

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

2025 NY Slip Op 31060(U)

March 17, 2025

Supreme Court, Kings County

Docket Number: Index No. 518780/2024

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 17th day of March, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X Index No.: 518780/2024
YOSEF KAHAN and CHAYA KAHAN,

Plaintiffs,

-against-

DECISION AND ORDER

HYUNDAI MARINE & FIRE INSURANCE CO., LTD. (Mot. Seq. No. 1)
(U.S. BRANCH),

Defendant.

-----X

The following e-filed papers read herein: NYSCEF Doc Nos.

Notice of Motion/Affirmation in Support/Affidavits/Exhibits/	
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Plaintiffs Yosef Kahan and Chaya Kahan (collectively, “Plaintiffs”) are spouses and owners of real property located at 310 Foster Avenue in Brooklyn, New York (the “Premises”). Plaintiffs aver that defendant Hyundai Marine & Fire Insurance Co., Ltd. (“Defendant”) issued a policy of insurance, effective September 19, 2023 through September 19, 2024. On or about March 18, 2024 (the “date of loss”), while the policy was in full force and effect, Plaintiffs alleged that they suffered a loss by a “covered peril” (fire). According to Plaintiffs, Defendant has refused to pay and issued a denial letter dated March 8, 2023. In their complaint, Plaintiffs assert that Defendant breached its contract of insurance. Plaintiffs seek at least \$621,410 in damages to the Premises.

In its pre-answer motion, Defendant Hyundai Marine & Fire Insurance Co., Ltd. (“Defendant”) moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing Plaintiffs’ complaint (Mot. Seq. No. 1), arguing that the policy was obtained through material misrepresentation and is void ab initio. Plaintiffs oppose the motion.

According to Defendant, in the insurance application Plaintiff Yosef Kahan (“Kahan”) completed on or about August 29, 2023, Plaintiffs attested that the Premises (a) was owner occupied, (b) was not a “[d]welling that is vacant or unoccupied,” (c) was not a “[d]welling that is under renovation, remodeling or major repair,” and (d) was not a “[d]welling without an operational smoke alarm” (NYSCEF Doc No. 7). In addition, Kahan signed the section titled “Owner Occupancy” in which he confirmed that the “dwelling is owner occupied” (NYSCEF Doc No. 7). According to Defendant, its investigators confirmed that the Premises was vacant, and not owner occupied, at the time Plaintiffs completed the application. In addition, the post-fire investigation revealed that the Premises was undergoing renovations at the time of the fire. Defendant further avers that Plaintiffs admitted to its investigators that they never resided in the home prior to and during renovations. Defendant’s investigation further revealed that the Premises did not have an operational smoke alarm.

In his affidavit, Thomas Mertz, Manager, Personal Lines, asserts that Defendant does not issue homeowners policies for any property that is not owner occupied, vacant or unoccupied. Along with Mr. Mertz’s affidavit, Defendant submits its underwriting guidelines which include as “ineligible exposures,” a property that is “under renovation, remodeling or repair where permit is required by law” or “vacant or unoccupied for more than 30 continuous days after policy issuance”. Since Plaintiffs made material misrepresentations, Mr. Mertz states that the policy was rescinded and all premiums paid were refunded via check dated June 27, 2024.

In addition, Defendant relies on the affidavit of Frank Poerio, a fire investigator with T.J. Russo Consultants, and his fire investigation report. According to Mr. Poerio, he interviewed Kahan on March 26, 2024, and Kahan stated that he began a complete renovation of the Premises in October 2023 and that “he and his family had never resided in the home prior to and during the renovations” (NYSCEF Doc No. 12). Mr. Poerio found that battery powered smoke alarms or hard-wired smoke detectors were not installed on the first or second floor of the Premises (NYSCEF Doc No. 13). The FDNY’s fire incident report lists the Premises as being under construction (NYSCEF Doc No. 14). In further support of its motion, Defendant includes an affidavit of Wesley Nielsen, an independent field adjuster, who inspected the Premises on March 28, 2024. In his affidavit, Mr. Nielsen states that he observed that the Premises had no personal property and the tools and building materials present were consistent with ongoing renovations (NYSCEF Doc No. 15). He further states that Kahan signed the contract for renovations on

October 11, 2023, less than a month after the Premises was purchased. According to Mr. Nielsen, he was informed that Plaintiffs continued to reside at 1401 55th Street in Brooklyn, New York.

