Mountain Val. Indem. Corp. v Rosen

2023 NY Slip Op 31101(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 160553/2021

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MOUNTAIN VALLEY INDEMNITY CORPORATION,

Plaintiff,

- v -

PAUL ROSEN, SARA ROSEN, WILLIAM D GARRY, JILL GARRY

Defendant.

---X

INDEX NO. 160553/2021

MOTION DATE 04/03/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 29, 30, 32, 33, 34, 35, 36, 37, 38

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

Plaintiff's motion for summary judgment for an order declaring that it need not defend or indemnify defendants Paul and Sara Rosen in a pending action in Suffolk County is granted.

Background

This declaratory judgment action concerns an underlying case in Suffolk County wherein defendant William Garry (a mailman) claims he slipped and fell while returning to his truck on an exterior walk at a property owned by the Rosens in Patchogue, New York. Plaintiff issued a homeowner's policy to the Rosens and the policy lists the home as a one family, owner-occupied property. It insists that the policy does not provide coverage for premises that are rented to others. Plaintiff alleges that the Rosens did not reside at the premises when the accident occurred (November 30, 2020) and so it seeks an order that it need not cover the Rosens in the Garrys' lawsuit against them. Plaintiff relies upon the transcript of a phone call in which Mr. Rosen admitted his residence was not the subject premises at the time of the accident.

In opposition, the Rosens argue that plaintiff's disclaimer of coverage relied solely on a phone call between an employee of plaintiff's third-party administrator and Mr. Rosen. They argue that the transcript of this phone call is admissible hearsay and the affidavits submitted by plaintiff in its moving papers are vague and conclusory.

The Rosens claim that there are issues of fact with respect to whether plaintiff knew or should have known that they may not have been residing at the residence. They claim it is unclear when plaintiff first had reason to suspect that the Rosens no longer lived at the subject premises. The Rosens admit that a foreclosure proceeding was commenced against them in 2017 and that they tried to reach a settlement in that lawsuit in 2019 (it was allegedly going to be a "cash for keys agreement") but that the pandemic prevented them from selling the house back to the bank.

In reply, plaintiff emphasizes that the Rosens do not dispute Mr. Rosen's admission that they did not live at the premises at the time of the subject accident.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 221-22, 746 NYS2d 622 [2002] [internal quotations and citations omitted).

In the instant action, there is no dispute that the homeowner's policy requires that the Rosens reside at the insured premises. The only question on this motion is if plaintiff met its burden to show that the Rosens did not reside at the house in Patchogue. The Court finds that plaintiff met its burden through the affidavit of Ann Quinn, the employee for the third-party administrator who was on the phone call with Mr. Rosen (*Tower Ins. Co. of New York v Brown*, 130 AD3d 545, 546 [1st Dept 2015] [finding that plaintiff met its burden to show the insured did not reside at the premises through the affidavit of its claims adjuster who insisted that the insured admitted not residing in the premises at the time of the accident]).

Moreover, the transcript of the phone call makes clear that Mr. Rosen admitted that he moved away from the Patchogue house in June 2018 (NYSCEF Doc. No. 23 at 2). This is admissible as an admission of a party opponent (*People v Smalls*, 162 AD3d 555, 556 [1st Dept 2018] [finding that a phone call recording was an admissible under the admission exception to the hearsay rule]). The Court also observes that Mr. Rosen, in his affidavit in opposition, did not contest the veracity of the recording or produce other evidence that he resided in the home at the time of the incident. That there were delays in the foreclosure proceeding does not serve to modify the homeowner's policy.

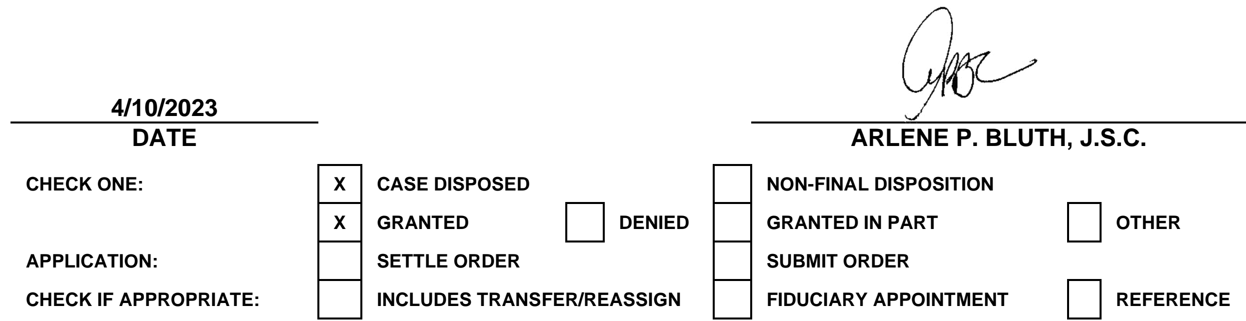
The Court declines to find that there is an issue of fact with respect to what plaintiff knew or should have known. The Rosens procured a homeowner's policy for 2020 that required that they live at the premises when they knew they no longer there. They could have sought coverage to fit their circumstances in order to get coverage in case something happened on their property, but they did not. This Court is unable to find that it was plaintiff's obligation to investigate the veracity of the Rosens' representation that they lived at the property or the status of the Rosens' foreclosure action.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, defendants' affirmative defenses and counterclaims are severed and dismissed; and it is further

DECLARED that plaintiff has no duty to defend or indemnify Paul Rosen or Sara Rosen in the currently pending lawsuit in Supreme Court, Suffolk County under Index Number 614726/2021; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.



4/10/2023		
DATE		ARLENE P. BLUTH, J.S.C.

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