

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

2008 NY Slip Op 32344(U)

August 19, 2008

Supreme Court, New York County

Docket Number: 0104885/2007

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rakower
Index Number: 104885/2007

PART 5

TOWER INS. CO. OF NY

vs
RAJARAM MADHU

INDEX NO. 104885/07

Sequence Number : 001

MOTION DATE _____

DEFAULT JUDGMENT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED
1, 2, 3, 4, 5, 6

Answering Affidavits — Exhibits _____

7, 8

Replying Affidavits _____

9, 10, 11

Cross-Motion: Yes No

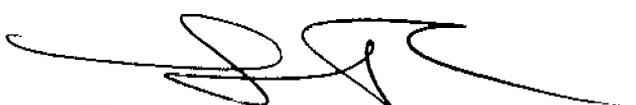
UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 8/19/08


EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No.
104885/07

Seq No.: 001

- against -

Decision, Order
and Judgment

MADHU RAJARAM, ANZHELA BADINER,
FELIKS TSATSKIN, YANINA GRANOVSKAYA,
ERNA KARPILOVSKAYA, and THE CITY OF NEW YORK

Defendants.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

-----X
HON. EILEEN A. RAKOWER

Tower Insurance Company of New York (Tower) brings a declaratory action arising from a question of its duty to defend an action brought by Erna Karpilovskaya in Kings County (Index no. 27234/06, the underlying action) against the remaining defendants. Tower alleges that Rajaram, Badiner and Tsatskin failed to appear in this New York County action, and Tower seeks a default judgment as against them pursuant to CPLR 3215(a). Additionally, Tower moves for summary judgment as against the remaining defendants, seeking the declaration of this court that Tower has no duty to defend and/or indemnify City or Karpilovskaya in connection with the Kings County action. Rajaram, Badiner and Tsatskin oppose the motion. Karpilovskaya opposes the motion. City does not appear.

Karpilovskaya alleges that she tripped and fell on January 15, 2006 on the sidewalk in front of the premises located at 138 Brighton 11th Street (the premises), in the county of Kings, State of New York. The premises are alleged to have been owned by Yanina Granovskaya. It is further alleged that Granovskaya hired certain entities to perform work at the premises. It is also alleged in the Kings county complaint that Rajaram, Badiner and Tsatskin ("defendant owners"), collectively, owned the building and were responsible for the premises. Finally, she alleges that

City was responsible for the sidewalk where she fell. Tower issued a homeowners insurance policy to defendant Madhu Rajaram (the policy).

Tower filed the instant action in New York County seeking declaratory relief. It requests that the Court declare that Tower is not obligated to defend or indemnify Rajaram because: “(a) Rajaram made material misrepresentations in her insurance application, (b) the premises was not an ‘Insured location,’ since Rajaram never resided at the premises, and (c) the underlying accident may have arisen out of Rajaram’s business pursuits.” Additionally, Tower seeks a declaration of no coverage based upon “all the defendants’ failures to promptly notify it of the accident and/or claim as required under the Tower policy.” It asserts that it is entitled to the above as against the defaulting defendants, whose failure to answer amounts to an admission of the facts Tower claims. Finally, it seeks summary judgment as against the remaining answering defendants.

In support of its motion, Tower provides the underlying complaint in the Kings county action; a letter from its own senior liability examiner; the pleadings in the instant matter; the affidavits of service along with notices of default it served upon Rajaram, Tsatskin, and Badiner, all at Advanced Pediatric Practice on the first floor of the subject premises; the affidavit of Lowell Aptman along with a copy of the policy, a report of claim and a communication to the insured; the affidavit of Edward Blomquist along with Tower’s homeowner selection rules, and the application for the instant policy; and the affidavit of Brian Williams along with his statement of investigation.

The policy proposed for the premises was to be in effect from January 5, 2006 through January 5, 2007. Tower asserts that it first received notice of Karpilovskaya’s claim on November 14, 2006. It shows that it sent Mr. Williams to investigate the claim. By letter dated December 13, 2006, Tower disclaimed coverage, and commenced this action to “confirm the propriety of its disclaimer.”

