

Hermitage Ins. Co. v Difuccia

2014 NY Slip Op 30322(U)

February 4, 2014

Supreme Court, New York County

Docket Number: 101091/12

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

HERMITAGE INSURANCE COMPANY,
Plaintiff,

Index No.: 101091/12

Motion Date: 08/30/13

- v -

GIOVANNI DIFUCCIA,
Defendant.

Motion Seq. No.: 01

The following papers, numbered 1 to 5 were read on this motion for summary judgment declaring rights under an insurance policy.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

No (s) .	1, 2, 3
No (s) .	4
No (s) .	5

Cross-Motion: Yes No

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

In this action arising out of a ten unit apartment building, located at 94 St. Andrews Place, in Yonkers, New York, destroyed by fire, plaintiff Hermitage Insurance Company moves, pursuant to CPLR 3212, for an order granting summary judgment, declaring that its insurance policy with defendant Giovanni Difuccia, excludes coverage for defendant's loss.

FILED

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NEW YORK

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In February of 2006, defendant purchased the premises located at 94 St. Andrews Place (Premises) as the prior owner, Hamza Hamideh (Hamideh). After purchasing the Premises, defendant hired Hamideh to serve as the property manager.

On November 19, 2007, the Premises suffered damage from its first fire, which plaintiff maintains was the result of an arson.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Plaintiff submits a copy of the crime investigation report which includes a report from a fire investigator. Plaintiff maintains that defendant received approximately \$400,000 from his insurance carrier for the damage.

Several years later, plaintiff and defendant entered into a policy which was effective from February 2, 2010 to February 2, 2011, in which plaintiff provided first-party property insurance coverage for the Premises. That same year, in October 2010, defendant submitted an insurance claim to plaintiff arising out of boiler damage at the premises. Plaintiff denied the claim because it determined that the boiler damage was caused by ordinary usage. In connection with the boiler failure, an inspection by Con Edison concluded that defendant had not been billed for gas service for the premises due to alleged tampering with the system. Gas service to the premises was terminated, and defendant was billed \$67,035.11 by Con Edison for the theft of the utilities.

In October of 2010, the City of Yonkers and its fire department issued summonses to defendant for illegal gas connections, for the storage of combustible materials in the boiler room, for exposed wiring at the premises, and for failing to provide heating to the Premises.

On November 8, 2010, the Department of Housing and Buildings of the City of Yonkers issued an order of condemnation for the premises which required all tenants to vacate the premises by

November 19, 2010. Ross Smith (Smith), Housing Inspector for the City of Yonkers, personally inspected the premises on November 10, 18, 23, and 26, 2010, to ensure that the order of condemnation was obeyed. The inspection on November 18, 2010 determined that only one of the ten tenants remained at the premises. Smith confirmed in an affidavit dated July 26, 2012, that the tenant had vacated the premises as of November 26, 2010 and the premises was "totally uninhabited."

Plaintiff maintains that, pursuant to the terms of its policy with defendant, the Premises are considered vacant unless 31% of its total square footage is rented to a lessee. Plaintiff argues that the Premises were vacant as of November 18, 2010, when the housing inspector confirmed that only one tenant remained in the apartment building.

On November 28, 2010, the fire department was called to the Premises due to a strong order of gasoline. According to the report, the responding fireman discovered gasoline poured throughout the interior, along with a rope out of the window that appeared to be charred. On December 20, 2010, plaintiff was notified by Hamideh of water damage to the Premises caused by a ruptured frozen pipe. Defendant and Hamideh testified that the pipe burst because the Premises were not heated and the water to the Premises was never shut off. As the policy did not provide coverage for such circumstances, the claim was withdrawn by

defendant's public adjuster.

On January 20, 2011, the Premises were destroyed by a fire. The Yonkers Fire Department and Bill Hayden, plaintiff's "cause and origin" investigator, determined that the fire was probably arson. The investigation disclosed that the fire had three different points of origin, that a hole was cut in the floor between the first and second floors, and that a gasoline can was discovered. Defendant submitted a claim to plaintiff in the amount of \$1,800,000 for the damage caused by the fire. After conducting its investigation, plaintiff denied coverage.

"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" Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiff moves for summary judgment and contends the Premises were vacant for more than 60 days before the January 20, 2011 fire, and therefore, would not be covered under the policy's vacancy provision. The policy's vacancy provision provides in part:

6. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1) (a) and (1) (b) below:

.

* * *

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sub-lessee and used by the sub-lessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism

Plaintiff maintains that the affidavit of Housing Inspector Smith demonstrates that there can be no dispute that the Premises were vacant as defined by the policy for more than 60 consecutive days before the date of the January 20, 2011 fire, and thereby, coverage would be precluded.

