463 Saddle Up Tremont LLC v Union Mut. Fire Ins. Co.
2021 NY Slip Op 31948(U)
June 11, 2021
Supreme Court, Bronx County
Docket Number: 32188/2019E
Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __07___

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463 SADDLE UP TREMONT LLC,

Index №. 0032188/2019

-against-

Hon. WILMA GUZMAN

UNION MUTUAL FIRE INSURANCE CO.

Justice Supreme Court

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The following papers numbered 1 to _____ were read on this motion (Seq. No. _E #001__) for ___SUMMARY JUDGMENT DEFENDANT_____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is Denied in accordance with the attached decision and order.

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 6/11/21

Hon. _____ **J.S.C.**
WILMA GUZMAN

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index#32188/2019E
Motion Sequence No.1
Motion Date: 2/8/21

463 SADDLE UP TREMONT LLC,
Plaintiff,
-against-

UNION MUTUAL FIRE INSURANCE COMPANY,
SCHAEFER ENTERPRISES, INC., and
PAPA RESTAURANT, CORP.,
Defendants.

DECISION/ ORDER
Present:
Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Notice of Motion and Affidavit in Support & Exhibits thereto Affidavit Annexed	
Affirmation in Opposition & Exhibits thereof Annexed	
Schaeff Affirmation in Opposition & Exhibits	
Replying Affirmation	
Exhibits	
Other:	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Motion decided as follows: Upon deliberation of the application duly made by defendant, Union Mutual Insurance Company (hereinafter referred to as defendant "Union Mutual") by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting defendant, Union Mutual, summary judgment, and opposition having been submitted thereto, the motion is heretofore denied.

The defendant seeks an order of this court granting summary judgment declaring that there is no coverage under the Commercial General Liability and Property Policy bearing Policy # 314PK-49109-01 for the policy period of June 20, 2017 through June 20, 2018 (hereinafter referred to as the "01 Policy") and renewal policy bearing Policy # 314PK-49109-02 (hereinafter referred to as the "02 Policy") for the period of June 20, 2018 to June 20, 2019 (collectively the "Policies") as to the claims asserted in the underlying action captioned herein. On June 20, 2017, Schaefer Enterprises Inc. (hereinafter referred to as "Schaefer"), an insurance broker, submitted an application for a Commercial General Liability and Property insurance on the Plaintiff's behalf to Roundhill Express LLC (hereinafter referred to as "Roundhill"). The insurance coverage was issued by Union Mutual for the property located at 463 E. Tremont Avenue, Bronx, NY 10457 (hereinafter

referred to as the "Risk Location"). The 01 Policy for the Risk Location was issued for the period from June 20, 2017 through June 20, 2018. Union Mutual sent an inspector to the Risk Location on July 3, 2017 to inspect the Risk Location. The first floor of the Risk Location consists of a commercial space occupied by a restaurant and the second floor consists of a residential space. The Risk Location was issued a renewal policy, the 02 Policy, for the period of June 20, 2018 through June 20, 2019. The first floor is rented to Papa Restaurant. On February 24, 2019, a fire erupted at Papa Restaurant at the Risk Location. The Plaintiff filed a claim for loss coverage through Schaeffer on February 25, 2019, and the Risk Location was inspected on February 27. 2019. On July 29, 2019, Roundhill issued a denial letter in connection with the fire damage alleging that the Plaintiff materially misrepresented information on the insurance application and therefore was not entitled to covered under the Policies. Defendant is seeking to rescind the 01 Policy and the 02 Policy as void *ab initio*.

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by submitting sufficient evidence to negate any triable issue of fact and the opponent must submit admissible evidence to rebut the *prima facie* showing by demonstrating the existence of factual issues. *See* Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); *see also* Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Summary judgment is a drastic remedy which should only be granted if no genuine issue of fact is presented. Andre v Pomeroy, 35 N.Y.2d 361 (1974). It is well settled therefore that a Court's function on a motion for summary judgment is issue finding rather than issue determination. Stillman v Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).

Defendant, Union Mutual, has failed to make a *prima facie* showing of entitlement to summary judgment. Defendant raised issues regarding Plaintiff's material misrepresentation on the Application and Renewal Application. Defendant claims the Plaintiff was not covered by the Policies pursuant to the New York Insurance Law §3105 because Plaintiff materially misrepresented that the Risk Location did not have "open flame cooking" and it did not have a Single Room Occupancy or Boarding Rooms (hereinafter referred to as the "SRO"). New York Insurance Law §3105 states that "no misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract". In "determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible". Insurance Law §3105c. Generally, determining materiality is a question of fact for the jury, however, interpretation of an insurance agreement is a question of law for the court. Dwyer v. First Unum Life Insurance Ins. Co., 41 A.D.3d 115, 116 (2007). An insurer may be entitled to rescind a policy *ab initio* if the insurer is able to show that the applicant

made a material misrepresentation with an intent to defraud. Kiss Const. NY, Inc. v. Rutgers Cas. Ins. Co., 61 A.D.3d 412, 413 (2009); *see also* Dwyer, 41 A.D.3d at 115. Under New York law, the burden is on the insurer to set forth policy coverage "*in clear and unmistakable language*" and are to be accorded a "*strict and narrow construction*" that are subject to no other reasonable interpretation. 242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co., 31 A.D.3d 100, 103, 105 (2006); *see also* Ins. Co. Greater N.Y. v. Clermont Armory, LLC, 84 A.D.3d 1168, 1170 (2011). A party seeking to rescind must act without unreasonable delay upon learning of the grounds for rescission. Schenck v. State Line Tel. Co., 238 N.Y. 308, 313 (1924); Zeldman v. Mutual Life Ins. Co. of N.Y., 269 A.D.53, 56 (1945). The Continental Ins. Co. Court contends that an insurer waives its right, or more properly an estoppel against, the right to cancel or rescind the policy when after learning of an event allowing for cancellation of the policy, continues to accept premiums from the insured. Security Mut. Life Ins. Co. of New York v. Rodriguez, 65 A.D.3d 1, 10 (2009); *see also* Continental Ins. Co. v. Helmsley Enterprises, Inc., 211 A.D.2d 589 (1995). Defendant produced the Underwriting Guidelines stipulating that Mercantile exposure with open flame cooking would be deemed an unacceptable risk, however, it does not provide specific guidelines as to the procedure of encountering a premise that has a standard cooking stove nor did it explain or defined the term "open flame cooking" to mean a standard cooking stove. Application material submitted indicates that the Plaintiff acknowledged there to be a one apartment unit and cooking in the mercantile space at the Risk Location. While the Plaintiff indicated that there is no open flame cooking within the mercantile space, it did not correlate a standard cooking stove to mean open flame cooking. An answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation by the insurance company against its insured where a reasonable person in the insured's position could rationally have interpreted the question as he or she did. Garcia v. American Gen. Life Ins. Co. of N.Y., 164 A.D.2d 808, 809 (1999). As to the case regarding SRO, the Underwriting Guidelines does not contain any language pertaining to an SRO. SRO is defined by the New York Multiple Dwelling Law §248 as "one or two person of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment, so that the occupancy or occupants thereof reside separately and independently of the other occupant". This is not the case here. The Plaintiff indicated on the application for the insurance policy that there is one apartment unit at the Risk Location, however, this information is irrelevant because the Underwriting Guidelines does not reference any language to an SRO. Furthermore, Union Mutual requires a loss control inspection to be performed within 45 days of the inception of the policy in order to approve the Policies. An inspector employed by Union Mutual was sent onsite, to the Risk Location, to physically inspect the property on July 3, 2017, less than one month after the policy inception, over a year before the February 24,

2019 fire damage, well into the 02 Policy, and the inspection did not reveal unacceptable or uncontrolled hazards warranting rescission of the Policies under the claimed material misrepresentation. In fact, the Underwriting Guideline states that upon the property inspection, the policy is "either accepted as is or the coverage is cancelled". It is clear through the 01 Policy and the renewal 02 Policy that inspection was accepted.

In this matter, there are issues of fact as to the materiality of what defendant, Union Mutual, claims were alleged material misrepresentations on the Plaintiff's application for insurance. There are clear issues of fact raised by the Plaintiff. Defendant, Union Mutual, has failed to make a *prima facie* showing entitlement to summary judgment on rescission of the policy as it has failed to show a false statement or misrepresentation made by the insured. Furthermore, the affidavit submitted by James Lambert raised additional issues of fact. Mr. Lambert, President of Roundhill attests that he is the Third-Party Claims Administrator for Union Mutual and is authorized to underwrite insurance policies that conform to the Underwriting Guidelines. The Underwriting Guidelines of Union Mutual's New York Landlord/Tenant Property and General Liability Package Program are approved by Union Mutual for commercial property and general liability. In addition, Mr. Lambert attest that as President and chief underwriter of Roundhill, he is fully familiar with the Underwriting Guidelines and is familiar with the handling of claims made against Union Mutual's policy, including claims for loss caused by fire damage, here in this action made by the Plaintiff. Contrary to the claims made by both Union Mutual and Roundhill, it is unclear in the Underwriting Guidelines what is meant by "open flame cooking" or SRO and whether a premise having either of the two would have resulted in denial of insurance coverage. Furthermore, the Feldman Court ruled that it may not merely accept conclusory, self-serving affidavits from the insurer's representatives to meet the insurer's burden. Feldman v. Friedman, 241 A.D.2d 433, 434 (1997). Therefore, Union Mutual would need to provide clear evidence in its Underwriting Guidelines to indicated that 463 Saddle Up's Policies would have been denied for the Court to find material misrepresentation as a matter of law.

Defendant has submitted documents in support of the motion that have created a "cloud" over the credibility issues of the defendant. Our Highest Court rejects the insurer's literal reading in Universal Am. Corp. and ruled in favor of common speech and consistency with the reasonable expectations of the average insured. Universal Am. Corp. v. Nat'l Union Fire Ins. Co of Pittsburgh, Pa., 25 N.Y.3d 675, 680 (2015); *see also* Belt Painting Corp. v. TIG Ins. Co., 100, N.Y.2d 337, 383 (2003). It follows that the burden is on the insurer to state in a clear and unmistakable language and that ambiguity exists if the agreement on its face is reasonably susceptible

of more than one interpretation. Universal American Corp., 25 N.Y.3d at 680. It is well settled that on a motion for summary judgment the court may not weigh the credibility of witnesses. *See*, Glick & Dolleck v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968); Perez v. Bronx Park South Associates, 285 A.D.2d 402 (1st Dept. 2001). The Court in the case of Quinn v. Krumland, 179 A.D.2d 448 (1st Dept. 1992) stated: "The function of a court on a motion for summary judgment is not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact."

Therefore, based upon the aforementioned the defendant's motion is denied in its entirety, with leave to renew upon completion of all discovery.

Accordingly, it is

ORDERED AND ADJUDGED, that the defendant, UNION MUTUAL INSURANCE COMPANY, motion seeking summary judgment is denied in its entirety, with leave to renew upon completion of all discovery.

ORDERED AND ADJUDGED that the defendant, UNION MUTUAL INSURANCE COMPANY, shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days from the day of entry.

This constitutes the decision and order of the Court.

6/11/21
DATE

HON. WILMA GUZMAN
J.S.C.