Estate of Gen Yee Chu v Otsego Mut. Fire Ins. Co.
2014 NY Slip Op 33862(U)
October 7, 2014
Supreme Court, Queens Counrty
Docket Number: 19067/11
Judge: Timothy J. Dufficy
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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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THE ESTATE OF GEN YEE CHU by CHIEN MIN CHU, as executor and/or administrator, AND CHIEN MIN CHU, Individually,

Plaintiff(s),

Index No.:19067/11

-against-

DECISION AND ORDER

OTSEGO MUTUAL FIRE INSURANCE COMPANY,

Defendant(s).

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OPINION OF THE COURT

After reviewing the parties' submissions and oral argument held on October 3, 2014, the Court grants defendant **OTSEGO MUTUAL FIRE INSURANCE COMPANY**'s (Otsego) motion for a directed verdict at the close of the evidence, as follows:

In November 2006, the plaintiffs' insurance broker submitted a signed insurance application to Otsego's agent, which indicated that the premises to be covered was a two-family dwelling. Otsego issued a policy of fire insurance covering the described two-family premises.

On July 15, 2011, a fire loss occurred. The plaintiffs demanded damages equal to the policy limit in order to repair fire damage to three apartments. In fact, upon inspection after the fire, the premises had three separate and distinct apartments. Otsego refused to pay the claim, stating the policy was void *ab initio* and returned the premium to the plaintiffs. Otsego's decision was based upon a material misrepresentation by the plaintiffs when the policy was issued. The plaintiffs stated in the policy application that

the premises were occupied by two families. In fact, there were three separate apartments, each with its own bedroom, bathroom and kitchen, occupied by three different families, at the time of the fire.

The evidence at trial established conclusively and unequivocally that Otsego does not insure three-family residences, and would not have written a policy of insurance for the subject premises had it known that had three apartments.

Insurance Law § 3105(b)(1) and (c), provide, in pertinent part that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract" and "[i]n determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

Thus, to establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented (see Insurance Law §3105[b][1] supra). 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 (see James v Tower Insurance Co., 112 AD3d 786 [2d Dept. 2013]).

The facts of this case are essentially uncontroverted. The plaintiff in this case represented on the application for insurance that the property in question was a two-family dwelling. In fact, the property had three separate living units. The insurer in this case has made it clear that its underwriting practices do not include insuring three-family residential properties. Thus, had the insurer known the true state of facts, it would not

have entered into a contract of insurance for the premises. Simply stated, this was a three-family residence, and Otsego does not insure three-family residences.

The First and Second Departments are in agreement that, in this scenario, a misstatement of this type is material, and permits the insurer to void the agreement in the event of a loss. The Court notes that the preeminent cases on this issue were decided only in the last two years, following defendant's summary judgment motion and reargument.

In James v Tower Ins Company, 112 AD3d 786 (Dec. 2013), the owner misrepresented that a premises would be owner occupied. Tower demonstrated through testimony of their underwriting manager and relevant portions of their underwriting manual that they would not have issued the policy had they known the premises were not owner occupied. The plaintiff's complaint was dismissed.

The case of Dauria v CastlePoint Ins. Co., 104 AD3d 406 (1st Dept. 2013) affirmed in part 2014 NY App. Div LEXIS 5963, 2014 NY Slip Op 6034, 2014 NY Slip Op 06034 [1st Dept. Sept. 4, 2014), is right on point. After a fire at the plaintiff's residence, the insurer rescinded the policy on the basis that the premises contained a basement apartment, rendering it a three-family residence as opposed to the two-family designation that was listed on the insurance application. The First Department reversed the trial court's denial of summary judgment to the insurer. The court found that the misrepresentation was material because the insurer demonstrated that its underwriting regulations did not permit it to issue policies to such buildings.

Shortly thereafter, the Second Department, on the same facts, adopted the Dauria case and its reasoned holding in Lema v Tower Ins. Co., 119 AD3d 657, 658 [2d Dept. 2014]. It held that:

> Although the plaintiff represented in the application for insurance that the subject premises was a two-family dwelling, the defendant submitted evidence, which included photographs and the affidavit of its property field adjuster, showing that the subject premises contained three separate dwelling units, each with its own

kitchen, bathroom, and separate entrance. This evidence established, prima facie, that the subject premises was a three-family dwelling based on its structural configuration (see Dauria v CastlePoint Ins. Co.,104 AD3d 406, 960 N.Y.S.2d 105; Hermitage Ins. Co. v LaFleur, 100 AD3d 426, 953 N.Y.S.2d 209). Furthermore, the defendant submitted an affidavit from its underwriting manager and its "Homeowners Selection Rules," which showed that it would not have issued the same policy if the application had disclosed that the subject premises was a three-family dwelling (see James v Tower Ins. Co. of N.Y., 112 AD3d 786, 787, 977 N.Y.S.2d 345).

While it is always this Court's predilection to have trial matters determined by the jury, on these facts, given the foregoing case holdings, it is impossible to do so in this case. The misrepresentation that the subject premises was a two-family residence is a material misrepresentation as a matter of law. Otsego has demonstrated, in uncontroverted fashion, that had it known that the premises was a three-family dwelling , it would not have insured it, as Otsego had not insured polices for three-family residences since 1980 (see Insurance Law § 3105(b)(1) and (c), Lema v Tower Ins. Co., supra; Dauria v CastlePoint Ins. Co., supra; James v Tower Insurance Co., supra.)

In this case, through the live testimony of Otsego's underwriter, along with the admission of its underwriting manuals and memoranda, Otsego presented ample evidence to prove that it would not have issued the subject policy if not for the plaintiff's material representation.

Accordingly, defendant Otsego's's motion for a directed verdict is granted, and the plaintiff's complaint is dismissed as against it.

This constitutes the opinion, decision and order of the Court.

Dated: October 7, 2014

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TIMOTHY J. DUFFICY, J.S.C.