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COURT OF APPEALS

STATE OF NEW YORK

DEAN,

Respondent,

-against-

No. 173

TOWER INSURANCE COMPANY OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
September 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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1 CHIEF JUDGE LIPPMAN: Dean v. Tower
2 Insurance.

3 Counselor, do you want any rebuttal time?

4 MR. GERSHWEIR: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

7 MR. GERSHWEIR: Good afternoon. May it
8 please the Court. This appeal involves what I would
9 submit is a very simple issue of insurance policy
10 interpretation. Tow - - -

11 JUDGE CIPARICK: So you say that the
12 Appellate Division completely ignored the plain
13 meaning of the word "resides"?

14 MR. GERSHWEIR: Right. It simply said that
15 since the policy doesn't define the word "reside",
16 that it's ambiguous. Now, it goes without saying
17 that there are many terms in the insurance policy
18 that aren't defined. That doesn't, by necessity,
19 make them ambiguous.

20 JUDGE PIGOTT: No, but our famous 165 lines
21 which you have to have at least - - - you know, it
22 has to be at least that favorable to the homeowner,
23 talks about "vacant and unoccupied". And in your - -
24 - if I remember your disclaimer letter right, you
25 said that it was unoccupied, and therefore, not a

1 premises, which doesn't necessarily follow.

2 And there are a number of cases, in my
3 recollection, where you can, as it happened in this
4 case, make it your residence, but you're not - - -
5 you've got to fix it up. So their argument put - - -
6 I think addressing directly your letter, but is
7 saying it was occupied. And you don't dispute that,
8 that it was occupied, right?

9 MR. GERSHWEIR: Well, no. We dispute that
10 it was occupied at the time of the loss. What we say
11 is that it's - - - that that is not the material
12 question.

13 CHIEF JUDGE LIPPMAN: Is "occupied" a word
14 that matters, or is it residence/premises?

15 MR. GERSHWEIR: It's reside. That is the
16 term that matters.

17 CHIEF JUDGE LIPPMAN: Now - - -

18 JUDGE GRAFFEO: If we agree - - - go ahead.

19 CHIEF JUDGE LIPPMAN: Go ahead. I'm sorry,
20 go ahead, Judge Graffeo?

21 JUDGE GRAFFEO: If we agree with you, does
22 this mean - - - a lot of people go to closings and
23 they've got their - - - you know, they've paid for
24 their insurance, particularly their fire insurance,
25 before they move in the house. Say they want to get

1 some painting done, or they're still packing up where
2 they were, or they want their kids to finish school,
3 whatever. This means, before they physically move
4 into the house, if there's an electrical short and
5 there's a fire, you folks are going to disclaim?

6 MR. GERSHWEIR: No, Your Honor. I address
7 that in the brief. I think based - - -

8 JUDGE GRAFFEO: But it's not their
9 residence yet. They haven't moved in.

10 MR. GERSHWEIR: I understand what you're
11 saying. I can tell you, as a matter of practice,
12 I've been working for this insurance company for
13 seventeen years, they've never taken that position.
14 And if you look at any published decisions, you'll
15 never find a situation - - -

16 JUDGE GRAFFEO: Well, I mean, maybe they've
17 done that as a matter of policy. But how would what
18 you're asking us to do in this case not result in
19 that by other companies, if we say, if you haven't
20 moved in?

21 MR. GERSHWEIR: Right. Because the court
22 has certain tools at its disposal to prevent that
23 type of decision. You can call it public policy; you
24 can call it reasonable expectations.

25 CHIEF JUDGE LIPPMAN: But where do you draw

1 the line? Where is it that if you don't - - - you
2 buy something and you don't move in, for what, a
3 week, two weeks, or in this case they discovered they
4 have termites and they - - - and it's going to be a
5 long period before they move in, while they do some
6 work. Where do you draw the line?