Based upon the foregoing, Defendant argues that Plaintiffs made material misrepresentations that the Premises was owner-occupied, not vacant or unoccupied and not under renovation. In addition, Defendant avers that Plaintiffs materially misrepresented that the Premises had an operational smoke alarm. Accordingly, Defendant contends that the policy is void ab initio. Even if the policy was not void ab initio, Defendant contends that coverage is barred as a matter of law because Plaintiffs did not reside at the Premises on the date of loss.¹

In their opposition, Plaintiffs assert that Defendant's motion is premature. According to Plaintiffs, they sufficiently plead a breach of contract cause of action, and a factual inquiry as to whether their allegations are true is "not a part of the equation at this stage of litigation" (NYSCEF Doc No. 22, ¶ 11). Plaintiffs further assert that Defendant's motion is really one for summary judgment, made before any discovery has been conducted. With respect to Defendant's motion seeking dismissal under CPLR 3211 (a) (1), Plaintiffs contend that Defendant relies on "an attorney affirmation, affidavits from interested parties making conclusory statements, and purported reports" that are not admissible as documentary evidence (NYSCEF Doc No. 22, ¶ 13). Plaintiffs also "suspect that Defendant Hyundai conducted a pre-loss underwriting inspection of the subject premises" (*id.* at ¶ 15). Accordingly, Plaintiffs contend that to the extent this inspection revealed that the Premises was contrary to the information Defendant received in the application but continued to accept their policy premium, Defendant is estopped from denying coverage.

Moreover, Plaintiffs maintain that they made no misrepresentations in the insurance application. With respect to the smoke detectors, Plaintiffs submit a report from a home inspection that occurred on June 21, 2023, in which the presence of smoke detectors was documented. Plaintiffs further submit an Affidavit of Compliance, executed by the prior owners and dated September 19, 2023, attesting to the presence of "an operable single station smoke detecting alarm device or devises" (NYSCEF Doc No. 26). In his affidavit, Kahan states that he did not receive any violations from the New York City Department of Buildings (the "DOB") for the absence of

¹ Defendant argues that since Plaintiffs did not reside at the Premises at the time of loss, even if they intended to do so, the Premises does not meet the definition of "residence premises" (NYSCEF Doc No. 19). The policy defines "residence premises" as "a. The one family dwelling where you reside; b. The two, three or four family dwelling where you reside in at least one of the family units; or c. That part of any other building where you reside" and which is shown as the 'residence premises' in the Declarations" (*id.*).

smoke detectors (NYSCEF Doc No. 23). Thus, Plaintiffs assert that this evidence establishes that Plaintiffs were truthful when they represented on the application that there were operational smoke detectors at the Premises. Turning to the issue of owner occupancy, Plaintiffs aver that there is no evidence suggesting that Plaintiffs sought to utilize the Premises as a “tenant occupied” property. In his affidavit, Kahan asserts that he and his wife intended to make the Premises their primary residence and did not intend to rent it to anyone. Plaintiffs also submit a Loan Quality Initiative Disclosure, executed on September 19, 2023, in which they indicated that the Premises would be occupied as a primary residence (NYSCEF Doc No. 25).

Plaintiffs further argue that the Premises was not undergoing renovations, remodeling or major repairs at the time the insurance application was submitted on August 29, 2023. Plaintiffs assert that as of the date of submission, the Premises was not undergoing any work at all because Plaintiffs had not yet closed on the purchase. In addition, Plaintiffs argue that no work was actively being done even at the time of closing. Instead, work began more than a month after the application was submitted. According to Plaintiffs, the application did not ask whether Plaintiffs would be undertaking any renovations, remodeling or major repairs during the policy period. Thus, Plaintiffs argue that there is nothing in the application or Policy prohibiting them from doing so. In fact, Plaintiffs assert that Defendant permits and contemplates that properties may undergo renovations, remodeling or major repairs during the policy period. Plaintiff further argues that the terms “renovation, remodeling and major repairs” are not defined and are inherently ambiguous. Though Defendant’s underwriting guidelines lists as an ineligible exposure, a “property under renovation, remodeling or repair where permit is required by law,” Kahan asserts that the work at the Premises did not require permits, and he was not issued any violations from the DOB for unpermitted work.

In addition, Plaintiffs claim that the Premises was not vacant or unoccupied. According to Kahan, the Plaintiffs anticipated moving into the home within 30 days of closing. Thus, Plaintiffs aver that they “truthfully represented in their application for insurance that the premises would not be vacant or unoccupied” (NYSCEF Doc No. 22, ¶ 39). Nonetheless, Plaintiffs contend that the terms “vacant or unoccupied” are not expressly defined. Since the Policy states that a dwelling being constructed is not considered vacant, Plaintiffs assert that this raises an issue of fact as to whether the Premises can be considered vacant. Furthermore, in his affidavit, Kahan states that he “visited the property regularly” (NSYCEF Doc No. 23, ¶ 15). Plaintiffs also assert that the presence of the workers at the Premises would satisfy the occupancy requirement.

