Yisroel v Union Mut. Fire Ins. Co.
2020 NY Slip Op 34242(U)
December 21, 2020
Supreme Court, Kings County
Docket Number: 523187/2017
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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YESHIVA TORAS YISROEL,

Plaintiff,

-against-

UNION MUTUAL FIRE INSURANCE COMPANY,

Defendant.
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Index No.: 523187/2017
Motion Date: 10-26-20
Mot. Seq. No.: 2

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this declaratory judgment action involving a claim for property damage, the defendant, UNION MUTUAL FIRE INSURANCE COMPANY ("Union Mutual"), moves for summary judgment declaring that the plaintiff, YESHIVA TORAS YISROEL, is not entitled to coverage under a policy of insurance issued by Union Mutual because plaintiff failed to provide Union Mutual with timely notice of the claim and because the alleged loss was not a covered event within the terms of the policy.

Background:

This action arises out of a property damage claim made under a policy of insurance issued by Union Mutual to the plaintiff. The plaintiff is the owner of a building located at 1151-46th Street, Brooklyn, New York, which was allegedly damaged on or about July 22, 2016. Plaintiff first submitted the claim to Union Mutual on March 7, 2017.

By correspondence dated April 18, 2017, Union Mutual disclaimed coverage. One of the grounds for the disclaimer was that the plaintiff failed to provide timely notice of the claim. The disclaimer stated:

> The Policy contains certain Loss Conditions, which are found in the BUILDING AND PERSONAL PROPERTY COVERAGE FORM (CP 00 10 10 00) endorsement, including the following:
>
> 3. Duties in the Event of Loss or Damage
>
> a. You must see that the following are done in the event of loss or damage to Covered Property:
>
> (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
>
> (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
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> ***
>
> (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.
>
> Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

The disclaimer further stated:

> Pursuant to the Policy's terms and conditions, you are required to give us prompt notice of loss or damage, and give us a description of how, when, and where the loss or damage occurred as soon as possible. Yoshe Stern told us that the loss occurred in July 2016. The patios at the Premises were demolished in July 2016 and reconstruction began in January 2017. However, you did not give us notice of the loss or damage until March 2017. This lengthy delay in providing notice has prejudiced our ability to investigate the cause, origin, nature, or extent of your claimed damage and is a violation of your policy terms. As such, there is no coverage for you under your policy with Union.

The defendant also maintained that the loss was not a covered event within the meaning of the policy. In this regard, the disclaimer provided as follows:

> Please be advised that there is no coverage for you under the Policy. As an initial matter, the Policy excludes coverage for wear and tear, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself. To the extent that your claimed damage was caused by wear and tear, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself, there is no coverage for you under your policy with Union.
>
> The Policy also excludes coverage for settling, cracking, shrinking or expansion. During our investigation, we observed cracking to the interior of the Premises. To the extent that your claimed damage was caused by settling, cracking, shrinking or expansion, there is no coverage for you under your policy with Union.
>
> Further, the Policy excludes coverage for collapse, except as provided in the Collapse Additional Coverage. There is only coverage under the Collapse Additional Coverage if there is an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose. Indeed, a building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse. You indicated that an engineer advised you that the patios and windows at the Premises were unsafe and were in danger of falling down. However, we understand that there never was an abrupt falling down or caving in of the building or any part of the building at the Premises. It appears that the only things that fell were sections of beadboard, which were likely attached to rotten wood. As there was no collapse as that term is defined under the Policy, there is no coverage for you under your policy with Union.

The Motion:

With respect to that branch of the motion based on late notice, plaintiff contends that that triable issue of fact exist as to whether plaintiff had a reasonable excuse for not notifying the defendant of the claim for approximately 7.5 months. The plaintiff submitted the affidavit of Moishe Stern, plaintiff's Secretary, who states that his mother, plaintiff's President, Barbara Stern, suffered a broken hip just prior to this loss and almost immediately contracted Alzheimer's disease thereafter. He annexed to his affidavit a medical report from Dr. Wolintz indicating that his mother was suffering from dementia since December of 2016. The report, however, was not submitted in admissible form. Mr. Stern maintained that all of the above

delayed the presentation of the claim to the defendant for several months and that when he discovered that the claim had not been reported to the defendant, he took immediate steps to present the claim.

In reply, defendant pointed out that Ms. Stern's hospitalization for hip surgery ended on May 26, 2016, almost two months prior to the claimed loss. In addition, defendant contends that Mr. Stern's claim that his mother's cognitive skills prevented her from making the claim should be disregarded, as he is not qualified to proffer such an opinion, and the inadmissible medical record attached to his affidavit did not support his assertion.

In support of its claim that the loss is not a covered event, the defendant submitted a report prepared by Alexander Shteyn, a consulting engineer, who stated that when he inspected the premises following the submission of the claim, he found that the porch was compromised and in danger of complete collapse and that the damage to the premises was caused by deterioration and cracking. Mr. Shteyn's report was not, however, submitted in admissible form. Defendant also submitted the affidavit of Marc Rosenthal, an insurance adjuster, who conducted an on-site inspection of the premises on March 10, 2017. He could not verify the cause and origin, nature, or extent of plaintiff's claimed damages based on the inspection but stated that he observed cracks to the interior of the premises which were the result of settling due to deteriorated framing members at the Premises.

