

Union Mut. Fire Ins. Co. v Choi
2018 NY Slip Op 31778(U)
April 4, 2018
Supreme Court, New York County
Docket Number: 158898/2015
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

UNION MUTUAL FIRE INSURANCE COMPANY,

INDEX NO. 158898/2015

Plaintiff,

MOTION DATE 07/21/17

- v -

YOUNG CHOI,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54

were read on this application to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Union Mutual Fire Insurance Company is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendant Young Tai Choi is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, 60 Centre Street, Room 331, New York, New York on May 8, 2018, 9:30 A.M.

DECISION

In this declaratory judgment action, which follows the underlying personal injury/negligence action, plaintiff Union Mutual Fire Insurance Company (Union Mutual) moves for summary judgment on its complaint against defendant Young Tai Choi (Choi), and Choi cross-moves for summary judgment to dismiss that complaint (together, motion sequence number 001).

BACKGROUND

The above-referenced underlying personal injury/negligence action accrued on February 24, 2015, when the plaintiff therein, Chui Ping Lee (Lee), was injured in a building (the building), owned by Choi, and located at 144-03 Bayside Avenue, in the County of Queens, City and State of New York. That action (the underlying action), which bears Index No. 706195/15, is currently being litigated in the Supreme Court of the State of New York, County of Queens.

Prior to Lee's injury, Choi had applied to Union Mutual's underwriter, non-party Roundhill Express, LLC (Roundhill), for a commercial general liability insurance policy to cover the building. Union Mutual issued such a policy to Choi (the Choi policy) that was in effect from July 19, 2014 through July 19, 2015.

After the commencement of the underlying action, Choi submitted a request for coverage to Union Mutual on April 6,

2015. Roundhill undertook an investigation, during which it interviewed the building's superintendent, and thereafter sent Choi a letter, dated May 1, 2015, in which it disclaimed coverage for Lee's injuries. On June 22, 2015, Roundhill sent Choi a second letter in which it informed him that it was rescinding the Choi policy, and tendered a refund check for the policy premium that Choi had paid. The relevant portion of the Choi policy provides as follows:

"6. Representations

"By accepting this policy, you agree:

"a. The statements made in the Declarations are accurate and complete;

"b. Those statements are based on representations you made to us; and

c. We have issued this policy in reliance upon your representations."

In its May 1, 2015 disclaimer letter, Roundhill noted that Choi's insurance application had stated that there was only one apartment unit in the building, but that its own investigation had disclosed that Choi had rented out individual rooms in that apartment to at least eight separate tenants. Roundhill stated that this was a misrepresentation that provided grounds upon which to disclaim coverage to Choi in the underlying action. In its June 22, 2015 rescission letter, Roundhill further stated that this misrepresentation also provided grounds upon which to rescind the Choi policy.

For his part, Choi states: 1) that the alleged building superintendent is his only tenant, and the other occupants of the building's apartment are his tenant's roommates; and 2) that the report that the investigator from Roundhill prepared was inaccurate, since the investigator spoke only English, while he and the alleged building superintendent speak primarily Korean, and the investigator did not understand them. Choi denies having made any misrepresentation to Roundhill or to Union Mutual.

On August 27, 2015, Union Mutual commenced this action by filing a complaint that sets forth a single claim for a declaratory judgment that it is entitled to rescind the Choi policy. Choi filed an answer with affirmative defenses on October 5, 2015. Now before the court is Union Mutual's motion for summary judgment on the complaint, and Choi's cross motion for summary judgment to dismiss the complaint (together, motion sequence number 001).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 (1st Dept. 2002). Once this showing has been made, the burden shifts

to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 (1st Dept. 2003).

Here, Union Mutual's sole cause of action seeks declaratory relief. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal, 264 AD2d 681 (1st Dept. 1999). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself'." Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 (1st Dept. 2001), quoting Lake Constr. & Dev. Corp. v City of New York, 211 AD2d 514, 515 (1st Dept. 1995).

Here, Union Mutual bases its request for summary judgment on its claim for declaratory relief on the assertion that Choi

made a material misrepresentation on his insurance application, which had the effect of violating the "representation" portion of the Choi policy, and affording Union Mutual the right to rescind that policy. In its decision in Lema v Tower Ins. Co. of N.Y. (119 AD3d 657 [2014]), the Appellate Division, Second Department, observed that:

"To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. 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." 119 AD3d at 657-658 (internal citations and quotation marks omitted).

In Lema, the Court found that the defendant had committed a material misrepresentation on his insurance application by stating that the subject premises was a two-family dwelling, but the plaintiff had submitted documentary evidence to show that the premises was, in fact, a three-family dwelling that contained three separate living units, each with their own kitchen, bathroom, and entrance. Id. at 658.

On its motion, Union Mutual argues that it is entitled to summary judgment pursuant to the above legal standard.

Union Mutual alleges that Choi made a similar material misrepresentation to the one in Lema on his own insurance application. Union Mutual contends that the underwriting guidelines that govern its (and Roundhill's) issuance of commercial general liability insurance policies do not permit the issuance of such policies where a building contains more than one apartment unit. Union Mutual presents an affidavit from Roundhill's president and a copy of the underwriting guidelines to support its claim. Union Mutual argues that the Choi policy would not have been issued but for Choi's misrepresentation that the building has only one apartment unit, as it has more units, and is being "operated as a boarding or rooming house . . . renting separate units out to eight separate tenants." These allegations, if true, would meet the legal standard set forth in Lema. After reviewing the evidence, however, the court finds that Union mutual has failed to meet its burden of proof.

First, the underwriting guidelines, labeled "Exhibit G", consist of pages 41 through 66 of an unknown document to which it is an exhibit. Further, nothing in such guidelines states that insurance policies cannot be issued to buildings that contain more than one apartment unit. The closest textual support in the guidelines for Union Mutual's claim is the listing of buildings with "rental on a daily or weekly basis"

under the category of "unacceptable risks." The court here notes that Union Mutual provides no evidence that the subject building or its apartment unit falls into this category. The guidelines excerpts set forth "ISO classifications", which do permit the issuance of insurance policies, under certain circumstances, to one-, two-, three- and four-family residential buildings, and to up to ten-unit apartment buildings. This is followed by a formula under which certain "risk factors," including the ISO classifications, are assigned codes that correspond to a certain numerical "risk" value that, when the values of all "risk factors" are combined, yields a final score from which to determine whether there is "too much risk" to issue an insurance policy, or an "acceptable" amount of risk to permit issuance. Since this formula does allow for the issuance of commercial general liability insurance policies to multiple family dwellings and apartment buildings, provided that their overall risk score is low enough, the guidelines do not bear out Union Mutual's argument that no policy could have been issued to the subject building.

The statements set forth in Roundhill president's affidavit do not support Union Mutual's argument, wherein he states that "Roundhill is not authorized to write insurance policies for any ISO classification code that is not included in the Underwriting Guidelines". He cites as an example "boarding or rooming

houses," which are assigned "ISO Classification code 61000 Boarding or Rooming Houses," and are treated by the guidelines as "unacceptable risks." However, contrary to that statement, the "unacceptable risks" and "ISO classifications" set forth in the guidelines do not include any of the data that to which he refers. Without supporting documentary evidence, Roundhill's assertions about the guidelines are unsubstantiated claims.

The concurrent claim of Roundhill's president that the building is being operated as an uninsurable rooming house is similarly a mere conclusory statement devoid of factual support. Union Mutual has presented no proof that this is the case, or that the designation of the building as a "rooming house," for insurance purposes, is warranted. All that has been presented is a copy of a lease for the building's apartment between Choi and the alleged building superintendent, and a subsequent sublease whereby the alleged building superintendent transferred his tenancy to the apartment's current occupant of record, one Juhyun Hong (Hong).

In his statement to Roundhill's investigator, defendant's claimed building superintendent alleges that, when he lived at the building, "the house had eight tenants and I would collect the rent from each." Moreover, though Choi need not come forward with evidence where Union Mutual has not established its prima facie case, he nevertheless asserts that the apartment's

other occupants were neither "tenants" nor "subtenants," but rather were his tenant's roommates, from whom he would collect money to pay the monthly rent for which he was responsible pursuant to his lease. Choi ascribes this discrepancy to an accidental or willful mistranslation of the superintendent's actual words (which he delivered in limited English) by the interviewing investigator (who spoke no Korean). Choi also emphasized that the alleged building superintendent/employee was not his building superintendent/employee but merely his tenant.

Thus, this court finds that Roundhill's evidence is insufficient to establish that the building was used as an uninsurable "rooming house," as Union Mutual contends. There is deposition testimony at all, and no record evidence of the numbers or identities of the "roommates", or of the length or nature of their alleged residency in the building. Further, Choi has presented a plan of the layout of the building's apartment, which shows that it is a two-bedroom, two-bathroom unit without separate facilities for the use of individual subtenants. Based upon the foregoing, Union Mutual has failed to support its claim that the building was operated as an uninsurable "rooming house."

Finally, the court notes that there is a disparity between Roundhill's president's and Choi's respective allegations regarding Choi's application. Roundhill's president describes

an online insurance application program in which the applicant selects the type of building he/she wishes to insure, and that building is assigned an "ISO classification" and the corresponding numerical "risk factors." He asserts that Choi misrepresented the number of apartment units in the building, and obtained both an incorrect "ISO classification" and the wrong value of "risk factors." By contrast, Choi denies having used the online program, and asserts that he submitted a written insurance application packet to a third-party reviewer through his usual insurance broker. Choi has presented an affidavit and correspondence from his broker with his broker to support his claim. Such broker has included a printout of Union Mutual's online insurance application which shows that an applicant can only choose the number of apartment units in a building, but does not a choice among different types of building. Neither party has presented an actual copy of Choi's insurance application. Thus, Union Mutual has not prima facie established its entitlement to a declaratory judgment in its favor, as a matter of law, as its evidence is equivocal, showing issues of fact that must be resolved by a fact-finder at trial.

On the same basis, Choi is not entitled to the contrary declaration, i. e. that Union Mutual is obligated to defend and indemnify him in the underlying action, pursuant to the terms of the Choi policy. The evidence submitted in Choi's papers is

likewise insufficient to resolve factual issues necessary to establish his entitlement to such a declaration.

4/4/2018
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	