

**Sarikov v State Farm Fire & Cas. Co.**

2015 NY Slip Op 31790(U)

September 18, 2015

Supreme Court, Kings County

Docket Number: 502525/2013

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of September, 2015.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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NISSIM SARIKOV,

Plaintiffs,

- against -

STATE FARM FIRE AND CASUALTY COMPANY and  
CHRISTOPHER TIGHE (d/b/a CHRISTOPHER TIGHE AGENCY),

Defendants.

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DECISION/ORDER

Index No. 502525/2013

Motion Sequence Nos. 1, 2

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

1-3, 4-7

Opposing Affidavits (Affirmations) \_\_\_\_\_

Reply Affidavits (Affirmations) \_\_\_\_\_

8, 9

\_\_\_\_\_ Affidavits (Affirmations) \_\_\_\_\_

Other Papers \_\_\_\_\_

Upon the foregoing papers, plaintiff Nissim Sarikov moves for an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability. Defendants State Farm Fire and Casualty Company (State Farm) and Christopher Tighe (d/b/a Christopher

Tighe Agency), cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint.

### ***Background***

Plaintiff commenced the instant action by electronically filing a summons and verified complaint with this court on May 15, 2013. The record indicates that plaintiff, through Tighe, an insurance broker, purchased a comprehensive homeowners insurance policy from State Farm; this policy provided coverage (among other things) against damage to the building located at 112-18 68th Road in Queens. Thereafter, on or about January 10, 2013, and while the subject policy was in effect, a leak from a bathroom in the subject building caused extensive water damage to the premises. Consequently, plaintiff submitted a claim for benefits to State Farm.

By letter to plaintiff dated April 9, 2013, State Farm disclaimed coverage for the loss. The letter states, in essence, that the subject policy covers only dwellings that are used as a residence—a dwelling where the policyholder actually resides. The letter also informed plaintiff that State Farm's investigation of the claim revealed that plaintiff and his family did not reside in the subject premises on the date of loss.<sup>1</sup> Instead, at all relevant times (and since 1991) plaintiff and his family had resided at 2303 East 66<sup>th</sup> Street in Brooklyn. State Farm

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<sup>1</sup> In fact, as mentioned below, plaintiff and his family had never resided in the subject premises before the date of loss.

concluded that since plaintiff did not reside at the subject premises at relevant time, the premises are not an insured location pursuant to the policy.

Consequently, plaintiff commenced the instant action, alleging breach of contract and negligence against State Farm and Tighe. Also, plaintiff alleges a breach of a special relationship between him and defendants. Defendants then interposed an answer. Discovery ensued, including the depositions of several witnesses. On January 15, 2015, plaintiff filed a note of issue with a jury demand, certifying that all discovery is complete and that the action is ready for trial. Both instant motions for summary judgment followed.

### ***Plaintiff's Arguments***

In support of his motion, plaintiff first asserts that Tighe failed to act as a reasonably prudent insurance broker in this matter. Specifically, plaintiff notes the deposition testimony of George Watling, the Tighe employee who serviced plaintiff. Plaintiff points out that Watling gave sworn testimony that he had no recollection of the substance of his conversations with plaintiff. Also, plaintiff states that Watling testified that, in August of 2012, he had conversed with plaintiff's wife during an inspection of the premises, but he somehow had no recollection of the interior of the house (other than the fact that it had a basement). Plaintiff suggests that the reason Watling so testified is because the house was empty; in other words, Watling knew that plaintiff was not going to move in immediately, but was instead going to renovate the house. Moreover, plaintiff emphasizes that Watling

had actual notice of plaintiff's plans concerning the subject property—specifically, that plaintiff and his family were not going to move into the new house until the following school year. Plaintiff claims that the sworn deposition testimony of the parties indicates as such. Thus, reasons plaintiff, a reasonably prudent insurance broker in Watling's situation should have obtained insurance coverage against damage to the premises that was not contingent upon plaintiff's residence therein. Accordingly, concludes plaintiff, Tighe is liable for negligently failing to procure the desired insurance policy.

Plaintiff claims that these facts, elicited through sworn deposition testimony, demonstrate that he is entitled to summary judgment. Anticipating that defendants will attempt to claim that triable issues of fact exist, plaintiff instead contends that since defendants' agents saw a house that "was completely vacant and barren" during inspection, Watling's testimony that he couldn't remember the interior of the house is insufficient to defeat summary judgment. Plaintiff argues that, in sum, a reasonable and prudent insurance broker would have understood that plaintiff sought insurance coverage against damage to the house without the requirement that the policyholder reside therein. Plaintiff concludes that since defendants failed to act prudently while procuring an insurance policy, he is therefore entitled to summary judgment on the issue of liability against them.

### *Defendants' Arguments*

In opposition to plaintiff's arguments, and in support of their motion for summary judgment, defendants first assert that the subject policy unambiguously provides insurance benefits only (as relevant here) for a dwelling where the insured resides. Defendants claim that other courts have upheld similar policy provisions, and have also found that no coverage exists where indicia of residence (e.g. sleeping and eating in the dwelling, receiving mail at the address) is absent. Here, defendants continue, plaintiff testified that he both did not reside in or engage in acts indicating residence in the subject house at any time prior to the date of loss. Defendants conclude that plaintiff's own testimony establishes that, as a matter of law, there is no insurance coverage available in this matter.

Defendants next note that plaintiff is arguing, essentially, that defendants have somehow waived the residence requirement contained in the policy because Watling observed that the house was empty in August of 2012. Defendants point out that, nevertheless, plaintiff and his family failed to reside in the subject premises from August of 2012 until the date of loss. In sum, defendants argue that the fact that the house was empty in August of 2012 does not establish that defendants "intended to insure a vacant and unoccupied home for an indeterminate amount of time." Therefore, reason defendants, the residence requirement was not waived and this court should thus find that no coverage exists in this matter.

Also, defendants assert that plaintiff's alleged damages have been caused by his acts and omissions (specifically, his failure to reside in the premises), and not by the negligence of any defendant. Moreover, defendants maintain that since plaintiff had limited interactions (two phone conversations) with Watling, plaintiff thus did not have the sort of relationship with Tighe that would create a duty to advise plaintiff about insurance coverage options. Instead, continue defendants, plaintiff's mortgage broker referred him to "George" (Watling) at Tighe. In any event, defendants contend that plaintiff had never informed Watling of his plans to renovate the house; if plaintiff had done so, plaintiff could have received coverage for a dwelling under construction or renovation. Indeed, defendants assert that plaintiff did not request any specific "dwelling under renovation" coverage from Watling; plaintiff simply sought (and received) a homeowners policy. Defendants claim that it is an insured's request for specific insurance coverage, and not any form of constructive notice (i.e. the observation of an empty house) that delineates the duty to procure coverage. In this case, conclude defendants, plaintiff got what he asked for; accordingly, plaintiff's negligence claims must be dismissed as both against State Farm and Tighe.

Lastly, defendants argue that plaintiff has no viable claim for consequential damages. Defendants reason that, given plaintiff's limited interactions with Tighe, the record thus does not support a finding that plaintiff's alleged damages were foreseeable. Defendants reiterate that plaintiff made no request for any specific coverage other than homeowners; indeed, the

record indicates that it was plaintiff's mortgage broker, and not plaintiff, who forwarded most of the information necessary to obtain a homeowners policy to Tighe and State Farm. Moreover, continue defendants, consequential damages are available only when an insurer demonstrably proceeded in bad faith; here, no such bad faith exists. Defendants note that plaintiff's deposition testimony indicates that the State Farm investigator treated him fairly; defendants suggest that nothing State Farm could have done differently during the investigation would have altered plaintiff's course of conduct during that time. Also, defendants characterize as frivolous plaintiff's argument that State Farm has a pattern of improperly denying claims; defendants note that plaintiff testified at his deposition that, in this matter, he was not concerned with State Farm's relationship with other claimants.

Defendants reason that, in sum, plaintiff obtained homeowners insurance for a dwelling in which he did not reside. Defendants note that plaintiff thus failed to meet a condition required for coverage under the subject policy; accordingly, coverage was properly denied, and plaintiff is thus responsible any hardship he has experienced as a consequence. For these reasons, defendants conclude that their motion for summary judgment dismissing the complaint should be granted.

## *Discussion*

### *1. Standards for Summary Judgment*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he 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 demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

Nevertheless, a motion for summary judgment should be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

Based on these principles, this court denies the motion of plaintiff, and grants the motion of defendants. First, plaintiff has no viable claims against State Farm. The record indicates that plaintiff did not ever reside in the subject premises. Also, it is undisputed that the subject policy applies only to “residence premises . . . where [plaintiff] reside[s]”. Given that the word “reside” has “a definite and precise meaning” (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355 [1978]) [the question of whether an insurance policy is

ambiguous is a matter of law to be determined by the court], *rearg denied* 46 NY2d 940 [1979]), this court will not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists (*Acorn Ponds v Hartford Ins. Co.*, 105 AD2d 723, 724 [2d Dept 1984]; *see e.g. Herrnsdorf v Bernard Janowitz Constr. Corp.*, 96 AD3d 1011, 1013 [2d Dept 2012]). Therefore, the relevant insurance coverage did not apply to the subject premises, and State Farm thus correctly denied plaintiff's claim.<sup>2</sup>

Also, plaintiff has no viable claims against Tighe. Contrary to plaintiff's suggestion that notice of an empty dwelling somehow determines an insurance broker's duties, the correct principle is that "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" (*Barco Auto Leasing Corp. v Montano*, 215 AD2d 617 [1995]; *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132 [1994]). "[A]bsent a specific request for coverage not already provided in a client's insurance policy, neither an insurance company nor its agent has a common-law

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<sup>2</sup> The record is devoid of any support for plaintiff's assertion that State Farm has engaged in a pattern of bad faith claim denials. In any event, to succeed on such a claim requires "more than an arguable difference of opinion between carrier and insured over coverage to impose an extra-contractual liability for legal expenses in a controversy of this kind"—instead, a plaintiff must make "a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it" (*Sukup v State of New York*, 19 NY2d 519, 522 [1967]). Given that this court decides that State Farm correctly denied plaintiff's claim, it follows logically that plaintiff has not demonstrated a bad faith denial of his claim. Moreover, to demonstrate a "pattern" of bad faith denials, plaintiff must show both "egregious tortious conduct" directed at the insured claimant and "a pattern of similar conduct directed at the public generally" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995], citing *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

duty to advise a client to procure additional coverage” (*Empire Indus. Corp.*, 226 AD2d 580, 581 [1996]; *see also Chaim v Benedict*, 216 AD2d 347 [1995]; *Hjemdahl-Monsen v Faulkner*, 204 AD2d 516, 517 [1994]). Here, plaintiff’s sworn deposition testimony indicates that he asked Watling for a homeowners policy (and that plaintiff received such). Thus, Watling and Tighe were obligated only to procure a homeowners insurance policy, which they did. Plaintiff’s testimony<sup>3</sup> does not indicate that he made any “specific request . . . to procure additional coverage” for a house that is not being used as a residence (*Empire Indus. Corp.*, 226 AD2d at 581). Accordingly, Tighe did not breach any duty to plaintiff, and there is thus no viable claim of negligence. In sum, since plaintiff has no viable claims against either State Farm or Tighe, defendants’ cross motion for summary judgment dismissing the complaint must be granted; plaintiff’s motion is thus moot.

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<sup>3</sup> To the extent that plaintiff’s statements in affidavits deviate from the sworn testimony he gave at his examination before trial, this court considers the statements made in affidavits feigned for the purpose of attempting to avoid summary judgment (*see e.g. Semple v Sterling Estates*, 300 AD2d 297 [2d Dept 2002]). Accordingly, this court disregards any statement in plaintiff’s affidavits that deviate from sworn testimony.

For the foregoing reasons, the motion of plaintiff Nissim Sarikov for summary judgment on the issue of liability against defendants State Farm Fire and Casualty Company and Christopher Tighe is denied. Defendants' cross motion for summary judgment dismissing plaintiff's complaint is granted.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.



NANCY T. SUNSHINE  
Clerk

KINGS COUNTY CLERK  
FILED  
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