

Dauria v Castlepoint Ins. Co.

2012 NY Slip Op 33670(U)

January 26, 2012

Supreme Court, Bronx County

Docket Number: 302708/11

Judge: Jr., Kenneth L. Thompson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
LINDA and THOMAS DAURIA,

Index No. 302708/11

Plaintiff,

-against-

DECISION/ORDER

CASTLEPOINT INSURANCE COMPANY, FRANK
CAMPO and NORTHEAST AGENCIES, INC.,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1, 1a, 2, 3, 3a
	Answering Affidavit and Exhibits-----	5, 5a
	Replying Affidavit and Exhibits-----	4
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant FRANK CAMPO's motion for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing the Complaint, Plaintiffs' cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment as to Defendant CASTLEPOINT INSURANCE COMPANY, and Defendant CASTLEPOINT INSURANCE COMPANY's cross-motion for an Order pursuant to CPLR 3212 granting summary judgment and dismissing the Complaint are all consolidated for Decision herein.

CAMPO's motion is **GRANTED**.

Plaintiffs' cross-motion is **GRANTED**.

CASTLEPOINT's cross-motion is **DENIED**.

CAMPO was Plaintiffs' insurance agent and procured them a Homeowner's policy underwritten by CASTLEPOINT on or about October 16, 2008. The Policy states that CASTLEPOINT "cover[s]: The dwelling on the "residence premises" shown in the

Declarations" (Policy at pg. 2, Coverage A – Dwelling.) The Policy indicates that a "residence premises" means a one and two-family dwelling. (Id. at pg. 1, Definitions § 8.) The Declaration states that "[t]he residence premises covered by this policy is located at the above insured address unless otherwise stated below location." (HT011(7/99).) The address listed is 2894 Zulette Ave, Bronx, NY 10461 (Premises). (Id.) "Building" is also listed under the Section I Coverage. (Id.) The Premises suffered fire loss on November 6, 2010, which CASTLEPOINT declined coverage for based on its finding that the Premises was a three-family dwelling.

Plaintiffs commenced this lawsuit against CAMPO for negligence and breach of contract, and against CASTLEPOINT for breach of contract. CAMPO argues that he is entitled to dismissal because he properly procured an insurance policy for Plaintiffs. CASTLEPOINT contends that its entitled to summary judgment because Plaintiffs' materially misrepresented that the Premises was a three-family dwelling. Plaintiffs contend that they are entitled to summary judgment because certain terms in the Policy are ambiguous and the Premises operated as one "household."

The Court finds that: CAMPO fulfilled his duty to Plaintiffs; CASTLEPOINT is not entitled to rescind the insurance policy; Plaintiffs are entitled to be indemnified by CASTLEPOINT. The Court is accepting Plaintiffs' cross-motion since there is no prejudice to CASTLEPOINT and because CASTLEPOINT has ample opportunity to be heard on the merits. See Daramboukas v Samlidis, 84 A.D.3d 719, 721.

Dismissal

[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action. Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be

denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.

Sokol v Leader, 74 AD3d 1180, 1182 (citations omitted).

Insurance agents

CAMPO has shown that “no significant dispute exists regarding” his lack of duty to Plaintiffs under the circumstances of this matter. “[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage.” Murphy v. Kuhn, 90 NY2d 266, 270 (citation omitted); see also Wied v. New York Cent. Mut. Fire Ins. Co., 208 AD2d 1132, 1133 (stating that “[i]n New York, the duty owed by an insurance agent to an insurance customer is ordinarily defined by the nature of the request a customer makes to the agent”) (citations omitted). CAMPO procured insurance for the Plaintiffs, within a reasonable time. He had no continuing duty to advise Plaintiffs to procure additional insurance once this was achieved. See Riedman Agency, Inc. v. Meaott Constr. Corp., 90 AD2d 963, 964 (finding “a duty to use reasonable skill and care, act loyally, and give notice to ... in the event of his failure to procure the desired bond within a reasonable time”); Rodriguez v. Investors Ins. Co. of Am., 201 AD2d 355, 356 (finding broker liability “for neglect in failing to procure insurance”). “Absent a specific request for coverage or a level of coverage, an insurance agent or broker is not liable to an insured for any failure to procure a particular type or amount of coverage not already in the policy.” Phila. Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP, 379 FSupp2d 442, 458 (citations omitted).

