

Vericrest Fin., Inc. v Automobile Ins. Co. of Hartford, Connecticut
2015 NY Slip Op 32190(U)
October 22, 2015
Supreme Court, Queens County
Docket Number: 702399/12
Judge: Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE RUDOLPH E. GRECO, JR.
Justice

IA Part 32

_____X

VERICREST FINANCIAL, INC., and
U.S. BANK TRUST NATIONAL
ASSOCIATION AS TRUSTEE FOR
VERICREST OPPORTUNITY LOAN
TRUST 2011-NPL2,

Plaintiffs,

- against -

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT and
THE TRAVELERS PROPERTY CASUALTY
COMPANIES

_____X

Index
Number 702399/12

Motion
Date August 19, 2015

Motion
Seq. No. 1

FILED
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COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 6 read on this motion by plaintiff Vericrest Financial, Inc. and plaintiff US Bank Trust National Association for, inter alia, summary judgment and on this cross motion by defendant Automobile Insurance Company of Hartford, Connecticut and defendant The Travelers Property Casualty Companies for summary judgment

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1
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Answering Affidavits - Exhibits	
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Memoranda of Law.....	5-6

Upon the foregoing papers it is ordered that the branch of the cross motion which seeks summary judgment dismissing the complaint against defendant The Travelers Property Casualty Companies is granted. The branch of the cross motion which seeks summary judgment dismissing the complaint against the Automobile Insurance Company of Hartford Connecticut is denied. The branch of the motion which is for an order permitting the substitution of U.S. Bank Trust, N.A., as Trustee for Volt Participation Trust 2011-NPL2 as the plaintiff in this case is granted. The branch of the motion which is for summary judgment on the complaint is granted on the issue of liability and is otherwise denied.

I. The Facts

On or about October 29, 2003, Jacksy F. Jules and Marie C. Jules obtained a loan totaling \$200,500 from First Republic Mortgage Bankers, Inc. which the lender secured with a mortgage on premises known as 120-44 219th Street, Cambria Heights, New York. After assignments, US Bank Trust, NA, as Trustee for VOLT Participation Trust 2011-NPL2 now holds the mortgage. Vericrest Financial Inc. is the servicing agent for the mortgage.

The Automobile Insurance Company of Hartford, Connecticut (AIC), one of the Travelers Property Casualty Companies, issued a homeowner's policy to Jacksy F. and Marie C. Jules effective from February 3, 2010 to February 3, 2011. The policy insured the Jules' premises located at 120-44 219th Street, Cambria Heights, New York. The policy required the insureds to use the Cambria Heights property as their principal residence for coverage to apply. A fire occurred at the home on or about October 14, 2010, and the insureds submitted a claim to AIC for property damage.

On November 5, 2010, AIC took a recorded statement from Jacksy Jules in which he stated: (1) He has a Florida home where he resided with his wife and daughter, but the Cambria Heights property was also his "residential property" in the basement of which he stayed when he came to New York. (2) He rents the upper floor to a woman who pays \$2,500 in rent. (3) He travels "back and forth" between Florida and New York. (4) He travels back to New York about every two months, and he stays for about two weeks. (5) He and his family reside in the Cambria Heights apartment for two months in the summer when the schools in Florida are closed. (6) The basement apartment has two bedrooms, a full kitchen, a full bath, and a living room. (7) In February, 2010, before the fire, he contacted his insurance broker to inform her that he had a tenant at the premises.

AIC conducted an examination under oath of Jacky Jules on November 2, 2011, and the insurer learned that the insureds had purchased a home at 141-18 78th Place North, Loxahatchee, Florida in 2006 and had moved into the Florida home in 2006. The insureds

had obtained full time employment in Florida, had obtained Florida driver's licenses, and they had enrolled their daughter in a Florida school in 2006. The insureds had left the Cambria Heights property vacant from 2006 through 2008 or 2009, when they began renting part of the premises.

As a result of its investigation, AIC denied the insureds' claim, and they did not press the matter any further. However, after the denial of the insureds' claim, the plaintiff mortgagee submitted its own claim to AIC.

