

Lucas & Son Reall Holdings, LLC v Allstate Inc. Co.
2012 NY Slip Op 31723(U)
June 21, 2012
Supreme Court, Suffolk County
Docket Number: 07-15221
Judge: Daniel Martin
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 12-20-11
ADJ. DATE 2-14-12
Mot. Seq. # 003 - MD

-----X
LUCAS & SON REAL HOLDINGS, LLC
PABLO LUCAS and MARIA LUCAS,

Plaintiffs,

SCOTT LOCKWOOD
Attorney for Plaintiffs
1476 Deer Park Avenue, Suite 3
North Babylon, New York 11703

- against -

ALLSTATE INSURANCE COMPANY
and LESLY JEAN-PIERRE,

Defendants.
-----X

LEWIS JOHS AVALONE AVILES, LLP
Attorney for Defendants
425 Broad Hollow Road
Melville, New York 11747

Upon the following papers numbered 1 to 15 read on this motion for summary judgment and declaratory relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and for a declaration that defendant Allstate Insurance Company has no duty to defend or indemnify plaintiffs in the underlying action is denied.

Plaintiffs commenced this action against defendant Allstate Insurance Company (Allstate) and its authorized agent, defendant Lesly Jean-Pierre (Jean-Pierre), for failure to pay property damage and lost rental income claims resulting from a fire at the insured premises and for refusing to defend and indemnify plaintiffs in the underlying personal injury action. The insured premises is known as 35 West Suffolk Avenue, Central Islip, New York. It had been insured since October 2003 pursuant to an Allstate Landlords Package Policy obtained by the named insured, non-party Augusto Lucas, from Allstate agent, defendant Jean-Pierre.

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On December 28, 2005 a fire occurred at the subject premises, and on or about that date Allstate received notice of a fire loss claim. The Allstate policy had been renewed on October 2004 for the policy period of October 7, 2005 to October 7, 2006 and provided coverage for fire loss.

On June 13, 2006 the underlying personal injury action, Juan Matos, Andrea Silva and Milagros Cortes, plaintiffs, against Lucas & Son Real Holdings, LLC, defendants under Index number 06-15987 was commenced in the Supreme Court, Suffolk County. The complaint of the underlying personal injury action alleges that defendant Lucas & Son Real Holdings, LLC owned, managed, and controlled the subject premises and leased an apartment therein to plaintiff Juan Matos who was injured in the fire at the premises.

By letter dated August 3, 2006, Allstate disclaimed any coverage obligations to Lucas & Son Real Holdings, LLC (Lucas & Son) with respect to the underlying personal injury action on the ground that Lucas & Son was not an insured under the Allstate policy. Plaintiffs, Lucas & Son, Pablo Lucas and Maria Lucas, commenced the instant action on May 17, 2007 alleging breach of contract, breach of the duty of good faith and fair dealing, reformation of the Allstate policy to add Lucas & Son as a named insured based on mutual mistake, equitable estoppel against Allstate, and negligence by agent Jean-Pierre in failing to name Lucas & Son or its members on the renewal policy or to timely notify them of the denial of their request so as to enable them to obtain insurance elsewhere.

Plaintiffs claim that the owner of the subject premises, Augusto Lucas, died in November 2003, that he was the husband of plaintiff Maria Lucas and father of Pablo Lucas, that in May 2004 Maria Lucas was issued Letters Testamentary, and that in April 2005 ownership of the subject premises was transferred to Lucas & Son. In addition, they claim that on or about September 22, 2005, Pablo Lucas informed Allstate agent Jean-Pierre, prior to the 2005 policy renewal period, that the subject premises was owned by Lucas & Son, of which Pablo Lucas and Maria Lucas were members. Plaintiffs also claim that on or about September 28, 2005 Lucas & Son paid the annual premium either directly to Allstate or indirectly to its agent Jean-Pierre, and that on or about October 7, 2005, Allstate through its agent Jean-Pierre renewed the subject policy for the period of October 7, 2005 to October 7, 2006. Plaintiffs further claim that defendants erred in failing to properly list Lucas & Son or its members as owner of the subject premises, and that they reasonably relied on the representations and actions of Allstate and its agent in accepting its annual premium check that the change in insured would occur.

