Kashaka v Tower Ins. Co. of N.Y.
2016 NY Slip Op 32499(U)
December 22, 2016
Supreme Court, Kings County
Docket Number: 16257/2014
Judge: Mark I. Partnow

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of April, 2016.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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MAKEDA KASHAKA,

Plaintiff,

- against -

Index No. 16257/2014

TOWER INSURANCE COMPANY OF NEW YORK, NORTHEAST AGENCIES INC., and NAZIM KHAN

Defendants.

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The following papers numbered 1 to 16 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-6 7-10
Opposing Affidavits (Affirmations)	11 12-13
Reply Affidavits (Affirmations)	14
Affidavit (Affirmation)	
Memorandum of Law	15 16

Upon the foregoing papers, defendant Tower Insurance Company of New York (Tower) moves for an order pursuant to CPLR 3212 seeking dismissal of Makeda Kashaka's (plaintiff) complaint. Plaintiff cross-moves for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability against Tower and to set the matter down for an inquest as to damages.

Background

Plaintiff commenced the instant action by electronically filing a summons and complaint with the court on March 18, 2015. The record indicates that plaintiff purchased an insurance policy from Tower; this policy provided coverage against fire damage to the premises located at 1929 Bergen Street in Kings County (subject property).[1] Thereafter, on or about July 4, 2014, the property allegedly sustained damage as a result of a fire. Consequently, plaintiff submitted a claim to Tower.

By letter dated September 11, 2014, Tower disclaimed coverage for the alleged loss. The declination letter states that upon Tower's investigation, the subject premises were not owner occupied at the time of application. The letter also states that the premises were never owner occupied. It went on to say that based on plaintiff's statements to Tower's investigator, the property was purchased as an investment property by plaintiff. Accordingly, Tower asserts that the policy would not have been written had plaintiff not made a material misrepresentation to Tower. Further, the letter states that Tower was not advised that the property was occupied, in part, by a commercial tenant. Thus, Tower asserts that the premises are not an insured location pursuant to the policy.

Consequently, plaintiff commenced the instant action alleging breach of contract against Tower, and negligence, recklessness and breach of trust against defendants Northeast

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[1] The subject property was purchased approximately ten years ago by plaintiff and her then boyfriend, Marlon Bonny (Bonny).

Agencies Inc. (Northeast) and Nazim Khan (Khan). Tower then interposed an answer and the instant motions were filed thereafter.[2]

Tower's Motion

In support of its motion, Tower asserts that the subject policy should be void ab initio. Tower argues that plaintiff made a material misrepresentation in representing that the property was plaintiff's primary dwelling and that no farming or other business, including child or day care, was being conducted on the premises.[3] Additionally, in support of its position, Tower submits an affidavit from Edward Reilly (Reilly), who is an insurance adjuster at an independent adjustment firm. Reilly avers that during his inspection, plaintiff informed him that she resided at 219-27 130th Road, Laurelton, New York and that she never resided at the subject premises.[4] Additionally, Tower submits an affidavit from John Shannon (Shannon), an investigator hired by Tower to investigate plaintiff's claim. In his affidavit, Shannon avers that during his interview with Bonny, Bonny informed him that he has resided at 10424 204th Street, Saint Albans, New York

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[2] Northeast submits papers in response to the instant motions to assert that it takes no position on the subject motions. Northeast denies the allegation that Khan was employed by Northeast and contends that Northeast had no involvement in preparing plaintiff's application for insurance coverage.

[3] See Exhibit 2, "Dwelling Fire Application" in Affirmation in Support of Tower's Motion.

[4] Tower submits a transcript of Reilly's July 9, 2014 interview with plaintiff along with a digital recording of such interview.

for roughly twelve years and that neither he nor plaintiff ever resided at the subject premises.

Tower also submits an affidavit from Jerome Tutak (Tutak) who was employed by Tower as the Personal Lines Underwriting Manager at the time plaintiff submitted her application. Tutak avers that based on his personal knowledge, plaintiff's policy was renewed annually based upon plaintiff's representation that the property was owner occupied. Further, Tutak avers that the representations made by plaintiff on the ACORD dwelling fire application were material to Tower's decision to issue the policy. Additionally, Tutak states that in order for plaintiff to be eligible for the subject policy, as provided for in Tower's "Homeowner Selection Rules," the premises must be owner occupied. Tutak further states that an applicant who does not reside in the premises to be insured poses a significantly greater risk to the insurer and such risk is deemed inappropriate for certain policies. Tutak concludes by stating that based on Tower's Selection Rules, Tower would have been prohibited from issuing the subject policy if Tower was informed that plaintiff did not occupy the premises.

Lastly, Tower deposed non-party witness Bonny in the presence of plaintiff and her counsel. At the deposition, Bonny testified that he never lived at the subject property. Thus, Tower argues that its summary judgment motion should be granted as the misrepresentations regarding occupancy were material and warrant rescission of the policy.

Plaintiff's Cross-Motion

In opposition to Tower's motion and in support of her cross-motion, plaintiff asserts that the facts of the instant action are not in dispute. However, plaintiff argues that she has never contended that she resided at the property. Plaintiff contends that Tower declined coverage not because of any alleged misrepresentation of where plaintiff resided or lived but rather because the property was not occupied by plaintiff. Plaintiff argues that the property was clearly owner occupied. Plaintiff further argues that because Tower's declination letter failed to state that coverage was denied because the premises were not plaintiff's primary residence or because it contained a commercial unit and tenant, Tower waived those defenses. In support of her position, plaintiff cites to *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 955 N.Y.S.2d 817, 819, 979 N.E.2d 1143 (2012), arguing that similarly to the *Dean* case, Tower failed to define the term reside in the subject policy.

Furthermore, plaintiff argues that if Tower preserved its argument that the property was not plaintiff's primary residence, plaintiff did not misrepresent her residency on the application. Plaintiff asserts that she represented that her mailing address was the subject property as it is where she receives her mail. Plaintiff contends that it is irrelevant that it is her business address rather than her home address because the question asked what is plaintiff's mailing address.

Lastly, plaintiff claims that the property was owner occupied. Plaintiff contends that occupancy is not synonymous with residency as occupancy only requires a regular

presence thereat. Plaintiff's affidavit states that she occupied the property with her business and was present at the property on average five days a week and slept there on average at least once a week. Furthermore, plaintiff alleges to having a cot, clothing and personal items at the property.

Tower's Opposition to Plaintiff's Cross-Motion

In opposition to plaintiff's cross-motion, Tower submits a further affidavit from Tutak. In his affidavit, Tutak avers that based on the Selection Rules, Tower would not have issued the subject policy had it known that plaintiff intended to operate a day care or child care facility, or any business, out of the premises. Tutak states that he would have followed this guideline if the correct information was provided to him. Furthermore, Tutak avers that had Tower known plaintiff only occasionally slept there, it would not have issued the subject policy as an applicant who does not reside in the building to be insured presents significantly greater risk to the insurer.

Additionally, plaintiff answered "no" when asked whether she owned, occupied or rented any other residence on the ACORD application. Tutak avers that the purpose of this question is to inform the underwriter such as himself, whether the location to be insured is only an occasional residence of the insured. The plaintiff's response to this question informed Tower that the plaintiff had no other residence than the one that is the subject of the application. Lastly, Tutak states that as a result of plaintiff's response, Tower relied on her representation that the subject premises was her primary and only

residence, which made her appropriate for the policy issued. Tutak contends that her misrepresentations were material since Tower would never have issued the policy to plaintiff had it known that the premises were not an owner occupied residence and that a day care/learning center would be operated there.

Plaintiff's Affirmation in Further Support of Cross-Motion

In the affirmation in further support, among other arguments, plaintiff's counsel asserts that *Dean v. Tower Ins. Co. of N.Y.* is analogous to the case at hand as it deals with the same defendant and the same type of policy. Additionally, plaintiff's counsel asserts that defendant's counsel failed to cite to a single case holding that the doctrines of waiver and /or estoppel are inapplicable to property insurance policies.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v*

Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

Nevertheless, a motion for summary judgment should be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue

of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

"To establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation" (*Morales v. Castlepoint Ins. Co.*, 125 AD3d 947, 947-948 [2d Dept 2015]; quoting *Zilkha v. Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713 [2d Dept 2001]). "A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (*id.* at 948; see also *Insurance Law* 3105[a]). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*id.*; quoting *Zilkha v. Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*id.*; quoting *Schirmer v. Penkert*, 41 AD3d 688 [2d Dept 2007]).

Based on these principles, this court denies the motion of plaintiff, and grants Tower's motion. The record indicates that plaintiff did not ever reside in the subject premises. It is undisputed that the subject policy applies only to "dwellings...occupied by owner...[for] primary usage." The record is clear that plaintiff and Bonny purchased the

subject property for investment purposes and never intended on occupying the subject premises as their primary residence. Tower demonstrated, prima facie, that the application for insurance contained a misrepresentation regarding whether the premises would be owner-occupied. In opposition, plaintiff failed to raise a triable issue of fact. Therefore, the relevant insurance coverage did not apply to the subject premises, and Tower thus correctly denied plaintiff's claim Thus, Tower's summary judgment motion is granted and the complaint is dismissed as against Tower since there was a material misrepresentation on the ACORD application.[5]

Furthermore, the court finds that Tower did not waive its denial of coverage based upon a material misrepresentation as to whether business would be conducted at the subject property. Specifically, the September 11, 2014 denial letter states that coverage was denied based on plaintiff's misrepresentation that, among others, the building contains a business.[6]

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[5] The court further finds that the *Dean* case relied upon by plaintiff is not analogous to the instant set of facts as the insurance policy in the *Dean* case was purchased in advance of a closing. After the closing, the policy holder was unable to move in due to extensive termite damage at the insured premises. Douglas Dean, along with family and friends, began repairing the damage. Here, the record indicates that the property was purchased as an investment property and plaintiff never intended on residing at the subject property and any intent of hers to move in was not frustrated due to the need for major repairs.

[6] See exhibit 4, Declination Letter in Affirmation in Support of Tower's Motion, Page 3.

Here, Tower demonstrated prima facie, that the application for insurance contained a misrepresentation regarding whether, among other things, any farming or other business would be conducted on premises, including day/child care. Plaintiff answered the foregoing question in the negative on the application. Plaintiff continued to ratify the application and its answers by accepting the policy and permitting it to be renewed for years thereafter on the same terms. It is undisputed that at the time of the alleged loss, plaintiff operated a day care at the subject premises. Tower established that this misrepresentation was material as Tutak avers that according to Tower's Selection Rules, Tower would not have issued the subject policy had the application answered the above question in the affirmative. In opposition, plaintiff failed to raise a triable issue of fact.

For the foregoing reasons, Tower's summary judgment motion seek dismissal of plaintiff's complaint is granted. Plaintiff's summary judgment on the issue of liability is denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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KINGS COUNTY CLERK
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