

Dean v Tower Ins. Co. of N.Y.

2010 NY Slip Op 31107(U)

April 27, 2010

Supreme Court, New York County

Docket Number: 600989/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____

PART 11

Meeting

Index Number : 600989/2007

DEAN, DOUGLAS

vs.

TOWER INSURANCE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion seq. no. 001, and the consolidated motions are determined in accordance with the decision and order filed under motion seq. no. 001.

FILED

MAY 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 27, 2010

[Signature]
HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
DOUGLAS DEAN and JONA DEAN,

Plaintiffs,

-against-

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

-----X
JOAN A. MADDEN, J.:

Index No. 600989/07

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action to recover monetary damages for an alleged breach of an insurance contract, defendant seeks summary judgment (CPLR 3212) dismissing plaintiffs' complaint in motion sequence 001. In motion sequence 002, plaintiffs seek summary judgment (CPLR 3212) on their complaint. For the reasons stated below, defendant's motion is granted and the complaint is dismissed; plaintiffs' motion for summary judgment is denied.

On March 23, 2005, plaintiff Jona Dean went to Northeast Agencies (Northeast) in Dobbs Ferry, New York, to obtain homeowner's insurance on a house plaintiffs intended to buy at 4 Mountain Road, Irvington, New York (the Mountain Road house). The homeowner's insurance application (the application), which Jona Dean asserts was filled out by a woman named Tania at Northeast,¹ sought insurance to commence on March 31, 2005.²

¹ Although it is unclear from the proffered evidence whether Northeast is defendant's agent or a broker chosen by plaintiffs out of the telephone book, such distinction is not critical to the determination of the instant motions.

² A second application, the umbrella policy application which sought third party liability coverage was also completed.

Jona Dean signed the three page home owners application seeking all-peril property coverage with the following limits: \$350,000 in dwelling coverage, as well as \$35,000 in coverage for other structures, \$175,000 for personal property, and \$70,000 for loss of use of the location. Page one of the application lists the Mountain Road house, the location to be insured, as plaintiffs' mailing address, and lists plaintiffs' former address as 212 Taxter Road Irvington, New York (the Taxter Road address). The first page also includes a section entitled "RATING/UNDERWRITING" in which answers to questions are indicated by placing an "X" in the box next to the answer selected. In this section, the "X" indicates that the structure type is a "dwelling," the usage type "primary" (two additional options are "secondary" and "seasonal,") and the premises are occupied by the "owner." Moreover, "March 31, 2005" and "\$350,000" are listed on this page under "PURCHASE DATE/PRICE." On the second page of the application, the "GENERAL INFORMATION" section, question 4 asks "ANY OTHER RESIDENCE OWNED, OCCUPIED, OR RENTED" and an "X" is inserted in the "NO" box next to the question. Jona Dean maintains, however, that she told Tania that the closing was not until March 31, 2005, the date the policy would commence, and that she and her husband, plaintiff Douglas Dean, would be residing at the Taxter Road address until then.

As a result of plaintiffs' application, a homeowners policy, denominated # HOP2551612, was issued by defendant for a one-year period, commencing on March 31, 2005 (the policy). The policy was subsequently renewed on March 31, 2006, also for a one-year period.³

Although plaintiffs intended to close on the location on March 31, 2005, the inception

³ The initial policy was issued on March 31, 2005, and the renewal certificate was issued on February 2, 2006.

date of the policy, such closing was allegedly delayed by the sellers until May 18, 2005.

Plaintiffs admit that they never informed Northeast or defendant of the delay. Jona Dean also admits that despite information that there might be problems with termite damage at the location, she failed to inform Tania about it, and, in fact, just told her that there were some "cosmetic issues" that had to be fixed at the location.

Jona Dean contends that, at some time later, she did call Northeast to ask whether there was coverage under the policy for such termite damage, but when she received a negative response, she never revealed that the damage had and would continue to prevent plaintiffs from moving in to the location. In fact, plaintiffs admit that at no time prior to the fire did either of them notify defendant insurance company or Northeast that they were still living at the Taxter Road address.

