated June 7, 2010, the motion dismissing plaintiffs' complaint was granted. Subsequently, on August 26, 2010, the parties entered a stipulation, which was so ordered by the Court, acknowledging that plaintiffs submitted papers in opposition to Allstate's motion, that said papers were erroneously omitted from the papers considered by the Court, that the previous order and notice of entry be vacated and stricken, and that the motion containing a complete set of the parties' papers be reconsidered.

Allstate moves for summary judgment dismissing the complaint on the ground that neither of the plaintiffs are entitled to coverage under the terms and conditions of the subject policy. Specifically, Allstate argues Raymond Azzato's submission of altered receipts from P.C. Richards and Son overstating the cost of household appliances allegedly damaged during the fire violated the insurance policy's fraud and concealment clause and disqualified his claim. Allstate also argues that under the terms of the agreement, its liability under the policy, if any, cannot exceed 50% of the value of the property since Mr. Azzato only possesses an insurable interest of 50% of the premises and his business partner owns the remaining 50% interest. Allstate further asserts that Tricia Williamson is not entitled to recover under the policy as she failed to demonstrate that she held an insurable interest in the property or its contents at the time of the loss. In opposition, plaintiffs argue the motion should be denied as triable issues exist as to whether plaintiff Raymond Azzato attempted to engage in fraudulent conduct, and whether his wife, Tricia Williamson, held an insurable interest in the property as one of the mortgagors of the subject premises. Plaintiffs further argue that denial of coverage would be unconscionable since plaintiff Raymond Azzato's insurance agent failed to explain that Allstate's liability under the policy would not exceed 50% of the value of the subject premises.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573,774 NYS2d 792 [2d Dept 2004]). On such a motion the court should draw all reasonable inferences in favor of the non moving party and should not pass on issues of credibility (*see* ***S.J. Capelin Assocs. Inc., v Globe Mfg. Corp***., 34 NY2d 338, 357 NYS2d 478 [1974]; ***Rizzo v Lincoln Diner Corp***., 215 AD2d 546, 626 NYS2d 280 [2d Dept 1995]).

The "Concealment and Fraud " clause contained within Allstate's Landlords Package Policy provides as follows:

> Allstate has the right to cancel or non-renew your policy if it was obtained by fraud, material misrepresentation, or concealment of material facts, or if you intentionally conceal any material facts or circumstance before or after a loss. Furthermore, Allstate does not cover you or any other person insured under this policy who has concealed or misrepresented any material fact or circumstance, before or after a loss.

Here, Allstate established its prima facie entitlement to summary judgment dismissing the

complaint by demonstrating plaintiff Raymond Azzato breached the fraud and concealment clause of its policy, and that it, therefore, was entitled to cancel the policy and disclaim any coverage sought thereunder (*see* ***Deitsch Textiles v New York Prop. Ins. Underwriting Assn.***, 62 NY2d 999, 479 NYS2d 487 [1984]; ***Saks & Co. v Continental Ins. Co.***, 23 NY2d 161, 295 NYS2d 668 [1968]; ***Latha Rest. Corp. v Tower Ins. Co.***, 38 AD3d 321, 831 NYS2d 411 [1st Dept 2007]). Significantly, Allstate proffered an affidavit by the treasurer of P.C. Richards and Sons Long Island Corporation, Kevin Hughey, stating that the receipt submitted by plaintiffs listing the total price of the household appliances allegedly lost during the fire as $7,000 grossly overvalued the cost of the claimed property. Mr. Hughey further provided a copy of the electronic record of the sale of the items maintained by the store indicating that the actual cost of the appliances purchased by Raymond Azzato was $2,000.

However, in opposition, plaintiffs submit, among other things, the affidavit of Tricia Williamson wherein she states she will suffer damage and pecuniary loss if the policy is disclaimed because she furnished the premises with a family heirloom dining room set and is personally liable for a line of credit secured by her primary residence that was used to purchase the subject premises. While the production of false, spurious and altered documents in support of an insurance claim serves to vitiate the policy and bars recovery thereunder (*see* ***Deitsch Textiles v New York Prop. Ins. Underwriting Assn.***, 62 NY2d 999, 479 NYS2d 487 [1984]; ***Saks & Co. v Continental Ins. Co.***, 23 NY2d 161, 295 NYS2d 668 [1968]), New York has adopted the rule that "as a matter of fairness and equity . . . the independent wrongdoing of one insured should not bar recovery as to the coinsured" (***Reed v Federal Ins. Co.***, 71 NY2d 581, 588, 528 NYS2d 355 [1983]). Moreover, "an interest, legal or equitable, in the property burned is not necessary to support an insurance upon it . . . it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against . . . as will cause the insured to sustain a direct loss from its destruction [so] . . . that a loss of the property will cause pecuniary damage to the holder of the right against it" (***Scarola v Ins. Co. of N. A.m.***, 31 NY2d 411, 413, 340 NYS2d 630 [1972]; *see* ***Etterle v Excelsior Ins. Co. of N.Y.*** , 74 AD2d 436, 428 NYS2d 95 [4th Dept 1980]). Therefore, inasmuch as Ms. Williamson has submitted evidence that she will suffer pecuniary loss as a result of Allstate's disclaimer and no evidence has been submitted indicating that she participated in her husband's alleged wrongdoing, triable issues exists as to whether she held an insurable interest in the subject premises at the time of the fire, and whether she should be covered to the extent of that interest.

With regard to the issue of plaintiffs' insurable interest in the subject premises, the agreement states, in pertinent part, that "[i]n the event of a covered loss, [Allstate] will not pay for more than an insured person's insurable interest in the property covered, nor more than the amount of coverage afforded by this policy". Plaintiffs allege that this language is ambiguous as it fails to notify them that co-ownership of the premises by their business partner limits Allstate's liability under the insurance policy to 50% of the value of the subject premises. Plaintiffs also submit an affidavit by their insurance broker stating that he did not know nor did he inform plaintiffs of the meaning of the provision. It is well settled that any ambiguity in an insurance policy must be resolved against the insurer and in favor of the insured (*see* ***Lavanant v General Acc. Ins. Co. of A.m.***, 79 NY2d 623, 584 NYS2d 744 [1992]; ***Aetna Cas. & Sur. Co. v Gen. Cas. Co. of A.m.***, 285 AD 767, 140 NYS2d 670 [1st Dept 1955]). However, where as in this case, " the intent of the parties to be bound by an agreement must be determined by disputed evidence or inferences outside the written words of the instrument, a question of fact is presented" (*see* ***Ashland***

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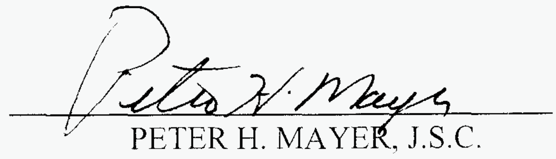
Mgt. v Janien, 82 NY2d 395, 401, 604 NYS2d 912 [1993]). Thus, triable issues exist as to whether the parties had a meeting of the minds as to this portion of the agreement and whether Allstate was justified in limiting its liability to no more than 50% of the value of the subject premises.

Accordingly, the motion is denied.

Dated: 9/6/11



PETER H. MAYER, J.S.C.