64 Misc.3d 1208(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, Bronx County, New York.

Cosmo CANALE and Antonette Canale, Plaintiffs,
v.
CASTLEPOINT INSURANCE COMPANY,
Tower Group International, Ltd, Tower
Group, Inc., National General Insurance,
XYZ Corp. 1, XYZ Corp. 2, Defendants.

20118/16E
|
Decided May 20, 2019

Opinion

George J. Silver, J.

***1** In this action, defendants CASTLEPOINT INSURANCE COMPANY, TOWER GROUP INTERNATIONAL, LTD., TOWER GROUP, INC., and NATIONAL GENERAL INSURANCE AGENCY, INC. ("defendants") move for summary judgment, pursuant to CPLR § 3212, and an order dismissing the complaint of plaintiffs COSMO CANALE and ANTONETTE CANALE ("plaintiffs") as against them, with prejudice.

BACKGROUND

On July 14, 2005, plaintiffs purchased property located at 4451 Matilda Avenue, in the Bronx (the "premises"). On July 11, 2005, plaintiffs applied for homeowners' insurance on the premises by submitting a standard industry form, commonly referred to as Accord Form 80 Homeowner Application, to defendants through insurance broker, Michael A. Weiss, Northeast Agencies, Inc. The application, by checking off boxes in response to questions, represented, among other things, that the premises was to be used as plaintiffs' primary dwelling, that it was occupied by the owner, and that the property consisted of two families and eleven (11) rooms. Based on the application, defendant CastlePoint Insurance Company ("CastlePoint") issued plaintiffs a Homeowners Policy No. HOS2556976 for a period of one year, which included first-party property and liability coverage (the Policy" or "Policies"). The Policy was renewed for one-year periods during the ensuing years, including terms commencing on July 15, 2012 and July 15, 2013, respectively. On January 10, 2014, a fire occurred at the premises. That same day, plaintiffs contacted CastlePoint to notify them of property damage due to a fire on the second floor of the premises causing smoke damage, water damage, and damage to the front door of the property. The Policy was in full force and effect at that time. However, upon investigation of the claim, Bruce D. Guttenplan, the claims adjustor assigned by defendants, learned that the premises was being used as a Single Room Occupancy ("SRO") residence. He noted numerous tenants moving items out of various rooms within the premises, and was refused access to inspect the rear section of the first floor of the premises. Guttenplan's affidavit also contains photos of the subject premises showing the front doors and interior of numerous SRO units.

By letter dated December 1, 2014, CastlePoint informed plaintiffs that it was disclaiming coverage and voiding the Policy because "of material misrepresentations in the procurement of this coverage." Specifically, the letter indicated that the policy defined "Residence Premises" to mean a one or two family dwelling where the named insured reside in at least one of the family units. CastlePoint advised plaintiff that their investigation revealed that at the time of the loss, the premises was configured as multiple single-room occupancies and that neither of the named insureds resided at the premises on the date of loss. Accordingly, CastlePoint determined that the premises "does not fall within the definition of a 'residence premises' " and is not covered by the Policy. CastlePoint further noted that plaintiffs' failure to provide requested copies of all Environmental Control Board, Administrative Law Judge Decisions corresponding a Notice of Violation testified to by plaintiff COSMO CANALE, is a breach of the Policy conditions and an independent basis for the denial of plaintiffs' claim.

***2** Plaintiffs subsequently commenced this action to recover damages for breach of the Policy in failing to tender the Policy for the fire damage, loss of personal property, and loss of use. Plaintiffs also assert a claim for breach of the Policy based upon CastlePoint's December 3, 2015 disclaimer of coverage or to defend for a personal liability claim based upon a trip and fall at the premises, on April 27, 2013, filed by Lisa Varis. Defendants answered, asserted affirmative defenses, and asserted a counterclaim alleging that the Policy was void *ab initio* because of plaintiffs' material misrepresentations as to the structural configuration of the premises and regarding their occupancy of the premises. Regarding the personal

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

injury claim, CastlePoint also asserts a defense based upon untimely notice of the claim.

ARGUMENT

Defendants move herein for dismissal of the complaint. In support, defendants supply, *inter alia*, the affidavit of Brett Hammond, an Underwriting Manager employed by National General Insurance Company.[1] According to Hammond the instructions applicable to the relevant homeowner application define the term "No. Families" to mean the "[n]umber of separate family units in the dwelling." Hammond avers that had the homeowner application indicated a configuration other than a one or two-family dwelling it would have presented an unacceptable risk for the type of insurance policy that CastlePoint issued to plaintiff, and that non-primary or non-owner occupied dwellings were also an unacceptable risks for the type of insurance policy issued to plaintiff. Hammond contends that such information in the homeowner application was material to CastlePoint's decision to issue the 2012 and 2013 insurance policies. In support of these contentions Hammond annexes to his affidavit a copy the "Tower Groups Companies Homeowners Selection Rules" (the "underwriting guidelines") that governed CastlePoint's decision with respect to the Policies. He contends that the underwriting guidelines would have prohibited the issuance of the Polices if plaintiffs had truthfully informed CastlePoint that the premises was a single room occupancy dwelling that was not owner-occupied. Indeed, Hammond asserts avers that CastlePoint's homeowner's program only issues policies for premises that are owner-occupied, one or two-family dwellings that are an insured's primary residence.