In addition to asserting that they made no misrepresentations, Plaintiffs argue that Defendants have not demonstrated that any alleged misrepresentation was material. Plaintiffs request that the Court disregard Defendant's underwriting guidelines, two versions of which were attached to Defendant's motion, because it is "clearly a draft document that contains inconsistent information" (NYSCEF Doc No. 22, ¶ 46). Moreover, Plaintiffs assert that Mr. Mertz's statements in his affidavit are contradicted by the underwriting guidelines. Furthermore, Plaintiffs contend that the policy itself provides coverage for damages arising from renovations, remodeling or repairs. Additionally, Plaintiffs assert that the policy imposes limitations for coverage for certain losses when the premises is vacant for more than thirty days, and this limitation does not prevent coverage for damages resulting from a fire. Finally, Plaintiffs argue that there are issues of fact as to whether the Premises met the definition of "residence premises."

In reply, Defendant argues that (1) it provided irrefutable documentary evidence demonstrating that Plaintiffs made several misrepresentations in their insurance application; (2) Plaintiffs' alleged intent to reside at the Premises is irrelevant and fails to raise an issue of fact; (3) the terms in the application are unambiguous; (4) Plaintiffs rely on unrelated terms of the policy to create an issue of fact as to whether the Premises was vacant; (5) Plaintiffs failed to raise an issue of fact as to whether the Premises was not undergoing renovations; and (6) Plaintiffs did not reside at the Premises on the date of loss as required for coverage under the policy.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]). "[T]he issue on a motion pursuant to CPLR 3211(a)(7) is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint" (*LoPinto v J.W. Mays, Inc.*, 170 AD2d 582, 583 [2d Dept 1991]). It is well-established that

Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*YDRA, LLC v Mitchell*, 123 AD3d 1113, 1114 [2d Dept 2014]).

Pursuant to CPLR 3211 (a) (1), a complaint will only be dismissed if there is documentary evidence that “utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law” (*Granada Condo. III Ass’n v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). For evidence to be considered documentary, it must be unambiguous, authentic and undisputed (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). Therefore, “affidavits, deposition testimony, [and] letters are [not considered] ‘documentary evidence’ within the intendment of CPLR 3211 (a) (1)” (*Granada Condo. III Ass’n*, 78 AD3d at 997).

“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” (*Zilkha v Mut. Life Ins. Co.*, 287 AD2d 713, 714 [2d Dept 2001]). 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]). “A

misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented” (*Zilkha*, 287 AD2d at 714). “[E]ven innocent misrepresentations, if material, are sufficient to allow an insurer to defeat recovery under the insurance contract” (*Meagher v Exec. Life Ins. Co.*, 200 AD2d 720, 720 [2d Dept 1994]).

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).

The Court turns to Defendant’s argument that the Premises does not meet the definition of “residence premises” and thus, there is no coverage under the policy. The Second Department has consistently found that a disclaimer of coverage is proper where the insureds did not live at the covered property on the date of loss (*see Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014, 1015 [2d Dept 2007]; *Milgrim v Royal & SunAlliance Ins. Co.*, 75 AD3d 587, 589 [2d Dept 2010]; *Vela v Tower Ins. Co. of N.Y.*, 83 AD3d 1050, 1051 [2d Dept 2011]; *Zises v New York Cent. Mut. Fire Ins. Co.*, 116 AD3d 950, 951 [2d Dept 2014]).

Upon review of the documents, the Court finds that Defendant has established entitlement to dismissal of Plaintiffs’ complaint by demonstrating that Plaintiffs did not reside at the Premises on the date of loss. Thus, the Premises was not covered under the subject policy and there was no breach of contract. Plaintiffs’ reliance on *Dean v Tower Ins. Co. of N.Y.* (19 NY3d 704 [2012]) is unavailing. The homeowner in *Dean* alleged that he was at the subject property at least five days a week, he would eat at the house everyday, and he slept there on several occasions (*Dean*, 19 NY3d at 708). Thus, the Court of Appeals found “issues of fact as to whether [the homeowner’s] daily presence in the house, coupled with his intent to eventually move in with his family, is sufficient to satisfy the insurance policy’s requirement” (*Dean*, 19 NY3d at 708-709 [emphasis

added)).² No one has contested the Plaintiffs' intent to reside at the Premises in the future. Nonetheless, the "mere intention to reside at the premises [is] insufficient to satisfy the policy's 'residence premises' requirement" (*Vela*, 83 AD3d at 1051). In addition, in his affidavit, Kahan states only that he visited the property regularly and was there on the morning of the fire. This is insufficient to create an issue of fact.

Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss (Mot. Seq. No. 1) is granted.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.
HON. INGRID JOSEPH

² It is important to note that the Court of Appeals found that "under the circumstances of *this* case the term ["residence premises"] was ambiguous" (*Dean*, 19 NY3d at 707 [emphasis added]).