Tower Insurance Company of New York v Duarte
2008 NY Slip Op 33456(U)
December 19, 2008
Supreme Court, New York County
Docket Number: 100803/2008
Judge: Milton A. Tingling
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SCANNED ON 12/30/2008

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

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

Tower

- v -

Duarte

INDEX NO. 100083/08

MOTION DATE 9/3/08

MOTION SEQ. NO. 1

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decision.

FILED
DEC 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/19/08

Mat
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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HON. MILTON A. TINGLING
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 44

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TOWER INSURANCE COMPANY OF NEW YORK,
Plaintiff,

-against-

FRANCISCO DUARTE and DINORA L. RUIZ,
as Administratrix of the Estate of
OSVIN ERNESTO SALGUERO, Deceased

Defendants.

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Index No. 100803/2008

ORDER and JUDGMENT

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TINGLING, MILTON, J:

Plaintiff, Tower Insurance Company of New York ("Tower") moves pursuant to CPLR 3215(a) for a default judgment against defendant Francisco Duarte ("Duarte") for his failure to appear in this action and pursuant to CPLR 3212 for summary judgment against Dinora L. Ruiz ("Ruiz"), as administratrix of the estate of Osvin Ernesto Salguero ("Salguero"), declaring that Tower is not obligated to defend and indemnify Duarte in an underlying personal injury action captioned *Dinora L. Ruiz v. Francisco Duarte and Alexer Alvarado*, ("the underlying action") pending in the Queens County Supreme Court.

The Underlying Action

According to the complaint, (Gershweir Aff., Ex. A) on December 24, 2006, Alexer Alvarado ("Alvarado"), an alleged patron of Duarte's delicatessen, assaulted and stabbed Salguero, another patron, on the sidewalk in front of the delicatessen. Salguero died of his injuries on December 26, 2006.

Alvarado, who was found guilty of assault, is now confined at Albion Correctional Facility.

Following Salguero's demise, Diaz, Salguero's widow, commenced a wrongful death action against Alvarado and Duarte. In the only cause of action against Duarte, Diaz alleges "negligence . . . in the ownership, operation and control of [the premises]," including "failing to maintain order within the . . . premises; in serving alcohol to person's intoxicated, or likely to become intoxicated, including . . . Alvarado;" (Gershweir Aff., Ex. A, para.. 23)

The Insurance Policy and the Declaratory Judgment Action

Tower issued a Commercial Lines Policy to Duarte d/b/a Original Valle effective November 29, 2006 to November 29, 2007. The policy includes a Commercial General Liability Coverage Part that covers the sums that the insured becomes legally obligated to pay as damages because of "bodily injury" caused by an "occurrence" which is defined in pertinent part as an accident.

The policy also includes an "Assault and Battery Exclusion" which modifies both the commercial general liability coverage and liquor liability coverage, if the policy contains such coverage. (Aptman Aff., Ex. 1 at TOW-F2) The endorsement states, in its entirety:

> 1. This insurance does not apply to Bodily Injury or Property Damage arising from, due to or caused by:
>
> a. Assault and/or Battery committed by any insured, any employee of any insured, any patron or customer of the insured, or any other person; or
>
> b. The failure to suppress of prevent any Assault and/or Battery or any act or omission in connection with any Assault and/or Battery; or
>
> c. The negligent hiring, supervision or training of any employee or agent of the insured with respect to the events described in a. or b. above.

(Id.)

Tower received notice of the incident on November 7, 2007 when it's agent forwarded a copy of the summons and complaint in the underlying action. Following an investigation, Tower disclaimed coverage on several grounds, including the assault and battery exclusion in the policy. (Aptman Aff., Ex. 3)

CONTENTIONS

In support of summary judgment, Tower argues that it has no duty to defend or indemnify Duarte in the underlying lawsuit because the assault and battery exclusion in the subject policy applies to Ruiz's negligence claim against Duarte.

In opposition, Ruiz contends that there are questions of fact regarding the underlying incident that must be developed in discovery; that the assault and battery exclusion applies to policies with liquor liability coverage and thus, it is inapplicable here because the subject policy excludes liquor liability coverage and that the policy exclusion is not applicable to Duarte's negligence in regard to the underlying incident.

