

45 Misc.3d 1218(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, New York County, New York.

Juan Ramon ALMONTE, Olga Almonte,
Katherine Almonte and Oscar Almonte, Plaintiffs,

v.

CASTLEPOINT INSURANCE
COMPANY, Defendant.

No. 112220/11.

|
Oct. 8, 2014.

Attorneys and Law Firms

Michael P. Lagnado, Esq., for plaintiff.

Kevin F. Buckley, Esq., Mound Cotton Wollan &
Greengrass, for defendant.

Opinion

JOAN A. MADDEN, J.

*1 In this action for damages and declaratory relief as to insurance coverage, defendant CastlePoint Insurance Company (Castlepoint) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiffs oppose the motion and cross move, pursuant to CPLR 3212, for an order granting summary judgment for the relief demanded in the complaint.

The following facts are not disputed unless otherwise noted. On February 12, 2011, a fire occurred at the property owned by plaintiff Juan Ramon Almonte, located at 7807 97th Avenue, Ozone Park, New York. Plaintiffs Olga Almonte, Katherine Almonte, and Oscar Almonte resided with Juan Ramon Almonte and were members of his household. At the time of the fire, the property was insured by defendant Castlepoint under Homeowners Policy No. * * * * *5694. On or about February 15, 2011, Castlepoint received notice of the fire and acknowledged receipt of plaintiffs' claim.

By letter dated March 3, 2011, Castlepoint advised Juan Ramon Almonte that “without a waiver of our rights, we are currently investigating the facts surrounding the loss” and “will continue to keep you advised of our adjustment.” The letter quoted the definition section of the policy, specifically the definitions of “insured location,” and “residence premises,” and explained that “[o]ur preliminary investigation has found the home to be a 3 family residence,” which does not qualify as a “residence premises under the policy and we reserve our right to disclaim coverage for this reason.”¹ Quoting the “Concealment or Fraud” provision in the policy, the letter additionally advised that “[a] review of the policy application, submitted on March 13, 2009, indicated that the premises ... was a two-family owner occupied dwelling,” and that “[t]his policy would not have been issued if the dwelling was known to be a 3 family home. Accordingly, we reserve our rights to disclaim coverage of this loss as well as any liability claim arising here from if it is determined that this in fact a 3 family home.”

By letter dated April 27, 2011, Castlepoint through its parent company Tower Group Companies (“Tower”) notified Joan Ramon Almonte that “we have completed our review of this matter and must advise you this claim does not fall within the scope of your policy,” and “we are disclaiming coverage of this claim for the reasons set forth below.” Quoting the Property Coverages provision in the policy and the definitions of “Insured location” and “Residence premises,” the letter explained as follows:

You reported a claim for fire damage to your residence. Our inspection of the building and statement provided by you confirmed the dwelling is a 3 family home. There are 3 separate living spaces/apartments within the house. As per the above provision, a residence premises is a one or two family home. It was clear that your home does not meet the definition of residence premises as defined above in that it is a 3 family home. Accordingly, we hereby disclaim coverage of the loss.

*2 On October 27, 2011, plaintiffs commenced the instant action seeking actual, compensatory,

consequential and punitive and/or exemplary damages of more than \$500,000, and a declaration that their “claim was fully insured pursuant to the terms of the policy.” The complaint asserts a first cause of action for breach of contract; a second cause of action alleging that the policy afforded coverage for the loss and Castlepoint’s disclaimer “was improper, ineffective and untimely”; a third cause of action for “fraud, negligent misrepresentation, intentional misrepresentation and conspiracy,” and violations of General Business Law §§ 340, 349 and 350; and a fourth cause of action for “emotional distress, injury and harm to reputation, insurance and credit history, the ability to obtain insurance and financing the cost of same.” Castlepoint answered asserting six affirmative defenses, including a second affirmative defense that the policy is void *ab initio* based on a material misrepresentation that the premises was occupied as a two family residence, and a third affirmative defense that the premises is not a “residence premises” as defined in the policy.