Discussion:

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "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" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion "the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a

trial of the action" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York,* 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661).

With respect to that branch of the motion in which the defendant seeks summary judgment on the grounds that the plaintiff failed to provide timely notice of the claim, "[it] is clear that insurance policy provisions, such as those in this case, requiring notice to the insurance carrier of a potential claim as soon as practicable act as conditions precedent to coverage" (*Kreger Truck Renting Co. v. Am. Guarantee & Liab. Ins. Co.*, 213 A.D.2d 453, 454, 623 N.Y.S.2d 623, 624, citing *White v. City of New York,* 81 N.Y.2d 955, 957, 598 N.Y.S.2d 759, 615 N.E.2d 216, *see also*, *C.C.R. Realty of Dutchess v. New York Cent. Mut. Fire Ins. Co.*, 1 A.D.3d 304, 766 N.Y.S.2d 856; *Pierre v. Providence Wash. Ins. Co.,* 286 A.D.2d 139, 730 N.Y.S.2d 550, *affd.* 99 N.Y.2d 222, 754 N.Y.S.2d 179, 784 N.E.2d 52). The right of an insurer to receive notice is so fundamental that an insurer does not have to show prejudice to be able to disclaim liability on late notice (see *Tennant v. Farm Bur. Mut. Auto. Ins. Co.*, 286 App.Div. 117, 141 N.Y.S.2d 449; *Gizzi v. State Farm Mut. Ins. Co., supra*; 31 N.Y.Jur., Insurance, § 1262). Thus, an insured's failure to comply with the notice requirement of a policy vitiates coverage unless the insured proffers a reasonable excuse for failing to do so (*see Viggiano v. Encompass Ins. Co./Fireman's Ins. Co. of Newark, N.J.,* 6 A.D.3d 695, 775 N.Y.S.2d 533; *Pile Found. Constr. Co. v. Investors Ins. Co. of Am.,* 2 A.D.3d 611, 612–613, 769 N.Y.S.2d 290).

Here, the defendant established its prima facie entitlement to summary judgment declaring that it does not have to cover the claim by demonstrating that it did not receive notice of the claim until March 7, 2017, over seven months after the claim arose (*Henaghan v. State Farm Fire & Cas. Co.,* 175 A.D.3d 1267, 1269, 109 N.Y.S.3d 108, 110–11; *Albano–Plotkin v.*

Travelers Ins. Co., 101 A.D.3d 657, 658–659, 955 N.Y.S.2d 612; *McGovern–Barbash Assoc., LLC v. Everest Natl. Ins. Co.*, 79 A.D.3d 981, 983, 914 N.Y.S.2d 218). Thus, the burden shifted to plaintiff to raise a question of fact as to whether there was a reasonable excuse for failing to provide the defendant with timely notice of the claim.

In determining whether a plaintiff raised a triable issue of fact on late notice issue, Courts are required to construe the notice requirements contained in policies of insurance liberally in favor of a plaintiff and where an excuse is offered for delay in furnishing notice, the Court must generally find that the reasonableness of the delay and the sufficiency of the excuse are matters to be determined to be determined at trial (*see Morris Park Contracting Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 33 A.D.3d 763, 764–65, 822 N.Y.S.2d 616, 618 [*citations omitted*], see also *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 A.D.2d 40, 42–43, 752 N.Y.S.2d 286; *Winstead v. Uniondale Union Free School Dist.*, 170 A.D.2d 500, 503, 565 N.Y.S.2d 845). The issue of whether an excuse is reasonable may be decides as a matter of law "only when the facts are undisputed and not subject to conflicting inferences" (*St. James Mech., Inc. v. Royal & Sun alliance*, 44 A.D.3d 1030, 1031, 845 N.Y.S.2d 83; *see Greenwich Bank v. Hartford Fire Ins. Co.*, 250 N.Y. 116, 131, 164 N.E. 876; *Preferred Mut. Ins. Co. v. New York Fire–Shield, Inc.*, 63 A.D.3d 1249, 1251, 880 N.Y.S.2d 744). Applying the above principles, the Court finds that whether the plaintiff had a reasonable excuse for failing to provide the defendant with timely notice of the claim presents a triable issue of fact for trial an cannot be decided as a matter of law.

Turning to the second branch of defendant's motion, defendant's submissions were woefully insufficient to establish a prima facie case of entitlement to summary judgment on the ground that the alleged loss is not covered under the policy. Defendant relies primarily on the report of Mr. Shteyn, which was not submitted in admissible form, and the reports of Mr. Rosenthal, whose qualifications to render an opinion on the cause of plaintiff's alleged damages was not established. Accordingly, this branch of defendant's motion must be denied regardless of the sufficiency of plaintiff's opposition papers.

For the above reasons, it is hereby

ORDRED that the motion is **DENIED.**

This constitutes the decision and order of the Court.

Dated: December 21, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020