Heintze v Kwon
2020 NY Slip Op 33187(U)
September 29, 2020
Supreme Court, New York County
Docket Number: 150144/2020
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

----------X

RUDY HEINTZE,

Plaintiff,

- v -

ANDY KWON, SUSAN CANTROWITZ, and ALLSTATE,

Defendants.

----------X

INDEX NO. 150144/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Rudy Heintze commenced this action against defendants Andy Kwon and Susan Cantrowitz seeking to collect for property damage allegedly caused by their negligence. Additionally, plaintiff commenced this action against defendant Allstate Indemnity Company s/h/a Allstate seeking to collect damages arising from its alleged breach of an insurance contract. Further, plaintiff seeks declaratory relief against Allstate. Plaintiff now moves, pursuant to CPLR 3212, for: 1) summary judgment and a declaration, pursuant to CPLR 3001 and 3017, that Allstate owes him insurance coverage for the property damage claim made by plaintiff; 2) setting this matter down for an inquest; and 3) for such other relief as this Court deems just and proper.

FACTUAL AND PROCEDURAL BACKGROUND:

The captioned action arises from an incident on January 8, 2018, in which a pipe allegedly froze because Kwon and Cantrowitz left the window in their apartment at 138 Watts Street ("the premises") open, resulting in damage to, and destruction of, property owned by plaintiff, who was

also a resident at the premises. Doc. 9 at pars. 12-15. Kwon and Cantrowitz lived on the second floor at the premises. Doc. 9 at par. 8.

On January 30, 2019, Merrimack Mutual Fire Insurance Company ("Merrimack") a/s/o 138 Watts Street Owners Corp. c/o Andrews Building Corp. commenced a subrogation action against Kwon and Cantrowitz in this Court styled *Merrimack Mutual Fire Insurance Company a/s/o 138 Watts Street Owners Corp. c/o Andrews Building Corp. v Andy Kwon & Susan Cantrowitz*, pending in this Court under Index Number 151032/19 ("the Merrimack action"). Doc. 1. Merrimack alleged in that action that it was insurer for 138 Watts Street Owners Corp. ("138 Watts"), the owner of the premises, that it reimbursed 138 Watts for a water damage loss it sustained on January 8, 2018, and that the loss occurred due to the negligence of Kwon and Cantrowitz. Doc. 6 filed under Index Number 151032/19.

Plaintiff thereafter commenced the captioned action against Kwon, Cantrowitz, and Allstate by filing a summons with notice on January 6, 2020. Doc. 1. In response, defendants appeared and demanded a complaint. Docs. 3-5. In the complaint, filed February 21, 2020, plaintiff alleged as a first cause of action that his property was damaged as a result of the negligence of Kwon and Cantrowitz. Doc. 9 at pars. 17-18. As a second cause of action, plaintiff claimed that Allstate breached the insurance agreement he had with it, which was issued under policy number 0009439300008 ("the policy"), by refusing to provide him with coverage for the loss. Doc. 9 at pars. 20-28. He further alleged that he was entitled to a judgment declaring that Allstate was obligated to provide him with coverage for the loss. Doc. 9 at 29.

Kwon and Cantrowitz joined issue by their answer filed March 5, 2020. Doc. 13. Allstate joined issue by its answer filed March 12, 2020. Doc. 14. In their answers, defendants denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Docs. 13-14.

Allstate also cross-claimed against Kwon and Cantrowitz for contribution and common-law indemnification. Doc. 14.

On March 17, 2020, Kwon and Cantrowitz moved to consolidate the Merrimack action with the captioned action for the purposes of discovery and joint trial. Doc. 17 filed under Index Number 151032/19. The said motion is *sub judice*.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against Allstate seeking the relief set forth above. In support of the motion, plaintiff submits the pleadings (Docs. 26-27); the affidavit of Geoffrey Hull of The Andrews Organization, the property manager for the premises, who attests, based on "the best of [his] knowledge, the sources of information, investigation and records on file", that the incident occurred because Kwon and Cantrowitz left their window open (Doc. 28); the affidavit of plaintiff, who attests, inter alia, that the tiles in his shower were damaged as a result of the incident and that Allstate is obligated to cover the loss (Doc. 29); a purported copy of the policy covering the loss (Doc. 30); a letter from Allstate to plaintiff dated May 31, 2018 denying plaintiff's claim arising from an incident on May 4, 2018 (Doc. 31); plaintiff's calculation of his damages (Doc. 32); and an incident report reflecting that the damage occurred as a result of pipes freezing when a second floor window was left open. Doc. 33.

Counsel for plaintiff argues that the motion must be granted because a review of the incident report establishes that Allstate's "coverage position is misplaced, inaccurate and not applicable to the fact[s] surrounding this incident" (Doc. 25 at par. 14) and that it clearly has an obligation to insure plaintiff for the loss. Doc. 25 at pars. 9, 16.

In opposition, Allstate's attorney argues that the motion must be denied as premature pursuant to CPLR 3212(f). Doc. 37 at pars. 9-13, 15-16. Although Allstate admits that it issued

the policy to plaintiff and that it sent plaintiff a denial letter dated May 31, 2018, the said letter related to a reported date of loss of May 4, 2018 and not to that which allegedly occurred on January 8, 2018, and that it did not learn of the January 8, 2018 incident until this lawsuit was filed. Doc. 37 at par. 14.

In reply, plaintiff's counsel argues, inter alia, that the motion must be granted because Allstate failed to raise an issue of fact by submitting an affidavit of an individual with personal knowledge and did not identify any factual issue warranting denial of the motion. Doc. 41 at pars. 3-9, 13-16. Plaintiff further maintains that CPLR 3212(f) is inapplicable herein since Allstate is already in possession of the information it needs to dispute coverage. Doc. 41 at pars. 3, 10-11.

LEGAL CONCLUSIONS:

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). If the moving party meets its burden, it becomes incumbent upon the non-moving party to establish the existence of material issues of fact. *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the

motion, *regardless of the sufficiency of the opposing papers*." *Vega*, 18 NY3d at 503 (internal quotation marks and citation omitted, emphasis in original).

When considering a summary judgment motion in a coverage case, New York courts will enforce the "plain and ordinary meaning" of unambiguous policy terms. *See 2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 300 (1st Dept 2003). The issue of whether a provision in an insurance policy is ambiguous is a question of law for the court to decide. See *Atl. Mut. Ins. Co. v Terk Techs. Corp.*, 309 AD2d 22, 28 (1st Dept 2003).

This Court finds that plaintiff has failed to establish its prima facie entitlement to summary judgment. "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." *Zuckerman*, 49 NY2d at 563. Although plaintiff's counsel purports to submit such evidence herein, it is clear that important documents submitted by plaintiff are not in admissible form.

First, the policy proffered by plaintiff (Doc. 30), perhaps the most crucial piece of evidence to be submitted in support of a motion for summary judgment in a declaratory judgment action (*see generally Evanston Ins. Co. v Po Wing Hong Food Mkt., Inc.*, 21 AD3d 333, 334 [1st Dept 2005]) is not in admissible form, since it is not authenticated and there is no foundation for its submission. Although plaintiff represents, and Allstate concedes, that the latter issued him the policy, plaintiff does not state that the document annexed as an exhibit to his motion is a true and accurate copy of the policy he was issued. He merely states that the policy annexed to the motion "is the applicable policy of insurance." Doc. 29 at par. 1. However, since the exhibit plaintiff submits has the words "Sample Document" stamped across each page, it clearly cannot be a true and accurate copy of the policy issued to him. Doc. 30. Nor does the exhibit contain a declarations

page, a policy number, an effective date, or even name plaintiff as the insured. Doc. 30. Thus, this Court cannot use the terms set forth in the proffered exhibit to make a coverage determination.

Additionally, plaintiff relies on the incident report and affidavit prepared by Hull in asserting that the loss occurred because Kwon and Cantrowitz left their window open. Docs. 28, 33. As noted above, Hull states in his affidavit that to "the best of [his] knowledge, the sources of information, investigation and records on file" resulted from the window being left open. Doc. 28. However, Hull fails to divulge the sources of his information, specifics of his investigation, and/or what records he reviewed. His vague and conclusory statement is thus devoid of evidentiary value and does not entitle plaintiff to summary judgment. *See Forssell v Lerner*, 101 AD2d 807, 808 (2d Dept 2012). Moreover, to the extent Hull relied on hearsay statements in writing his affidavit, such cannot be considered as evidence in support of a motion for summary judgment. *See Zuckerman*, 49 NY2d at 560. Thus, this Court is constrained to deny the motion.[1] However, the denial is without prejudice to renew at the close of discovery.

In any event, as Allstate asserts, given that no preliminary conference has been conducted and no depositions have been held, the motion must be denied as premature. See CPLR 3212(f); *50 Gramercy Park N. Owners Corp. v GPH Partners LLC*, 149 AD3d 635 (1st Dept 2017); *Ali v Effron*, 106 AD3d 560 (1st Dept 2013). Moreover, since this action may be consolidated with the Merrimack action, discovery sought in that action may bear on the issues herein.

Therefore, in light of the foregoing, it is hereby:

[1] This Court further notes that, although the incident report reflects that the frozen pipes resulted in damage to retail space and the basement of the premises (Doc. 33), plaintiff states in his affidavit that the tiles in his shower were damaged. Doc. 29 at par. 8. This is rather curious, since Hull states in his affidavit that plaintiff lived on the third floor, *above* Kwon and Cantrowitz. Doc. 28 at par. 2. Therefore, even if the policy were in admissible form, the motion would be denied since this Court would be unable to determine exactly how the incident occurred and thus whether plaintiff's loss would have been covered under the language of the policy.

ORDERED that plaintiff's motion is denied in all respects, with leave to renew at the close of discovery; and it is further

ORDERED that the parties are directed to appear for a telephonic preliminary conference on October 28, 2020 at 10:30 a.m., prior to which the parties must provide the court with a dial-in number and access code or must have all parties on the line and then patch in the court at (646) 386-5655; and it is further

ORDERED that, in lieu of a conference call on the aforementioned date, the parties may, prior to said date, request from chambers a preliminary conference form, complete the same, and return it to Jonathan Judd, Law Clerk for Justice Freed, by email (jjudd@nycourts.gov) so that it may be so-ordered, leaving blank spaces for the compliance date and the note of issue filing deadline; and it is further

ORDERED that this constitutes the decision and order of the court.

9/29/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE