SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

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ROLAND PACQUETTE and OLIVE PACQUETTE,

Plaintiff(s), Decision and Order

-against- Index No. 500153/19

TOWER INSURANCE COMPANY,

Defendant(s).

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The defendant's motions to dismiss the complaint and amended complaint are granted.

In this case the plaintiffs brought suit against the defendant based upon the defendant's denial of coverage for damage that occurred to the plaintiffs' premises as a result of a fire that occurred on February 1, 1015. On March 10, 2015, the defendant sent a letter to the plaintiffs reserving its right to disclaim coverage after it conducted an investigation. Thereafter, by letter dated August 7, 2015, the defendant stated, in sum and substance, that their investigation revealed that the plaintiffs' were utilizing their home as a three family dwelling when the policy only covered one or two family dwellings, and that, as such, the defendant was denying coverage for the damage caused by the fire. The letter also informed the plaintiffs that their insurance policy limited the amount of time in which they could commence a lawsuit against the defendant. In January of 2019, almost four years after the fire and more than three years after the defendant denied coverage, the plaintiff commenced the within action.

The defendant made a pre-answer motion to dismiss the plaintiffs' complaint on the same grounds set forth in its letter denying coverage as well as upon its contention that the plaintiffs' lawsuit was not timely commenced. While the motion was pending, the plaintiffs amended their

complaint and thereafter the defendant filed another motion to dismiss the amended complaint. Since the amendment to the complaint was timely, the Court will consider the motions together as for dismissal of the amended complaint.

In their opposition to the motion, the plaintiffs' argue that the denial was untimely, relying upon Insurance Law § 3420 (d). However, that statute is inapplicable to this case. "By its terms, the statute applies only in cases involving death or bodily injury claims arising out of a New York accident and brought under a New York liability policy. Where, as here, the underlying claim does not arise out of an accident involving bodily injury or death, the provisions in section 3420 (d) (2) are inapplicable." KeySpan Gas E. Corp. v Munich Reins. Am., Inc., 23 N.Y.3d 583 (2014). As such, common law applies and an insurer's delay in giving notice of disclaimer of coverage, even if unreasonable, will not prevent the insurer from disclaiming unless the insured has suffered prejudice from the delay. Ira Stier, DDS, P.C. v. Merchants Ins. Group, 127 A.D.3d 922 (2nd Dept., 2015); O'Dowd v. American Sur. Co. of N.Y., 3 N.Y.2d 347 (1957).

In this case, the Court finds unpersuasive the plaintiffs' contention that they were prejudiced because they never received the defendant's denial of coverage letter and that, as a result, they were "lulled into believing the claim would be paid" while at the same time claiming that they were prejudiced because the defendant's denial letter stated that the time period within which to bring a lawsuit was two years, but then, erroneously, pointed to a section of the policy that stated that the time period was one year, although it had been superseded by another section which correctly reflected that the time period was, indeed, two years.

The plaintiffs' contention that they were prejudiced by confusing language in the defendant's denial letter falls on its face as a result of the plaintiffs' own argument that they never

received the letter and only saw it for the first time when the defendant made the within motion. For the plaintiffs to claim that they were confused about how long they had to bring their lawsuit because of language in a letter that they had never seen defies logic. Moreover, a review of the language in the letter reveals that any confusion regarding how long the plaintiffs had to commence a lawsuit arguably benefitted the plaintiffs because the time period was actually the longer of the two periods mentioned and, per the contract, is two years, not one. *See* NYSCEF Doc. No. 8, page 50. Even if the plaintiffs were confused about whether they had one year or two years to commence an action, it does not explain why they waited almost four years to do so.

As the record reveals no such prejudice, the Court finds that the disclaimer was effective, and additionally finds that the plaintiffs' commenced this action beyond the period in which to they were permitted to do so per the terms of the subject insurance policy. In light of the foregoing the court need not address the issue of whether the basis for the original denial was valid. Based upon the foregoing, the defendant's motions are granted and the plaintiffs' amended complaint is dismissed.

This constitutes the decision and order of the court.

E N T E R:

Dated: May 12, 2020 J. S. C.