Williams claims that he visited the premises and discovered a pediatrician’s office operating from the first and second floors of the premises. Additionally, he claims he took a statement dated November 21, 2006 from Rajaram, which he states, she read and signed before him. In relevant part, the statement submitted states:

My name is Dr. Madhu Rajaram. My date of birth is (redacted). My home address is 7 Telegraph Hill Road, Homdel, NJ 07733. My contact

telephone number is (redacted). I have been the Property Owner of a residential private house located at 138 Brighton 11th Street, Brooklyn, NY 11235, since January 5, 2006. I have leased the property to the former owner (I will provide their name at a later date) since January 5, 2006 until November 2006. I have never resided at the property since I purchased it on January 5, 2006. I visit the premises a few times a month or whenever necessary. I do not believe I visited the premises on January 15, 2006, however ... (redacted).

Tower claims that the application Rajaram filled out for the subject policy is inconsistent with her admissions above, and concludes that her misrepresentations invalidate coverage. Additionally, Tower provides proof of service of the summons and complaint on the defendant owners on April 16, 2007, and avers that none of these parties has answered to date. Thus, Tower urges this court to deem these parties in default and grant a judgment declaring that it has no obligation to defend or indemnify these parties in the Kings county action.

Defendant owners, in opposition, provide their verified answer to Tower's complaint, served on July 1, 2007. Additionally, they note that Tower has failed to append to its motion proof in admissible form. Specifically, it points to the alleged statement of Rajaram, which contains no jurat, no notary public or commissioner of deeds, and is neither an affidavit nor affirmed under penalties of law. Finally, the defendant owners argue that Tower's disclaimer was insufficient because it was made over thirty days after it learned of the grounds for disclaimer.

Initially, Tower's motion seeking default judgments against the defendant owners is denied. Despite Tower's contention that the defendant owners failed to appear in this action, the defendant owners submit their answer dated July 1, 2007. Generally, "an appearance shall be made within twenty days after service of the summons." (*see* CPLR 320). The defendant owners were served on April 16, 2007 so their time to answer would have expired prior to their July 1, 2007 answer. However, on June 12, 2007, Tower sent each defendant owner a letter stating, in relevant part:

This letter is to inform you that Tower Insurance Company of New York will move for a default judgment against you, if you fail to respond to the Complaint by *September 16, 2007*. (emphasis added).

Thus, as the defendant owners' answer was served on July 1, 2007, the defendant owners are not in default. Tower urges that if the court does not find the defendant owners in default, it should treat the motion as one for summary judgment. Such treatment is proper when both sides lay bare their proof and it is clear that they are deliberately charting a summary judgment course. (*Four Seasons Hotels Ltd. v. Vinnik*, 127 A.D.2d 310[1st Dept. 1987]). Such is the case here as Tower explicitly requests that the court treat this a motion for summary judgment in lieu of granting a default judgment and the defendant owners state in their opposition papers "The within affidavit is submitted in opposition to plaintiff's default and *summary judgment* motions . . ."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The defendant owners claim that Tower did not timely assert its disclaimer notice. Indeed, an insurer must serve written notice of the intent to disclaim coverage as soon as is reasonably possible. (*Those Certain Underwriters at Lloyds, London v. Gray*, 49 AD3d 1[1st Dept. 2007]). Here, Tower sent its investigator to investigate Rajaram's claim on November 21, 2006. Tower did not disclaim coverage until December 13, 2006, more than three weeks later and does not offer any excuse for its delay in doing so. However, the issue of a timely disclaimer is irrelevant if the policy, from its inception, never provided coverage for the particular claim at issue. (*Metropolitan Property & Ca. Ins. Co. v. Pulido*, 271 AD2d 57[2nd Dept. 2000]). (when insureds claimed they would occupy the insured premises but it was discovered that they lived elsewhere, the court found that their material misrepresentation made the timeliness of the disclaimer irrelevant). Tower claims that the timeliness of its disclaimer is a non-issue because, similar to *Metropolitan Property*, the contract was

void *ab initio* due to Rajaram's material misrepresentation that she would be living at the insured premises.

In order to establish that a fact is material so as to void *ab initio* an insurance contract, an insurer must show that it would not have issued the policy had that fact been revealed at the time that the policy was issued. (*Interested Underwriters at Lloyd's v. H.D.I. III Assoc.*, 213 AD2d 246[1st Dept. 1995]). "A court, in finding a material misrepresentation as a matter of law, generally relies upon two categories of evidence, an affidavit from the insurer's underwriter and the insurer's underwriting manual." (*Kroski v. Long Island Sav. Bank FSB*, 261 AD2d 136[1st Dept. 1999]). Tower supports its claim that it would not have issued the policy if it had known that Rajaram was not living at the residence by submitting the affidavit of Mr. Blomquist, Supervising Underwriter. Mr. Blomquist affirms that if Rajaram had indicated on her application that she did not intend to occupy the premises it would have presented an unacceptable risk and Tower would not have issued the "homeowner's policy." Mr. Blomquist refers to the Tower Group Homeowner's Selection Rules ("the Rules") which are annexed to his affidavit. Indeed, those rules state that the insured premises must be "owner occupied."

Rajaram represented on the "Homeowner Application" that the building would be "owner occupied" and that it would be for "primary usage." However, in her statement to Mr. Williams, Rajaram gives her home address as "7 Telegraph Hill Road, Homdel, NJ and she states unequivocally that she "leased the property to the former owner . . . I have never resided at the property since I purchased it on January 5, 2006."¹ The defendant owners do not contradict the statement made by Ms. Rajaram. Where "the evidence of the materiality of the misrepresentation is clear and substantially uncontradicted, the matter is one of law for the court to determine." (*Interested Underwriters at Lloyd's v. H.D.I. III Assoc.*, 213 AD2d 246[1st Dept. 1995]).

¹ Defendant owners claim that the statement is not admissible because it "contains no jurat, no notary public or commissioner of deeds, and is neither an affidavit nor affirmed under penalties of law." While generally, unsworn statements should not be considered in a motion for summary judgment, the statement by Rajaram here is annexed to an affidavit by Mr. Williams which attests that the statement was taken by him and that Ms. Rajaram read and signed the statement at the bottom of each page to attest to its accuracy. While hearsay, admissions by a party of any fact material to the issue are always competent evidence against that party. (*Reed v. McCord*, 160 NY 330, 341). Of course, the party-declarant has the right to explain it.

The Rules also state that: “any risks with the following factors may not be written: Any business conducted on the premises . . .” Rajaram indicated on her application that no business was to be conducted on the premises. Contrary to this declaration, Mr. Williams affirms that he “observed a pediatrician’s office being operated from the first and second floors of the premises.”

Tower has shown that it would not have issued a homeowner’s policy had it known that Rajaram would not be residing at the subject premises and that she would be running a business at the location. It is incumbent upon the party opposing summary judgment to come forward with proof in admissible form demonstrating that there exists an issue of fact for the trier of fact to determine. Here, the defendant owners have not contradicted Tower’s showings. Indeed, they submit no evidence controverting Tower’s showing.

Erna Karpilovskaya’s argues that notice was timely given and that discovery is not yet complete. Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied.

CPLR 3212(f) states, in relevant part:

Facts unavailable to the opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion . . .

Here, however, facts necessary to rebut Tower’s showing that the policy should be void *ab initio*, are not within Tower’s exclusive knowledge and possession. Rather, they are within the possession of Rajaram, if they exist at all. In light of the facts that Tower has demonstrated that Rajaram made material misrepresentations, Rajaram has failed to raise an issue of fact regarding these material misrepresentations, and the policy is void *ab initio*, the issue of notice is moot.

Finally, where the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). City fails to respond to the instant motion, and the motion as against City is granted on default.

Wherefore it is hereby

ORDERED that the motion for a default judgment as against Madhu Rajaram, Anzhela Badiner, and Feliks Tsatskin is denied; and it is further

ORDERED that the motion for summary judgment is granted to the following extent: it is hereby

ADJUDGED that Tower Insurance Company of New York's homeowner's insurance policy issued to Madhu Rajaram for premises known as 138 Brighton 11th Street, in the county of Kings, State of New York for the period January 5, 2006 through January 5, 2007 is void *ab initio*, and Tower has no duty to defend or indemnify Madhu Rajaram, Anzhela Badiner, Feliks Tsatskin, Yanina Granovskaya, Erna Karpilovskaya or the City of New York in the Kings County action, Index No. 27234/06.

This constitutes the Decision, Order and Judgment of the Court. All other relief requested is denied.

DATED: August 19, 2008



EILEEN A. RAKOWER, J.S.C

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1417)