DISCUSSION

A. Summary Judgment Against Ruiz

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by an "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." (CPLR 3212[b])

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York,* supra at 560) Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v. Steward M. Muller Constr. Co.,* 46 N.Y.2d 276 [1978]; *Fried v. Bower & Gardner,* 46 N.Y.2d 765 [1978])

It is well settled that an insurer may be relieved of its duty to defend and indemnify its insured "where it can be determined from the factual allegations that 'no basis for recovery within the coverage of the policy is stated in the complaint.'" (*Allstate v. Mugavero*, 79 N.Y.2d 153, 163 [1991][citations omitted];*Peters v. State Farm Fire & Cas. Co.,* 100 N.Y.2d 634, 635 [2003]; *Swan Consultants Inc. v. Travelers Prop. Cas. Co.*, 360 F.Supp. 2d 582, 588 [S.D.N.Y. 2005]; *Westport Resources Dev. Svcs., Inc. v. Chubb Custom Ins. Co.*, 2003 WL 22966305 [S.D.N.Y.])

In *Mt. Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 88 N.Y.2d 347 (1996), the Court of Appeals held that, as to assault and battery exclusions, even when the theory of recovery pleaded is the insured's negligence, if the negligence cause of action would not exist "but for" the assault, then coverage under the policy for the alleged negligence is excluded. (*See also, McGinley v. Odyssey Re [London]*, 15 A.D.3d 218 [1st Dept 2005]; *Tower Ins. Co. Of New York v. Old Northern Blvd. Restaurant Corp.*, 245 A.D.2d 241 [1st Dept 1997])

Here, Ruiz alleges in the underlying action that her decedent was assaulted by a third party. In the cause of action against Duarte she alleges that Duarte is liable for her decedent's injuries and death because of Duarte's alleged negligence in: 1) failing to maintain adequate security on the premises; 2) serving alcohol to persons likely to become intoxicated, including Alvarado and 3) allowing a disturbance on the premises. Here, as in *Creative Housing*, the negligence cause of action against would not exist "but for" the assault and therefore, the assault and battery exclusion applies to the cause of action against Duarte in the underlying action.

Ruiz's argument that there are questions of fact about how the underlying incident occurred is without merit. The complaint (Gershweir Aff., Ex. A, paras. 12 & 13), and the affidavit in opposition to the motion (Bushlow Aff., paras. 3 & 4) aver that Alvarado assaulted Salguero, causing Salguero's death. Moreover, the assault was detailed in Tower's investigation into the incident (See, e.g. Aptman Aff., Ex. 3) and Alvarado is currently incarcerated for the assault. Therefore, Ruiz's conclusory assertion that there are questions of fact about how the incident occurred is insufficient to overcome Tower's prima facie showing that Salguero's injuries and death resulted from Alvarado's assault.

In addition, Ruiz has failed to demonstrate that summary judgment is premature because further discovery might lead to facts to justify opposition to the motion. Ruiz's mere hope that additional discovery might uncover some different information about how the incident occurred is insufficient to defeat summary judgment. (*See, e.g., Waverly Corp. v. City of N.Y.*, 48 A.D.3d 261 [1st Dept 2008][request for additional discovery must be based on something other than mere hope or conjecture]; *see also, Mahoney v. Turner Constr. Co.*, 37 A.D. 3d 377, 380 [1st Dept 2007])

Moreover, contrary to Ruiz's assertion, the assault and battery exclusion unambiguously applies to both the Commercial General Liability Coverage Part and/or the Liquor Liability Coverage Part, if the policy contains liquor liability coverage. Because the policy at issue in this case did not contain a Liquor Liability Coverage Part, the exclusion applies only to the Commercial General Liability Coverage Part in the subject policy.

Here, Ruiz has failed to come forward with a scintilla of evidence to overcome Tower's *prima facie* case that it is entitled to judgment as a matter of law.

B. Default Judgment Against Duarte

Tower's motion pursuant to CPLR 3215 for a default judgment against Francisco Duarte is granted. Tower submitted an affidavit of service establishing the Duarte was properly served (Gershweir Aff, Ex. C) and Tower states, without contradiction, that Duarte did not answer or otherwise appear in this action. Moreover, as discussed, *supra*, Tower has also established that it has a viable cause of action against Duarte (See, CPLR 3215[f]; *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70-71[2003])

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Accordingly, it is ORDERED that Tower's motion for a default judgment against Francisco Duarte is granted on default; and it is further

ORDERED that Tower's motion for summary judgment declaring that it is not obligated to defend and indemnify Francisco Duarte in the action captioned *Dinora L. Ruiz v. Francisco Duarte and Alexer Alvarado*, Index #26139/07, pending in Queens County Supreme Court is granted.

The Clerk is directed to enter judgment accordingly.

12/19/08

HON. MILTON A. TINGLING
J.S.C.