

Alvarado v First Liberty Ins. Corp.

2009 NY Slip Op 32427(U)

October 6, 2009

Supreme Court, Nassau County

Docket Number: 205/08

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

JOSE ALVARADO,

Plaintiff,

- against -

FIRST LIBERTY INSURANCE CORPORATION,

Defendant.

FIRST LIBERTY INSURANCE CORPORATION,

Third-Party Plaintiff,

- against -

MICHAEL DESIR,

Third-Party Defendant.

TRIAL/IAS PART 18
NASSAU COUNTY

INDEX NO. 205/08

X X X

MOTION SUBMISSION
DATE: 8/19/09

MOTION SEQUENCE
NO. 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Memorandum in Support of Motion.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>

The defendant/third-party plaintiff, First Liberty Insurance Corporation, (hereinafter referred to as "Liberty"), moves for an order pursuant to CPLR §3212 granting Liberty summary judgment dismissing plaintiff's complaint in its entirety pursuant to Liberty's fifth and sixth affirmative defenses. Liberty submits a Memorandum of Law in support of the motion. Plaintiff submits opposition. Liberty submits a reply affirmation.

The plaintiff initiated this action for breach of contract seeking the amount of Two Hundred Eighty-One Thousand Eight Hundred Eighty-Two and 26/200 Dollars, (\$281,882.26). The plaintiff claims that Liberty is in breach of a certain policy of insurance relating to the premises known and located at 522 Halsey Street, County of Kings, State of New York, that was in full force and effect on May 2, 2006 when the premises sustained damage due to fire. Plaintiff claims that Liberty's refusal to make payment for such damage is a breach of the policy and contract of insurance.

Liberty moves for summary judgment to dismiss plaintiff's action based on Liberty's sixth affirmative defense, material misrepresentation in the application for insurance, and Liberty's fifth affirmative defense, breach of the residency requirement in the policy.

BACKGROUND

The plaintiff purchased the premises known as 522 Halsey Street, Brooklyn, New York on or about May 13, 2005. The plaintiff applied for the subject policy of insurance on May 8, 2005. On or about May 2, 2006, the premises sustained fire damage. Upon the record herein, it is uncontroverted that the plaintiff never resided at the subject premises, from the inception of the policy on May 9, 2005, up and until the date of the fire, approximately one year later. The plaintiff testified that the first time that he ever saw the house, the subject premises, was approximately two weeks after closing. The plaintiff's testimony reveals that he never occupied, used or resided in the premises, never had a key, never put electricity or other utilities in his name, and never brought personal property to the premises. Plaintiff's testimony provides that before he purchased the house, his plan was to buy it, fix it upon, and then sell it.

Liberty has demonstrated, that as per the plaintiff's own testimony, and the testimony of third-party defendant, Michael Desir, (hereinafter referred to as "Desir"), that the acquisition of the property, and the insuring of the property, involving plaintiff, Desir, and a non-party broker, was an attempt to make a profit. The plaintiff testified that Desir approached him to purchase the property on his behalf and promised him that Desir would sell the house and pay the plaintiff Ten Thousand and 00/100 Dollars, (\$10,000.00). Plaintiff testified that Desir was in charge of fixing the house, that plaintiff had no paperwork including a copy of the contract of sale for the house, and that plaintiff did not put a down payment down for the purchase of the house. The plaintiff stated that Desir paid the mortgage on the house for four months because the house was going to be sold and "there was going to be a profit". The house was put up for sale.

Desir testified that he, a non-party real estate agent, and the plaintiff were partners in several real estate deals, including the subject premises. The subject premises was purchased for Four Hundred Five Thousand and 00/100 Dollars, (\$405,000.00), and two mortgages were obtained in the amount of Six Hundred Fifty Thousand and 00/100 Dollars, (\$650,000.00). Desir testified that after the closing, there was an excess of One Hundred Eighty Thousand and 00/100 Dollars, (\$180,000.00), of which Desir received approximately Eighty-Two Thousand and 00/100 Dollars, (\$82,000.00), and the remaining monies were taken by another non-party broker. The plaintiff admitted that the two mortgages were obtained for the purchase of the premises in the amount of Six Hundred Fifty Thousand and 00/100 Dollars, (\$650,000.00). Desir testified in detail similar to the subject transaction with respect to other properties involving plaintiff's name on deeds and mortgages.

DISCUSSION

It is well established that misrepresentations, even if incorrect, if material, are sufficient to allow an insurer to defeat recovery under an insurance policy if that misrepresentation is material to the risk being insured. (*Kulikowski v. Roslyn Savings Bank*, 121 AD2d 603). Whether an applicant's misrepresentations were material to the risk he was seeking to insure, is for the Court to decide where the evidence concerning materiality is clear and substantially uncontradicted. (*Aguilar v. US Life Insurance Co. in the City of New York*, 162 AD2d 209). "To demonstrate materiality as a matter of law, an insurer need only show that the misrepresentation 'substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have been taken.'" (*Id.*, citing *Geer v. Union Mutual Life Insurance Company*, 273 NY 261). "The question in each case is whether the company had been induced to accept an application which it might otherwise have refused." (*Geer, supra.*; *North Atlantic Life Ins. Co. Of America v. Katz*, 163 AD2d 283).

The plaintiff applied for the subject insurance policy with respect to the subject premises on May 8, 2005. Plaintiff stated that the subject dwelling is his principal residence, his primary residence and his mailing address. The plaintiff provided that the dwelling is not under construction and is not undergoing significant renovations or remodeling and is generally occupied during the day.

The defendant submits the affidavit of Liberty's underwriter who avers that Liberty's application for homeowner's insurance requires the applicant to state that he will occupy the insured premises as his residence, and as per the written underwriting guidelines, Liberty will not provide coverage to an insured who is not the owner and occupant. Liberty's underwriter submits that if the applicant does not occupy the insured premises as his or her own residence, the risk would be ineligible. "Liberty will only issue a homeowners policy to a name insured who occupies and resides within the insured residence premises." Furthermore, the underwriter states that had Liberty known that the plaintiff did not intend on residing and occupying the insured premises, Liberty would not have accepted the risk and would not have issued a policy to the plaintiff. Simply put, Liberty's underwriter provides that coverage for a residence premises under the policy requires the named insured use the premises as his residence, and if the name insured does not reside in the insured premises, there is no coverage for that premises. Liberty's underwriter states that if plaintiff stated he would not be occupying the insured premises as his residence, Liberty would not have extended the subject insurance policy to him.

Here, the plaintiff, in his application, states that the dwelling is his principal residence, his primary residence and his mailing address. The plaintiff also represented that the premises was a two-family house that would be occupied by him as his principal residence.

However, Liberty has demonstrated, through documentary and testimonial evidence, that the plaintiff purchased the insured premises in an effort to make a profit and that plaintiff never resided or occupied the insured premises. The defendant has demonstrated, and it is not disputed, that plaintiff never occupied the premises, never bought personal property to the premises, never had a key, had only seen the premises for the first time about two weeks after closing, (approximately three weeks after he applied for the subject homeowner's insurance policy), and that his plan was to buy it, fix it up and sell it. Upon the record herein, the defendant has established that the plaintiff's application contained material misrepresentations material to the risk he was seeking to insure, and

as so, plaintiff's material misrepresentation in the application for insurance voids the policy of insurance. (§3105 Insurance Law; *Aguilar v. US Life Ins. Co.*, *supra.*; *Kulikowski v. Roslyn Savings Bank*, 121 AD2d 603; *Chester v. Mutual Life Ins. Co. of New York*, 290 AD2d 317).

In any event, it is uncontroverted that plaintiff did not in fact reside in the insured premises at any time, and such failure alone constitutes a valid ground for disclaimer of a claim by an insured where there is not coverage under the policy if the named insured did not reside at the insured premises. (*Marshall v. Tower Ins. Co. of New York*, 44 AD3d 1014).

The plaintiff, in opposition, essentially disregards Liberty's contentions contained in its motion as "rhetoric" and frames the following issue, in essence, as whether a premises under renovation constitutes a "residence" when the "insured" changes his mind about living there subsequent to the renovations. Plaintiff's counsel contends that at his Examination Under Oath, (EUO), conducted earlier to plaintiff's Examination Before Trial, plaintiff testified that when he purchased the insured premises, he intended to reside there, renovations commenced, and he later decided not to move in, but rather to sell. A review of the EUO testimony provides that plaintiff testified that he allowed Desir to purchase homes under his name as a favor, that he purchased the subject insured premises and saw it for the first time one month after he purchased it. Plaintiff testified at his EUO that he was going to live there, but saw that it wasn't such a good neighborhood and suggested that Desir should sell. Plaintiff testified at his EUO that he did not know if he signed the application for the policy, that when he signed all the paperwork dealing with the house, nobody was telling him if the insurance policy was included in the paperwork. Plaintiff also testified at his EUO that Desir was paying the insurance and the mortgage. While plaintiff recognized his own signature on the application for insurance, plaintiff did not recall having seen the application. Plaintiff also testified that when Desir approached him to purchase the insured premises, he told the plaintiff that Desir would sell the house and pay him Ten Thousand and 00/100 Dollars, (\$10,000.00).

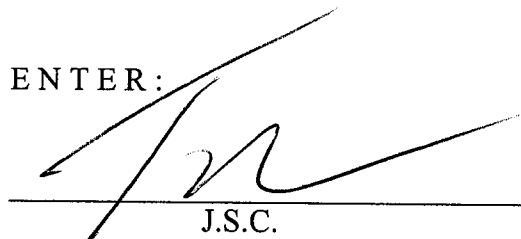
Plaintiff's reliance on *Feinstein v. Reliance*, 380 NYS2d 990 is misplaced. In *Feinstein*, the Court found the residence in question was not 'vacant' with the meaning of an exclusion in the policy where the owner stayed there occasionally, and the premises were not empty of inanimate objects. In *Feinstein*, the insured who initiated repairs to the home, regularly visited the home, lived there occasionally, moved in items of personal property, including furniture, a cot to sleep on, kitchen utensils, towels and various other paraphernalia. Here, plaintiff did not continuously visit the home, at no time brought personal property into the home, did not make any repairs himself, nor pay for repairs, nor hire any contractor for repairs, had not made a single mortgage payment, and had not made a single out-of-pocket payment towards the purchase of the house whatsoever. Plaintiff's contention that plaintiff merely 'changed' his mind is not supported by the record and is unavailing. The plaintiff's own application for insurance provides that the dwelling was not under construction and was not undergoing significant renovation or remodeling.

In any event, plaintiff does not dispute the fact that he never resided at, or occupied the insured premises. As already provided, such failure alone constitutes a valid ground for disclaimer.

CONCLUSION

In light of the foregoing, Liberty's motion for summary judgment is granted, and therefore, plaintiff's complaint is dismissed in its entirety.

ENTER:



J.S.C.

Dated: October 6, 2009

cc: Law Office of Mitchell J. Winn, Esq.
Feldman, Rudy, Kirby & Farquharson, P.C.
Michael Desir

ENTERED

OCT 08 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE