

NEW YORK COURT OF APPEALS

Dean v. Tower Ins. Co. of N.Y.

19 N.Y.3d 704, 979 N.E.2d 1143 (2012) · Decided October 25, 2012

OPINION

CIPARICK, J.

*707OPINION OF THE COURT Ciparick, J. This appeal requires us to determine whether the term “residence premises” in an insurance contract is ambiguous where an insured purchased a homeowners’ policy in advance of a closing but was unable to move in due to the need for major repairs.

We conclude that under the circumstances of this case the term is ambiguous, precluding summary judgment. Plaintiffs Douglas and Joanna Dean entered into a contract to purchase a home in Irvington in February 2005. The closing was scheduled to take place on March 31, 2005. Plaintiffs acquired a homeowners’ insurance policy from defendant Tower Insurance Company of New York (Tower) effective as of the closing date.

The closing was delayed until May 20, 2005. After the closing, plaintiffs discovered extensive termite damage to the house. Douglas Dean, with the help of family and friends, began the process of repairing the damage. Work on the house progressed over the course of the year following the closing, and the policy was renewed in March 2006.

The renovations were substantially completed when, on May 15, 2006, a fire completely destroyed the house. The morning after the fire, plaintiffs gave notice to Tower. On June 22, 2006, Tower disclaimed coverage on the ground that “[o]ur investigation revealed the dwelling was unoccupied at the time of the loss.

Accordingly, this dwelling does not qualify as a ‘residence premises’ [sic] there is no coverage for this claim under your policy.” Secondly, Tower disclaimed coverage on the ground that plaintiffs engaged in fraud by misrepresenting their intent to live in the premises on the application submitted in advance of acquiring the policy.

The Tower policy provides as follows: “We cover: 1. The dwelling on the ‘residence premises’ shown in the Declarations, including structures attached to the dwelling.” In the definitions section, “residence premises” is defined as: “The one family dwelling... where you reside.” The term reside is not defined in the policy. Plaintiffs commenced this action for breach of the insurance contract.

Following discovery, both parties moved for summary judgment. Supreme Court granted Tower's motion, denied plaintiffs' motion and dismissed the complaint. The court held that the term "reside" is clear and unambiguous, and that plaintiffs never established residency at the premises and *708 "[a]t best... established ownership of the house and presence in it to perform certain renovations, and a stated intent of living there" (2010 NY Slip Op 31107[U], *9 [2010]).

The Appellate Division modified the order of Supreme Court, finding that Tower failed to satisfy its prima facie burden on a motion for summary judgment (see *Dean v Tower Ins. Co. of N.Y.*, 84 AD3d 499 [1st Dept 2011]). It concluded that the "residence premises" requirement in the policy failed to define what qualifies "as 'resides' for the purpose of attaching coverage" and that the "policy [was] ambiguous in the circumstances of this case" and otherwise denied summary judgment (*id.* at 499-500).

The Appellate Division granted Tower leave to appeal to this Court on a certified question (2011 NY Slip Op 82928[U] [2011]). We agree with the Appellate Division and now affirm. "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Seaboard Sur.*

Co. v Gillette Co., 64 NY2d 304, 311 [1984] [citations omitted]). "[A]mbiguities in an insurance policy are to be construed against the insurer" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978]). "The standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (*Government Empls.*

Ins. Co. v Paolicelli, 303 AD2d 633, 633 [2d Dept 2003] [internal quotation marks omitted]; see also *Matter of Aetna Cas. & Sur. Co. v Gutstein*, 80 NY2d 773, 775 [1992]; *Matter of Allstate Ins. Co. [Rapp]*, 7 AD3d 302, 303 [1st Dept 2004]). Plaintiff Douglas Dean claimed that between the date of the closing and the date of the fire he was generally at the property at least five days a week.

He would go there after work between 4:00 and 5:00 p.m. and leave no earlier than 10:00 p.m. and would frequently stay late into the night or early morning. He also averred that he had built a table for eating purposes and would eat at the house everyday, sometimes with other workers, and that he slept there on several occasions.

Therefore, there are issues of fact as to whether Douglas' daily presence in the house, coupled with his intent to eventually move in with his family, is sufficient to *709 satisfy the insurance

policy's requirements (cf. *Vela v Tower Ins. Co. of N.Y.*, 83 AD3d 1050, 1051 [2d Dept 2011], lv granted 2011 NY Slip Op 85357[U] [2d Dept 2011], appeal withdrawn 18 NY3d 881 [2012]).

Further, because the term "reside" is not defined in the contract making the term "residence premises" ambiguous, it is arguable that the reasonable expectation of an average insured (see *Cragg*, 17 NY3d at 122) is that occupancy of the premises would satisfy the policy's requirements. Notably, the standard fire policy as provided in Insurance Law § 3404 (e) speaks in terms of occupancy, and Insurance Law § 3404 (f) (1) (A) states that a policy "with respect to the peril of fire" cannot contain provisions "less favorable to the insured than those contained in the standard fire policy." Additionally, Tower's letter disclaiming coverage also speaks in terms of occupancy.* Courts have held that "[a] householder need not necessarily have conventional, or, indeed, any furniture in a house to occupy it.

His presence in it for sleeping and eating and working purposes can literally constitute occupancy. He can, if he will, sleep and eat on the floor or on improvised devices" (*Page v Nationwide Mut. Fire Ins. Co.*, 15 AD2d 306, 307 [3d Dept 1962]; see also *Perrotta v Middlesex Mut. Ins. Co.*, 37 AD2d 783, 783 [2d Dept 1971]).

Thus, there are issues of fact rendering summary judgment inappropriate in this matter. Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative. While not determinative, the disclaimer letter is indicative that the reasonable expectation of an average insured, under these facts, is that occupancy is sufficient to establish coverage.