Defendant argues that a question of fact exists as to whether the building was vacant for the 60 day period prior to the fire. Defendant submits affidavits from six of the ten renters which state that the residents retained property in the apartments at the time of the fire, and lived in the premises during the alleged 60 day vacancy period. Defendant argues that the court must consider such affidavits since the identities of all of the residents and contact information were provided to plaintiff's counsel during the discovery process, while plaintiff contends that the contact information of the witnesses was withheld by defendant, since plaintiff was unable reach such witnesses at the contact numbers provided.

Defendant submits an affidavit from Dennise Espinal (Espinal), a resident in the building in which she states that her last day in Apartment 3W was November 27, 2010, that most of her personal property remained in the Premises until January 20, 2011, and that she did not expect to vacate the apartment permanently. Plaintiff argues that Espinal gave conflicting information regarding an earlier move-out day in the statement she gave to an investigator from plaintiff.

Defendant submits additional affidavits from (1) Francisco Hernanadez, a resident of apartment 5W, in which he states that the last day of his residence was November 24, 2010, and that he and his mother lost everything in the fire; (2) Sevgi Gorur, a resident

of apartment 3E, in which he states that his last day of residence was November 24, 2010, and that his property remained on the Premises; (3) Janny Tapia (Perez) of Apartment 4W, in which she states that her last day of residence was November 25, 2010, and that she did not expect to vacate the apartment permanently; and (4) Kelvin Rodriguez of apartment 4E in which he states that his last day of residence was November 23, 2010, that his property remained on the Premises, and that he did not expect to vacate the apartment permanently.

Defendant also proffers an affidavit from Hamideh, who estimates that the Premises were over 50% occupied as of November 27, 2010, and that all of the units were under lease and paid through the end of November. However, plaintiff argues that Hamideh's affidavit contradicts his own sworn deposition testimony regarding when he was at the Premises, and whether he was aware if anyone resided there.

The Court of Appeals has held that "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." S. J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974); see also Psihogios v Stavropoulos, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Even were the court to disregard Hamideh's affidavit to the

extent that it conflicts with his deposition testimony, the fact that Housing Inspector Smith's affidavit conflicts with the tenants' affidavits raises questions of credibility that cannot be resolved on this motion, and which must be determined by a fact finder at trial. Since without adjudicating the credibility of the witnesses, the court is unable to determine whether the Premises were vacant for at least 60 days before the fire, plaintiff's motion for summary judgment declaring that there is no coverage of defendant's claim must be denied.

"[T]he doctrine of stare decisis requires trial courts to follow precedents set by the Appellate Division of another department until the Court of Appeals or Appellate Division of the department wherein the trial court is located pronounces a contrary rule". Mountain View Coach Lines v Storms, 102 AD2d 663, 664 (2d Dept 1984). Defendant is correct that the decision of the Second Department, Appellate Division, in MDW Enterprises, Inc. V CNA Insurance Company, 4 AD3d 338 (2004) is controlling here. In that opinion, the Appellate Division unanimously modified the trial court's opinion granting defendant insurance carrier's motion to dismiss plaintiff insured's breach of contract action, reinstated such cause of action, and granted defendant's cross motion for partial summary judgment of liability on such cause of action. In its opinion, the Court reasoned that defendant insurance carrier had failed to sustain its burden of proof on its summary judgment

motion that the term "vandalism" was subject to only one reasonable interpretation, i.e. the interpretation that defendant insurance carrier proffered that coverage for damages was excluded under a vacancy provision of the all risk-policy, where the commercial premises were destroyed by a fire intentionally set by unknown persons. Applying the principle that "[w]here a policy is ambiguous, the policy must be narrowly interpreted in favor of the insured", the Court granted defendant insurance company's cross motion for partial summary judgment as to liability, holding that the defendant insurance carrier had breached its contractual obligation under the policy in denying coverage to the insured. MDW Enters., supra, 4 AD3d at 340.

In the matter at bar, defendant insured has not cross moved for summary judgment but argues that there are issues of fact with regard to whether the Premises were vacant for the period of 60 days before the fire. In addition, unlike in MDW Enterprise, where the policy was held to be ambiguous in part because the word "arson" was listed separately elsewhere in its provisions, the word "arson" is not listed anywhere in the policy at bar. Therefore, it will be for a finder of fact to determine whether a reasonable and ordinary business person would view "vandalism" and "arson" as separate and distinct from one another, for the purpose of the vacancy exclusion, where the explicit word "arson" is not used at all in the policy. Should the fact finder find no ambiguity in

that regard, then it will have to determine whether the Premises were vacant for the 60 days period prior to the fire.

Finally, although defendant filed a counterclaim for damage to the boiler, in his opposition papers counsel for defendant states that the counterclaim is withdrawn as the claim is time-barred.

Accordingly, it is

ORDERED that plaintiff Hermitage Insurance Company's motion for summary judgment is denied.

This is the decision and order of the court.

Dated: February 4, 2014 .

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

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