Castlepoint is now moving for summary judgment dismissing the complaint in its entirety. In support the motion, Castlepoint argues the policy provides no coverage as the unambiguous language in the policy requires the property to be either a one or two-family dwelling, and the “overwhelming evidence” establishes that the subject premises was a three-family dwelling. Castlepoint also argues that the policy was void from its inception based on material misrepresentation in the application that the premises was a two-family dwelling. In opposition to the motion, and in support of their cross motion, plaintiffs argue that issues of fact exist as to whether the premises was a two or three family dwelling, and that defendant’s policy limiting coverage to a residence defined as a one or two family dwelling violates Insurance Law § 3404(e).

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible

form to demonstrate that material issues of fact exist which require a trial. See *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose. *Zuckerman v. City of New York*, *supra* at 562.

In support of the motion Castlepoint submits an affidavit of Jerome Tutak, who is “employed by Tower Group, Inc., as the Personal Lines Underwriting Manager with underwriting responsibility for Tower’s subsidiary, CastlePoint Insurance Company,” an affidavit of Glenn J. Verhaaren, the insurance adjuster who inspected and photographed the premises, and an affidavit of Wayne Behnken, an investigator in Tower’s Special Investigative Unit, who conducted and recorded interviews of plaintiffs Joan Ramon Almonte and Katherine Almonte, and non-parties Howard Tobar, Alexandra Almonte and Beyerliz Fernandez. Castlepoint also submits an attorney’s affirmation, the pleadings, transcripts of the interviews conducted by investigator Behnken, CDs containing the digital recordings of those interviews, and documents including the insurance policy, the insurance application dated March 13, 2009, the Property Loss Notice dated February 14, 2011, photographs of the premises taken by adjuster Verhaaren after the fire, and March 3, 2011 and April 27, 2011 letters from Tower addressed to plaintiff Juan Ramon Almonte.

*3 Based on the foregoing, Castlepoint makes a sufficient *prima facie* showing that coverage under the policy is limited to one and two family residences. It is undisputed that the policy defines “insured location” as the “residence premises,” and “residence premises” is defined as meaning the “one family dwelling ... where you reside” and “also means a two-family dwelling where you reside in at least one of the family units” (emphasis added). Thus, to be eligible for coverage, the insured premises must be a one or two family owner occupied home, but not a three-family home. See *Dawria v. CastlePoint Insurance Co.*, 104 AD3d 406 (1st Dept 2013).

Castlepoint also makes a sufficient *prima facie* showing that the insured premises is three-family residence that does not qualify for coverage. Castlepoint submits an affidavit from its adjuster Glenn J. Verhaaren stating that he personally conducted an inspection of the premises on February 16, 2011. Verhaaren submit copies of photographs he took during his inspection. He states that

“[d]uring my inspection of the Premises I discovered that the Premises was a three-family home with three separate living units.” He explains that at the time of his inspection, “parts of the Premises had already been gutted and debris and damaged property had been moved out,” but “it was apparent during my inspection that the Premises contained separate living units/apartments on the first and second floors, as well as one in the basement,” and that “[e]ach of the three living units contained its own kitchen, bathroom and living area.” The photographs show, *inter alia*, an interior staircase leading to the basement, and the remains of the basement apartment, including the bathroom and a portion of the kitchen.

Castlepoint also submits an affidavit from its investigator, Wayne Behnken, stating that in February 2011, he “was assigned to obtain statements from the people residing at the Premises at the time of the Loss,” and on February 18, 2011, he interviewed plaintiffs Juan Ramon Almonte and Katherine Almonte. He explains that Katherine Almonte “acted as an interpreter for Juan Almonte [her father] during their interview and also answered questions directly.” Behnken states that “[d]uring the interview of Juan and Katherine Almonte, they stated that, at the time of the Loss, Plaintiffs in this action resided on the second floor of the Premises; Alexandra Almonte, Howard Taber and their baby resided on the first floor of the Premises; and a woman whose name they could not recall resided in the basement of the Premises.” Behnken explains that “[e]ventually the identity of the basement tenant was revealed to be a woman named Beyerliz Fernandez, whom he interviewed on March 4, 2011,” and she “stated that, at the time of the Loss, she was residing in the basement of the Premises,” and that the basement contained its own kitchen and bathroom.”

