Philadelphia Indem. Ins. v Adirondack Ins. Exch.
2018 NY Slip Op 31316(U)
June 20, 2018
Supreme Court, New York County
Docket Number: 160760/2016
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN, *Justice* — PART IAS MOTION 33EFM

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INDEX NO. 160760/2016

MOTION DATE 6/20/2018

MOTION SEQ. NO. 001

PHILADELPHIA INDEMNITY INSURANCE,

Plaintiff,

- v -

ADIRONDACK INSURANCE EXCHANGE,

Defendant.

---X

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Plaintiff Philadelphia Indemnity Insurance (PII) moves for summary judgment against defendant Adirondack Insurance Exchange (AIE) in this subrogation action to enforce an underlying judgment against Defendant's insured, Donna Iglupas (Iglupas).[1] Defendant cross-moves for summary judgment and to declare that AIE has no duty to provide coverage for or indemnify non-party Iglupas. The decision and order is as follows:

Relevant Facts

On the date of loss, February 26, 2015, a frozen pipe burst in a condominium unit previously inhabited by Iglupas and caused damage to the surrounding property in the Fairlawn Estates Condominium complex (Fairlawn). Fairlawn sustained damage of $20,808.64 (Complaint at ¶ 6). It is undisputed that on the date of loss, Iglupas was not present at the premises. The fire department broke open the premises' door to shut off the water.

Plaintiff reimbursed Fairlawn, its insured, for the damages and thereby assumed all rights and remedies against Iglupas. Plaintiff subsequently filed a complaint against Iglupas to recover damages (the underlying action). Iglupas notified defendant of the underlying action on November 6, 2015 (Mowczko Aff. at ¶

[1] Underlying action is captioned *Philadelphia Indem. Ins. Co. v Iglupas*, Sup Ct, Orange County, Oct. 16, 2015, index No. 7667/15.

42). Iglupas subsequently defaulted, thereby giving plaintiff a default judgment in the amount of $20,824.54 (*see Philadelphia Indem. Ins. Co. v Iglupas*, Sup Ct, Orange County, Oct. 16, 2015, index No. 7667/15). Iglupas failed to pay and thus, plaintiff commenced this instant action on December 22, 2016, to collect on the judgment against Iglupas from her insurer, defendant AIE.

Defendant's policy at issue does not provide coverage for personal liability or for property damage unless it occurs at the "insured location" (Def. Exh. 1 – Policy Form HO 6000 01 06 at 14, § II(E)(4)). "Insured location" means the "residence premises" or "[t]he part of other premises, other structures and grounds used by [policy holder] as a residence; and (1) which is shown in the Declarations..." (*id.* at 1-2, §6(a-b)). "Residence premises" is defined as "the unit where you reside as shown as the 'residence premises' in the Declarations" (*id.* at 2, §11). Defendant denied coverage because its insured, Iglupas, had vacated the insured location prior to the date of loss.

Defendant began its investigation after Iglupas notified AIE Field Adjustor Brian Mowczko of the incident and that she was "out of town" on February 26, 2015 (Mowczko Aff at ¶ 14; Def. Exh. 2 – Ins. Assignment Form). On February 27, 2015, defendant assigned Terrier Claim Services (TCS) to investigate the claim (Def's Memo at 9). Shortly thereafter, TCS's investigator Mullins contacted Iglupas who stated that she was "living with family and needed to have the home repaired as soon as possible" (Mullins Aff at ¶ 5). Iglupas stated that she was unable to provide access to the premises, but her plumber would (Mullins Aff at ¶ 5). TCS performed a physical inspection on March 9, 2015, and found the residence to be vacant, virtually without any furnishings, and the refrigerator to be empty and cleaned out (*id.* at ¶11-12). Additionally, TCS found a chalkboard in one of the bedrooms that contained a handwritten note that read: "Thank you Lord for Your Protection Here. Goodbye 5 ESTATE DRIVE. Thank you for the memories! Love, Sean" (*id.* at 13; Exh. 2 – Photos 3/19/15). Defendant, therefore, concluded that because Iglupas moved out of the insured location prior to the date of loss, it had no duty to provide coverage.

Plaintiff's evidence likewise shows that Iglupas moved out of the residence before the date of loss. Plaintiff enlisted its own investigator, C.I.A. Adjustors & Investigators, Inc. (CIA) to inspect the premises (Pl. Exh. H – CIA Report). CIA investigated the premises on March 16, 2015, and its report acknowledged that Iglupas "had moved out of the complex on February 8, 2015" (*id.* at 2). CIA obtained Iglupas' utility bills which indicated that during the time of residence between December 18, 2014, and January 22, 2015, the gas bill was $217.72 whereas between January 22, 2015, and February 20, 2015, there was $118.28 worth of charges and that between February 20, 2015, and March 19, 2015, after Iglupas' vacancy and the date of loss, the bill was $42.18 (*id.* at 3). They concluded that this corresponded with turning off the gas.

Discussion

On a motion for summary judgment the movant must establish a cause of action or defense sufficiently to warrant the court directing judgment in its favor, and the movant must do so by tender of evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Defendant appropriately disclaimed coverage because Iglupas was not residing at the premises at the time of the loss, and therefore, the property was no longer an "insured location" pursuant to the policy provisions. In similar situations, the Appellate Division, First Department, has interpreted "insured location" and "residence premises" provisions to require, as a condition of coverage, that the insured reside at the "residence premises" address as shown in the Declaration Page of the Policy (*see Tower Ins. Co. of New York v Brown*, 130 AD3d 545 [1st Dept 2015]). The evidence demonstrates that Iglupas left the property prior to the pipe bursting, allowing Defendant to disclaim coverage here.

Plaintiff's argument that the policy's "other premises" language in §6(b) makes the Iglupas premises an "insured location" is incorrect (*see* Def. Exh. 1 at 1-2). Iglupas had vacated the property by February 8, 2015, indicating that it was not used as a residence. Residence requires "something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" and Iglupas had no intention to remain as the condominium unit was cleaned out and left vacant (*Dean v Tower Ins. Co. of New York*, 19 NY3d 704, 708 [2012]). As the property was not an "insured premises" on the date of loss, plaintiff is unable to enforce its default judgment against defendant.

In any event, even if defendant's policy was in effect at the time of the incident, frozen pipe bursts caused by owner's failure to properly drain and maintain heat are specifically excluded from coverage (Def. Exh. 1 – Policy Form SH 23 25 01 06 at 1, §1(2)(c)). The record shows that Iglupas did not use reasonable care to maintain heat in the building or shut off the water supply, as indicated by the lack of gas usage on the utility bill. Therefore, the relevant policy would not apply to this loss.

Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment is denied; and

It is further ORDERED that defendant's cross-motion for summary judgment is granted and plaintiffs' complaint is dismissed. The clerk of the court is directed to enter judgment in favor of defendant as written.

This constitutes the decision and order of the court.

6/20/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE