

Franco v Tri-State Consumer Ins. Co.

2018 NY Slip Op 32842(U)

October 24, 2018

Supreme Court, Kings County

Docket Number: 510393/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of October, 2018.

HON. CARL J. LANDICINO

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
JOSEPH FRANCO and FRIEDA FRANCO,
Plaintiff,

Index No.: 510393/20167

510393/2017

- against -

DECISION AND ORDER

TRI-STATE CONSUMER INSURANCE COMPANY,
Defendant.

Motions Sequence #2

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4
Memorandum of Law	5

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Defendant Tri-State Consumer Insurance Company (the "Defendant") moves pursuant to CPLR 3212 for summary judgement and the dismissal of the Complaint for breach of contract in relation to the purported material misrepresentation by the Plaintiffs in relation to the procurement of a certain insurance policy. Plaintiffs, Joseph Franco (hereinafter "Joseph") and Frieda Franco (hereinafter "Freida") (collectively "the Plaintiffs") oppose the motion.

The Defendant contends that it tendered an insurance policy (the "Policy") to the Plaintiffs to insure them in relation to the premises known as 30-13 West Street, Brooklyn, New York (the "Premises"). The Defendant more specifically contends that "as our Underwriting

Guidelines provide, ‘the house must not be unoccupied for more than 2 consecutive weeks per year.’” (See Affidavit of Deborah Gavin, Underwriting Supervisor of the Defendant, in support of the subject motion). Ms. Gavin further contends that both the initial application and renewal questionnaires were requested of the Plaintiffs. Ms. Gavin contends that the Plaintiffs indicated in the initial application (the “Initial Application”) submitted on February 18, 2012, that “... the Insured Premises was ‘not unoccupied’ for more than two-weeks a year.” She further states that the renewal questionnaire (the “Renewal”) (Plaintiff’s Motion Exhibit “D”), submitted by the Francos on November 29, 2014, indicated that “...the Francos are away from the insured Premises for eight weeks a year.”

Ms. Gavin represents that as a result of, what she characterizes as, a “...change in response...” between the Initial Application and the Renewal, Ms. Danielle Volpe, an employee of the Defendant, who works in the Defendant’s underwriting department, inquired of the Francos further for the purposes of clarification. According to Ms. Volpe she contacted the Plaintiffs by telephone. She said she spoke to Joseph and simultaneously made notations on the Renewal document. “...I was noting the questionnaire while he was speaking.” (Volpe Deposition, Defendant’s Motion, Exhibit H, Page 31) Ms. Volpe confirmed that she added the language “...kids stay in the home...” on the Renewal document during the telephone conversation with Joseph. (Volpe Deposition, Defendant’s Motion, Exhibit H, Page 34-35). Ms. Volpe testified that she could not recall the duration of the call and did not recall whether she indicated to Joseph the significance of the call. (Volpe Deposition, Defendant’s Motion, Exhibit H Page 36)

Ms. Volpe testified ed that she did not specifically recall what Joseph told her, but she confirmed that it was her belief that Joseph told her that the “kids stay in the home.” (Volpe Deposition, Defendant’s Motion, Exhibit H, Page 38) Ms. Volpe confirmed that Joseph

thereafter supplied the Defendant with proof of insurance for the Plaintiff's summer home and that the Policy for the Premises was thereafter renewed. (Volpe Deposition, Defendant's Motion, Exhibit H Page 39). After having indicated that there was a call log in relation to her call with Joseph, Ms. Volpe reviewed and testified in relation to the contents thereof. Ms. Volpe indicated that there was a notation at 2:15 pm on December 23, 2014, which reflected the time that she had finished her review of the Renewal documents. She stated that she called Joseph thereafter. Ms. Volpe indicated that a note, at 2:23 pm on that same day, was made after speaking to Joseph. She confirmed that the note indicated that Joseph said "kids stay in the home." Ms. Volpe also confirmed that she had no other notes relating to who stayed at the home, except as contained in the Renewal document.

When asked whether it was possible that Joseph did not understand the question in relation to the "home" based upon how she phrased the question, Ms. Volpe responded that "I don't know what he understood." (Volpe Deposition, Defendant's Motion, Exhibit H, Pages 40-41) When asked whether Joseph possibly believed that she had been referring to the summer home, (because Ms. Volpe wrote "home" only, in her notes, and the earlier note (2:15 pm) refers to question 4, which relates to being away from the Premises), Ms. Volpe said no. "We weren't speaking about the vacation home." However, Ms. Volpe acknowledged that she did not "...recall if [she] specifically said that address", referring to the Premises address. (Volpe Deposition, Defendant's Motion, Exhibit H Page 43-44). Ms. Volpe further acknowledged that the Renewal document was not returned to Joseph for review after she added her notes to it. (Volpe Deposition, Defendant's Motion, Exhibit H Page 47).

Plaintiff, Joseph Franco's Deposition is contained in Defendant's moving papers at Exhibit F(2). Joseph testified that he owned a second home, other than the Premises, in Allenhurst, New Jersey since 2004 and that he has used it every summer since 2004. (Volpe

Deposition, Defendant's Motion, Exhibit F Pages 11-12) After a series of questions Joseph indicated that he did not sign the Initial Application. In relation to the yes or no question in the Initial Application, "Is home/apartment unoccupied for more than 2 weeks a year," he stated that if he had been asked to answer that question he "...would probably question the person that sent this application. Tell them the situation and ask them how I should fill it out." "This is not my application. So I don't know anything about this application." (Volpe Deposition, Defendant's Motion, Exhibit F, Pages 21-24). Joseph acknowledged that he did fill out and sign the Renewal document (Volpe Deposition, Defendant's Motion, Exhibit F, Page 25) When asked why he would have needed further explanation for the word "unoccupied" in the Initial Application, but having filled out the Renewal, he did not need further explanation relating to the word "away", Joseph stated that "[i]t doesn't say unoccupied. It says away." (Volpe Deposition, Defendant's Motion, Exhibit F Page 28).

Joseph indicated that he did not include the words "kids stay in the home," to the Renewal and that it was not his intent to indicate that the kids stay in the home while he was in the summer home. He stated further that he had "...no idea..." where that information came from and that he did not recall if anyone on behalf of the Defendant contacted him in November of 2014 (Volpe Deposition, Defendant's Motion, Exhibit F, Pages 28-29). "I don't recall this conversation. Or if there was a conversation, I don't recall." (Volpe Deposition, Defendant's Motion, Exhibit F Page 31).

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to

judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

“To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when securing the policy.” *Caldara v. Utica Mut. Ins. Co.*, 130 A.D.3d 665, 665, 15 N.Y.S.3d 346, 348 [2nd Dept, 2015]. “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.” *Indian Harbor Ins. Co. v. SP & K Const.*, 151 A.D.3d 704, 704–05, 53 N.Y.S.3d 549 [2nd Dept, 2017], quoting *Schirmer v. Penkert*, 41 A.D.3d 688, 840 N.Y.S.2d 796 [2nd Dept, 2007].

A threshold issue in this case is whether Plaintiffs made a material misrepresentation of fact to the Defendant. Both parties agree that the Renewal document contained language that was added by Defendant’s employee. Ms. Volpe says that the language was obtained from Joseph

during a telephone conversation with him and although she cannot recall exactly what was said during the call, she took notes of the call. Joseph says that there was no such call and that, in any event, he had no idea how Ms. Volpe can assert that he said that his children stay at the Premises during the times that he spends in his summer home in New Jersey.

The testimony of Ms. Volpe indicates that she does not specifically remember the purported conversation but that she relies upon her notes, which were purportedly taken shortly after the conversation. CPLR 4518(a) states:

a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

Certainly, a properly founded business record can be used to support or withstand a motion for summary judgment. Ms. Volpe states that she did make the notation shortly after the purported conversation. It is also clear that part of her employment duties include chronicling what transpired during such conversations with insureds. However, she also states that she has no specific recollection of the conversation. Therefore, even accepting the notes as business records, their level of clarity and specificity impact their overall probative value. “Where records are

illegible or, as here, comprehensible only to the creator, the probative value is minimal or nonexistent.” *Wilson v. Bodian*, 130 A.D.2d 221, 231, 519 N.Y.S.2d 126, 133 [2nd Dept, 1987].

“With respect to those documents which are found to be medical records, if any portion of a record is deemed illegible, the medical record as a whole is not inadmissible. Rather, only those entries or notations within the record that are illegible should be deemed inadmissible.”

Fortunato v. Murray, 101 A.D.3d 872, 874, 955 N.Y.S.2d 206, 209 [2nd Dept, 2012]. The notes are somewhat cryptic in that “kids stay in the home” is a general statement. In any event, even assuming, *arguendo*, that the notes are admissible as business records and those notes clearly indicate that Plaintiff’s children occupy the Premises when the Plaintiffs are in their summer home, Plaintiff Joseph refutes the contention.

Joseph’s testimony makes clear that his position is that 1) he did not add the “kids” language to the renewal document after he signed it 2) he never received the amended version of that document to review 3) he does not recall the conversation and 4) he did not say what Ms. Volpe purports that he said. When asked if he knew where the information about the Children came from, Joseph stated, “I have no idea.” Joseph by his own affidavit in opposition to the motion states, “[t]hough I do not have a memory of this specific conversation I am 100% certain that I did not tell Ms. Volpe that my children stay at the subject premises while we are away at our New Jersey home because that is completely false.”

Accordingly, there is clearly an issue of fact as to whether Plaintiff made, what the Defendant considered to be, a material misrepresentation in relation to the procurement of homeowners insurance. *See Matias v. Bello*, No. 2016-12554, 2018 WL 4763079 [2nd Dept, 2018]; *Nelson v. Neng*, 297 A.D.2d 313, 315, 746 N.Y.S.2d 177, 179 [2nd Dept, 2002]; *Job v. 1133 Bldg. Corp.*, 251 A.D.2d 459, 460, 674 N.Y.S.2d 710, 711 [2nd Dept, 1998]. In so far as

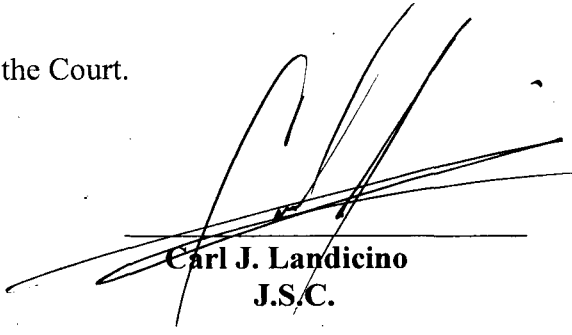
there is a material question of fact the Court does not need to address any of the remaining issues in this case. Therefore, Defendant's motion for summary judgment is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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