Behnken provides transcripts and CD recordings of his interviews. When Juan and Katherine Almonte were asked about the “person” who “lives in the basement,” they could not remember her name, but described her as a young “Hispanic female” who had a child, and stated she paid \$675 in monthly rent in cash, but she did not have a lease. They explained that “half the basement is owner occupied and the other half is what's rented,” and that the owner-occupied area was in the front of the house and contained a washing machine. They also explained that the basement tenant had keys to the front door of the house, and keys to the back, and that she “could have easily came [sic] out through the front if she chose

to get her mail, which she did. She would like go to the front or most of the time she's working. Go to the back.” They explained that the tenant could get to her apartment “easily” by “going down stairs.”²

*4 The affidavits from defendant's adjuster and investigator establish that the plaintiffs' premises contained a third and separate dwelling unit in the basement, which renders it a three-family dwelling not covered under the policy. See *Lema v. Tower Insurance Co*, 119 AD3d 657 (2nd Dept 2014); *Dauria v. CastlePoint Insurance Co*, *supra*; *Hermitage Insurance Co v. LaFleur*, 100 AD3d 426 (1st Dept 2012). Adjuster Verhaaren personally inspected the building and concluded that the basement contained a separate dwelling unit, and for that reason the building was a three-family residence. Investigator Behnken personally conducted and recorded plaintiffs' interviews. Although the statements by Juan and Katherine Almonte are unsworn, their statements acknowledging the existence of the basement apartment, are admissible as admissions of parties. See *Reed v. McCord*, 160 N.Y. 330 (1899); *Delgado v. Martinez Family Auto*, 113 AD3d 426 (1st Dept 2014); *Montes v. New York City Transit Authority*, 46 AD3d 121 (1st Dept 2007). Likewise, in plaintiffs' response to defendant's Notice to Admit, they admit the basement “included a kitchen, bathroom, living room and bedroom,” and that Beyerliz Fernandez was the “tenant” who began residing in the basement “approximately nine months prior to the fire,” and “paid plaintiffs approximately \$700 per month to reside in the basement.”

In opposing the motion, plaintiffs fail to establish a triable issue of material fact as to whether the basement apartment constitutes a third and separate dwelling unit. Plaintiffs submit no affidavits or other evidentiary proof, and rely solely on an attorney's affirmation and a memorandum of law. Citing *Dauria v. CastlePoint Insurance Co*, *supra*, plaintiffs argue defendant's evidence “clearly establishes” the premises “was a two family dwelling,” since it “had only one entrance, with staircases leading from the first floor to the second floor and basement,” and that “[t]here were no separate entrances to the second floor or basement.” Plaintiffs' argument is without merit.

The Court in *Dauria v. CastlePoint Insurance Co*, did not, as plaintiffs assert, *emphasize* the existence of a

separate entrance, but rather found that “even if, as plaintiffs, claim, all the residents of the premises shared a single household’ in the sense of living together, the premises is a three-family dwelling because of its structural configuration, i.e. three separate units, each with its own kitchen, bathroom and separate ntrance.” *Id.* Notably, *Dauria* interpreted the identical policy language at issue in the instant case and involved nearly identical facts. The First Department determined that the “policy term residence premises’ is not ambiguous,” and the “term family,’ as used in family units,” one family dwelling’ and two family dwelling,’ necessarily relates to an entire self-contained dwelling unit.” *Id.* The First Department concluded that “[s]ince the premises here consists of three dwelling units, it is a three-family dwelling and does not fit within the policy definition of a covered residence premises.’ “ *Id.*

*5 Plaintiffs also mischaracterize the configuration of the instant premises. While defendants’ photographs show one entrance on the exterior of the building, Juan and Katherine Almonte referred to another entrance in the “back,” to which the basement tenant had keys. The question here is whether the premises contained separate *interior* entrances. It is undisputed that one interior staircase led up to the second floor apartment which plaintiffs concede is a separate dwelling unit. It is also undisputed that a second interior staircase led down to the basement, which was divided into two separate areas, with the apartment located in the back and the area with the washing machine in the front. Plaintiffs’ ignore the additional undisputed evidence that the basement apartment had its own bathroom and kitchen, which are the additional factors cited in *Dauria*. Significantly, even though plaintiffs are in the best position to describe the configuration of their own premises, they have not submitted any affidavits to controvert the first-hand observations of defendant’s adjustor, or explain and clarify their statements to the investigator. Thus, on the authority of *Dauria v. CastlePoint Insurance Co*, the court concludes as a matter of law that the basement apartment was a separate dwelling unit. *Id.*

Finally, plaintiffs’ reliance on Insurance Law § 3404 is misplaced. That statute codifies the New York standard fire insurance policy, and provides the minium level of coverage permissible for fire loss. *See* Insurance Law § 3404 [f][1][A]; *TAG 380, LLC v. ComMet 380, Inc*, 10

NY3d 507, reargument den 11 NY3d 753 (2008); *Lane v. Security Mutual Insurance Co*, 96 N.Y.2d 1, 5 (2001). While plaintiffs argue that Castlepoint’s fire insurance policy limiting coverage to one and two family owner occupied dwellings violates Insurance Law § 3404, they neither identify a specific provision in the statute, nor cite any case law interpreting the statute, to support their argument. To the contrary, the appellate authorities cited above have uniformly enforced provisions in fire insurance policies that are identical to those at issue in this action. *See Lema v. Tower Insurance Co, supra; Dauria v. CastlePoint Insurance Co, supra; Hermitage Insurance Co v. LaFleur, supra.*

Thus, since plaintiffs’ premises consists of three separate dwelling units, it is a three-family dwelling that does not fall within the policy definition of a covered “residence premises,” and plaintiffs are not entitled to coverage for the February 12, 2011 fire. In view of this conclusion, the court need not address the issue of material misrepresentation. Castlepoint is therefore entitled to summary judgment declaring that plaintiffs are not entitled to coverage, and summary judgment dismissing the balance of the complaint, which asserts breach of contract and other claims for damages based on the underlying allegation that Castlepoint wrongfully or improperly denied coverage; and plaintiffs’ cross-motion for summary judgment is denied.

*6 Accordingly, it is

ORDERED that defendant’s motion for summary judgment is granted; and it is further

ORDERED that plaintiffs’ cross motion for summary judgment is denied; and it is further

ORDERED AND ADJUDGED that defendant CastlePoint Insurance Company is not obligated to provide insurance coverage to plaintiffs Juan Ramon Almonte, Olga Almonte, Katherine Almonte and Oscar Almonte for the fire that occurred on February 12, 2011 at the premises located at 7807 97th Avenue, Ozone Park, New York; and it is further

ORDERED that the balance of plaintiffs’ complaint is dismissed and the Clerk is directed to enter judgment accordingly.

All Citations

45 Misc.3d 1218(A), 3 N.Y.S.3d 284 (Table), 2014 WL 6434448, 2014 N.Y. Slip Op. 51624(U)

Footnotes

- 1 The policy defines "insured location" as "[t]he residence premises," and "residence premises" is defined as:
 - a. The one family dwelling, other structures, and grounds;
 - or
 - b. That part of any other building;
where you reside and which is shown as the "residence premises" in the Declarations."Residence Premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations.
- 2 While Juan and Katherine Almonte stated that the basement tenant did not have a hot plate or stove for cooking, and that she would bring food in from the outside, "or my mom used to cook for everyone in the house," the tenant, Barleys Fernandez, told investigator Behnken that the apartment had a bathroom, and a kitchen with a microwave and a "small electric stove."