Defendants further supply the affidavit of Bruce Guttenplan of Compass Adjusters, an independent adjustment firm, retained by CastlePoint to inspect the premises. Guttenplan inspected the premises on January 10, 2014, the date of the subject fire. Defendants also hired Gene Pietzak ("Pietzak") of T.J. Russo Consultants, Inc. to investigate the claim. Pietzak interviewed plaintiff ANTONETTE CANALE, her brother Dominick Canale, and two individuals who stated they were renting rooms at the premises, Jeff Hood ("Hood") and Robert Somonski ("Somonski"). Pietzak photographed personal effects found at the premises, from four different individuals. Hood stated that he paid rent to Dominick Canale, that plaintiff Cosmo Canale did not live at the subject premises, and that his only contact was with Dominick Canale. Defendants additional submissions include, *inter alia*, the Fire Department of New York incident report dated January 25, 2014 ("FDNY report"), the transcript of Lisa Varis' ("Varis") deposition, excerpts from plaintiffs' tax returns, NYC Department of Buildings (DOB) records regarding violations issued on the premises, the transcripts from plaintiffs' depositions and the transcript from plaintiff ANTONETTE CANALE's examination under oath dated May 28, 2014.

***3** In opposition to defendants' motion, plaintiffs argue that contrary to the reason for defendants' disclaimer of coverage, both plaintiffs have testified and submit affidavits that they resided in the premises at the time the instant homeowner Policy was issued. Specifically, plaintiffs aver that Plaintiff COSMO CANALE resided in the first floor of the property from July 2005 through 2014 and that plaintiff ANTONETTE CANALE resided on the second floor from July 2005 until 2009. Plaintiffs argues, accordingly, there were no material misrepresentations made to CastlePoint as to the occupancy of the premises during the procurement of the policy. Plaintiffs assert that the parties' testimony and affidavits raise significant issues of fact as to whether the premises was indeed owner-occupied at the time of inception, warranting the denial of summary judgment. Plaintiffs also note that defendants have failed to supply first hand evidence that plaintiffs did not reside at the premises at the time the policy was procured. Plaintiffs, as well as their father Pasquale Canale, aver by affidavits that the layout of the premises remained "basically" unchanged from the time it was purchased up until the time of the fire and there were no material changes made to the layout. Plaintiffs also supply the deposition testimony of Brett Hammond, a history of the premiums paid by plaintiffs to CastlePoint, plaintiff ANTONETTE CANALE's examination under oath, a March 15, 2006 appraisal of the premises for Shoreline Capital, and DOB printouts including violation and complaint histories.

DISCUSSION

The proponent on a motion for summary judgment, made pursuant to CPLR § 3212, must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to eliminate any material issues of fact (*see Giufrida v. Citibank*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegard v. New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). If a *prima facie* showing has been made, the burden then shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez*, 68 NY2d at 324, *supra*). "When deciding a

motion for summary judgment, the court's function is issue finding rather than issue determination (*see Kershaw v. Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Furthermore, the evidence must be viewed "in the light most favorable to the non-moving party" and the non-moving party afforded the benefit of all reasonable inferences that can be drawn from the evidence (*Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]; *see Bravo v. Vargas*, 113 AD3d 579, 582 [2d Dept 2014]).

Here, defendants have demonstrated a *prima facie* entitlement to judgment in their favor through, *inter alia*, their fire investigator's affidavit, the FDNY report, the testimony of Varis and the DOB records illustrating that the premises was not configured and occupied as a one or two-family dwelling as covered by the subject policy and as represented in the application for insurance (*see Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401, 401-402 [1st Dept 2015]; *Dauria v CastlePoint Ins. Co.*, 104 AD3d 406, 407 [1st Dept 2013]). Rather, the overwhelming and undisputed evidence demonstrates that at the time of the claimed loss the premises was configured as a SRO and occupied by no less than ten separate family units. The relevant evidence consists of photographs of the interior of the premises showing eleven (11) room doors outfitted with single cylinder key-operated dead bolts, rooms identified by numbers on the door, an entry doorway to the rear of the first floor containing a key operated deadbolt and a peephole, personal effects such as prescription medicine belonging to Hood, Varis, and Somonski, an April 2014 Monroe College identification card for Bruce Alvarez, and cash receipts dated 8/1/13 and 9/1/13 made out to Somonski. The evidence reveals that the first floor consisted of three to four bedrooms, and the second floor had six sleeping areas and two refrigerators. The FDNY report identified the use of the property as a "429 - Multifamily dwelling" and noted that the building was "illegally divided into single room occupancies." The FDNY report further notes that four occupants were rescued from the second floor. On January 10, 2014, the DOB issued a violation on the premises finding that "upon inspection a total of 11 SROs created within 5 at first floor and 6 at 2nd floor creating a hazard for occupants" and that the residence had been altered from a one or two-family dwelling to a greater than four family. A second DOB violation submitted by defendants is dated November 20, 2008 and alleges that the occupancy was contrary to that allowed by the Certificate of Occupancy or DOB records as the cellar was converted from ordinary use into a class 'A' apartment with full kitchen and bathroom, thereby increasing the building's occupancy.