The mortgage clause in the homeowner's policy provides as follows:

“12. Mortgage Clause. *** If we deny your [the insureds] claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:
a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware; ***”

AIC discovered affidavits of service of process upon the insureds showing service upon them in Florida of process in an action to foreclose the mortgage on the Cambria Heights property. AIC also discovered affidavits of service of process upon the insureds showing service upon them in Florida in a subsequent action to foreclose the mortgage on the Cambria Heights property.

AIC subsequently denied the mortgagee's claim for coverage under the policy on the ground that the mortgagee had knowledge that the insureds resided in Florida, not in Cambria Heights, but had failed to comply with section 12a of the policy when it did not notify AIC

II. Discussion.

A. The Cross Motion By Defendant AIC and Defendant Travelers

The insurance policy issued to the Jules reads: “ Your Insurer: The Automobile Insurance Company of Hartford Connecticut One of the Travelers Property Casualty Companies.” All of the Travelers companies did not collectively issue the policy to the Jules, only AIC. The plaintiffs did not oppose that branch of the cross motion which seeks summary judgment dismissing the complaint against defendant The Travelers Property Casualty Companies

Turning to defendant AIC: The standard mortgagee clause in an insurance policy creates “a separate and independent insurance of the mortgagee's interest, free from the

conditions imposed upon the mortgagor or owner ***.” (*Grady v. Utica Mut. Ins. Co.*, 69 AD2d 668, 673.) “The mortgagee under a standard mortgage clause in a policy of fire insurance has an independent contract with the insurer which cannot be invalidated by any act of the owner and which continues valid and enforceable until rendered invalid by a subsequent act or neglect of the mortgagee ***.” (*Rubenstein v. Cosmopolitan Mut. Ins. Co.*, 61 AD2d 1029, 1029.)

Thus, in the case at bar, pursuant to clause 12a in the policy, the ultimate issues pertain to the mortgagee’s knowledge of the actions of the Jules, rather than directly to those actions themselves. The plaintiff mortgagee is not bound by the denial of coverage letter sent to the Jules.

“[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 ***.” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Leaving aside for the moment *First Fed. Sav. & Loan Ass’n of Niagara Cnty. v. Nichols* (33 AD2d 259), defendant AIC successfully carried this burden, first in regard to whether there was a change in occupancy and second in regard to the plaintiff mortgagee’s knowledge of the change.

There was a change in occupancy in the Cambria Heights property within the meaning of section 12a. In the case at bar, a change in occupancy as used in section 12a does not mean only a change to vacancy, although that is often the increased hazard which insurers try to protect themselves against. (*See, First Fed. Sav. & Loan Ass’n of Niagara Cnty. v. Nichols, supra*, 262 [“It appears that in the normal case insurers deem a vacant house a greater risk than one which is occupied, and special provision is made in a standard fire insurance policy for vacant premises ***.”].) The occupancy of the upper floor of the Cambria Heights property full time by a tenant rather than by the Jules is still a change in occupancy.

In the case at bar, the term “occupancy” as used in section 12a must be construed in light of the purpose of the policy which was to provide coverage for the dwelling used as a residence by the Jules. When so construed, the term is not ambiguous, which would otherwise require its interpretation in favor of the insured and against the insurer. (*See, Kingsbay v. Yaakov*, 130 AD3d 769.) The definitions section of the policy provided in relevant part: “‘residence premises’ means the one or two family dwelling, other structures, and grounds of that part of any other building where you reside and which is shown as the ‘residence premises’ in the Declarations.” Section 1– Property Coverages provided in relevant part: “We cover: the dwelling on the residence premises shown in the Declarations, used principally as a private residence ***.”

A change in occupancy would occur if the Jules changed their residence either full or part time. “The standard for determining residency for insurance coverage requires something more than temporary or physical presence and ... at least some degree of permanence and intention to remain ***.” (*Allstate Ins. Co. v. Rapp, supra*, 303 [quotation marks and citations omitted]; *A. Cent. Ins. Co. v. Williams*, 105 AD3d 1042; *Neary v. Tower Ins.*, 94 AD3d 725.) There is no issue of fact concerning whether the Jules changed their residence to Florida at least part time. From the recorded statement given by Jacksy Jules and from his examination under oath, it can only be concluded that they did so. The court notes that “[a] person can have more than one residence for insurance coverage purposes.” (*Allstate Ins. Co. v. Rapp*, 7 AD3d 302, 303.)

