

Mateyunas v Cambridge Mut. Fire Ins. Co.
2015 NY Slip Op 31226(U)
July 16, 2015
Supreme Court, Queens County
Docket Number: 1125/13
Judge: Allan B. Weiss
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

WILLIAM MATEYUNAS,

Plaintiff,

-against-

CAMBRIDGE MUTUAL FIRE INSURANCE CO.
AND THE CLAUSEN AGENCY, INC.,

Defendants.

Index No: 1125/13

Motion Date: 5/13/15

Motion Seq. No.: 3

The following papers numbered 1 to 14 read on this motion by plaintiff, and cross motion by defendant, Cambridge Mutual Fire Insurance Company (Cambridge), each seeking summary judgment, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	1-4
Notice of Cross Motion - Affirmation- Exhibits.....	5-8
Affirmations in Opposition and Reply - Exhibits	9-14

Upon the foregoing papers, it is ordered that this motion by plaintiff, and cross motion by defendant, Cambridge, both for summary judgment, pursuant to CPLR 3212, are determined as follows:

Plaintiff's residence suffered a fire on January 23, 2011, while covered by a Homeowners Policy of insurance (the Policy) issued by defendant, Cambridge. Plaintiff submitted a claim, which plaintiff concedes was paid "for the most part." Plaintiff commenced this action for breach of contract claiming additional monies due him under the Dwelling, Additional Living Expenses (ALE), and Personal Property coverages of the Policy. The action against defendant, The Clausen Agency, Inc., was discontinued pursuant to a stipulation signed by counsel for both parties, dated December 17, 2014.

Plaintiff's instant motion seeks summary judgment with regard to the Dwelling and ALE coverage claims, only. Defendant, Cambridge, cross-moves for summary judgment and dismissal of plaintiff's complaint contending that, pursuant to the terms of the Policy, plaintiff has been paid the amount he is entitled to for the dwelling and ALE. Each moving party contends that there exists no triable issue of material fact, thereby necessitating a finding of summary judgment in their favor.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On motions for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving party (see *Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (see *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also, *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono.*, 126 AD3d 927 [2014], citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]).

The branch of plaintiff's motion seeking summary judgment on the dwelling coverage is denied. Pursuant to the terms of the Policy, each party obtained an appraisal of the loss and submitted the appraisals to an "umpire," who determined an "actual cash loss to the dwelling" of \$400,008.90, and a "replacement cost loss to the dwelling" of \$451,232.98.

According to the terms of the Policy, plaintiff was covered for "replacement cost without deduction for appreciation," specifying that the insurance company "will pay the cost to repair or replace" the building "but not more than the least of the following amounts; (a) The limit of liability under this policy that applies to the building; (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or (c) The necessary amount actually spent to repair or replace the damaged building."

Defendant has paid plaintiff the amount of \$415,232.98 on plaintiff's claim for loss to his dwelling, and asserts that no further amount is due, as plaintiff has been paid the actual cash value of the dwelling as determined by the umpire. Defendant contends that the language of the Policy permits the withholding of the difference between the actual cash value and the replacement cost until the repair or replacement is completed, because only at that time could defendant ascertain whether the actual cash value or the amount spent on repairing or replacing the property is the lesser amount to which plaintiff is entitled. Defendant further contends that the replacement of the dwelling was not completed within the two-year-from-date-of-loss period required by the Policy, and that plaintiff has not demonstrated the actual cost of the replacement to be in excess of the amount already paid to plaintiff. Plaintiff contends that he is entitled, by the unreserved terms of the policy, to the replacement amount as set by the umpire; that the two-year period is unreasonable and he was entitled to notification by defendant of such limited period; and that his actual expenses exceeded the amount already paid to him, as evidenced by the bills, checks and credit card receipts he included, for the first time, in his opposition/reply papers.

The interpretation of the provisions of an insurance policy is a question of law for the court (*see Vigilant Ins. Co. v Bear Stearns Companies, Inc.*, 10 NY3d 170 [2008]; *Bailey v Fish & Neave*, 8 NY3d 523 [2007]; *Shants, Inc. v Capital One N.A.*, 124 AD3d 755 [2015]). An insurance contract, "like other agreements, will ordinarily be enforced as written" (*J.P. Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013], by reading the language of the policy "in light of 'common speech' and the reasonable expectations of a businessperson" (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]. "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *see Jacobs v Northwestern Mut. Life Ins. Co.*, 103 AD3d 78 [2012]).

