Union Mut. Fire Ins. Co. v 72nd Forest Hills Assn.
2018 NY Slip Op 31265(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 654948/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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UNION MUTUAL FIRE INSURANCE COMPANY,

Plaintiff

Index No.654948/2016

v

DECISION, ORDER and JUDGMENT

72ND FOREST HILLS ASSOCIATION,

Defendant.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff, Union Mutual Fire Insurance Company, commenced this action for a judgment declaring that the commercial insurance policy that it issued to the defendant, 72nd Forest Hills Association, is void ab initio. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint, contending that the defendant's application for insurance contained a material misrepresentation and that its return of the defendant's policy premium constituted an accord and satisfaction. The defendant opposes the motion. For the reasons set forth below, the motion is granted.

II. BACKGROUND

On July 30, 2014, the defendant, acting through Ramesh Sarva, submitted an on-line application for a commercial

insurance policy referable to a building that it owned at 109-19 72nd Road in Queens County. Sarva stated in the application that the building comprised three apartment units and a commercial unit. He certified that his statements were true, and acknowledged that "willful concealment or misrepresentation of a material fact or circumstance shall be grounds to rescind the insurance policy." The plaintiff then issued the defendant commercial general liability policy 314PK-24272-01 for the period July 30, 2014, through July 30, 2015. The policy included coverage for bodily injury up to $1 million per occurrence.

On May 20, 2015, a tenant at the building, Christopher Strombaugh, allegedly fell on interior stairs and sustained injuries. He made a claim against the defendant, which sought coverage under the policy that the plaintiff had issued to it. The plaintiff disclaimed coverage, and thereafter commenced this action.

In support of its motion, the plaintiff submits, among other things, the affidavit of James Lambert, the president and chief underwriter for non-party Roundhill Express LLC (Roundhill). As Lambert explained, Roundhill underwrites commercial general liability insurance policies issued by the plaintiff as part of the plaintiff's New York Landlord/Tenant Property and General Liability Package Program. The underwriting guidelines for that program, which were submitted with his affidavit, identified

student housing and "[r]ental on a daily or weekly basis" as unacceptable risks which were not eligible for coverage. Lambert also described the insurance application and approval process. According to Lambert, after an applicant submits an on-line application, a computer program assigns each property a classification code from a system developed by Insurance Services Office, Inc. (ISO), which represents the classification of the risk, or type of property, to be insured. Lambert stated that the computer program automatically calculates premiums based on the ISO Classification code and other factors. As Lambert described it, based on the defendant's statements on its insurance application, the computer program designated the subject property as a three-family dwelling under ISO Classification code 63012. Lambert submitted a copy of the ratings worksheet for the defendant's policy, and stated that Roundhill has no authority to alter the rate generated by the program.

Lambert asserted that his duties also included claims management. Lambert averred that, during an investigation into Strombaugh's claim, Roundhill learned that the configuration of defendant's building differed from the representations made in the insurance application, based on a signed, witnessed, but unsworn written statement from the defendant's general counsel, Jason Harrington, dated July 22, 2015. In his statement,

Harrington admitted that the defendant owned the building, and he identified Sarva as the defendant's general partner. Harrington further stated that the building consisted of three floors and a basement, that there were four rooms for rent where tenants shared a common kitchen and bathroom, that Strombaugh rented a room on the third floor, and that a commercial tenant occupied the ground floor. Lambert likened such arrangements to student housing or boarding or rooming houses, and asserted that Roundhill's contract with the plaintiff prohibited it from writing insurance policies for those types of properties. Lambert averred that the plaintiff would not have issued an insurance policy to the defendant if it had been aware of those facts, as the underwriting guidelines specifically excluded student housing and daily and weekly rentals from coverage.

The plaintiff's submissions further show that the plaintiff informed the defendant by letter dated August 27, 2015 that it reserved the right to determine that a material misrepresentation had been made with regard the composition of the building, and stated that it would continue to investigate possibly rescinding the policy.

At Harrington's 2016 deposition, he essentially reiterated the particulars set forth in his written statement from 2015. He testified that the second and third floors of the defendant's building consisted of a single apartment, in which four tenants

rented separate rooms or "residential quarters." Harrington could not recall if the tenants collectively paid a monthly sum, but asserted that each room was rented individually, that the tenants shared a common bathroom and kitchen, and that the defendant hired someone to clean the common areas.

The plaintiff also submitted a letter dated May 3, 2016, pursuant to which it issued a supplemental disclaimer of coverage. It rescinded the policy on June 6, 2016, and returned the defendant's policy premium. The plaintiff has provided a copy of the cancelled check, showing that the defendant accepted the return of the premium.

The plaintiff argues that the defendant's description on its insurance application of the property as three apartment units and a commercial unit constitutes a material misrepresentation that warrants rescission of the policy. Harrington testified that the property comprised a commercial unit and a single apartment with four separate rooms for rent. In addition, the plaintiff contends that its refund of the policy premium, and the defendant's acceptance thereof, constitute an accord and satisfaction.

The defendant argues the application is ambiguous with regard to whether the term "Hab Unit," referable to a habitable unit, on the on-line application form annexed to its opposition refers to an apartment or single room available for rent. It

contends that any ambiguity must be construed against the plaintiff, as the insurer. The defendant also argues that Lambert lacks direct knowledge of the condition at the premises, and that the plaintiff's reliance on Harrington's statements is also misplaced because Harrington's unsworn statement shows that only two of the rooms were rented at the time of Strombaugh's incident. The defendant thus asserts that, as such, the building falls within the three-unit apartment dwelling classification. Finally, the defendant argues that the plaintiff has not shown the requisite intent for an accord and satisfaction.

III. DISCUSSION

A. Summary Judgment Standard

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) (citations omitted). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the 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. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012) (internal quotation

marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to raise material issues of fact. See id. The movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See id.

B. Misrepresentations Under The Insurance Law

"A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false." Insurance Law § 3105(a). A misrepresentation is considered "material" if an insurer would not have issued the policy had it known of the misrepresented facts. Insurance Law § 3105(b)(1). The materiality of a misrepresentation is ordinarily a question of fact for a jury, but if there is clear and uncontradicted evidence concerning materiality, then the question becomes a matter of law for the court. See Process Plants Corp. v Beneficial Natl. Life Ins. Co., 53 AD2d 214 (1st Dept. 1976), affd 42 NY2d 928 (1977).

"Insurance Law § 3105 permits an insurer to rescind a policy where the application contains a material misrepresentation." East 115th St. Realty Corp. v Focus & Struga Bldg. Devs., LLC, 85 AD3d 511, 511 (1st Dept. 2011). Rescission may be based upon an intentional misrepresentation (see Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co., 61 AD3d 412 [1st Dept. 2009]), or an

innocent misrepresentation. See 128 Hester LLC v New York Mar. & Gen. Ins. Co., 126 AD3d 447 (1st Dept. 2015). An insurer need only show that "a misrepresentation substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken." Aguilar v United States Life Ins. Co. in City of N.Y., 162 AD2d 209, 210-211 (1st Dept. 1990), quoting Geer v Union Mut. Life Ins. Co., 273 NY 261 (1937).

The plaintiff has met its burden on this motion by submitting the defendant's application for insurance, Lambert's affidavit, the underwriting guidelines, and the transcript of Harrington's deposition. See Kerrigan v Metropolitan Life Ins. Co., 117 AD3d 562 (1st Dept. 2014); Arch Specialty Ins. Co. v Kam Cheung Constr., Inc., 104 AD3d 599 (1st Dept. 2013). These submissions establish, prima facie, that the defendant made a material misrepresentation as to the nature and classification of its building, and that the plaintiff would not have issued the insurance policy had the defendant disclosed that the building was configured as a four-room single occupancy residence.

The construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance. See NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52 (1st Dept. 2008). The question of whether an ambiguity exists

must be ascertained from the face of an agreement, without regard to extrinsic evidence. See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78 (1st Dept. 2013); Schmidt v Magnetic Head Corp., 97 AD2d 151 (2nd Dept. 1983).

Any ambiguity in the language of an insurance policy must be construed against the insurer and in favor of coverage. See Ace Wire & Cable Co. v Aetna Casualty & Surety Co., 60 NY2d 390 (1983); Marshall v Tower Ins. Co. of N.Y., 44 AD3d 1014 (2nd Dept. 2007). Thus, an answer to an ambiguous question on an insurance application cannot form the basis for a claim of misrepresentation. See Garcia v American Gen. Life Ins. Co. of N.Y., 264 AD2d 808 (2nd Dept. 1999). Here, however, the defendant has not demonstrated that the application question requesting information as to the total number of apartment units was ambiguous. See Dauria v CastlePoint Ins. Co., 104 AD3d 406 (1st Dept. 2013). Moreover, contrary to the defendant's assertion, the plaintiff was entitled to rely on Harrington's sworn testimony that the subject premises consisted of four single rooms and a commercial unit, and Harrington confirmed that the configuration did not change when he later became Roundhill's in-house counsel.

In any event, the defendant did not submit an affidavit from Sarva attesting to his understanding of the questions or asserting that he was misled by unclear language. See Bleecker

St. Health & Beauty Aids, Inc. v Granite State Ins. Co., 38 AD3d 231 (1st Dept. 2007). The quote for the insurance premium and the policy itself reveal unequivocally that Sarva represented on the application that there were three discrete apartment units in the building.

C. Accord and Satisfaction

The plaintiff has also established its entitlement to judgment as a matter of law on the alternative ground that an accord and satisfaction occurred. "[A]n accord and satisfaction will only be found where there is a clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim." TIAA Global Invs., LLC v One Astoria Sq. LLC, 127 AD3d 75, 90 (1st Dept. 2015) (internal quotation marks and citation omitted). The defendant does not deny having accepted and cashed the check tendered to it by plaintiff in full refund of its insurance premium. Unlike the facts in Nadel v Manhattan Life Ins. Co. (211 AD2d 900 [3rd Dept. 1995]), relied upon by the defendant, the letter accompanying the plaintiff's remittance of the check in this action clearly stated that cashing of the check was "an accord and satisfaction, meaning that you do not dispute [plaintiff's] rescission of the policy." Under no view of the facts is it reasonable to conclude that the defendant was unaware of the consequence of cashing the check.

Thus, even if the policy were not deemed to be void ab initio, the policy must be deemed rescinded as of July 12, 2016, which is the date that the defendant cashed the refund check.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment declaring that the commercial general insurance policy issued to defendant is void ab initio is granted; and it is

ADJUDGED and DECLARED that commercial general liability policy 314PK-24272-01 issued by the plaintiff, Union Mutual Fire Insurance Company, to the defendant, 72nd Forest Hills Association, is void ab initio.

This constitutes the Decision, Order, and Judgment of the court.

Dated: June 12, 2018

ENTER: _____
J.S.C.

HON. NANCY M. BANNON