Through the submission of Jacksy Jules’ recorded statement and examination under oath, defendant AIC successfully showed prima facie that the Jules had established at least part time residence in Florida. Then, through the submission of affidavits of service showing service of process upon the Jules in Florida in foreclosure actions and a letter sent to the Jules in Florida, AIC demonstrated that the plaintiff mortgagee or its predecessors in interest knew about a change in residence. Disregarding *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols (supra)*, AIC established prima facie that the plaintiff mortgagee breached a condition of the policy.

But *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols (supra)*, relied upon by the plaintiff mortgagee in its reply papers, must be taken into account. In order to establish a prima facie case, AIC was required to show both a change in occupancy and a “substantial change in risk.”

In *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols* (33 AD2d 259), Gold and Murphy, who were homebuilders, contracted in writing in the name of their corporation to sell a home to Robert and Terry Nichols. The homebuilders executed a mortgage on the property in favor of plaintiff Loan Association in January 1966, and the homebuilders obtained a fire insurance policy on the property from Mutual Insurance Company of Hartford which had a standard New York State mortgage clause in it covering plaintiff Loan Association.. The homebuilders permitted the Nichols to occupy the property in March 1966. On June 17, 1966 a fire occurred, causing nearly \$12,000 in damage to the property. Plaintiff Loan Association filed proof of loss with Mutual, which refused to pay, and an action ensued. Mutual argued that because of a change in ownership and occupancy of the property without notice to it, the policy was null and void. The standard New York mortgage clause included in the Mutual policy provided in relevant part: “ the mortgagee * * * shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee * * * and * * * the mortgagee * * * shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise

this policy shall be null and void.” The Appellate Division, Fourth Department, found: “Mutual remains liable to the plaintiff and [the homebuilders] unless an ‘increase of hazard’ resulted from Nichols being admitted into occupancy of the house.” (*First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols, supra*, 262.) The house was presumably vacant before the Nichols began to occupy it, the appellate court wrote, and “in the normal case insurers deem a vacant house a greater risk than one which is occupied ***.” The appellate court held: “The burden is upon the insurer, Mutual, to allege and prove that an increase of hazard occurred by reason of Nichols' occupancy of the property; and a mere allegation of a change of occupancy is insufficient to raise an issue of increased hazard ***.” (*First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols, supra*, 262 [emphasis added].) Since Mutual did not produce any evidence showing that an increase in hazard resulted from the change in occupancy, the Appellate Division, concluded that the Loan Association was entitled to summary judgment against the insurer.

AIC did not successfully distinguish *Nichols (supra)* from the case at bar, and in both cases the relevant clauses are written in the disjunctive. Nevertheless, the Appellate Division, Fourth Department, held that a showing of a change in occupancy alone, without an allegation of an increased hazard, did not suffice.

There are no other New York appellate cases on point, and this court is required to follow *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols (supra)*, even though it is an Appellate Division, Fourth Department case. (See, *D'Alessandro v. Carro*, 123 AD3d 1; *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663.)

Defendant AIC did not allege or offer proof that the change in occupancy which occurred when the Jules ceased to occupy the Cambria Heights property full time resulted in a “substantial change in risk,” (a tenant occupied the property full time), and the insurer’s omission to do so requires the denial of that branch of its cross motion which seeks summary judgment dismissing the complaint against it. Without an allegation that there was a substantial change in risk, there can be no allegation that the plaintiff was aware of a circumstance requiring notice to AIC.


Read in the light of *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols (supra)*, AIC’s submissions fail to establish an entitlement to judgment as matter of law.

B. The Motion by the Plaintiffs

There was no opposition to that branch of the motion which sought the substitution of U.S. Bank Trust, N.A., as Trustee for Volt Participation Trust 2011-NPL2 as the plaintiff in this case. (See, CPLR 1018.)

The plaintiffs are entitled to summary judgment on the issue of liability arising under that branch of their motion which is for summary judgment on their complaint. (See, *First Fed. Sav. & Loan Ass'n of Niagara Cnty. v. Nichols, supra.*) Defendant AIC did not allege or submit any evidence showing that there was a “substantial change in risk,” resulting from the change in occupancy. On the present state of the record, there is an issue of fact pertaining to the damages suffered by the plaintiff.

Dated: October 22, 2015



J.S.C.

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