Meanwhile, plaintiffs sought to complete the repairs at the location themselves, with the help of family and friends. For the most part, they did not hire professionals to repair the house, and did not get licenses or permits to do so. Additionally, no construction plans were drawn up. As part of those repairs, Douglas Dean testified that he ripped out the entire first floor to get to the rotted beams, as well as the stairs between the first and second floors, and removed the floor between the first floor and the basement. Douglas Dean also testified that he worked on these repairs for close to one year and had not completed them when, on May 15, 2006, a fire of unknown origin destroyed the property.

Both plaintiffs admit that at the time of the fire, they had never moved into the Mountain Road house, and that, at all times, they continued to live at and have separate insurance on the Taxter Road address. Plaintiffs assert, however, that Douglas Dean was at the Mountain Road

house five days a week after his regular working hours doing renovations. Dean asserts he frequently ate and slept there for several hours and kept some clothes there, but he did not shower there and went home to the Taxter Road address every night.

Additionally, plaintiffs contend that they did not receive a copy of their policy nor did they ask for one prior to the fire. According to Jona Dean, she did not realize that the policy would be sent to the mailing address on the application, and they were not receiving mail at the Mountain Road address until the closing, which occurred in May 2005. Plaintiffs did receive the renewal certificate in February 2006, at which point there were no problems with the mail at the Mountain Road address, but still neither of them requested a copy of the full policy prior to the fire.

The fire occurred on May 15, 2006 and plaintiffs gave notice to defendant the following morning. By letter dated June 22, 2006, defendant disclaimed coverage under the homeowners policy. The letter gave two reasons for disclaiming coverage. First, the letter references the coverage and definition sections of the policy stating that coverage is for the "dwelling on the residence premises" and that "residence premises" means "[t]he one family dwelling... where you reside." The letter then states that "the dwelling was unoccupied at the time of the loss... [T]his dwelling does not qualify as a 'residence premises' there is no coverage for this claim under your policy." Second, the letter states that plaintiffs engaged in "concealment or fraud," in that they either "a. [i]ntentionally concealed or misrepresented any material fact or circumstance; or b. [e]ngaged in fraudulent conduct; relating to this insurance." The letter also explains that "[t]he policy application clearly states the residence premises is an owner occupied, one family dwelling. Based upon the material misrepresentation of the facts regarding occupancy,

[defendant] is disclaiming coverage of this claim."

Defendant contends that as it is undisputed that plaintiffs did not live in the Mountain Road house, there is no coverage. Defendant further contends that plaintiffs misrepresented on their application that the premises were an owner occupied one-family residence, and that even if it is accepted that plaintiffs were unable to move into the premises because of its condition, plaintiffs' failure to inform defendant that they were not residing in the premises was a material misrepresentation that should allow defendant to rescind the policy.

To support its contention, regarding the lack of coverage, defendant points to the Coverage Section and the definition in that section of the policy mentioned above. In support of its contentions regarding misrepresentations, defendant submits an affidavit from Jerry Tutak, its personal lines underwriting manager, and includes as an exhibit, a copy of its underwriting guidelines. According to Tutak, defendant only writes homeowners coverage for owner-occupied primary residences, because they pose a lower risk than either non-owner-occupied or non-primary residence properties. The "Homeowners Selections Rules" themselves state that "Occupancy" is for "1 or 2 family primary residence, owner occupied."

In response, plaintiffs argue that the Mountain Road house was within defendant's underwriting guidelines as it was not unoccupied at the time of the loss. Plaintiffs further argue the defendant is limited to the reasons stated in the disclaimer letter in which plaintiffs argue defendant equated residency with occupancy and as the premises were occupied at the time of loss, there is coverage. As to the misrepresentation claims, plaintiffs argue that the insurance application did not ask when they would move in, and that it was their intention to move in as soon as the repairs were completed. Jona Dean testified that Tania never told her that they were

* 7]

required to live there for coverage to take effect. Plaintiffs further argue that at the time of the fire, they had never received a copy of the homeowners policy, so they had no ability to understand what was covered under the policy, and had no knowledge that other coverage may have been needed.

In the instant motions, plaintiffs and defendant are each seeking summary judgment. To obtain such relief, a movant must make a prima facie showing of entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003). The motion may only be granted where it "clearly appear[s] that no material and triable issue of fact is presented," *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when an issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

As indicated above, defendant asserts two grounds in support of its summary judgment motion. As to the first ground that there is no coverage, for the following reasons, the court concludes that the dwelling on the property did not fall within the definition of "residence premises" as defined in the policy.

According to the Coverage Section of the policy, it covers the dwelling on the "residence premises" which, to the extent relevant, is defined as

- a. The one family dwelling, other structures, and grounds; or

b. That part of any building;
where you [the named insured] reside and which is shown as the
“residence premises” in the Declarations.

There is no dispute that the Mountain Road house is defined as the “residence premises” in the Declaration. As indicated above, the disclaimer letter states that coverage is provided for “residence premises,” quotes the policy definition as indicated above, and states that “[o]ur investigation revealed that the dwelling was unoccupied at the time of the loss. Accordingly, this dwelling does not qualify as a ‘residence premises’ there is no coverage for this claim under your policy.”

“The construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts. Moreover, where the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.” *Marshall v Tower Insurance Co.*, 44 AD3d 1014 (2d Dept. 2007) (internal quotation marks and citations omitted). In *Marshall*, the court found that the exact policy provisions at issue here were not “ambiguous.” According to Webster’s II New College Dictionary (2001) “reside” means “to live in a place for a permanent or extended period of time; to be inherently present.” Giving the words “where you reside” their “plain and ordinary meaning,” the policy covered a dwelling where the Deans lived for a permanent or extended period of time. Consistent with this construction, “[t]he standard for determining residency for insurance coverage ‘requires something more than temporary or physical presence and . . . at least some degree of permanence and intention to remain’ ” *Allstate Insurance Co., v Rapp*, 7 AD3d 302 (1st Dept. 2004) (citing *Government Empls. Ins. Co. v Paolicelli*, 303 AD2d 633, 633 [2nd Dept. 2003] (for uninsured motorist coverage, a grandson was a resident of his grandfather’s home where he lived Monday to

Friday during the school year for six years and attended school based on the grandfather's address). Moreover, for the purposes of residency, a "resident is one who lives in the household with a certain degree of permanency and intention to remain" *Canfield v Peerless Ins. Co.*, 262 AD2d 934, 934-935 (4TH Dept. 1999), lv denied 94 NY2d 757 (1999) (the insurer failed to rebut the plaintiff's testimony that she maintained a residence at both her own household and at the household of the insured, where plaintiff's testimony established that she was the sole owner of the home in which the insured resided, spent weekends and holidays in the home, had a key to the home, maintained her own bedroom in the home, in which she kept clothing and necessities, and paid the heating, water costs and real estate taxes for the home .)

Here, plaintiffs do not allege that they ever lived at the Mountain Road house. At best, plaintiffs have established ownership of the house and presence in it to perform certain renovations, and a stated intent of living there. The court concludes that under these circumstances, there is insufficient evidence of plaintiffs' physical presence and permanency to demonstrate that they resided in the premises at any time prior to the date of loss. Accordingly, defendant has established there is no coverage, and is entitled to summary judgment.

In reaching this conclusion, the court rejects plaintiffs' argument that based on the disclaimer letter, Tower equates occupancy with residency and that it is bound by such a construction of the meaning of "residence premises." Plaintiffs argue that Douglas Dean's presence as described above doing renovation work demonstrates that the premises were occupied (or at least not "unoccupied") at the time of the loss, and thus, plaintiffs, not defendant, are entitled to summary judgment. While an insurer is bound by the contents of its disclaimer, *Benjamin Shapiro Realty Company v Agricultural Insurance Company*, 287 AD2d 389 (1st Dept. 2001), it cannot be

said that Tower's disclaimer letter limits the construction of "residence premises" to one that is occupied. The letter specifically cites the policy definition of a "residence premises" as a one-family dwelling where the insured resides. Although the letter states that Tower's investigation revealed that the dwelling was unoccupied, it is clear from the context in which this statement is made and reading the statement together with the definition of "residence premises" in the letter, that the lack of occupancy was only a factor considered in determining whether the dwelling constituted a "residence premises" within the meaning of the policy. Plaintiffs' argument attempts to read the residency requirement out of the "residence premises" definition and incorrectly characterizes the requirement that the insured reside in the premises as an occupancy requirement. For the foregoing reasons, plaintiffs' arguments that defendant equates occupancy with residency is without merit.

Nor do plaintiffs' other arguments provide a basis for denying summary judgment. Plaintiffs argue that the policy construction as asserted by the defendant violates New York Insurance Law, §§ 3404 (e) and (f) (1) which respectively provide that a policy offering fire and other coverage may contain a provision that an insurance company is not liable for loss where a building is vacant more than 60 consecutive days or other "provisions no less favorable to the insured." Plaintiffs' argument is predicated on their characterization of Tower's disclaimer as equating residency with occupancy, and then extrapolates from this characterization that Tower's position necessarily implies that premises which are unoccupied are never insured. Plaintiffs argue such a provision violates Insurance Law as it is less favorable to an insured than the 60 day vacancy permitted under section 3404 (f) (1). This argument misses the mark. Tower does not assert that unoccupied premises are not covered, but that the dwelling in issue does not qualify for coverage as "residence premises." Moreover, plaintiffs do not assert that the policy has an exclusion for vacant

or unoccupied premises.

Similarly, plaintiffs' argument that the term "residence premises" is ambiguous based on other provisions in the policy, is without merit. Plaintiffs assert that "residence premises" is only one of eight definitions in section 4 of the policy which defines "insured locations," and section 4f defines "insured location" as "land on which a one family house is being built as a residence for an insured." Defendant argues the definition of "insured location" is a defined term, and does not apply to Section I of the policy, the first party coverage at issue here; rather it applies to Section II regarding coverage for third party liability. Plaintiffs' argument lacks legal support and the existence of other definitions of "insured locations" does not change the conclusion as to the coverage at issue here.

Plaintiffs also rely on Section I, Coverage A - Dwelling, which states that coverage is for a dwelling on the "residence premises" and for materials and supplies located on or next to the "residence premises." This provision providing for coverage of such materials and supplies is not inconsistent with the coverage for "residence premises" as defined in the policy.

Plaintiffs also point to Section 10M which excludes coverage for freezing, plumbing, heating, and air conditioning while the premises are unoccupied unless reasonable care has been taken to perform certain proscribed acts. Plaintiffs argue that this provision refutes defendant's position that occupancy is required for coverage. As explained above, plaintiffs incorrectly characterize defendant's position, and Section 10M is not inconsistent with the construction of "residence premises" as a dwelling where the insured resides. Moreover, defendant replies that the policy contemplates that an insured may be absent from the premises where he or she resides for a

certain period of time. Similarly, plaintiffs' argument regarding the limitation on coverage for Glass or Safety Glazing Material in the Additional Coverage Section 9 does not impact on the definition of "residence premises" within the meaning of coverage.

Plaintiffs further argue that under Coverage, Section D, Loss of Use, coverage is provided for loss of use of the dwelling where the insured resides, but if the residence premises is not the insured's principal place of residence, then a certain option is not provided. Asserting that defendant's position is that only a dwelling occupied by an insured at the time of loss is covered, plaintiffs allege an ambiguity exists as under the Loss of Use provision, the covered resident premises need not be an insured's principal place of residence, and contrary to defendant's argument, it need not be occupied as a residence at the time of loss. Again, this argument is without merit as it is predicated on incorrectly characterizing defendant's position.

For the same reason, plaintiffs' argument is rejected that even if occupancy is required, since plaintiffs "could not legally move into the building until it was structurally sound," they are entitled to coverage under a reasonable construction of an occupancy requirement when circumstances beyond an insured's control prevent an insured from doing so.

Based on the foregoing conclusion that the Mountain Road house is not a "residence premises" within the meaning of the policy and that there is no coverage, the court need not address the additional grounds for defendant's disclaimer based on material misrepresentations.

Defendant, therefore, is entitled to summary judgment dismissing the complaint, and plaintiffs' motion for summary judgment is denied.

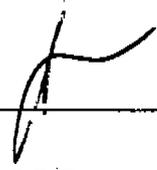
Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment (motion seq. no. 002) is denied;
and it is further

ORDERED that defendant's motion for summary judgment (motion seq. no. 001) is granted
and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment
accordingly.

DATED: April 27 2010

ENTER:



J.S.C.

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