

Bumford v Allstate Indem. Co.
2020 NY Slip Op 34622(U)
June 3, 2020
Supreme Court, Chemung County
Docket Number: Index No. 2018-0064
Judge: Christopher P. Baker
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At a Motion Term of The Supreme Court of the State of New York held in and for the Sixth Judicial District, at the Hazlett Building, in the County of Chemung, Elmira, New York on the 29th Day of May 2020.

**PRESENT: HON. CHRISTOPHER P. BAKER
SUPREME COURT JUSTICE**

STATE OF NEW YORK
SUPREME COURT: COUNTY OF SCHUYLER

CHRISTINE BUMFORD and,
JOSHUA BUMFORD,

Plaintiffs,

DECISION AND ORDER

vs.

INDEX No.: 2018-0064

ALLSTATE INDEMNITY COMPANY,
DEBRA COLUCCI, JOSEPH A. COLUCCI,
and SHAWN DALLY,

Defendants.

CHRISTOPHER P. BAKER, JSC

STATEMENT OF FACTS

Plaintiffs, Christine Bumford and Joshua Bumford,¹ are the owners of a building located at 2547 County Road 6, Alpine, New York, Schuyler County. On March 6, 2012, plaintiffs purchased a Deluxe Homeowners Policy (hereinafter the policy) from defendant Allstate (hereinafter Allstate) through its agent, Defendant Joseph A. Colucci (hereinafter Colucci).² The policy has been renewed each year since 2012. On January 1, 2018, fire substantially destroyed a building and its contents at that address and plaintiffs filed an insurance claim with Allstate.

~~Allstate denied coverage for several reasons. First, Allstate informed plaintiffs that the policy did not cover the dwelling damaged by the fire. Allstate's investigation revealed two separate dwellings on the property. The "primary dwelling" – built in 1984 – was identified as the insured premises. The fire, however, damaged the "second dwelling" which was not listed on~~

¹The Bumfords are referred to collectively as plaintiffs and individually as Ms. Bumford and Mr. Bumford.

²Defendant Shawn Dally (hereinafter Dally) purchased Colucci's agency and with it plaintiffs' account. Where necessary, Colucci and Dally will be referred to collectively as the agents.

the “Declarations Page and Allstate was not aware of its existence.”³ Secondly, Allstate cited plaintiffs’ alleged failure to advise Allstate of an occupancy change in the primary dwelling. Allstate learned that Ms. Bumford’s sister, Kathy, lived in the primary dwelling and plaintiffs did not. Allstate’s third reason was that “a camping business was being run on the Property, whereby RV campers were allowed to camp on the Property. Allstate was similarly not made aware of this.”

Thereafter, plaintiffs commenced this action. The complaint alleges Allstate’s denial of coverage constitutes a breach of contract and, further, the agents committed a breach of contract and were negligent because they failed to obtain the proper insurance coverage for plaintiffs. Issue was joined. Although depositions have not been taken, plaintiffs filed the instant motion for summary judgment against all three defendants. Allstate argues plaintiffs’ motion is premature and that issues of fact preclude summary judgment; the agents oppose the motion and also, by cross-motion, seek dismissal of the complaint.

Plaintiffs’ motion is supported by the couple’s joint affidavit as well as Ms. Bumford’s supplemental affidavit. In sum, the joint affidavit attempts to establish that the agents were aware of a business – the RV campground – on the property as well as the existence of other buildings on the property. Plaintiffs also recount a visit to the property by Philip Parrish, an Allstate representative, in June of 2017. According to plaintiffs, after Mr. Parrish’s visit to the property, they were advised that due to issues with the property the policy would be cancelled.⁴ Plaintiffs’ affidavit further alleges that Colucci, Dally or their representatives visited the property and knew or should have known that the property contained a business as well as other buildings and despite this knowledge the agents failed to advise plaintiffs to modify their coverage. Plaintiffs’ allegations concerning visits to the property are general in nature and lack specificity such as the time, date or the name of the individual who visited the property.

Ms. Bumford’s supplemental affidavit asserts that she and her husband have no education in law, insurance or business and they relied upon the agents’ expertise and experience to advise them concerning the proper insurance coverage. As with plaintiffs’ affidavit, Ms. Bumford’s affidavit offers only allegations of a general nature and is devoid of specific details of conversations with the agents or their employees.

With respect to Allstate, plaintiffs’ affidavit attempts to refute Allstate’s reasons for declining coverage. For example, plaintiffs quote from Allstate’s letter:

[o]ne of the reasons given for the denial is that “[a]t the time of the loss there were two buildings at the Property . . . At the time the Property was first insured by Allstate in 2012, the Primary Dwelling was the

³ Allstate’s investigator Robert Koban’s affidavit states that “the structure involved in the loss was not even constructed in 2012 when the policy was written and [was not] the Primary Dwelling listed on the Policy.”

⁴It is clear from statements made during oral argument that the policy was never cancelled.

only dwelling on the Property. . . The Second Dwelling is said to have been built around a trailer that was present when the Property was first insured in 2012. It is the second Dwelling which was damaged in the fire. The Second Dwelling is not listed on the Declarations Page and Allstate was not aware of its existence.

Plaintiffs argue that the sentences are contradictory; it is not clear, however, in what manner the alleged contradiction invalidates, as a matter of law, Allstate's reason for denying coverage. Plaintiffs rely on their interpretation of the meaning of policy terms as a way to challenge Allstate's other reasons for denying coverage.

It is noteworthy that on June 29, 2017, an Allstate representative, Philip Parrish, reinspected the premises by physically visiting the property. In his report, Mr. Parrish characterized the premises as unacceptable. Among the things noted in his report was the existence of a business on the property – the campground.

Allstate opposes plaintiffs' motion arguing that it is premature and also that issues of fact preclude judgment in plaintiffs' favor. Allstate contends the motion is premature because further discovery is required. The agents oppose plaintiffs' motion and seek dismissal of the claims against them because they contend they fulfilled their obligations as agents by procuring the insurance coverage requested by plaintiffs.

The agents' responding papers include plaintiffs' application for coverage, plaintiffs' responses to interrogatories as well as affidavits from Linda Scacco, an Allstate employee, and Dally.

As set forth in their interrogatories, plaintiffs' contact with the agents and their employees was over the telephone. Plaintiffs' interrogatories assert that they received assurances that the policy covered all of the buildings on the property. The interrogatory responses, however, lack specific information such as who they spoke with or when this is alleged to have occurred. Plaintiffs, by way of their interrogatories, acknowledge there was no written agreement with the agents concerning insurance consultations but instead claim that there was an implied promise that the agents would procure an insurance policy to meet the plaintiffs' insurance needs.

~~Ms. Scacco averred that in March 2012, she spoke with Ms. Bumford by phone. Ms. Bumford described the property as a log cabin on a campground in upstate New York; plaintiffs' intended to use the log cabin as their primary residence. Ms. Bumford did not tell Ms. Scacco that plaintiffs owned the campground and did not mention any additional dwellings on the property. Ms. Scacco recorded the information and gave Ms. Bumford the price quote for the policy. Ms. Bumford, according to Ms. Scacco, did not ask for anything beside the policy. Ms. Scacco did not visit the premises; the plaintiffs never requested that Ms. Scacco modify the policy.~~

According to Dally's affidavit, he purchased the agency in 2015 and was not involved

with plaintiffs' initial purchase of the policy. Dally never visited the property and never spoke with plaintiffs. According to Dally, the policy issued was based upon information plaintiffs provided and they never requested changes to the policy. Dally was unaware of a secondary dwelling on the property or that plaintiffs were not residing in the dwelling covered by the policy.

CONCLUSIONS OF LAW

On a motion for summary judgment the question is whether the moving party "ma[d]e 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 NY2d [1986]; see, Matter of Eighth Judicial Dist. Asbestos Litig., 33 NY3d 488, 496 [2019]). On a motion for summary judgment, 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]), "and every available inference must be drawn in the [non-moving party's] favor" (De Lourdes Torres v Jones, 26 NY3d 742, 763 [2016]). If the moving party meets this burden, "the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action'" (Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833, [2014], quoting Vega, supra, 18 NY3d at 503).

First, the Court considers plaintiffs' motion for summary judgment against Allstate. Plaintiffs argue that summary judgment is appropriate because Allstate has no defense to paying plaintiffs' claim. On this record, the Court does not agree. In that regard, the evidence submitted raises an issue of fact as to whether the policy covers the loss. For example, plaintiffs have not offered sufficient proof to overcome the affidavit of Mr. Hoban – the Allstate employee who investigated the claim – wherein he avers that the structure damaged in the fire is not the structure covered by the policy. Additionally, plaintiffs have not established as a matter of law that Allstate's other reasons do not apply. Notably, there is an issue of fact as to whether there was a change in occupancy and the extent to which Allstate was aware of that change. Moreover, there is an issue of fact as to whether Allstate was aware of a business being operated on the property. Although Allstate's denial letter states that they were not aware of this fact until after the loss occurred, their representative, Mr. Parrish noted the existence of the business on the property in his reinspection report prepared several months prior to the fire.

The Court must now consider plaintiffs' motion and the agents' cross motion. Both parties seek summary judgment with respect to the second and third causes of action alleging a ~~breach of contract and negligence on the part of the agents in addressing plaintiffs' insurance needs.~~

It is settled law that "insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so[,] . . . they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (Murphy v Kuhn, 90 NY2d 266, 270 [1997]). This rule notwithstanding, in certain particularized and exceptional circumstances insurance agents by express or implied contract or through conduct may assume duties in addition to those established by the common law (see, Sawyer v Rutnecki, 92 AD3d 1237, 1237 [3rd Dept. 2012]). For example, an agent may develop a special

relationship with the insured when he or she (1) receives compensation for consultation in addition to the payment for premiums; (2) there was interaction regarding a question of coverage and the insured relied upon the agent's expertise; or (3) through a course of dealing over an extended period of time, an objectively reasonable insurance agent would have noticed that their advice was being sought and specially relied on (see, Sawyer v Rutnecki, supra, at 1238; see also, Murphy v Kuhn, supra, at 272).⁵ Application of the foregoing to the instant case requires that the agents' motion be granted and plaintiffs' claims against them dismissed.

The record reveals that in 2012, plaintiffs purchased the policy from the agents. Ms. Scacco's affidavit summarizes her telephone conversation with Ms. Bumford wherein plaintiffs sought insurance for a log cabin in upstate New York which they intended to use as their residence. Ms. Scacco further averred that Ms. Bumford made no additional requests. Ms. Scacco recorded the information and provided Ms. Bumford with a quote for the insurance; plaintiffs purchased the insurance and renewed it on an annual basis. Dally's affidavit reflects that he never visited the property nor did he ever speak with plaintiffs directly. From these facts it is evident that the agents made a prima facie showing that they satisfied their duty under the common law, to wit: they obtained the coverage that plaintiffs requested.

Plaintiffs' moving papers do not establish entitlement to judgment as a matter of law for their claims against the agents; additionally, the papers do not raise a triable issue of fact sufficient to defeat the agents' cross-motion for summary judgment. Plaintiffs' affidavits do not establish or even suggest the existence of a special relationship with the agents. There is no claim that plaintiffs paid a fee to the agents for advice regarding their insurance needs. Moreover, the affidavits do not identify any specific instances in which plaintiffs sought advice from the agents about the adequacy, nature and scope of their insurance coverage. The affidavits also do not present any facts that would suggest a course of dealing that would lead a reasonable person to believe that the agents' advice was being sought and or relied upon. Instead, plaintiffs' affidavits are replete with generalized statements about their subjective expectations about what the agents should have done for them.

In view of the foregoing, the Court finds, as a matter of law, that plaintiffs and the agents did not have a special relationship such that the agents had a duty to plaintiffs beyond the obligation to obtain for plaintiffs the insurance coverage they requested. Moreover, the record is clear that the agents fulfilled their obligation to plaintiffs in that regard. Accordingly, the agents cross-motion for summary judgment must be granted and the complaint dismissed as to the agents. It is hereby,

ORDERED that, plaintiffs' motion for summary judgment against Allstate is **denied** in its entirety; and is further

ORDERED that, the summary judgment motion on behalf of defendants Joseph A.

⁵By way of a supplemental filing, plaintiffs argue that the agents were insurance brokers and not insurance agents. Assuming for the sake of argument this is in fact true, such a difference does not alter the analysis or the outcome with respect to the duty owed to the insured.

Colucci and Shawn Daly is **granted** in its entirety and the complaint against these two defendants is **dismissed**.

This shall constitute the Decision and Order of the Court.

ENTER

Dated: June 3, 2020



Hon. Christopher P. Baker
Supreme Court Justice

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