Summary Judgment

"The 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers."

Winegrad v. NY Univ. Med. Ctr., 64 NY2d 851, 853.

Rescission

CASTLEPOINT has failed to meet its *prima facie* burden of showing entitlement to rescission as a matter of law. "To establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation."

Schirmer v. Penkert, 41 AD3d 688, 690 (citations omitted). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application." Varshavskaya v Metropolitan Life Ins. Co., 68 AD3d 855, 856 (citations omitted).

Edward Blomquist averred that CASTLEPOINT "only issues homeowner's policies for one- or two- family, owner-occupied, primary residences," since these "residences generally pose a lesser degree of risk than larger, non-owner-occupied or non-primary residences." (E. Blomquist Aff. at ¶ 3.) He proffers CASTLEPOINT's "underwriting guidelines" in support of this contention. (Id. at Ex. 1.) The guidelines have an "Unacceptable exposure" category, which includes "dwellings": "more than 1000 feet from a fire hydrant and/or more than five miles from a fire station"; "with rooming or SRO exposure"; "in the course of construction or renovation"; "previously

insured through the FAIR Plan or any non-standard carrier"; "with unfenced swimming pools"; and "with trampolines, skateboard ramps or any other attractive nuisance that poses a liability hazard." (*Id.*) "Three family dwellings," however, are not listed as an "unacceptable exposure." Compare with *Interboro Ins. Co. v. Fatmir*, 89 A.D.3d 993 (granting summary judgment where plaintiff showed that the property was "deemed an unacceptable risk under its underwriting guidelines").

Breach of contract

Absent rescission, CASTLEPOINT should indemnify Plaintiffs as per the Policy. Courts have long held that it is the four corners of an insurance policy that determines who is covered and the extent of such coverage. *Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 AD3d 386; *Stainless, Inc. v. Employers Fire Ins. Co.*, 69 AD2d 27. Where the provisions of a policy are clear and unambiguous on its face, the policy is enforced as written. *White v. Continental Cas. Co.*, 9 NY3d 264 (holding if an insurance contract on its face is reasonably susceptible of only one meaning a court is not free to alter it); *Cataract Sports and Entertainment Group, LLC v. Essex Ins. Co.*, 59 AD3d 1083. Words in a policy are to be given their ordinary meaning as understood by an average person. *Miller v. Continental Ins. Co.*, 40 NY2d 675 (holding terms of an insurance policy are construed in accordance with their understanding by the average man); *Prince v. ITT Life Ins. Corp.*, 89 AD2d 779; *J.G.A. Constr. Corp. v. Charter Oak Fire Ins. Co.*, 66 AD2d 315; *Brown v. Hearthstone Ins. Co. of Mass.*, 19 AD2d 578.

The Policy has an exclusions section, yet it does not include "three-family dwellings." (HO0030491 at 8, 9.) The Policy indicates that CASTLEPOINT will "cover" the "dwelling on the 'residence premises' shown in the Declarations." (HO0030491 at

2) (emphasis added). "Dwelling means any building lawfully occupied in whole or in part as the temporary or permanent residence of one or more natural persons." NYC Admin Code § 24-203(28). It also means "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings." NY Mult Dwell Law § 4(4). The "residence premises" in the Declaration is located at "2894 Zulette Ave, Bronx, NY 10461." (HT001 (8.98)) The Declaration also indicates that the "Building" is included under "Section I Coverage." (Id.) Since neither the Policy nor CASTLEPOINT's underwriting guidelines exclude "three-family dwellings" from coverage, the Court reads the Policy as covering the entire Building located at 2894 Zulette, Ave., Bronx, N.Y.

The foregoing shall constitute the decision and order of this Court.

Dated: JAN 26 2012



J.S.C.

KENNETH L. THOMPSON, JR.