Defendants now move for summary judgment dismissing the complaint on the grounds that Lucas & Son was not a named insured on the Allstate policy that was in effect at the time of the fire at the subject premises. They assert that defendant Jean-Pierre was not negligent in renewing the subject policy so that it continued to indicate Augusto Lucas as the insured, that reformation of the policy is not warranted inasmuch as no mutual mistake existed between plaintiffs and defendants concerning the named insured on the policy, and that there is no proof of mailing of plaintiffs' letter allegedly informing defendant Jean-Pierre that Lucas & Son owned the premises. In support of the motion, defendants submit the summons and complaint and their answers in the instant action, the summons and complaint of the underlying personal injury action, the subject policy, the disclaimer letter dated August 3, 2006, the application for insurance, the examination before trial transcript of defendant Jean-Pierre, the deposition transcript of non-party Betzie Bazelais, and the examination before trial transcript of plaintiff

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Pablo Lucas.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, *supra* at 324, citing to *Zuckerman v City of New York*, *supra* at 562).

The examination before trial testimony of defendant Jean-Pierre of August 3, 2010 reveals that he is an Allstate agent, and that the insurance policy was originally issued after a referral from an insurance broker, Sammis. Defendant Jean-Pierre indicated that he first became aware of the claim after its denial, and that after the claim was made his office received a faxed, unsigned, letter regarding a request to change the insured on the policy. In addition, he stated that although the “insured” claimed that the letter had been sent prior to making the claim, neither he nor the producer in his office, Betzy Bazelais, recalled receiving the letter until some point after the claim and that they forwarded the letter to the claims department. Defendant Jean-Pierre also stated that he never had any personal interactions with the insured or anyone purporting to be the insured or any representative of the insured other than the faxed letter. He further testified that he had no involvement in assessing or denying the claim.

At her deposition on March 25, 2011, non-party Betzy Bazelais testified that she was the administration salesperson working for defendant Jean-Pierre at the same office, overseeing sales activities and customer service and managing the agency. In addition, Ms. Bazelais testified that she first became aware of Augusto Lucas based on a referral from an insurance brokerage company, Sammis, and that she wrote the landlord policy for Augusto Lucas in October 2003 and faxed it back to Sammis without any direct communication with Augusto Lucas. She had no interactions with Augusto Lucas, and she became aware of an insurance claim in January 2006 through a telephone call from a gentleman to their receptionist asking to speak with defendant Jean-Pierre. According to Ms. Bazelais, Sammis faxed a letter on January 27, 2007 to the agency regarding a request to change the insured on the policy, which was the first time that she saw the letter, and on that date, defendant Jean-Pierre spoke to someone at Sammis and asked Ms. Bazelais if she was aware of said letter. She, in turn, went to the receptionist who received mail to check if they had ever received said letter. Ms. Bazelais explained that if they had received said letter, it would have been stamped, the envelope stapled to the letter and then placed in the customer’s file, and that there was no such letter in the file. She stated that she never spoke to Pablo Lucas but first became aware of him the day that they received the fax. Ms. Bazelais added that the agency never had problems with lost mail.

Plaintiff Pablo Lucas testified at his examination before trial on August 3, 2010 that he is an officer of Lucas & Son, which has been the sole owner of the subject premises since May or June 2003, and that his father Augusto Lucas was also an officer until his death in November 2003, after which his

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mother, plaintiff Maria Lucas, became an officer. He recalled that seven or eight years prior, his accountant was in the offices of Lucas & Son telling his secretary, Theresa Figueroa, that she had to write a letter to Allstate to switch the name of the insured to Lucas & Son and have their attorney send the letter. Plaintiff Pablo Lucas stated that he saw the letter dated September 22, 2005 in draft form and signed it. He also stated that he never spoke to defendant Jean-Pierre and never spoke to anyone from defendant Allstate concerning policies issued either to his father or anyone else regarding the subject premises nor did he receive any call from defendants Jean-Pierre or Allstate about said letter. Plaintiff Pablo Lucas identified the check that he signed on behalf of Lucas & Son to Allstate dated September 2005.

