Aschmoneit v Adirondack Ins. Exch.
2018 NY Slip Op 31909(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 162391/2014
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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THOMAS ASCHMONEIT

Plaintiffs,

-against-

ADIRONDACK INSURANCE EXCHANGE

Defendant.

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Index No.: 162391/2014

Mot. Seq. No. 002

DECISION and ORDER

MELISSA A. CRANE, J.S.C.:

This is an insurance coverage dispute. Plaintiff Thomas Aschmoneit ("plaintiff") alleges that following a fire at plaintiff's property (the Subject Premises), Adirondack Insurance Exchange ("Defendant" or "AIE") improperly disclaimed coverage under his homeowners' insurance policy's "residence premises" condition. Defendant has moved to dismiss plaintiff's complaint in its entirety. For the following reasons, the court GRANTS the motion.

BACKGROUND

On May 24, 2013 (the "Date of Loss"), a fire occurred at the Subject Premises. Plaintiff notified defendant of the loss later that day via a telephone call (the "Loss" or "Claim"). As a result of the fire, plaintiff sustained $150,000.00 of alleged damages (Complaint, ¶ 7). Plaintiff reports first purchasing coverage from defendant in 2012 (Complaint ¶ 3). In March of 2013, defendant renewed the Policy covering the Subject Premises (NYSCEF Doc. 41). The renewal policy, also numbered PLS-3H-1C57699, was effective from 3/18/13-3/18/14 (*Id*).

AIE denied Aschmoneit's claim because Aschmoneit did not reside at the policy per the Policy's "residence premises" requirement. The Policy states that "'[i]nsured location' means… the "residence premises" (*Id*, p. ASCH-01803). In the Policy, "you" and "your" refers to the

"named insured" shown in the Declarations and the spouse if a resident of the same household (*Id*). The Policy defines "Residence premises" as "[t]he one family dwelling where you reside… and which is shown as the 'residence premises' in the Declarations" (*Id*, p. ASCH-01804). 120 Helms Hill Road, Washingtonville, NY is the "residence premises" listed in the Policy's Declarations (*Id*, p. ASCH-01793). Thomas K. Aschmoneit is the Policy's only "named insured" (*Id*, p. ASCH-01789). The Policy contains the following condition in "Section I – Property Coverages" under the heading "Coverage A – Dwelling:" "[w]e cover…[t]he dwelling on the 'residence premises' shown in the Declarations, including structures attached to the dwelling" (*Id*). Additionally, under the heading "Coverage Changes" the Policy states:

> The coverage provided and the premium for the policy is based on information you have given [AIE]. You agree to cooperate with us in determining if this information is correct and complete. You agree that if this information changes, is incorrect or incomplete, we may adjust your coverage and premium accordingly during the policy period" (NYSCEF Doc. 41, p. ASCH-01823).

Defendant received correspondence dated November 29, 2012 from HSBC, the mortgagee on the Subject Premises, noting that an inspection of the property was performed on November 26, 2012 and that the Subject Premises appeared vacant (the "HSBC Correspondence") (Paradowski Affidavit at ¶ 9 and Ex. 3 [NYSCEF Docs. 40, 43]). Accordingly, on January 3, 2013, AIE Senior Underwriter Lisa Paradowski ("Paradowski") called the agent who brokered the Policy to the insured, McCartney Verrino & Rosenberry Group ("MVR Group"), to verify whether or not the Premises was vacant. (*Id* at ¶ 14). On January 24, 2013, Paraowski spoke with Sylvia McLoone ("McLoone") of MVR Group. McLoone explained to Paraowski that she had confirmed with plaintiff that the Subject Premises was not vacant, and that plaintiff was residing in the Premises (*Id* at ¶ 17.) Defendant notes that at this point, it did

not cancel (or decline to renew) the Policy due to vacancy, because MVR Group informed defendant that the Subject Premises was not vacant (*Id* at ¶ 18, 19; AIE Memorandum of Law, p. 12). Plaintiff does not dispute Paradowski's report.

On May 24, 2013, defendant began investigating the Claim and hired Terrier Claims Service ("Terrier") to act as its independent adjustor (AIE Memorandum of Law, p. 4). On May 29, 2013, Ray Mullins ("Mullins"), an investigator for Terrier, met and spoke with plaintiff at the Subject Premises (*Id*, p. 4). Mullins attests that plaintiff stated that he had owned the Subject Premises for over a decade, and had been restoring the interior and exterior since purchasing it (Mullins Affidavit ¶ 8-9 [NYSCEF Doc. 45]). Mullins further attests that plaintiff said that he was not residing at Subject Premises on the Date of Loss due to the ongoing restoration work. Instead, he maintained a residence in Orange County or stayed at his wife's Manhattan apartment (*Id*). Plaintiff does not dispute this account.

During his May 29, 2013 visit to the Subject Premises, Mullins performed a physical inspection and took photographs of the property (Mullins Affidavit ¶ 8-9 [NYSCEF Docs. 41, and 48]). Mullins observed that the ground floor and kitchen area of the Premises were sparsely furnished (*Id*). Plaintiff argues that Mullins' photos did not account for furniture, fixtures, and items stored in the Subject Premises' garage (Aschmoneit Affidavit ¶ 8-11 [NYSCEF Doc. 89]).

To clarify its understanding of plaintiff's living situation, defendant requested that plaintiff appear for an examination under oath ("EUO"). On September 11, 2013, the EUO of Plaintiff occurred (NYSCEF Doc. 65). Plaintiff testified that he currently resided at 8 Brian Court, Salisbury Mills, New York with his wife, that he had been renting since 2009 or 2010 (*Id* at 16:24-18:13, 19:20-20:3, 43:8-18). Plaintiff also occasionally stays at his wife's Manhattan

apartment ("412 East 73rd Street") (*Id* at 15:18-22, 21:16-22:19). Plaintiff has not lived in the Subject Premises since 2005, and his ex-wife moved out of the Subject Premises in 2009 (*Id* at 38:8-16, 51:3-11).

Further, tenants occupied the Subject Premises until November 2012 ("Tenant Exit Date") (*Id* at 48:12-17, 55:6-11). Although the tenants left the home in habitable condition, in late 2012, plaintiff began renovating the Subject Premises to conform to his occupancy standards (*Id* at 55:6-11, 55:6-22). Plaintiff never moved into the Subject Premises (*Id*, 55:6-25). Notwithstanding the tenant's departure in 2012, plaintiff spent most nights at 8 Brian Court (*Id*, 44:8-15). Plaintiff did not quantify how many days or nights per week (or per month) he spent at the Subject Premises (*Id*).

Defendant argues that Orange & Rockland utility bills show that from period of November 2012 through June 10, 2013 (which includes the Date of Loss) the "gas use for each [monthly billing] period was '0' and the 'gas service amount' for each period was '$0.00'" (AIE Reply Memorandum of Law, p. 11; NYSCEF Doc. 101). Defendant argues that the Subject Premises' gas water heater and oven could not have been operating, because of plaintiff's lack of gas usage. Defendant contends the lack of gas usage at the Subject Premises supports a finding that plaintiff did not reside at the Subject Premises for the roughly eight-month period between the Tenant Exit Date and approximately one month after the Date of Loss.

Plaintiff's affidavit states that he "was at the 120 Helms Hill Rd property on a regular basis, including most weekends" (Aschmoneit Affidavit ¶ 14). Plaintiff maintains that he performed construction work at the Subject Premises, and stored personal items, fixtures and furniture. (*Id* at ¶ 8-11, 15). Notably, plaintiff does not assert that he resided or lived at the

Subject Premises, ate meals there, slept there, the specific number of days he spent there, or whether his family members spent time there (*Id* at ¶ 8-11).

Plaintiff argues summary judgment is not appropriate because "(a) the word 'reside' was ambiguous; and (b) that [AIE] should be estopped from disclaiming liability because its agent was aware of plaintiffs' living arrangements" (Aschmoneit Memorandum of Law, p. 1).

DISCUSSION

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (*Zuckerman v New York*, 49 NY2d 557, [1980]; *People ex rel Spitzer v Grasso*, 50 AD3d 535 [1st Dept 2008)]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v New York Telephone*, 220 AD2d 728 [2d Dept 1985]).

"[T]he construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts" (*Marshall v Tower Ins. Co. of NY*, 44 AD3d 1014, 1015 [2d Dept 2007], quoting *Raino v Navigators Ins. Co.*, 268 AD2d 419, 419-20 [2d Dept 2000]; *Moshiko, Inc. v Seiger & Smith, Inc.*, 137 AD2d 170 [1st Dept 1988], affd 72 NY2d 945 [1988]). Further, "where the provisions of [an insurance] policy are clear and

unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*Government Empl. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]).

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 New York*, 19 NY3d 704, 708 [2012]). Courts have recognized that "a person may have more than one residence for the purposes of insurance coverage" (*Hochhauser v Electric Ins. Co.*, 46 AD3d 174, 184 [2d Dept 2007]). However, "that does not mean that every place in which a person spends time constitutes a residence" (*Yaniveth R. ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 194 [2016]).

Courts have found issues of fact concerning "residency" exclusion when a plaintiff "resides" in multiple homes, maintains a physical presence at the recently purchased insured property undergoing renovations necessary for occupancy, and demonstrates an intention to remain or reoccupy the insured property (*Dean*, 19 NY3d at 708). However, a plaintiff's unsupported and conclusory assertions of permanence and an intent to remain cannot defeat an insurer's summary judgment motion premised on a "residence premises" exclusion (*Tower Ins. Co. of New York v Brown,* 130 AD3d 545, 546 [1st Dept 2015]). Moreover, the meaning of the "one family dwelling where [the plaintiff] reside[s]" is not ambiguous if the insured plaintiff did not reside at the insured property during the policy period, but rented it to others and then left it vacant (*Id*; *Vela v Tower Ins. Co. of New York*, 83 AD3d 1050, 1051 [2d Dept 2011]; *see also Castlepoint Ins. Co. v Obadia*, 2017 WL 4773024 [Sup Ct, New York County Oct. 18, 2017]). Courts typically enforce "residence premises" policy provision if an insured admits that he did

not reside at the vacant insured premises on the date of loss (*Tower Ins. Co. of New York v Zaroom*, 145 AD3d 556, 557 [1st Dept 2016]; *Brown,* 130 AD3d at 545-46).

In *Dean*, the Court of Appeals evaluated a similar "residence premises" condition. The *Dean* plaintiffs-insureds presented evidence that they occupied the "residence premises" during repair work on their newly purchased home, such as being physically present at the property five days a week, eating, and occasionally sleeping there (*Dean*, 19 NY3d at 708). The *Dean* plaintiffs-insureds purchased the policy in advance of purchasing the subject premises, but were then unable to fulfill their intention to reside at the subject premises because they discovered termite damage requiring significant renovations (*Id* at 708-09).

In *Vela*, the plaintiff sued her insurance company after her property sustained damage and her insurance company disclaimed coverage under a similar "residence premises" condition (*Vela*, 83 AD3d at 1050). The *Vela* insurer defendant was entitled to summary judgment, because it presented to the Court, *inter alia*, evidence that the insured had moved into another house with her husband prior to the loss, and plaintiff admitted under oath that she did not reside at the residence premises at the time of the loss (*Id* at 1051). The *Vela* insured produced affidavits stating that she and her husband slept at the premises many nights while making repairs to the premises (*Id*). However, the Court viewed these affidavits "as presenting a feigned factual issue designed to avoid the consequences of the plaintiff's earlier admission in her deposition testimony that the premises were unoccupied at all times from the date of the closing to the date of the loss" (*Id*). The Appellate Division, Second Department held the residence premises provisions were not ambiguous and dismissed plaintiff's complaint (*Id*).