7 MR. GERSHWEIR: That's a good question,
8 Your Honor. I think my first answer to that question
9 is you don't draw it where it's more than a year past
10 the time that the policy is issued - - -

11 JUDGE CIPARICK: Do you sell insurance for
12 that purpose?

13 MR. GERSHWEIR: Excuse me?

14 JUDGE CIPARICK: Is there insurance that's
15 sold for that particular purpose - - -

16 MR. GERSHWEIR: Absolutely, Your Honor.

17 JUDGE CIPARICK: - - - to cover that
18 eventuality?

19 MR. GERSHWEIR: There's builder's risk
20 insurance, which is - - -

21 JUDGE READ: Is that generally more
22 expensive, or no?

23 MR. GERSHWEIR: I believe it is. I believe
24 - - -

25 CHIEF JUDGE LIPPMAN: What's it called?

1 MR. GERSHWEIR: - - - and for the reason -
2 - - builder's risk.

3 JUDGE GRAFFEO: Builder's risk.

4 CHIEF JUDGE LIPPMAN: Builder's risk.
5 Right.

6 JUDGE SMITH: So if you're an insurance
7 broker and a customer comes in and says I want
8 insurance, but I'm not moving in for three weeks, the
9 broker, if he's really doing his job, should say
10 well, in that three weeks, you're not going to be
11 covered unless you buy a different kind of coverage
12 for a higher premium?

13 MR. GERSHWEIR: I think the safest way to
14 deal with that situation is, if you look at the
15 insurance application, which is in the record, it has
16 - - - it has a question about do you own or occupy
17 any other residence. So obviously, if you haven't
18 yet moved into the one that you're seeking to insure,
19 the answer to that question is "yes".

20 JUDGE CIPARICK: So you said there was
21 misrepresentation here, that they claimed that it was
22 their primary residence?

23 MR. GERSHWEIR: Correct. And clearly at
24 the time that they applied for the policy - - -

25 JUDGE PIGOTT: I've got to take - - -

1 JUDGE CIPARICK: It wasn't a situation that
2 they were in the house, and they bought another
3 house, and while they were repairing it - - - well,
4 this is when the fire occurred, correct?

5 MR. GERSHWEIR: Correct. Again, more than
6 one year after they had - - -

7 JUDGE CIPARICK: There's a cutoff?

8 CHIEF JUDGE LIPPMAN: Is it intention? Is
9 that what it is? Let's say if they buy it, it's
10 their primary residence. They're living somewhere
11 else. They intend it should be their residence. And
12 they're cleaning up some matters, or whatever, they
13 don't get in. Is that different than this case,
14 where at the beginning, before they discovered the
15 termites, was that all right, if they weren't in yet?

16 MR. GERSHWEIR: I would say that there is a
17 difference. When - - - once they determined that
18 this was going to be a - - -

19 CHIEF JUDGE LIPPMAN: A long total.

20 MR. GERSHWEIR: - - - long renovation - - -

21 CHIEF JUDGE LIPPMAN: What should they have
22 done - - - what should they have done, then? Then
23 called you and said - - -

24 MR. GERSHWEIR: They could have called - - -

25 -

1 CHIEF JUDGE LIPPMAN: - - - gee ,this is
2 going to be a long-term thing?

3 MR. GERSHWEIR: Absolutely. They could
4 have called their - - - I think the normal process
5 would be they would contact their insurance broker.
6 They would say, look, you know - - - whether they've
7 read the policy or not - - - if they read the policy,
8 which all insureds are presumed to do, they would see
9 that there's a residence requirement. The insurance
10 application asks whether they occupy the premises; it
11 asks whether there's constructions going - - -

12 CHIEF JUDGE LIPPMAN: But if they just - -
13 - but it would have been okay if they just hadn't
14 moved in for three weeks?

15 MR. GERSHWEIR: I would say - - - again,
16 based on my experience, the insurance company would
17 not take a position - - -

18 JUDGE SMITH: As a practical matter - - - I
19 mean, you say as a practical matter it would have
20 been okay. But in fact, they would not have been
21 covered, would they?