The court agrees with the moving parties herein that the Policy terms regarding dwelling loss are unambiguous. Pursuant to the Policy, plaintiff would be entitled to payment, of up to the amount of the replacement cost loss, upon his completion of the replacement of the dwelling within two years and his submission of proof of the costs of replacement in excess of the actual cash loss to the dwelling. Otherwise, plaintiff would be entitled only to the actual cash loss to the dwelling, which amount has already been received by plaintiff. Plaintiff's contention that he is entitled to the stated replacement cost loss recovery purely by reason of his having maintained a "replacement loss" policy is without merit. Plaintiff does not deny that he failed to complete the replacement of the dwelling within the requisite two-year period, nor has he shown that his expenses incurred in replacing the dwelling exceeded the amount already paid to him. His introduction of the untimely, unexplained, and unsworn-to photocopies of bills, checks and credit card statements are inadmissible to evidence entitlement to summary judgment (*see CPLR 3212 [b]*; *Seidman v Industrial Recycling Props., Inc.*, 52 AD3d 678 [2008]; *see also CPLR 4533[a]*; *Daguerre*

S.A.R.L. v Rabizadeh, 112 AD3d 876 [2013]; *Matell Contracting Co., Inc. v Fleetwood Park Development, LLC*, 111 AD3d 681 [2013]). Plaintiff has failed to submit an affidavit of a person with first-hand knowledge of the facts, and counsel's reply affirmation herein, made without asserting any personal knowledge of the facts, did not satisfy the statutory requirements of CPLR 3212, because it did not serve as a vehicle to submit admissible documentary evidence (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Branch Services, Inc. v Cooper*, 102 AD3d 645 [2013]; *State of New York v Grecco*, 43 AD3d 397 [2007]).

The branch of plaintiff's motion seeking summary judgment on the ALE claim is denied for the same reason that the dwelling costs claim was denied, *i.e.*, that plaintiff has failed to demonstrate *prima facie* entitlement thereto (see *Alvarez v Prospect Hospital*, 68 NY2d 320; *Schmitt v Medford Kidney Center*, 121 AD3d 1088; *Zapata v Buitriago*, 107 AD3d 977).

The branch of plaintiff's motion seeking discovery, pursuant to CPLR 3124, is granted to the extent that defendant shall provide plaintiff's counsel with a response to plaintiff's demand for a bill of particulars as to affirmative defenses, within fourteen days of being served with a copy of this Decision with Notice of Entry. If such response has already been exchanged, defendant's counsel shall forward a copy of same, with a copy of the original affidavit of service, within the period as set forth above.

The branch of Cambridge's cross motion seeking summary judgment dismissing plaintiff's complaint, on the dwelling coverage cause of action, is granted. Defendant demonstrated that plaintiff had been paid for such claim pursuant to the terms of the Policy, and is entitled to no further amount under such terms. In opposition, plaintiff has failed to submit admissible evidence to rebut defendant's contentions, and has, therefore, failed to raise an issue of material, triable fact sufficient to deny defendant's *prima facie* right to summary judgment (see *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v. New York Univ. v Medical Center*, 64 NY2d 851 [1985]).

However, Cambridge has failed to demonstrate *prima facie* entitlement to summary judgment on plaintiff's ALE cause of action, as defendant's moving papers have failed to eliminate all material issues of fact therein. Here, issues of fact exist as to whether there was any undue delay in repairing or replacing the damage to plaintiff's residence, and, if so, the length of any such delay; what portion of any such delay was attributable to plaintiff; and the calculation of the amount, if any, due to plaintiff for additional living expenses in light of any such delays attributable to plaintiff. As such, summary judgment on the cause of action for ALE is denied.

The parties' remaining arguments and contentions are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branches of plaintiff's motion seeking summary judgment dismissing plaintiff's dwelling costs and ALE causes of action are denied.

The branch of plaintiff's motion seeking discovery, pursuant to CPLR 3124, is granted to the extent as above-determined.

Defendant's cross motion for summary judgment dismissing plaintiff's cause of action on the dwelling coverage issue is granted.

The branch of defendant's cross motion seeking dismissal of the ALE cause of action is denied

Dated: July 16, 2015

J.S.C.