

Lefkowitz v Hyundai Mar. & Fire Ins. Co., Ltd

2024 NY Slip Op 34082(U)

November 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 514222/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of November, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

ARON LEFKOWITZ,

Plaintiff,

-against-

HYUNDAI MARINE & FIRE INSURANCE CO., LTD,
(U.S. BRANCH),

Defendant.

DECISION AND ORDER
(Mot. Seq. Nos. 1-2)

Index No. 514222/2023

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	3-5, 19 _____
Opposing Affidavits (Affirmations) _____	21, 22, 30, 32 _____
Affidavits/ Affirmations in Reply _____	30, 32 _____
Other Papers: Affidavits/ Affirmations in Support _____	21, 22 _____

Upon the foregoing papers, defendant Hyundai Market & Fire Insurance Co., Ltd (U.S. Branch) moves (in motion sequence 1) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Aron Lefkowitz. Plaintiff cross-moves (in motion sequence 2) for an order, pursuant to CPLR 3212, granting summary judgment on his complaint.

Plaintiff commenced this action for breach of contract following denial of benefits under an insurance policy issued by defendant and rescission of the policy based on material misrepresentations allegedly made by plaintiff in his insurance application. Plaintiff is the owner of a residential rental property located at 1865 48th Street in Brooklyn. The premises was insured under a one-year policy issued by defendant on May 23, 2022 and expiring on May 22, 2023. In the application for the policy, dated May 19, 2022, plaintiff represented that the

property was a two-family house and, under the “Eligibility Criteria/Material Information” portion of the application, plaintiff

“acknowledge[d] and confirm[d] that his/her dwelling [did] not belong to any of the following conditions:

* * *

“(6) Dwelling that has illegal rental units, including basement unit.”

Plaintiff further acknowledged that the “Eligibility Criteria is material information and misrepresentation of Eligibility Criteria . . . may result in declination of coverage.”

On August 8, 2022, the subject property was damaged as the result of a fire. Defendant thereafter conducted an investigation of plaintiff’s claim, which included an examination under oath (EUO) of plaintiff held on March 2, 2023. At his EUO, plaintiff testified that there were apartments on the first and second floors of the premises, each rented by tenants. The first-floor apartment was occupied by Solomon Schmidt and his family. Plaintiff testified that in or about 2007, Schmidt added a “guest space” in the basement with plaintiff’s permission. Plaintiff stated that he never checked to make sure permits were filed nor did he oversee the construction. The “guest space” was made separate from a common storage area in the basement, which was accessible through an exterior side door to the premises as well as a common side stairwell from the first and second floor apartments. The guest space had a separate entrance door secured by lock and was equipped with its own bathroom and bedroom. Plaintiff testified that Schmidt paid rent on the basement unit. Photographs of the basement space taken shortly after the fire and provided to defendant by plaintiff’s counsel depict a bedroom, a bathroom with bathtub, toilet and sink and a kitchenette area with cabinets, a sink, a small refrigerator, a microwave and a toaster.

By letter dated May 2, 2023, defendant denied coverage based on misrepresentations plaintiff allegedly made in his application, to wit, the absence of the finished basement space. In its denial letter, defendant stated, in part:

“After Hyundai’s review, it is now known that the house is configured with three units. That is, the basement has a self-contained dwelling unit, with a separate entrance, kitchen, bathroom, bedroom and living area. Locks are evident on the entrance door. It is our understanding that this area is included in

the first floor tenant's rent payments.

* * *

"In addition, because a house with an illegal basement rental unit is not insurable by Hyundai, Hyundai is voiding and rescinding the policy ab initio, from May 22, 2022. By separate correspondence, Hyundai is refunding the premiums you paid to obtain this two-family policy, and the policy is void from its inception."

Defendant thereafter issued a check, dated May 4, 2023, reimbursing plaintiff for premiums remitted under the policy.

On May 12, 2023, plaintiff commenced the instant action, alleging in his complaint that he "suffered a loss by a covered peril of the property insured by [d]efendant," and that defendant breached its obligations under the insurance contract in "declin[ing] to indemnify [p]laintiff for the loss sustained although claim has been duly made and all conditions of the policy have been met." Plaintiff seeks a judgment in the amount of \$220,253.08, representing property damages in the sum of \$208,853.08, plus loss of rental income for a period of three months beginning from the date of loss in the sum of \$11,400.00, plus interest from August 8, 2022 and costs and disbursements.

On June 20, 2023, defendant brought a pre-answer motion for summary judgment dismissing the complaint. Plaintiff responded by cross-moving for summary judgment on his complaint. Generally, a summary judgment motion is premature prior to the service of an answer (*see Ferrera v City of New York*, 164 AD3d 754, 756 [2d Dept 2018]). However, a court may treat a pre-answer motion as one for summary judgment if it "give[s] prior notice to the parties or, through their submissions, the parties themselves . . . demonstrate an intent to deliberately chart a summary judgment course" by laying bare their proof (*Elhannon, LLC v Brenda J. DeLuca Trust*, 108 AD3d 911, 911-912 [3d Dept 2013] [brackets and internal quotation marks omitted]; *see CPLR 3211 [c]; Matter of Dashnaw v Town of Peru*, 111 AD3d 1222, 1224 [3d Dept 2013]). Here, both parties moved for summary judgment before issue was joined, demonstrating an intent to deliberately chart a summary judgment course.

"The 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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851,

853 [1985]; see *McHale v Sweet*, 217 AD3d 666, 667 [2d Dept 2023]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “[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” (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2d Dept 2023][internal quotation marks omitted]).

“An insurance agreement is subject to principles of contract interpretation” (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321 [2017] [internal quotation marks omitted]; see *Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). “Therefore, [a]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court” (*Burlington Ins. Co.*, 29 NY3d at 321 [internal quotation marks omitted]; see *Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). “In determining a coverage dispute, [the court] look[s] to the specific language used in the relevant policies, which must be interpreted according to common speech and consistent with the reasonable expectation of the average insured at the time of contracting, with any ambiguities construed against the insurer and in favor of the insured” (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 561 [2021][citations and internal quotation marks omitted]; see *Klein v State Farm Ins. Co.*, 198 AD3d 741, 742 [2d Dept 2021]). A policy term is ambiguous if it is “susceptible to more than one reasonable interpretation” (*Archstone v Tocci Bldg. Corp. of New Jersey, Inc.*, 101 AD3d 1062, 1064 [2d Dept 2012] [citation omitted]). “[E]xclusions or exceptions from coverage must be specific and clear in order to be enforced” (*Klein*, 198 AD3d at 742 [internal quotation marks omitted]; see *Hudson Shore Assoc., L.P. v Praetorian Ins. Co.*, 172 AD3d 830, 831 [2d Dept 2019]).

“[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is defined as a false “statement as to past or present fact, made to the insurer by . . . the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof” (Insurance Law § 3105 [a]). “An answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation . . . where . . . a reasonable person in the insured’s position could rationally have interpreted the question as he

did” (*Fanger v Manhattan Life Ins. Co. of N.Y., N.Y.*, 273 AD2d 438, 439 [2d Dept 2000]). “A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented” (*Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713, 714 [2d Dept 2001]). The issue of materiality is generally a question of fact for the jury (*see Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216 [1st Dept 1976], *affd* 42 NY2d 928 [1977]). 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, which show that it would not have issued the same policy if the correct information had been disclosed in the application (*see Insurance Law* § 3105 [c]; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 437 [3d Dept 2003]; *Tuminelli v First Unum Life Ins. Co.*, 232 AD2d 547 [2d Dept 1996]; *Shapiro v Allstate Life Ins. Co. of N.Y.*, 202 AD2d 659, 660 [1994]). Conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law (*see Curanovic*, 307 AD2d at 437; *Tuminelli*, 232 AD2d at 547).

In support of its motion for summary judgment, defendant submits the affidavit of Thomas Mertz, who identifies himself therein as “Underwriter, Personal Lines Team” for defendant. In his affidavit, Mertz states, in part:

“Our underwriting policy is that Hyundai will not issue policies for any dwelling that has an illegal basement unit. For example, without proper building permits and inspections, illegal units can contain hazardous conditions that overtax the building's infrastructure, particularly electrical and plumbing, thus greatly increasing the possibility of a loss.

“Hyundai's Underwriting Guidelines are annexed hereto as Exhibit ‘B.’ Therein, insurance brokers are warned that ‘Your brokerage/agency does not have the authority to bind a risk that does not meet Company's underwriting guidelines and it is critical that your brokerage/agency strictly adhere to the binding authority/procedures as outlined below.’

“The guidelines prohibit the issuance of policies for houses

with 'any unusual or potential hazardous conditions that may increase exposure to loss.'

"In reliance on plaintiff's representation that the house was configured as a two-family, tenant-occupied dwelling with no illegal dwelling units, Hyundai issued the subject policy. Policy Conditions 'C' and 'K' specifically remove coverage where an insured conceals or misrepresents any material fact or circumstance.

"Hyundai's investigation after the fire determined that the house had an illegal, finished basement unit with a kitchen and bathroom. The signed application representing that this home did not have a basement apartment was a material misrepresentation.

"Had Hyundai been advised that the house was configured with an illegal basement dwelling unit, no policy could or would have been issued by Hyundai for the house at 1865 48th Street, Brooklyn, New York."

Along with Mertz's affidavit, defendant submits its underwriting guidelines which include as an "Ineligible Exposure," "[a]ny unusual or potential hazardous conditions that may increase exposure to loss - refer to underwriter"

Defendant maintains that plaintiff made a material misrepresentation on his application, warranting rescission of the policy, by acknowledging the absence of "illegal rental units, including basement unit" at the premises. However, while defendant interprets the foregoing to include any illegal basement unit, it is not unreasonable for an insured to interpret "illegal rental units, including basement unit" as pertaining only to units at the property, wherever situated, which are, or which are intended to be rented out by the owner to tenants under separate leases. The record adduced so far in this matter, including the EUO transcript of plaintiff, shows that the improved basement space was never leased nor intended to be leased as a separate rental unit, but rather was part and parcel to the first-floor leasehold of Schmidt. Because there is more than one reasonable interpretation of the term "illegal rental units, including basement unit" such

must be deemed ambiguous and interpreted against the insurer. As a result, plaintiff's acknowledgment on the insurance application that the subject property did not contain "illegal rental units, including basement unit" may not form the basis of a material misrepresentation warranting denial of coverage and/or rescission of the policy.

Alternatively, defendant contends that plaintiff made a material misrepresentation in his application by describing the subject property as a two-family dwelling when the premises was actually a three-family dwelling due to the finished guest space in the basement. The number of dwelling units contained in a building is determined by its structural configuration and the number of self-contained dwelling units, and not by the certificate of occupancy or the number of families who reside in the building (*see Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401, 401 [1st Dept 2015]; *Dauria v CastlePoint Ins. Co.*, 104 AD3d 406, 407 [1st Dept 2013]; *Almonte v Castlepoint Ins. Co.*, 45 Misc 3d 1218[A], 2014 NY Slip Op 51624[U] [Sup Ct, NY County 2014], *affd* 140 AD3d 658 [1st Dept 2016]). Here, defendant has established, through the EUO testimony of plaintiff along with the photographs provided by plaintiff, that the subject premises contained three self-contained dwelling units - the first and second floor units, and the basement unit which had its own kitchen,¹ bathroom, living space, and separate entrance (*see Lema v Tower Ins. Co. of N.Y.*, 119 AD3d 657, 658 [2d Dept 2014]; *Elshazly v Castlepoint Ins. Co.*, 49 Misc 3d 1216[A], 2015 NY Slip Op 51732[U] [Sup Ct, NY County 2015]).

While defendant essentially argues that it would not have issued the subject policy if plaintiff truthfully represented that the premises contained three separate dwelling units, there is no explicit provision in the underwriting guidelines submitted by defendant which pertains to the number of dwelling units in a premises to be insured. Rather, defendant relies on an "ineligible exposure" category in its underwriting guidelines regarding "[a]ny unusual or potential hazardous conditions that may increase exposure to loss." Mertz offers, in conclusory terms, that illegal units "can contain hazardous conditions that overtax the building's infrastructure, particularly electrical and plumbing, thus greatly increasing the possibility of a loss." However, the court finds that this bare statement from Mertz is insufficient to establish as a matter of law that the presence of an additional unit in a two-family house comprises an "unusual or potential

¹ While the kitchen area of the basement space did not include a stove or range, there is no authority presented holding that the inclusion of such equipment is required in order for a space to be deemed a separate self-contained dwelling unit. The court notes that with respect to multiple dwellings, owners are required to provide every kitchen or kitchenette with a sink and gas or electricity for cooking, but are not required to provide stoves or other cooking equipment (*see Administrative Code of City of NY § 27-2070; Bartis v Harbor Tech, LLC*, 147 AD3d 51, 62 [2d Dept 2016]).


hazardous condition[] that may increase exposure to loss,” compelling denial of coverage, especially given the absence of proof of disclaimers or rescissions by defendant in similar situations (*see Sonkin Assoc. v Columbian Mut. Life Ins. Co.*, 150 AD2d 764, 765 [2d Dept 1996]; *Di Pippo v Prudential Ins. Co. of Am.*, 88 AD2d 631 [2d Dept 1982]; *cf. Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414 [1st Dept 2009]).

Accordingly, the court finds defendant has not established, at this juncture, entitlement to summary judgment dismissing the complaint.

Similarly, plaintiff has not proffered admissible evidence sufficient to establish, as a matter of law, that the misrepresentation as to the number of units at the property was not material. As a result, it is hereby

ORDERED, that the motion of defendant and cross motion of plaintiff for summary judgment are both denied at this time.

The foregoing constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**