Elshazly v Castlepoint Ins. Co.
2015 NY Slip Op 32222(U)
November 16, 2015
Supreme Court, New York County
Docket Number: 161329/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 161329/2014
ELSHAZLY, HAZEM
vs.
CASTLEPOINT INSURANCE COMPANY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10.19.2015
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant Castlepoint Insurance Company's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/1/15

HON. CAROL EDMEAD, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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HAZEM ELSHAZLY,

Plaintiff,

Index No. 161329/2014

- vs -

Motion Seq. 001

CASTLEPOINT INSURANCE COMPANY,

Defendant.

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action, defendant Castlepoint Insurance Company ("defendant") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Hazem Elshazly's ("plaintiff") complaint.

Factual Background[1]

Defendant is an insurance company that issued a homeowners policy, number HOP2410229, (the "Policy") to plaintiff for the premises located at 358 Howells Road, Bay Shore, New York 11706 (the "Premises") for the period from July 5, 2012 through July 5, 2013.[2] Plaintiff and his daughter occupied the first and third floors of the Premises, Victor Wilson occupied an apartment in the rear of the Premises on the first floor, and Maryann Krill and her son occupied the second floor.

On February 11, 2013, a fire occurred at the Premises, and defendant received notice of the fire. As part of its investigation after receiving notice of the claim, defendant arranged for an

[1] The factual background is taken in large part from the parties' moving and opposing papers.

[2] The Policy was a renewal of a policy that had been issued by defendant to plaintiff on July 5, 2004. The Policy was cancelled on April 2, 2013.

investigator, Thomas Karn ("Karn"), to inspect the Premises. Karn took photographs of his observations and interviewed Maryann Krill. Defendant also hired an independent adjuster, Thomas Erhardt ("Erhardt"), who conducted a subsequent investigation of plaintiff's claim on February 12, 2013. During his inspection, Erhardt interviewed plaintiff, who gave a recorded statement (the "Statement") in which he stated that Victor Wilson lived in a separate unit of the first floor of the Premises (Aff of Erhardt, Recorded Statement of Plaintiff at 5-6). Plaintiff also stated that Maryann Krill and her son occupy the second floor, where there is a "bathroom, two bedrooms, [and a] living room" (*id.* at 7). While plaintiff and his daughter occupy the first and third floors, plaintiff stated, "I have part of the second floor too, I have a closet there and stuff, you know, a little part of it" (*id.*). Plaintiff also stated regarding the second floor,

> "A. When I got divorced, I had a fully furnished house. I mean, I had three kids, we had the whole house. So when they moved in, they just moved right in. **I didn't put any partitions up or sections or anything, you know.**
>
> "Q. So this was how the house was with your family.
>
> "A. Exactly, exactly. **Like when you go upstairs, Maryann's door is right there, you just open the door and walk right in.**"

(*Id.* at 12 [emphasis added]). Notably, there was no written or verbal agreement for Ms. Krill and her son, who are plaintiff's close friends, to occupy the second floor or pay rent, but Ms. Krill "helped out" by paying for the oil, cooking, doing grocery shopping and, among other things, contributing some money from time to time (*id.* at 8).

By letter dated March 4, 2013 (the Disclaimer Letter), defendant disclaimed coverage on the basis that its initial investigation of plaintiff's claim revealed that the Premises does not

qualify as a "residence premises" under the Policy because it contained more than two family units (Aff. in Support, Exh. 2 at 3). Plaintiff requested that defendant reconsider its coverage position and a second independent investigator was assigned. On September 19, 2013, defendant advised plaintiff that the subsequent investigation of the claim also revealed that the Premises does not qualify as a "residence premises" under the Policy because it contained three separate dwelling units (Aff. in Support, Exh. 3).

On or about November 13, 2014, plaintiff commenced the instant action against defendant for breach of contract to recover amounts under the Policy for alleged damages caused by fire to the Premises. On or about February 6, 2015, defendant answered plaintiff's complaint and served plaintiff with a Notice to Admit and Interrogatories. Thereafter, on or about February 26, 2015, plaintiff provided a verified response to defendant's combined discovery demands. Depositions have yet to be conducted and a note of issue has not been filed. It is undisputed that defendant has yet to respond to plaintiff's discovery demands.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,*

101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, 963 NYS2d 24 [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Here, defendant met its *prima facie* burden to establish entitlement to judgment as a

matter of law. It is undisputed, and the Policy is clear, that coverage under the Policy is limited to a "residence premises," which is defined under the Policy as follows:

> "8. 'Residence premises' means:
>
> a. The one family dwelling, other structures, and grounds; or
>
> b. That part of any other building;
> where you reside and which is shown as the 'residence premises' in the Declarations.
>
> 'Residence premises' also means a two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations."

(Aff. in Support, Exh. 8, Homeowners 2 Broad Form at 1).

Defendant initially argues that the Premises is not covered under the Policy because the Premises does not fall within the Policy's definition of a "residence premises," as it is not a one or two family dwelling. Instead, defendant argues, the Premises is a three family dwelling, in that the Premises contained three separate living units, each with its own kitchen, bathroom, living room and bedroom. In support, defendant relies on the inspections and plaintiff's responses to defendant's Notice to Admit and Interrogatories. Thus, at issue is whether the second floor, which was occupied by Ms. Krill and her son, constituted a separate dwelling unit, so as to render the Policy inapplicable to the Premises.

In *Almonte v. Castlepoint Ins. Co.* (45 Misc. 3d 1218(A), 3 N.Y.S.3d 284 (Table) [Supreme Court, New York County 2014]), the Supreme Court, in addressing a similar issue, found that the insurer made a sufficient *prima facie* showing "that the insured premises is three-family residence that does not qualify for coverage." In *Almonte,* the policy (similarly) defined the "residence premises," as a "one family dwelling ... where you reside" and "a

two-family dwelling where you reside in at least one of the family units." Thus, according to the Court, "to be eligible for coverage, the insured premises must be a one or two family owner occupied home, but not a three-family home" (*id.* at *3). In finding that the insurer met its burden, the Court cited to an affidavit from the insurer's adjuster, who stated that his inspection revealed that "the Premises was a three-family home with three separate living units" "on the first and second floors, as well as one in the basement," and that *"[e]ach of the three living units contained its own kitchen, bathroom and living area . . .* an *interior staircase leading to the basement, and the remains of the basement apartment, including the bathroom and a portion of the kitchen*" (*id.* [emphasis added]). The Court next cited to an affidavit from the insurer's investigator, wherein he stated that "[e]ventually the identity of the basement tenant was revealed to be a woman named Beyerliz Fernandez, whom he interviewed on March 4, 2011," and she "stated that, at the time of the Loss, she was residing in the basement of the Premises," and that the basement *contained its own kitchen and bathroom*" (*id.* [emphasis added]). Further, "the basement tenant had keys to the front door of the house, and keys to the back," and that "the tenant could get to her apartment by 'going down stairs'" (*id.*). Thus, according to the Court, the "affidavits from defendant's adjuster and investigator establish that the plaintiffs' premises contained a third and separate dwelling unit in the basement, which renders it a three-family dwelling not covered under the policy" (*id.* at *4).

In *Dauria v. Castle Point Ins. Co.* (104 A.D.3d 406, 407 [1st Dept 2013]), the First Department held that the subject premises was a three family dwelling and did not fit within the policy definition of a covered "residence premises," which, in that case, was limited to a two family dwelling where the named insured resided in at least one of the two family units. The

Court explained, "the premises is a three-family dwelling because of its structural configuration, *i.e.*, three separate units, each with its own kitchen, bathroom and separate entrance" (*id.*).

Likewise here, defendant's investigator Karn and adjuster assert that there were "three separate living units," each with its own bedroom, bathroom, kitchen (or kitchenette) and separate entrance. Specifically, the evidence supplied by defendant sufficiently demonstrates that the second floor contained a kitchen (Karn affidavit with photograph), bathroom (Erhardt affidavit with photograph; Karn affidavit[3]), bedroom (Erhardt affidavit with photograph), living room (Karm and Erhardt affidavits with photographs), and a separate entrance (Karn affidavit with photograph). That plaintiff describes the kitchen as a "very small kitchenette" built to service the second floor deck, not intended "to act as a place for a family to daily cook in," is inconsequential, as the photographs clearly show an electric range oven in a kitchen area along with cabinets. The submissions establish that the second floor containing a kitchen, bedroom, living room, and bathroom, is an area separated by an interior door that led to an interior common hallway/staircase; whether one was able to lock such door with a key from either side is also of no moment, given that this interior door that separated the common hallway/staircase from the remaining area (which contained a bedroom, kitchen, and bathroom) created a configuration tantamount to a separate dwelling. The structural configuration of the premises is determinative, rather than how the occupants utilize the property (*see Dauria*, *supra*; *Lema*, *supra*). Plaintiff also concedes that the door depicted in the photograph as a door in the stairwell/hallway leading to the second floor area is a "normal interior bedroom door." And,

[3] In Karn's affidavit, he states that the "second floor apartment contained two bedrooms, a kitchen, a living room and a bathroom." (¶5)

whether the second floor had an *exterior* entry/exit door is inconsequential.[4] Plaintiff's also admits that there were two dwelling units on the first floor of the Premises; the second floor had an interior door leading to it; and there was a bathroom and kitchenette on the second floor.

Although it cannot be said, as a matter of law, that the three alleged separate dwelling units constitute an "apartment" as defined by the Administrative Code of the City of New York § 27-2004 (a)(14),[5] the affidavits from defendant's investigator and independent adjuster are sufficient to establish as a matter of law that the structural configuration of the Premises was arranged to consist of three dwelling units, each with its own bathroom, kitchen, living area/bedroom and separate entrance (*Dauria v. Castle Point Ins. Co.*, *supra*).

Plaintiff did not submit any pictures, including any of the doors leading to the second floor, as well as any authority indicating that the second floor did not constitute a separate dwelling unit due to the absence of door locks that could be operated from either side of both doors.

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[4] It is noted that although Erhardt states that "The photographs [attached to his affidavit] also reveal that the second floor apartment was accessed through an exterior door that led to an outside staircase" (Aff of Erhardt, ¶ 7), said photographs do not depict the exterior entrance to the second floor living unit, but show only peripheral photos of the balcony/deck from ground level (Aff of Erhardt, Exh. 3).

[5] Section 27-2004 (a)(14) provides:

"Apartment shall mean one or more living rooms, arranged to be occupied as a unit separate from all other rooms within a dwelling, with lawful sanitary facilities and a lawful kitchen or kitchenette *for the exclusive use of the family residing in such unit*." (Emphasis added).

The record does not establish that the second floor living area was arranged for "the exclusive use" of Ms. Krill and her son. Plaintiff states that he uses a part of the second floor, where he has a closet and stores his stuff (Aff of Plaintiff ¶7), and "never had to open or close a door to move from area to area, save for a bedroom door that *might* be closed for privacy as any normal bedroom has." (Id., ¶ 8 [emphasis added]). While plaintiff stated that such interior door was intended to provide "privacy," and that Ms. Krill "controlled when the door was locked and when it wasn't" (id. ¶16), plaintiff also contends that the second floor area lacks a door that can be locked from either side. The second floor's interior door "is a normal interior bedroom door" (*id.*); "anyone in the home was free to utilize whatever bathroom they wanted/needed to"; (id. ¶ 13); and there was "a small living room area on the second floor utilized by everyone,"; the "small kitchenette in the corner of the den area" on the second floor was arranged to be used by plaintiff and his family also, "for outdoor barbeque and food preparation activities on the deck" (*id.*, ¶ 6).

Further, while it is undisputed that no depositions have taken place, and that defendant has not provided any responses to plaintiff's discovery demands (including a copy of plaintiff's claims file), plaintiff failed to indicate how further information within defendant's exclusive possession are necessary to raise an issue of fact as to whether the Premises is a one or two family dwelling. There is no indication that depositions of underwriters, adjusters, and representatives of defendant may lead to other information necessary to defeat the within motion.

Also lacking in merit is plaintiff's argument that discovery of defendant's claims file of a prior loss caused by "Super Storm Sandy" is necessary to support an estoppel argument to oppose the motion. Plaintiff fails to assert an estoppel claim in the complaint or caselaw indicating the viability of such a claim to create coverage under the Policy under the circumstances herein.

Furthermore, depositions of Karn and Erhardt, are unnecessary, since details about the doors leading to the second floor are within the possession of the plaintiff.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant Castlepoint Insurance Company's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 16, 2015

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD