

**Refolio, LLC v Certain Underwriters of Lloyd's of
London**

2021 NY Slip Op 32588(U)

December 6, 2021

Supreme Court, Kings County

Docket Number: Index No. 500902/2020

Judge: Peter P. Sweeney

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

Index No.: 500902/2020
Motion Date: 7-12-21
Mot. Seq. No.: 3, 4

-----X
REFOLIO, LLC and 9M4N HOLDINGS,

Plaintiffs,

-against-

DECISION/ORDER

CERTAIN UNDERWRITERS OF LLOYD'S OF
LONDON THOSE SPECIFIC PRESCRIBES/
MEMBERS OF POLICY NUMBER L2H8752018/1384

Defendants.

-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 18-53, the motion is decided as follows:

The plaintiffs, REFOLIO, LLC and 9M4N HOLDINGS, commenced this action seeking recovery of the proceeds of a policy of insurance issued subscribed to by defendants, CERTAIN UNDERWRITERS OF LLOYD'S OF LONDON THOSE SPECIFIC PRESCRIBES/ MEMBERS OF POLICY NUMBER L2H8752018/1384, that provided coverage for damage to property in the amount of \$700,000 and for Loss of Rental Income in the amount of \$80,000. The plaintiffs claim that they are entitled to the coverage because a building owned by REFOLIO, LLC located at 94 Monroe Street, Brooklyn, New York was damages as a result of a fire that occurred on February 20, 2019. The defendants now move for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' complaint, with prejudice, on the grounds that the plaintiffs failed to comply with the provisions of the policy which required plaintiffs to appear for an examination under oath and to provide relevant information.

The policy of insurance at issue, which was effective on the date of the fire, contained the following conditions:

(34) NOTICE OF LOSS, DUTIES AND RESPONSIBILITIES

The Assured shall immediately report in writing, to the Underwriters, a description of every claimed loss or damage which occurs and may become a claim under this insurance immediately after it becomes known to the Assured. You may make a claim for loss or damage covered under this policy/certificate if you notify

Underwriters, but in no case, later than 120 days following the date of loss or damage.

Further, the Assured must immediately:

(1) notify the police in case of loss by theft or vandalism, (2) protect the property from further damage or loss, (3) make reasonable and necessary repairs to protect from further damage or loss, (4) keep an accurate record or repair expenses necessary to protect the property from further damage or loss, (5) make a list of all damaged or destroyed property showing in detail cost quantities, costs, actual cash value, amount of loss claimed and any other information Underwriters may require, (6) attach all bills, receipts and related documents that substantiate the figures in the list, (7) exhibit the damaged property as often as Underwriters may require, (8) **submit to an examination under oath**, and (9) do everything possible to preserve any rights to recover loss from others. If the Assured should do anything to impair the rights of recovery by Underwriters, the loss will not be covered.

Underwriters will not reimburse for the costs of any repairs or reconstruction unless records and receipts are provided.

(41) ASSISTANCE AND COOPERATION OF THE ASSURED

The Assured shall cooperate with the Underwriters, and upon the Underwriter's request shall attend hearings and trials and shall assist in affecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conducts of suits.

In support of the motion, the defendants submitted admissible proof demonstrating that following: On or about February 21, 2019, plaintiffs filed a notice of claim under the policy. By letter dated April 9, 2019, defendants requested that Plaintiffs appear for an Examination Under Oath ("EUO") on April 30, 2019 and provide certain documents one week prior to the EUO in accordance with their obligations under the policy. The defendants submitted admissible proof that plaintiffs did not contact defendant's counsel upon receipt of the April 9, 2019 letter and did not provide the requested documents prior to the scheduled date of the EUO.

On April 29, 2019, defendant's counsel contacted plaintiffs to inquire if they would be appearing for April 30, 2019 EUO. Plaintiffs advised that they had retained counsel and their counsel had requested that the EUO be adjourned to allow him time to familiarize himself with

this matter and to gather the documents requested in the EUO demand letter. Plaintiffs and defendants agreed to adjourn the EUO to June 6, 2019.

On June 5, 2019, having not heard from plaintiffs' counsel and not having received the requested documents, defendants' counsel contacted plaintiffs' counsel to inquire if plaintiffs would be appearing for the June 6, 2019 EUO. Plaintiffs' counsel again requested to adjourn the EUO because Plaintiffs had not yet provided him with the requested documents. The parties agreed to adjourn the EUO to June 21, 2019.

As of June 20, 2019, defendants had not heard from plaintiffs' counsel and had not received the requested documents. Defendants' counsel once again contacted plaintiffs' counsel to inquire if the plaintiffs would be appearing for the June 21, 2019 EUO. An employee of Plaintiffs' counsel advised that he was sick and unable to appear for the EUO the following day and requested another adjournment. Although the employee was unable to agree on a new date for the EUO, she stated that she would get back to him about a new date after she spoke to plaintiffs' counsel.

On July 3, 2019, having not heard from plaintiffs' counsel or his employee, defendants' counsel sent Plaintiffs' counsel an email advising that he was rescheduling the EUO for August 2, 2019. The email also requested that Plaintiffs' counsel contact him if that date was not workable. Plaintiffs' counsel did not respond to the July 3, 2019 email but during a subsequent telephone call on July 19, 2019, he requested yet another adjournment. Defendants again agreed to adjourn the EUO and the parties agreed to that the EUO would go forward on August 22, 2019, and that all the documents requested in the EUO demand letter would be provided by August 2, 2019.

On August 1, 2019, defendant's counsel wrote to plaintiffs' counsel to remind him that the requested documents were due the following day and that the EUO was scheduled for August 22, 2019. As of August 2, 2019, plaintiffs had still not produced any documents. On August 21, 2019, defendants' counsel attempted to contact plaintiffs' counsel to inquire if plaintiffs would be appearing for the August 22, 2019 EUO at Defendant's counsel's office. Plaintiffs' counsel did not take or return his call. In fact, defendants' counsel never received any communication from plaintiffs' counsel or anyone else on behalf of the plaintiffs requesting to adjourn the

August 22, 2019 EUO or to otherwise advise that the plaintiffs would not be appearing on the scheduled date. Plaintiffs failed to appear for the August 22, 2019 EUO. Further, as of that date, the defendants' counsel never received any of the documents that had been requested in the letter of the April 9, 2019.

On or about September 9, 2019, Abrams, Gorelick, Friedman & Jacobson, P.C., sent a letter to the plaintiffs on behalf of the defendants denying any obligation to provide coverage for the February 20, 2019 fire loss due to their failure to appear for an EUO and failure to provide the requested documents and otherwise cooperate with defendant's investigation of the claim. Plaintiffs subsequently commenced this action.

In opposition, plaintiff submitted the affidavit of Mr. Timlichman, plaintiffs' prior counsel, who stated "[o]n August 21, 2019 a staff member from [his] office spoke to Mr. Binsky [the attorney who was handling the EUO and investigation for the defendants] who mutually agreed to adjourn the August 22, 2019 EUO because we were still waiting for so many documents and reports. Mr. Timlichman further stated that "the agreement was to adjourn to September." Mr. Timlichman failed to identify the staff member who purportedly requested the adjournment and did not annex to his affidavit any contemporaneous documentation of the alleged agreement to adjourn the EUO.

"The failure to comply with the provision of an insurance policy requiring the insured to submit to an examination under oath and provide other relevant information is a material breach of the policy, precluding recovery of the policy proceeds (*see, Pizzirusso v. Allstate Ins. Co.*, 143 A.D.2d 340, 532 N.Y.S.2d 309; 2423 *Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Assn.*, 142 A.D.2d 124, 534 N.Y.S.2d 999; *Bulzomi v. New York Cent. Mut. Fire Ins. Co.*, 92 A.D.2d 878, 459 N.Y.S.2d 861; *Interboro Ins. Co. v. Clennon*, 113 A.D.3d 596, 597, 979 N.Y.S.2d 83, *Argento v. Aetna Cas. & Sur. Co.*, 184 A.D.2d 487, 487–488, 584 N.Y.S.2d 607). Here, the defendants established their prima facie entitlement summary judgment by submitting admissible proof that before defendants disclaimed coverage, the plaintiffs were given multiple opportunities to appear for an EUO and to produce the requested documents that were in their possession and control and failed to do. While plaintiffs may have not been in possession of all the documents that the defendants requested, the record makes clear

that they were in possession of some of the documents and still failed to produce them. In opposition, the plaintiffs failed to raise a triable issue of fact.

The only evidence submitted by the plaintiffs to support their contention that defendants agreed to adjourn the EUO scheduled for August 22, 2019 to sometime in September 2019 is the hearsay statement of Mr. Timlichman, who stated that some unidentified staff member contracted Mr. Binsky prior to August 22, 2019 and obtained his consent to adjourn the EUO. Plaintiffs' opposition fell short of the evidentiary showing needed to defeat defendants' motion for summary judgment since the existence of a factual issue may not be established by the hearsay information of one who had no personal knowledge of the facts (*see, Eddy v. Tops Friendly Markets*, 59 N.Y.2d 692, 463 N.Y.S.2d 437, 450 N.E.2d 243; *Siegel v. Terrusa*, 222 A.D.2d 428, 428, 635 N.Y.S.2d 52, 53).)

The court has considered plaintiffs' remaining arguments in opposition to the motion and find them to be unavailing.

Accordingly, it is hereby

ORDRED that defendants' motion to dismiss plaintiffs' complaint on the grounds that the plaintiffs failed to appear for an EUO and provide a response to defendants' document request, as required by policy conditions, is **GRANTED**.

This constitutes the decision and order of the Court.

Dated: December 6, 2021

PETER P. SWEENEY, J.S.C.

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