SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

GREGORY A. SIMMS,

Plaintiff,

-against-

LIBERTY INSURANCE CORPORATION,

Defendant.

DECISION / ORDER

Index No. 503581/2022
Motion Seq. No. 1, 2
Sub: 6/22/23

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for an order dismissing defendant's Third Affirmative Defense, and defendant's cross motion for summary judgment or leave to amend its answer and for other relief

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations and Exhibits Annexed.....	6-14
Notice of Cross-Motion, Affirmations and Exhibits Annexed.....	16-25
Answering Affirmations	26-32
Reply Affirmations.....	33-35

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a declaratory judgment action brought by an insured against his insurer following a fire which occurred on March 12, 2021 at a property known as 515 Hinsdale Street, Brooklyn, NY. The complaint alleges that defendant breached the insurance contract by denying coverage, causing plaintiff monetary damages, including lost rents, and for a declaratory judgment that defendant is obligated under the policy to provide insurance coverage for the fire.

The letter which denied coverage for the fire is submitted as Document 9. It is dated August 21, 2021, and states, in pertinent part, that "The investigation of your claim revealed

that after procurement of the policy you added additional dwelling units in the basement/cellar. At the time of the loss, the premises at 515 Hinsdale Street contained six separate dwelling units. Since 515 Hinsdale Street was not a one, two, three or four family dwelling at the time of the loss, the property no longer meets the definition of 'residence premises,' and there is no coverage for the loss under the above-captioned policy of insurance. In addition, the denial is based on the violation of the concealment or fraud condition of the policy. During the claim process you made material misrepresentations regarding the use and occupancy of the premises."

Plaintiff's Motion

In Motion Sequence #1, filed shortly after defendant filed its answer to the complaint, plaintiff seeks an order striking defendant's third affirmative defense. The notice of motion states that this motion is made pursuant to CPLR 3211(b)[1] and 3016(b).[2] The third affirmative defense [Doc 5] states, in pertinent part, that "plaintiff made statements to the defendant and testified at an Examination Under Oath regarding the facts and circumstances of his claim. . . [and] intentionally concealed and misrepresented material facts and circumstances and engaged in fraudulent conduct related to this insurance by, inter alia, misrepresenting the condition, use and occupancy of the basement at the time of the loss." Defendant concludes this affirmative defense by stating "By virtue of the acts referred to in the preceding paragraph, those policy provisions relating to concealment or fraud, set forth above, were violated, and there is no coverage for any part of the loss alleged in the Verified Complaint."

Plaintiff's counsel's affirmation states that the affirmative defense should be

[1] (b) motion to dismiss defense. A party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit.
[2] (b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentations, fraud, . . . the circumstances constituting the wrong shall be stated in detail.

dismissed because "Liberty Mutual has not specified which statements it felt constituted 'material misrepresentations,' nor which facts or circumstances Mr. Simms had supposedly concealed."

Defendants' Cross Motion

In Motion Sequence #2, defendant cross-moves for summary judgment dismissing the complaint in its entirety, or in the alternative, for an order pursuant to CPLR 3120 compelling the plaintiff to allow an inspection of the premises and for an order granting defendant leave to replead the third affirmative defense. Document 21 contains defendant's proposed amended answer, which repeats the policy provision quoted in the original answer, then states "At his Examination Under Oath the plaintiff testified that the basement was only one unit, that the only occupants of the basement were himself and Denel Noel, that he never rented any part of the basement, and that Kirk Brown and Cammea Simmons were not residing in the basement at the time of the fire. Said testimony contained misrepresentations, in that the basement was more than one unit, in that the plaintiff and Denel Noel were not the only occupants of the basement, in that a portion of the basement was rented, and in that Kirk Brown and Cammea Simmons were residing in the basement at the time of the fire. Said testimony misrepresenting the condition, use and occupancy of the basement at the time of the loss was material in that the defendant was investigating the use and occupancy of the building to determine, inter alia, whether it qualified for coverage under the policy. By virtue of the acts referred to in the preceding paragraph, those policy provisions relating to concealment or fraud, set forth above, were violated, and there is no coverage for any part of the loss alleged in the Verified Complaint."

Discussion

First, it is necessary to mention that these motions were initially on the motion

calendar in Part 66 on September 7, 2022, and plaintiff's counsel failed to appear, which resulted in an order (on defendant's cross-motion) dismissing the complaint due to plaintiff's default. The parties stipulated to vacate that order and restore the motions to the motion calendar, which was "so-ordered" on September 16, 2022 [Doc 46]. This case was then transferred to the undersigned.

Pleadings are freely amendable, absent prejudice. To the extent that plaintiff is claiming that defendant's third affirmative defense was not specific enough, as is required by the CPLR for a claim such as this, permitting defendant to amend its answer to assert its affirmative defense with greater specificity is warranted. Therefore, plaintiff's motion (motion sequence #1) to dismiss the third affirmative defense is granted, and the branch of defendant's cross motion for leave to amend its answer is granted.

Turning to the rest of defendant's motion, the court finds it must deny the branch of the defendant's motion which seeks summary judgment dismissing the complaint in its entirety.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320,

324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he proponent of a summary judgment motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York,* 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp*., 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; Strychalski v Mekus, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc*., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the

merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor,* 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc*., 43 AD3d 839 [2d Dept 2007]).

Here, the evidence provided consists of an affidavit [Doc 33] from James Ruiz, the defendant's "Senior Field Claim Resolution Specialist II," an affidavit from Brett Kelley [Doc 22], also defendant's "Senior Field Claim Resolution Specialist II," and, in opposition, an affidavit from the plaintiff. Mr. Ruiz states that he went to the "loss location" on March 23, 2021, and that the building contained six separate dwelling units, two on each floor. He states that "Each of these six apartment units had at least one bedroom, a kitchen and a bathroom, and each had a separate entrance. The building had five electric meters and five gas meters." Mr. Kelley did not go to the premises, but reviewed the file and contacted the building's occupants to interview them. He states that Cammea Simmons and Kirk Brown both stated that they were living in the basement at the time of the fire. This, of course, is hearsay, without any affidavit or transcript of an EUO or deposition taken under oath. Mr. Kelley states that the policy required the premises to have four or fewer dwelling units.

Mr. Simms states that at the time of the fire, there were only four apartments, not more, that the fifth meter for electric and gas is for the building's heat and electricity in the common areas, not a fifth apartment, and that his claim should not have been denied. He

states that he has been insured by defendant since 2015. Mr. Simms states that Cammea Simmons and Kirk Brown moved out of the premises on or about February 20, 2021, before the fire, but left some furniture behind. He also states that the fire was an electrical fire which started in his residence, unit 2R, and not in the basement. Plaintiff attorney disputes that plaintiff said that there were more than four apartments at the premises at his EUO, quoting extensively from the transcript, and claiming that defendant's counsel's presentation of the plaintiff's testimony is misleading.

Neither side has produced any evidence with regard to what the legal occupancy of the building is. The NYC Buildings Department has a public website, which classifies the building as C-4, an old-law walk-up apartment building, built before the City issued certificates of occupancy. It is not C0, which is a walk-up with three families, C2, which is a walk-up with five to six families, or C3, which is a walk-up with four families. Clearly, someone with expertise in this area needs to clarify how many dwelling units this building is permitted to have. The City has the property classified for real estate taxes as Class 2A, which is defined as a 4-6 unit rental building.[3] Of course, the number of dwelling units which the building is permitted to have is a different question from whether the dwelling unit or units in the basement are legal units. That too requires a professional to determine. It depends on whether the rear exit is at street level, the nature of the heating system, and how it is enclosed, and other factors. In any event, plaintiff was obligated to not only have obtained the correct type of fire insurance, here, he was insured for a building of one to four dwelling units, but he was also required to have the premises occupied in compliance with the applicable NYC codes, laws, rules and regulations.

To be clear, a court cannot determine issues of credibility, and based on the evidence

[3] Definitions of Property Assessment Terms (nyc.gov)

submitted, and viewing the evidence in the light most favorable to the plaintiff as the non-moving party, the court finds that defendant does not make a prima facie case for summary judgment dismissing the complaint.

Turning to the defendant's request for an inspection of the premises, plaintiff's counsel states "Plaintiff is willing to permit the inspection sought by Liberty Mutual at the appropriate time" [memo of law Doc 25 page 22]. That seems to be the present time.

Conclusions of Law

Accordingly, it is

ORDERED that the plaintiff's motion (MS #1) for an order striking defendant's Third Affirmative Defense is granted, as it is not specific enough as drafted, but it is further

ORDERED that the branch of defendant's motion (MS #2) for an order granting it leave to amend its answer to amend its third affirmative defense is granted; and it is further

ORDERED that defendant shall file an amended answer in the proposed form annexed to the moving papers (NYSCEF Doc 21) within ten days; and it is further

ORDERED that the amended answer shall be deemed to have been served on the plaintiff upon the electronic filing of the amended answer and the service by movant of a copy of this order with notice of entry; and it is further

ORDERED that the branch of defendant's motion (MS #2) for an order granting it summary judgment dismissing the complaint is denied; and it is further

ORDERED that the branch of defendant's motion (MS #2) for an order compelling the plaintiff to provide access to the premises for an inspection is granted, and the plaintiff shall permit the defendant to make an inspection of the premises without delay, which shall be conducted on or before September 29, 2023. The parties may be accompanied by

whatever professionals (i.e., engineers, photographers, independent insurance adjusters, and the like) they wish to bring to the inspection.

This constitutes the decision and order of the court.

Dated: August 15, 2023

ENTER:

Hon. Debra Silber, J.S.C.