22 MR. GERSHWEIR: Well - - -

23 JUDGE SMITH: For that three-week interim.

24 MR. GERSHWEIR: - - - again, if - - - in my
25 ex - - -

1 JUDGE SMITH: If some insurance company
2 were nasty enough to insist on the letter of the
3 policy, then they wouldn't - - -

4 MR. GERSHWEIR: They could take that
5 position, but at some risk; at the risk - - -

6 JUDGE PIGOTT: Let me take you back to
7 3404(e), because it's mandatory. I mean, isn't - - -
8 you agree with that, right, the 165 lines as set
9 forth in 3404?

10 MR. GERSHWEIR: They are deemed to be part
11 of any policy that insures from fire.

12 JUDGE PIGOTT: Right. And this says,
13 "Conditions suspending or restricting insurance.
14 Unless otherwise provided in writing added hereto,
15 this company shall not be liable for loss occurring
16 while the described building, whether intended for
17 occupancy by owner or tenant, is vacant or unoccupied
18 beyond a period of sixty consecutive days."

19 MR. GERSHWEIR: Right.

20 JUDGE PIGOTT: That's not in your policy
21 that I saw.

22 MR. GERSHWEIR: That precise provision is
23 not in the policy.

24 JUDGE PIGOTT: Right.

25 MR. GERSHWEIR: And it should be - - -

1 JUDGE PIGOTT: It could be - - - and it's
2 deemed in, right?

3 MR. GERSHWEIR: For purposes of fire loss,
4 it would be - - -

5 JUDGE PIGOTT: And it's deemed in there?

6 MR. GERSHWEIR: - - - deemed part of the
7 policy.

8 JUDGE PIGOTT: And I don't see where you
9 disclaimed on that grounds. You didn't say this was
10 unoccupied for sixty days, because I don't think it
11 was. I think they were over there working and doing
12 whatever they were doing.

13 MR. GERSHWEIR: You're right, Your Honor.
14 That was not the grounds for - - -

15 JUDGE SMITH: They - - -

16 MR. GERSHWEIR: That was not the grounds
17 for disclaiming. It was - - -

18 JUDGE CIPARICK: So how do you define
19 occupy? Actually sleeping there at night? I mean,
20 just having workmen in the house, and they're walking
21 around and supervising the workmen, that's not
22 occupying?

23 MR. GERSHWEIR: I wouldn't say that - - -
24 well, I wouldn't say that's occupying. But again,
25 it's not really the issue, because the issue here is

1 working - - -

2 MR. GERSHWEIR: I don't think that that
3 would qualify as - - -

4 CHIEF JUDGE LIPPMAN: Yes, that's what I'm
5 saying. If he's working on the house, and let's say
6 - - - because he's working late, and he said - - -
7 let's say, two nights a week, three nights a week, he
8 slept there, even though he spent more time in the
9 other residence. No good?

10 MR. GERSHWEIR: No good. You could have a
11 cont - - - in this particular case, it so happened
12 that the insured was a contractor - - -

13 JUDGE JONES: Why isn't this a question - -
14 -

15 MR. GERSHWEIR: - - - but if you have
16 another contractor in there, let's say he's working
17 late, stays over. That doesn't make it his
18 residence.

19 JUDGE JONES: Why isn't this a question of
20 fact for a jury?

21 MR. GERSHWEIR: Because the fact - - - the
22 undisputed - - - there's no dispute that they never
23 moved in. For more than a year after they applied
24 for the policy, they never moved in. There is no
25 definition of reside - - -

1 CHIEF JUDGE LIPPMAN: So your argument - -
2 - your argument - - -

3 MR. GERSHWEIR: - - - that would encompass
4 that situation.

5 CHIEF JUDGE LIPPMAN: - - - is that the
6 language is clear, they never moved in, end of story,
7 even though you're saying in a practical sense, the
8 insurance company would be flexible, but not in such
9 an extreme case as this?

10 MR. GERSHWEIR: Correct. And the court
11 would have levers to use in an extreme case like
12 that, too.

13 CHIEF JUDGE LIPPMAN: And if they had moved
14 in, you agree that it's also a different situation if
15 you moved in, you're residing there, and then you
16 move out for a relatively temporary period, three
17 four weeks, for some work to get done, you're still
18 residing there?

19 MR. GERSHWEIR: Absolutely.

20 CHIEF JUDGE LIPPMAN: Okay. Let's hear
21 from your adversary.

22 MR. MEADE: Good afternoon, Your Honor.

23 CHIEF JUDGE LIPPMAN: Good afternoon.

24 Counsel, what could be clearer: "a residence"?

25 MR. MEADE: Judge, it wasn't clear to the

1 insurance company.

2 CHIEF JUDGE LIPPMAN: What does "reside"
3 mean?

4 MR. MEADE: Tower, in the real world said -
5 - - a letter, Mr. Tippett, a vice president said that
6 you were not occupying the premises therefore you did
7 not reside there.

8 CHIEF JUDGE LIPPMAN: He said - - - the key
9 word is, yes, "reside".

10 MR. MEADE: He said, no, because you aren't
11 occupying. Their affirmative - - -

12 JUDGE SMITH: Well, I mean, you might
13 concede that occupant - - - the word in the policy is
14 "reside". Can you, with a straight face, say that
15 your clients were residing in this property?

16 MR. MEADE: Judge, they were occupying the
17 premises for - - -

18 JUDGE SMITH: Counselor, try it. Try it.

19 MR. MEADE: - - - one year.

20 JUDGE SMITH: Can you say it?

21 MR. MEADE: But there's no - - - there's
22 nothing in this policy that says - - -

23 CHIEF JUDGE LIPPMAN: Counselor, he's
24 looking for a yes or no, I think.

25 JUDGE SMITH: Actually, I'm looking to see

1 if you can do it. Can you say it with a straight
2 face?

3 MR. MEADE: Yes. Yes, I can.

4 JUDGE SMITH: Go ahead.

5 MR. MEADE: Within the meaning of this
6 policy - - -

7 JUDGE SMITH: Go ahead.

8 MR. MEADE: - - - okay. I have to give an
9 answer - - -

10 JUDGE SMITH: You haven't said it yet.

11 MR. MEADE: - - - in more than one
12 sentence.

13 JUDGE SMITH: It's a very simple sentence.
14 My clients were residing in that house.

15 MR. MEADE: My clients we residing in that
16 house because the word "reside" to Tower - - - Tower
17 knows what's in 3404 of the insurance law. It says
18 that the premises can't be vacant or unoccupied for
19 sixty days. They tried to get around that provision
20 by saying that if you weren't occupying the premises,
21 you're not really residing - - -

22 JUDGE SMITH: Are you saying - - - are you
23 saying they only ins - - - Tower says that it only
24 insures residential property. Are you saying the
25 insurance law prevents them from doing that? They

1 have to insure property where nobody's living?

2 MR. MEADE: I mean this is - - - Judge,
3 most - - -

4 JUDGE SMITH: How about a yes or no to that
5 one?

6 MR. MEADE: Yes, because most homeowners'
7 policies are purchased before a closing.

8 CHIEF JUDGE LIPPMAN: So does it not matter
9 whether you're actually living there? In other
10 words, if you have another house; you buy this one;
11 you want to insure it as your primary residence; in
12 the end, as long as you call it your primary
13 residence, does it matter that you're actually
14 sleeping somewhere else virtually all the time, as
15 long as you're in there every day? Does it matter?

16 MR. MEADE: I don't think it does, be - - -
17 and - - -

18 CHIEF JUDGE LIPPMAN: If I come in every
19 day - - -

20 MR. MEADE: I'd like to tell you why if I
21 could.

22 CHIEF JUDGE LIPPMAN: Yes. But be let me
23 give you just a further elaboration.

24 MR. MEADE: Yes.

25 CHIEF JUDGE LIPPMAN: If I come in every

1 day and I each lunch in the house, and I hang around
2 there, watch a little TV and then go home and sleep
3 somewhere else, do you reside there?

4 MR. MEADE: If you look at the case decided
5 by Judge Bergen, formerly of the Court of Appeals,
6 where he said five or six days of cleaning and
7 sleeping there, I think without sleeping there, was
8 sufficient to constitute occupancy. This house was
9 occupied for the entire year.

10 CHIEF JUDGE LIPPMAN: And residence?
11 Occupy and reside?

12 MR. MEADE: Occupy in their view. And this
13 is what I had been trying to say unsuccessfully.
14 They equate residence with occupancy.

15 CHIEF JUDGE LIPPMAN: So you're saying - -
16 - right. So you're saying as long as they occupy,
17 but they don't actually live there, it's good enough?

18 MR. MEADE: It's good enough for them,
19 because that's what the insurance law permits - - -

20 JUDGE SMITH: So you're saying - - -

21 MR. MEADE: - - - because they're - - -

22 JUDGE SMITH: - - - they disclaimed - - -
23 as I understand it, they disclaimed under the
24 residence clause, the same one they're now
25 disclaiming under.

1 MR. MEADE: Oh, they disclaimed because of
2 a lack of occupancy.

3 JUDGE SMITH: Are you telling me they
4 didn't cite that clause in their disclaimer letter?

5 MR. MEADE: What I'm - - -

6 JUDGE SMITH: No, no. Come on.

7 MR. MEADE: What I'm saying, Judge - - -

8 JUDGE SMITH: They cite - - - just a
9 minute. They cite - - - they do cite the residence
10 clause in the disclaimer letter. And then they say,
11 because this was not occupied, it was not your
12 residence, right?

13 MR. MEADE: That's correct.

14 JUDGE SMITH: And you say that binds them
15 to a special definition of "residence", which equates
16 to occupancy. Is that your argument?

17 MR. MEADE: Occupancy, 150 years ago, this
18 court - - -

19 JUDGE SMITH: Can you try to put it in - -
20 -

21 MR. MEADE: - - - yes. Yes, yes, yes, yes.

22 CHIEF JUDGE LIPPMAN: Is it the same thing?
23 That's what the judge is asking.

24 MR. MEADE: It is the same thing.

25 CHIEF JUDGE LIPPMAN: Occupancy and

1 residency are exactly the same thing?

2 MR. MEADE: Within the meaning of 3404 and
3 within the meaning of Tower's interpretation. Look
4 at the fourth affirmative defense - - -

5 JUDGE SMITH: So you're saying - - -

6 MR. MEADE: - - - you were not - - - you
7 were not occupying this - - -

8 JUDGE SMITH: - - - not just - - - not just
9 because of the discla - - - suppose there were no
10 disclaimer letter. You say that they still - - - you
11 still win the case?

12 MR. MEADE: Yes. Because the only
13 limitation on the absence of persons or objects
14 permitted by 3404 of the insurance law, is the sixty-
15 day vacancy or occupancy provision.

16 JUDGE PIGOTT: Right. It doesn't get into
17 whether or not it's a residence or not.

18 MR. MEADE: No, it doesn't.

19 JUDGE PIGOTT: Tower does that by saying we
20 only write this stuff.

21 MR. MEADE: Yes, but - - -

22 JUDGE PIGOTT: So if you move to Flor - - -
23 if you got your house up here, and you spend three
24 months down in Florida, you better be careful,
25 because if your house is unoccupied for more than

1 sixty days they can disclaim if you have a fire,
2 because you're supposed to be paying attention to
3 your residence.

4 MR. MEADE: Yes.

5 JUDGE PIGOTT: And they don't get into
6 whether it's a residence or not. They just get into
7 it was unoccupied for sixty days; we're not paying.

8 MR. MEADE: Yes. Their fourth affirmative
9 defense says you weren't living there because it was
10 not occupied. That's how the case started out.

11 CHIEF JUDGE LIPPMAN: So if you move down
12 to - - - if you go down to Florida for the winter,
13 because you don't want the cold weather, and you're
14 there, whatever, January, February and March, and
15 there's a fire, what happens?

16 MR. MEADE: Two answers to that. They now
17 say they would cover you as a seasonal residence.
18 Look at their underwriting rules, I think it's page
19 A598. We do not cover seasonal residence. They've
20 changed their position in this case so many times.
21 It's unheard of for insurance - - -

22 JUDGE SMITH: Suppose - - -

23 MR. MEADE: - - - companies.

24 JUDGE SMITH: - - - suppose the guy had not
25 been doing work at the house. Suppose it had just

1 been sitting completely vacant. Would you still win
2 the case?

3 MR. MEADE: No.

4 JUDGE SMITH: Why not?

5 MR. MEADE: Because it wasn't occupied.

6 JUDGE SMITH: Isn't your argument under the

7 - - -

8 MR. MEADE: And the fire occurs outside of
9 the sixty days or inside?

10 JUDGE PIGOTT: There can be a residence,
11 and if it's unoccupied or vacant for sixty days, it
12 doesn't make any difference. They're not paying and
13 they'd be right.

14 MR. MEADE: That's right, yes. But here it
15 was occupied and it wasn't vacant. I mean there were
16 people there, four, six, eight, ten, twelve hours a
17 day for a year rebuilding it.

18 CHIEF JUDGE LIPPMAN: It doesn't matter.
19 But the bottom line of your argument is, according to
20 their policy - - - I understand what you're saying -
21 - -

22 MR. MEADE: Yes, right.

23 CHIEF JUDGE LIPPMAN: - - - it doesn't
24 matter whether you lived there, even though you're
25 supposed to be insuring your residence.

1 MR. MEADE: Occupancy equals living there,
2 within the meaning of this policy and 3404.

3 CHIEF JUDGE LIPPMAN: Right. Within the
4 meaning of the policy, not within the general
5 meaning.

6 MR. MEADE: Right.

7 CHIEF JUDGE LIPPMAN: Occupancy doesn't
8 mean that it's your residence, right?

9 MR. MEADE: Yes. But if I could just say
10 as a practical matter, the consequences of what
11 they're saying, I mean, nobody moves in on the day of
12 the closing.

13 CHIEF JUDGE LIPPMAN: Yes. But what about
14 when it goes on this long - - - even assuming you're
15 right. Let's say we agree, nobody moves in on the
16 date of the closing. In practical terms, people move
17 in whatever - - -

18 MR. MEADE: Right.

19 CHIEF JUDGE LIPPMAN: - - - within weeks,
20 months, whatever. What about something that goes on
21 as long as this went on? Where do you draw the line?

22 MR. MEADE: As long as it's not vacant or
23 unoccupied, the sixty-day rule doesn't begin to
24 apply.

25 CHIEF JUDGE LIPPMAN: It could be ten

1 years?

2 MR. MEADE: I mean, that's not likely to
3 happen in the real world. But if this was a - - -

4 CHIEF JUDGE LIPPMAN: This is a pretty long
5 time, right?

6 MR. MEADE: - - - if this was a bar exam
7 question, the answer would be yes. It could be as
8 long as ten - - -

9 CHIEF JUDGE LIPPMAN: Okay. It's no
10 different if it's one year or ten years?

11 MR. MEADE: If it's - - - as long as it's
12 not vacant or unoccupied.

13 JUDGE SMITH: Why can't an insurance
14 company put in its policy two things: one, I'm only
15 insuring residences; two, and if you fail to occupy
16 your residence for more than sixty days, the coverage
17 lapses? Anything wrong with that?

18 MR. MEADE: No.

19 JUDGE SMITH: Okay. So why doesn't - - -
20 if they just did one - - -

21 MR. MEADE: But they did occ - - - but they
22 occupied this from day one.

23 JUDGE SMITH: Okay. But no, no. But I'm
24 suggesting that there are - - - I'm suggesting that
25 residence and occupancy might be different things.

1 MR. MEADE: What word - - -

2 JUDGE SMITH: You say they're not, because
3 they said in their letter they're the same thing.

4 MR. MEADE: Correct.

5 JUDGE SMITH: But put the letter out of the
6 case for a moment. Can residence and occupancy be
7 different? Aren't they different things in normal
8 English?

9 MR. MEADE: They could be.

10 JUDGE SMITH: And an insurance company is
11 allowed to say we only insure residences?

12 MR. MEADE: Well, but as a description of a
13 building. I mean, there's and 1880 Court of - - -

14 JUDGE SMITH: Well, no, no. We only insure
15 the building where you, the insured, reside. Can
16 they say that?

17 MR. MEADE: After you actually move in? I
18 don't know. Because you would be selling insurance
19 policies to people who would think they're covered
20 from the time they leave the closing and it might not
21 - - -

22 JUDGE SMITH: Well, then - - -

23 MR. MEADE: - - - it might not - - -

24 JUDGE PIGOTT: Well, that's why I'm - - -
25 that's why 3404 - - -

1 MR. MEADE: Yes.

2 JUDGE PIGOTT: - - - entitled "Fire
3 Insurance Contract Standard Policy Provisions
4 Permissible Variations" says that in every policy, as
5 your opponent is pointing out, what is the shorthand,
6 165 lines must be in it.

7 MR. MEADE: Yes.

8 JUDGE PIGOTT: And one of them is that they
9 can disclaim if it's unoccupied or vacant for sixty
10 days.

11 MR. MEADE: I agree with that, yes.

12 JUDGE PIGOTT: This one was not or was.
13 It's a question of fact, I suppose.

14 MR. MEADE: Well - - -

15 JUDGE PIGOTT: But it was not before they
16 cover it.

17 MR. MEADE: - - - there's no question here
18 about occupancy. They concede that.

19 JUDGE PIGOTT: Okay.

20 CHIEF JUDGE LIPPMAN: Counsel, what's the
21 significance of the fact that they renewed the
22 policy?

23 MR. MEADE: I'm sorry?

24 CHIEF JUDGE LIPPMAN: What's the
25 significance of the renewal?

1 MR. MEADE: That Tower renewed the - - -
2 the facts of this case indicate that an inspector
3 from Tower went to the premises, maybe one or two
4 months into the first - - -

5 CHIEF JUDGE LIPPMAN: Right. What's the -
6 - -

7 MR. MEADE: - - - policy period.

8 CHIEF JUDGE LIPPMAN: - - - significance of
9 all of that?

10 MR. MEADE: I think they waived it with
11 knowledge of the fact that these premises - - - that
12 the Deans, to use Judge Smith's language, never moved
13 in.

14 CHIEF JUDGE LIPPMAN: So you think they're
15 deemed to know that?

16 MR. MEADE: I'm sorry?

17 CHIEF JUDGE LIPPMAN: They're deemed to
18 know that?

19 MR. MEADE: Under the facts of this case,
20 when they had an inspector. You don't put a large
21 dumpster out in front of a house. It's photographed.
22 It's in the record.

23 JUDGE PIGOTT: Well, you called them and
24 told them you had an infestation, didn't you? And
25 they said we don't cover infestation?

1 MR. MEADE: Yes. No. I think they called
2 the insur - - - I'm not sure. I think they called
3 the broker.

4 JUDGE PIGOTT: Oh, okay.

5 MR. MEADE: But they certainly did report
6 that. And the Deans never received a policy. If - -
7 - you know, if somebody said there's a question about
8 your coverage unless you do this or that, they
9 certainly would have done it. I mean, this is a big
10 thing to a young family to buy a house. And they're
11 out - - - they're paying on the current mortgage - -
12 - they're out close to 100,000 dollars for what it
13 cost to rebuild the thing. And I don't think they're
14 being treated well at all.

15 You know, Tower claims this is an industry
16 standard provision. And if you go into the New York
17 Digest and look under insurance cases, you're going
18 to find a disproportionate number of Tower cases.

19 CHIEF JUDGE LIPPMAN: Okay, counselor.

20 MR. MEADE: And most of the Tower cases - -
21 - most of the Tower policies aren't sold - - -

22 JUDGE PIGOTT: Well, there's a lot of New
23 York Centrals. And there's a lot of - - -

24 MR. MEADE: There's - - - you know, there's
25 - - -

1 JUDGE PIGOTT: - - - Metropolitan.

2 MR. MEADE: - - - a pretty high percentage
3 of Tower cases - - -

4 JUDGE PIGOTT: Have to pick them.

5 MR. MEADE: - - - where there's no - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 Thanks.

8 MR. MEADE: Thank you.

9 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

10 MR. GERSHWEIR: I just wanted, on this
11 issue of occupancy and residency, I just wanted to
12 quote page 35 of the Deans' brief. "The courts of
13 this state have long recognized that occupancy and
14 residency are separate and distinct concepts." And
15 that's exactly what we're saying; that regardless of
16 the insurance flaw and its provisions regarding
17 occupancy, that's not what we're relying here.

18 CHIEF JUDGE LIPPMAN: What about the
19 renewal, counsel? How do you have an inspector come
20 there, you renew the policy and yet you don't know
21 that they don't reside there? Why aren't you - - -

22 MR. GERSHWEIR: We didn't.

23 CHIEF JUDGE LIPPMAN: - - - why isn't it
24 assumed that you know?

25 MR. GERSHWEIR: Because if you look at the

1 evidence in the record, there's no indication that we
2 did, in fact, know that they did not reside there.

3 JUDGE SMITH: Didn't he, the inspector,
4 according to Mr. Dean, the inspector said I'm going
5 to pretend I didn't see that?

6 MR. GERSHWEIR: Something like that.
7 Although that's obviously inadmissible hearsay. And
8 it's also - - -

9 JUDGE SMITH: A statement by a
10 representative of the insurance company? But I mean,
11 whether it's hearsay or not, I mean, doesn't that
12 suggest that he was not going to give notice to his
13 employer of this event?

14 MR. GERSHWEIR: I can't comment on what was
15 in his head. The bottom line is that the - - - his
16 report does not reflect that there was not any
17 residency going on. But again - - -

18 CHIEF JUDGE LIPPMAN: But he represents
19 you, doesn't he?

20 MR. GERSHWEIR: Well, but again, go back to
21 the issue of residency. You can be a resident of a
22 dwelling, even if it's temporarily vacated due to - -
23 -

24 JUDGE PIGOTT: That's not in the policy.
25 You know, you say we're not arguing occupancy; we're

1 say - - -

2 MR. GERSHWEIR: But it doesn't mean that
3 you can't say - - -

4 JUDGE PIGOTT: - - - oh, no. You can't say
5 we're writing it in the State of New York, and we
6 decided that we've called ours "buildings", and so
7 "building" isn't in there, and since yours isn't a
8 building, we're not going to - - - we're going to
9 disclaim. You can't define the whole insurance law
10 by saying we're now calling this "residences" or
11 we're going to call this "warm homes", and therefore,
12 since this isn't a warm home, we don't have to pay.

13 MR. GERSHWEIR: I don't think that putting
14 in the residence requirement is an attempt to get
15 around the vacancy and occupancy. I think - - -

16 JUDGE PIGOTT: Maybe not.

17 MR. GERSHWEIR: - - - it's just a question
18 of - - - it's exactly what homeowner's insurance is.
19 Residency is - - -

20 JUDGE PIGOTT: But they don't - - -

21 MR. GERSHWEIR: - - - it's a - - -

22 JUDGE PIGOTT: - - - they don't - - - but
23 it's not - - -

24 MR. GERSHWEIR: - - - is a core part of it.

25 JUDGE PIGOTT: Okay.

1 MR. GERSHWEIR: And that's the insurance
2 license - - -

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks.

5 MR. GERSHWEIR: Thank you, Your Honor.
6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Dean v. Tower Insurance Company of New York, No. 173 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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