Here, defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that defendant Allstate is not obligated to provide coverage to plaintiffs in the underlying personal injury action, inasmuch as they are not named insureds on the subject insurance policy (*see South Hylan, LLC v CNA Ins. Co.*, 89 AD3d 719, 931 NYS2d 704 [2d Dept 2011]; *Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 921 NYS2d 98 [2d Dept 2011]). The deposition testimony of Ms. Bazelaïs provided the regular practice and procedure of the agency in organizing and filing incoming mail (*see Liriano v Eveready Ins. Co.*, 65 AD3d 524, 884 NYS2d 248 [2d Dept 2009], *aff'd* 94 AD3d 716, 941 NYS2d 509 [2d Dept 2012]). Defendants established that they did not receive any notice from plaintiff Lucas & Son purportedly informing that it was the owner of the premises and requesting that the insured's name be changed on the policy until after a claim was made on the policy following the fire.

In opposition to the motion, plaintiffs contend that they have proof of mailing of notice to defendants, prior to the policy renewal for the coverage period October 7, 2005 to October 7, 2006, that the owner of the subject premises had changed and that a change in insured was requested. Plaintiffs submit the affidavit of Theresa Figueroa dated February 15, 2012 and the attached unsigned letter dated September 22, 2005 addressed to Allstate and to the attention of defendant Jean-Pierre from Pablo Lucas with a Lucas & Son letterhead.

By her affidavit, Theresa Figueroa avers that during September 2005 she was employed by Danic Concrete and that her boss was Pablo Lucas, that on occasion he would ask her to draft a letter for him unrelated to Danic Concrete, and that on or about September 22, 2005 Pablo Lucas requested that she write a letter for Lucas & Son to Allstate "regarding a change in the name on the insurance policy for 35 West Suffolk Avenue." She describes the office practice when requested by Pablo Lucas to draft a letter including "[a]fter he signed the letter it was my job to address an envelope, place the letter in the envelope, put postage on the letter and place the letter in the postal bin for our carrier." Ms. Figueroa states that she wrote the subject letter as per Pablo Lucas' instructions and that he signed the letter and that although she had been advised by him to have the attorney Roger Rothman review the letter, she was unable to contact the attorney and sent the letter out without such review. She informs that she "then placed it in an envelope addressed to 'Allstate Insurance, 80-03 31st Avenue, Jackson Heights, NY 11370, Att: Lesly Jean-Pierre'... affixed the proper postage and gave it to the mailman on our route." Ms. Figueroa also avers that she did not keep a signed copy of the letter but did keep an unsigned copy, and that the letter attached to her affidavit is a true and accurate copy of the letter that she mailed to Allstate. She concludes by stating that the letter she mailed to Allstate was not returned as undeliverable to the office and that if it had been, she would have been the person in the office to receive it.

The attached letter dated September 22, 2005 with the Lucas & Son letterhead addressed to Allstate and to the attention of defendant Jean-Pierre concerning the subject policy and property address states "Dear Lesly, Please note that the above property is now owned by Lucas & Son Real Holdings. Please contact me at my office (631) ... to either change the name on the current policy or to write a new policy if necessary. Very truly yours, Pablo Lucas".

As a general rule of evidence, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee (*see Matter of Rosa v Board of Examiners of City of New York*, 143 AD2d 351, 532 NYS2d 307 [2d Dept 1988]). "The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]; *see Dune Deck Owners Corp. v JJ & P Assocs. Corp.*, 71 AD3d 1075, 1077, 899 NYS2d 262 [2d Dept 2010]).

Here, the affidavit of Ms. Figueroa and the attached letter establish the actual mailing of the letter to defendants, giving rise to a rebuttable presumption of delivery (*see Dune Deck Owners Corp. v JJ & P Assocs. Corp.*, *supra*). The deposition testimony of Ms. Bazelais submitted with the motion and the affidavit of Ms. Figueroa submitted in opposition raise credibility issues that cannot be resolved on a motion for summary judgment (*see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]). Thus, said affidavit and attached letter raise issues of fact as to whether plaintiffs timely mailed the letter dated September 22, 2005 and whether defendants received said letter prior to the fire but failed to take any action on its contents (*see generally Turkow v Security Mut. Ins. Co.*, 92 AD3d 1180, 939 NYS2d 170 [3d Dept 2012]; *St. Vincent's Hosp. of Richmond v Government Employees Ins. Co.*, 50 AD3d 1123, 857 NYS2d 211 [2d Dept 2008]; *Carle Place Plaza Corp. v Excelsior Ins. Co.*, 144 AD2d 517, 534 NYS2d 397 [2d Dept 1988]).

Accordingly, the instant motion is denied.

Dated: JUNE 21, 2012.



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION