SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**
Justice

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MOUNTAIN VALLEY INDEMNITY COMPANY,

Plaintiff,

- v -

ALESSANDRA ZAVAGLIA, *et al.*,

Defendants.

INDEX NO. 150751/17

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

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By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment against all defendants and declaring that it has no duty to defend the Zavaglia defendants in the underlying action commenced against them by co-defendant Battaglia. Battaglia opposes the motion, the Zavaglias oppose and cross-move for an order dismissing the action and declaring that plaintiff has a duty to defend them, and plaintiff opposes the cross motion.

I. BACKGROUND

A. Underlying action

In 2016, Battaglia commenced an action against the Zavaglias and the City of New York in Supreme Court, Kings County, under index number 513140/16. He alleges that on January 10, 2016, while walking at and upon the curb and street adjacent to premises owned by the Zavaglias, he tripped and fell, and suffered personal injury. (NYSCEF 19).

While the original complaint identified the accident location as occurring in front of 149 Bay 8th Street in Brooklyn, Battaglia moved to amend it on or about November 1, 2016 to reflect the location as 62 Bay 8th Street. (NSYCEF 20).

B. Plaintiff's insurance policy

By insurance policy effective between October 2015 and October 2016, plaintiff issued a Dwelling Fire Policy to the Zavaglias, with all of them named as the insureds, and the residence premises identified as 62 Bay 8th Street in Brooklyn. The policy covers damages related to bodily injury caused by an occurrence, which the policy defines as an accident. Coverage is excluded when the injury arises out of a premises, owned by, rented to, or rented to others by an "insured," that is not an "insured location." The following definitions apply:

1) an "insured" is the "named insured" as shown in the Declarations and the spouse if a resident of the same household, and also residents of the household who are the named insured's relatives, or other persons under the age of 21 and in the care of any person named above;

2) an "insured location" is the "residence premises;" and

3) the "residence premises" is: (a) the one-family dwelling, other structures, and grounds; or (b) that part of any other building where the named insured resides and which is shown as the residence premises in the Declarations, or the two-, three-, or four-family dwelling where the named insured resides in at least one of the family units and which is shown as the residence premises in the Declarations.

(NYSCEF 18).

The policy excludes bodily injury arising out of the rental or holding for rental of any part of any premises by an insured, but does not apply, as pertinent here, to the rental or holding for rental of an insured location (a) on an occasional basis if used only as a residence. (*Id.*).

C. The investigation

Plaintiff alleges that after it received notice of the potential claim against premises owned by the Zevaglias, it retained an investigative firm to investigate the accident, and proceeded on

the belief that the accident occurred in front of 149 Bay 8th Street. (NYSCEF 13). By affidavit dated December 22, 2017, one of the investigators states that on September 15, 2016, he met with Alessandra Zavaglia, who told him that she resides in Staten Island, New York, and resided there at the time of the accident, that she is a part owner of the two-family dwelling located at 62 Bay 8th Street, that Battaglia lived in the premises' first floor apartment from 2011 until 2016, and that another tenant has lived in the second-floor apartment for the previous 30 years. The investigator advises that he reduced Alessandra's statement to writing, that she reviewed and signed the statement in his presence, and that the statement is a complete and accurate account of what she told him. (NYCEF 13, 14).

Alessandra's written statement also provides that she has been a part owner of the premises with her parents for at least the last 10 years, that Battaglia is the son of the first-floor tenants who lived there for approximately five years, and that the second-floor tenant was living at the premises when the Zavaglias purchased it. (NYSCEF 14).

The investigator also met with Margaret Zavaglia, who told him that she resides at the 149 Bay 8th Street property in Brooklyn which she has owned with her husband, Domenick Zavaglia, for 35 years. She is also a part owner of the 62 Bay 8th Street premises, and she confirmed Alessandra's account of the tenants at the premises and signed a written statement in his presence. (*Id.*; NYSCEF 15). Margaret added that she and her husband each own 25 percent of the 62 Bay 8th Street property and that her daughter, Alessandra, owns the remaining 50 percent. (NYSCEF 15).

Domenick Zavaglia likewise repeated to the investigator the statements made by Alessandra and Margaret, and signed his own written statement, which is consistent with that of his wife and daughter. (*Id.*; NYSCEF 16). None of the statements is sworn.

Plaintiff's claims examiner states by affidavit that plaintiff received notice of the claim by receipt of the underlying complaint on or about September 8, 2016, that on or about October 5, 2016, plaintiff received the investigator's report and the Zavaglias' signed statements, and that plaintiff then received the motion to amend the underlying complaint on November 7, 2016, after which an examiner reviewed the file, determined that the claim is not covered, drafted a disclaimer letter, and submitted it to a supervisor for review, approval, and editing. By letter dated December 7, 2016, it disclaimed coverage as the investigation reflected that none of the Zavagalias resided at the accident location, and that the premises was thus not the "residence premises" and did not qualify as an "insured location," especially as the injuries arose out of the rental of the premises. (NYSCEF 21).

II. ANALYSIS

A. Contentions

Plaintiff asserts that the Zavaglias' admissions that they did not reside at the accident location is dispositive in proving that it was not the residence premises, and is therefore not covered by the insurance policy. As the investigator's affidavit recounts the admissions reflected in the statements, plaintiff maintains that the statements are admissible even if unsworn. (NYSCEF 26).

Battaglia contends that as the Zavaglias's statements are unsworn, and absent any other evidence proffered by plaintiff, it fails to meet its burden of establishing that the residence premises exclusion applies. He also argues that plaintiff does not demonstrate that it timely disclaimed, as it submits no proof of the actual mailing of the disclaimer letter, and as plaintiff had all of the information that it needed to disclaim as of November 1, 2016, the date of the notice of the motion to amend, but nevertheless waited until at least December 7, 2016 to issue

its disclaimer. Plaintiff also observes that the disclaimer letter is fatally ambiguous, and that there has been no discovery in this action. (NYSCEF 31).

The Zavaglias assert that the two Bay Street premises are located less than a block away from each other, and that their statements do not reflect whether they ever resided there or resided there occasionally. In support of their cross motion, the Zavaglias argue that even if the accident location changed, plaintiff knew in September that Alessandra resided at neither location but waited three months to disclaim as to her, and that plaintiff provides no proof of mailing of the disclaimer. (NYSCEF 33). They submit an affidavit of Alessandra, who states that she lived at 62 Bay 8th Street until four or five years before the accident, and one from Domenick, who states that he was not told by plaintiff that the premises must be the owner's residence in order to be covered, and that he received plaintiff's disclaimer in December 2016, which was mailed to them by regular mail and was ambiguous. (NYSCEF 34).

In reply, plaintiff maintains that as the time between its receipt of the motion to amend on November 7 and the issuance of the disclaimer on December 7 was 30 days, the disclaimer is timely as a matter of law, and that even if untimely, there is no coverage as the policy at issue does not insure premises that are not the insured's residence. It also contends that if the Zavaglias lived at the accident location, they would have said so in their statements, but instead they stated that they lived elsewhere. Plaintiff relies on the examiner's statement that the letter was mailed on December 7 and the Zavaglias' admission that they received the letter in December as proof that the letter was mailed in December. (NYSCEF 38).

B. Applicable law

The terms of an insurance contract must be afforded their "plain and ordinary meaning," and the interpretation of an insurance policy poses a question of law. (*U.S. Fidelity & Guar. Co.*

v Annunziata, 67 NY2d 229 [1986]; *Broad Street, LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006]).

"Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." (*Consol. Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *see also Platek v Town of Hamburg*, 23 NY3d 688 [2015] [although insurer has burden of proving applicability of exclusion, insured has burden to establish existence of coverage]). To rely on an exclusion to deny coverage, an insurer must demonstrate that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case. (*J.P. Morgan Securities Inc. v Vigilant Ins. Co.*, 126 AD3d 76 [1st Dept 2015]).

C. Discussion

1. Applicability of exclusion

The Zavaglias's statements, while unsworn, constitute party admissions. (*See e.g., Tower Ins. Co. of N.Y. v Brown*, 130 AD3d 545 [1st Dept 2015] [claims adjuster's statement in affidavit that insured told him he did not reside at premises when incident occurred was *prima facie* evidence of non-residence]; *Tower Ins. Co. of N.Y. v Hossain*, 134 AD4d 644 [1st Dept 2015] ["the affidavit by plaintiff's insurance investigator stating that (defendant) admitted that he had not resided at the premises . . . is admissible for the purpose of showing his non-residence"]; *Schaaf v Pork Chop, Inc.*, 24 AD3d 1277 [4th Dept 2005] [admissions attributed to defendant in investigator's affidavit constitute admissible evidence]).

The subsequent affidavits submitted by Alessandra and Domenick are consistent with their earlier statements, and all of the admissions sufficiently establish, *prima facie*, that none of

the Zavaglias resided at the premises at the time of Battaglia's accident and that, therefore, the injury alleged by Battaglia is excluded from coverage.

While Alessandra's affidavit raises the possibility that she occasionally resided at the premises sometime before Battaglia's family rented her apartment, and defendants argue that such occasional use is an exception to the policy's rental exclusion, that exception applies if the premises is an insured location, which depends on whether the insured resides at the premises. Here, at the time of the accident and during the policy's effective period, neither Alessandra nor her parents resided at the premises. (*See e.g., Marshall v Tower Ins. Co. of New York*, 44 AD3d 1014 [2d Dept 2007] [absent dispute that insured did not reside at premises, insurer properly disclaimed coverage on ground that premises did not qualify a "insured location"]).

2. Timeliness of disclaimer

Even if plaintiff's disclaimer was untimely, it is irrelevant as a disclaimer is "not required because the policy only provided liability coverage to the insured for premises which [the insureds] occupied for residential purposes and, thus, 'the policy never provided coverage' for the claim at issue." (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2d Dept 2011], quoting *Metro. Prop. & Cas. Ins. Co. v Pulido*, 271 AD2d 57 [2d Dept 2000]; *see also State Farm & Cas. Co. v Guzman*, 138 AD3d 503 [1st Dept 2016], *lv denied in part, dismissed in part* 28 NY3d 1101 [as insured did not reside at premises and thus premises not covered under policy, timeliness of insurer's disclaimer irrelevant]).

In any event, defendants do not establish that the approximately 30-day delay between receipt of the motion to amend and the mailing of the disclaimer is untimely as a matter of law; the date of the mailing was sufficiently established by plaintiff's claims examiner. (*See e.g., Silk*

v City of New York, 203 AD2d 103 [1st Dept 1994], *lv denied* 84 NY2d 810 [delay of one month from date of investigator's report to date of disclaimer not unreasonable]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting it summary judgment and for an order declaring that it has no duty to defend or indemnify defendants Zavaglia in the underlying action is granted; it is further

ADJUDGED and DECLARED, that plaintiff is not obliged to provide a defense to, and provide coverage for, defendants Alessandra Zavaglia, Domenick Zavaglia, and Margaret Zavaglia in the action *Battaglia v Zavaglia*, index no. 513140/16, pending in Supreme Court, Kings County; it is further

ORDERED, that defendants Zavaglia's cross motion to dismiss and for a declaration that plaintiff has a duty to defend and indemnify them is denied; and it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly.

9/28/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER

APPLICATION: [ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE