Hermitage Ins. Co. v Lafleur

2011 NY Slip Op 31870(U)

July 6, 2011

Supreme Court, New York County

Docket Number: 114384/2010

Judge: Eileen A. Rakower

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SCANNED ON 7/11/2011

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 114384/2010

HERMITAGE INS. CO.

VS.

LAFLEUR, JOE KEVIN

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4, 5
Answering Affidavits — Exhibits	6, 7, 8
Replying Affidavits	9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/7/11

HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

HERMITAGE INSURANCE COMPANY,

Plaintiff,

- against -

JOE KEVIN LaFLEUR, RUDY NARAINE and MALCOM DOOKIE,

Defendant.

----------X

Index No. 114384/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

Plaintiff Hermitage Insurance Company ("Hermitage") brings this action for a judgment declaring that it has no duty to defend or indemnify defendants Joe Kevin LaFleur and Rudy Naraine in an action commenced by defendant Malcolm Dookie, titled *Dookie v. LaFleur et al.*, 6565/10, in Supreme Court, Queens County ("the underlying action"); and that Dookie is not entitled to coverage under the subject Hermitage policy. Hermitage now moves for summary judgment.

In the underlying action, Dookie alleges that, on or around September 5, 2009 at about 5:00 p.m., he fell while on the premises known as 82-27 179th Street in Queens ("the building"), sustaining bodily injuries. Dookie sued LaFleur and Naraine, the owners of the building, claiming that his injuries were caused by their negligent ownership, operation, and/or maintenance of the premises.

Hermitage issued Commercial General Liability Policy #HCP554634-09 (hereinafter "the policy") to LaFleur and Naraine, covering a period from May 7, 2009 through May 7, 2010. The Declarations section of the policy states that the building is classified as "DWELLINGS - TWO FAMILY (LESSOR'S RISK ONLY)", and describes LaFleur and Naraine's business as "TWO FAMILY DWELLING." The policy also contains the following conditions:

6. Representations

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By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

In support of its motion for summary judgment, Hermitage submits the affidavit of claims investigator Patricia Mattucci. Mattucci states that in the course of her investigation, she obtained a statement from LaFleur, which she transcribed on April 5, 2010. She had LaFleur sign the statement to attest to its accuracy. The statement is annexed as an exhibit in support of Hermitage's motion. In the statement, LaFleur states that, although the building was zoned as a two-family residence, the building contained a third apartment in its basement. Hermitage also submits the affidavit of Natalia Francovig, a commercial lines underwriting manager with Hermitage. Annexed to the Francovig affidavit are relevant portions of the ISO Classification Guide, which contain different classifications to two-family ("63011 Dwellings-two-family (lessor's risk only)") and three-family dwellings ("63012 Dwellings-three-family (lessor's risk only)"). Each of these classifications state that "Basis of premium is each dwelling." Also annexed to the Francovig affidavit are Hermitage's ratings for two-family dwellings and three-family dwellings. The premium for a two-family dwelling is $1,521, and the premium for a three-family dwelling is $1,862. Francovig states that, had LaFleur and Naraine accurately represented the status of the building as a three-family dwelling, Hermitage would have charged the higher premium.

Both LaFleur and Naraine, and Dookie submit papers in opposition to Hermitage's motion. LaFleur and Naraine argue that they did not misrepresent the building's status as a two-family dwelling, because the building's certificate of occupancy lists it as a two-family dwelling. They further argue that, even assuming the building is a three-family dwelling, Hermitage fails to show that this alleged misrepresentation was material as a matter of law. Dookie claims in his opposition that summary judgment is premature at this point because no discovery has been exchanged, and party deposition have not yet occurred.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

As stated by the First Department in *Interested Underwriters v. HDI III Associates*,

> A fact is material so as to avoid *ab initio* an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium .... While materiality must be assessed as of the time the contract was entered into and is ordinarily a question of fact, where the evidence of the materiality of a misrepresentation is clear and substantially uncontradicted, the matter is one of law for the court to determine....

(213 A.D.2d 246, 247[1st Dept. 1995]).

Here, none of the defendants dispute that the building, despite being classified as a two-family dwelling in its certificate of occupancy, did in fact contain three separate apartments, as stated in LaFleur's signed statement. Moreover, Hermitage submits documentary evidence which establishes that LaFleur and Naraine's misrepresentation as to the building's use as a two-family dwelling was material as a matter of law. Hermitage's ISO Classification Guide and ratings for two-family and

three-family dwellings establish that, had LaFleur and Naraine disclosed that there were three apartments in the building, Hermitage would have charged a higher premium (*see id.*) ("the evidence submitted sufficiently established defendant's relevant underwriting practices ... and thus, that summary judgment was appropriate in this case."). *Parmar v. Hermitage Insurance Company*, (21 A.D3d 538 [2005]), cited by LaFleur and Naraine in opposition Hermitage's motion, is inapposite. In that case, the Second Department's denial of summary judgment was based upon the fact that the insurer provided nothing more than "the conclusory statement by the ... underwriter to the effect that it would not have issued the Policy had it known that the premises included a third apartment, located in the basement ...."

Wherefore it is hereby

ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendants Joe Kevin LaFleur and Rudy Naraine in the action of *Dookie v. LaFleur et al.*, Index No. 6565/10, Queens County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendants LaFleur, Naraine, and Dookie in the said action pending in Queens County; and it is further

ADJUDGED that plaintiff Hermitage Insurance Company, having an address at 1311 Mamaronek Avenue - Suite 135, White Plains, NY 10605, do recover from the defendant Joe Kevin LaFleur, having an address at 337 Harbor Point Road, Baldwin, NY 11510; the defendant Rudy Naraine, having an address at 515 South 11th Street, New Hyde Park, NY 11040; and the defendant Malcolm Dookie, having an address at 88-27 179th Street, Jamaica, New York 11432, costs and disbursements in the sum of $_____ as taxed by the Clerk, and plaintiff have execution therefor.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 6, 2011

EILEEN A. RAKOWER, J.S.C.

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