In *Brown,* the insured admitted to the insurer's claims adjustor that he did not reside at premises (*Brown*, 130 AD3d at 545). Although the *Brown* insured defaulted, the Appellate Division, First Department also held that the insurer was entitled to summary judgment because the affidavit of its claim adjuster established that the insured admitted that he did not reside at the premises when the incident occurred (*Id*). Further, the Court found that investigator's affidavit constituted sufficient admissible evidence to support the insurer's motion for default and summary judgment declaring that the insurer had no obligation to indemnify its insured (*Id*).

In *Zaroom*, the Appellate Division, First Department again enforced a "residence premises" exclusion, because the defendant-insured admitted to the insurer's investigator that she did not reside at insured premises on date of incident. The insurer's investigator attested to the insured's admission in an affidavit (*Zaroom*, 145 AD3d at 556-57). The *Zaroom* insured's attorney claimed that plaintiff was aware that they did not reside at the insured premises, but continued to accept premiums (*Id*). The court rejected the attorney's argument and noted that the affirmation of an attorney who has no personal knowledge lacks evidentiary value (*Id*).

Here, Aschmoneit's alleged intention to reside at the Subject Premises is insufficient to satisfy the policy's "residence premises" requirement.[1] Plaintiffs reliance on *Dean's* limited holding is misplaced, because *Dean* is factually distinguishable. Here, unlike in *Dean*, Ashmoneit vacated the Subject Premises approximately eight years before the loss occurred, leased the Subject Premises to tenants, began a cosmetic renovation project after the tenant's departure, and began using the Subject Premises' garage area for storage on an unspecified date

[1] The parties agree that Aschmoneit could not have resided in the Subject Premises until the Tenant Exit Date. Therefore, the court must assess plaintiff's relationship with the Subject Premises for the period between the Tenant Exit Date and the Date of Loss.

(*c.f. Dean*, 19 NY3d at 708). In further contrast to the severe terminate infestation in *Dean*, Aschmoneit recognized that the Subject Premises was habitable following the Tenant Exit Date, and the pending renovations were cosmetic (*Dean*, 19 NY3d at 707; NYSCEF Doc. 65 at 55:6-11, 55:6-22). Finally, plaintiff did not demonstrate that "he would have resided in the subject premises but for an unforeseen event beyond his control" (*Zises v New York Cent. Mut. Fire Ins. Co.*, 34 Misc 3d 1208(A) [Sup Ct 2012], affd, 116 AD3d 950 [2d Dept 2014] *citing, Dean*, 19 NY3d 704).

Aschmoneit fails to produce evidence to buttress his assertions that he spent "most weekends" at the Subject Premises or that his belongings indicate his intent to reside at that location (*Dean*, 19 NY3d at 710). Storing a limited number of items in the Subject Premises' garage does not establish an intent to establish residency at 120 Helm Hills Road (*Id* at 710; *see also Zises*, 34 Misc 3d 1208(A) [insurer properly disclaimed coverage under a "residence premises" provision after the insured-plaintiff vacated the subject premises ten-years before the loss occurred, the insured continued to use the property's attic space for storage did not evince an intention of reestablishing residence]).

Like the insured in *Vela*, Ashmoneit did not reside at the Subject Premises the day of the fire (*Vela*, 83 AD3d at 1050-51). Ashmoneit attested that he primarily lived at two other locations, 412 East 73rd Street and 8 Brian Court, on the Date of Loss. Similar to *Zaroom*, *Vela*, and *Brown*, Aschmoneit never avers to have slept or eaten meals at the Subject Premises subsequent to the Tenant Exit Date. In fact, Aschmoneit never quantified the number of days he spent at the property. Instead, he simply contends that spent "most weekends" there (*c.f. Dean*,

19 NY3d at 708). Accordingly, Ashmoneit's mere future intention to reside at Subject Premises is not sufficient (*Vela*, 83 AD3d at 1051).

Frequent overnight lodging at the insured property can satisfy the permanence requirement (*Dean*, 19 NY3d at 708). Aschmoneit fails to reconcile the discrepancy between his purported weekend use of the Subject Premises and the lack of gas service during the winter months of his reported occupancy. Aschmoneit claims to have spent most weekends at the insured premises during the winter of 2012-2013. However, the utility bill show no gas was consumed at the Subject Premises during the winter months between Tenant Exit Date and the Date of Loss. In light of the lack of gas usage, without anything more than plaintiff's self-serving statements, the record does not support plaintiff's purported winter occupancy.

It is undisputed that tenants occupied the Subject Premises in 2012 while the Policy was in force (NYSCEF Doc. 65 at 48:12-17, 55:6-11). Aschmoneit declined to obtain insurance meant for landlords or vacation homeowners (which, presumably would be more expensive) (*Tower Ins. Co. of New York v Burrell*, 2017 WL 4843001, at 2, [Sup Ct, New York County Oct. 18, 2017]). Even if Aschmoneit informed his insurance broker, MVR Group, of his intention to rent out and subsequently renovate the premises, it does not constitute notice to plaintiff (*Castlepoint Ins. Co. v Obadia*, 2017 WL 4773024 [Sup Ct, New York County 2017]; *Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 24 NY3d 578 [2014] [as broker is usually agent for insured, notice to broker is not notice to insurer]). Aschmoneit "offers no evidence that defendant had notice, actual or constructive, that he did not reside at the premises" (*Id*).

Plaintiff's remaining arguments lack merit. Even if this court deemed the EUO inadmissible, AIE established its entitlement to judgment as a matter of law by submitting the

affidavit of its investigator stating that he met with Mr. Ashmoneit, who admitted that he and his wife did not reside at the insured premises on the Date of Loss. Plaintiff's affidavit stating that he spent "most weekends" at the Subject Premises while making repairs to the premises "must be viewed as presenting a feigned factual issue designed to avoid the consequences" of the plaintiff's statements to investigator Mullins that he did not reside at the Subject Premises on the Date of Loss (Mullins Affidavit ¶ 8; *Vela*, 83 AD3d at 1051; *see also*, *Zaroom*, 145 AD3d at 556, *supra*; *Brown*, 130 AD3d 545, *supra*; *Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401 [1st Dept 2015] [insured made admission in statement to investigator]).

Moreover, unlike in *Dean* where the insureds were generally at the property at least five days per week, Aschmoniet does not allege sleeping or eating at the 120 Helms Hill Road, the duration of his renovation project, nor the specific number of days spent at the Subject Premises (*Dean*, 19 NY3d at 708; *Brown,* 130 AD3d at 545-46; *Vela*, 83 AD3d at 1050-51). Here, theevidence exceeds the requirements outlined in *Zaroom*, *Vela*, and *Brown*, because defendant has submitted affidavits from its underwriter in reference to the HSBC correspondence, and plaintiff's "$0.00" gas bills from the period that plaintiff alleges to have resided at the Subject Premises (*Id;* see discussion of insurer investigator affidavits, *supra*).

For the foregoing reasons, defendant's motion for summary judgment is granted because Ashmoneit did not "reside" at the Subject Premises within the context of the Policy's residence premises condition.

Accordingly, it is,

ORDERED, that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's complaint (NYSCEF Doc. 1) is DISMISSED with prejudice.

The clerk is directed to enter judgment in favor of defendant and dismiss this case.

Dated: New York, New York

August 7, 2018

ENTER

Hon. Melissa Crane

HON. MELISSA A. CRANE
J.S.C.