***4** Varis testified that she resided with her roommate Dave Soto on the second floor of the premises from approximately June 2013 until the date of the fire. Varis further testified that plaintiffs did not live in the premises, but lived down the block, and that on the first of every month Dominick Canale would come to the premises to collect the rent. Varis personally met Dominick Canale. Varis provided a detailed description, and sketch, of how the premises was divided into separate rooms on the first and second floors and identified the tenants residing in each room.

Despite their testimony to the contrary, plaintiffs each listed the premises on their individual tax returns as rental real estate income property from 2005 through 2013.[2] Plaintiffs' claimed on each tax return that neither they nor any family member used the property for personal purposes during the relevant year.

Defendants further establish through the affidavit and testimony of Brett Hammond, and the applicable underwriting guidelines, that the policy issued to plaintiffs provides coverage for only "1 or 2 family primary residence" that was "owner occupied." Moreover, Hammond explains that the guidelines would have prohibited "the issuance of the policy if plaintiff had truthfully informed CastlePoint in the Application, or at any point during the renewal process, that the Premise was a Single Room Occupancy dwelling that was not owner-occupied ... A Single Room Occupancy dwelling is a risk that is simply inappropriate for certain policies of insurance, such as ... the Policies issued to Plaintiffs."

The number of families, for a property, is determined by the actual use of the property, "even if in violation of the certificate of occupancy" (*see Castlepoint Ins. Co.*, 127 AD3d at 401-402, *supra*; *Hermitage Ins. Co. v LaFleur*, 100 AD3d 426, 427 [1st Dept 2012]). Since the premises here consists of multiple dwelling units, greater than two, it does not fit within the Policy's definition of a covered "residence premises" (*see Dauria*, 104 AD3d at 407, *supra*).

In opposition, plaintiffs fail to raise any triable issue of fact as to whether the Policy offered coverage to the subject premises on the date of loss (*see Dauria*, 104 AD3d at 407, *supra*). Setting aside the issue of whether the premises was owner-occupied or plaintiffs' primary residence, plaintiffs offer no evidence to rebut defendants' evidence that the property was

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

occupied as a multiple dwelling of three or more families. Significantly, plaintiffs do not dispute that the property was being operated as an SRO. Plaintiff ANTONETTE CANALE testified at her deposition that she could not remember the "logistics" of the premises such as the layout of the bedrooms or whether the first floor had a kitchen. Moreover, she testified that she had not visited the premises since moving out in 2009. Neither plaintiff offers any explanation for the personal belongings found at the premises immediately after the fire, the identity of the individuals rescued by the FDNY from the second floor, or why a personal property loss claim was submitted for four-bedroom sets on the second floor.

Plaintiff COSMO CANALE testified that he was unable to give a description of the first floor layout other than the location of his bedroom and that the first floor had a kitchen and bathroom, and no living room. Plaintiff COSMO CANALE contended that he had no idea how many bedrooms existed on the second floor as he never went up there prior to purchasing the property and rarely went up there thereafter. In fact, plaintiff COSMO CANALE was unsure whether there was a kitchen on the second floor. Plaintiff COSMO CANALE also testified that, despite allegedly living in the premises up until the date of the fire, he did not know if the second floor was rented out after plaintiff ANTONETTE CANALE moved out in 2009. When asked whether the property was being used as a SRO he testified that "to his knowledge" it was not.

***5** Finally, although plaintiffs offer evidence that the DOB violations issued to the property on January 10, 2014 for the illegal conversion and occupancy of the property as an SRO were resolved and dismissed, the dismissal was based upon the defective conditions being repaired as of March 29, 2016, and not because the allegations were without merit.

Upon the unrebutted evidence that the premises does not fit within the Policy's definition of a covered "residence premises," the insurer CastlePoint is under no duty to cover the claimed losses and defendants are entitled to summary judgment dismissing the complaint (*see Almonte v CastlePoint Ins. Co.*, 140 AD3d 658, 659 [1st Dept 2016]; *Castlepoint Ins. Co.*, 127 AD3d at 401-402, *supra*; *Lema v Tower Ins. Co. of NY*, 119 AD3d 657, 658 [2d Dept 2014]; *Dauria*, 104 AD3d at 407, *supra*). Accordingly, it is hereby

ORDERED, that defendants' motion is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, and dismissing this case in its entirety.

This constitutes the decision and order of the court.

All Citations

Slip Copy, 64 Misc.3d 1208(A), 116 N.Y.S.3d 861 (Table), 2019 WL 2707668, 2019 N.Y. Slip Op. 51073(U)

Footnotes

1 Hammond contends that at the time the Policies were issued, CastlePoint was a subsidiary of Tower Group Companies, a predecessor by merger/acquisition to National General Insurance Company.

2 COSMO CANALE's 2005 income tax return is not provided.

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.