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| <b>Castlepoint Ins. Co. v Santana</b>  |
| 2012 NY Slip Op 30532(U)   |
| February 29, 2012  |
| Supreme Court, New York County   |
| Docket Number: 116171/10   |
| Judge: Jeffrey K. Oing   |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**JEFFREY K. OING**  
J.S.C.

PRESENT: \_\_\_\_\_  
*Justice*

PART 48

Index Number : 116171/2010  
CASTLEPOINT INSURANCE COMPANY  
VS.  
SANTANA, WANDA  
SEQUENCE NUMBER : 001  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

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

# FILED

MAR 06 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/29/12

\_\_\_\_\_  
**JEFFREY K. OING**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 48

-----x

CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

-against-

WANDA SANTANA, EDDIE APONTE, ANGEL  
OLIVO and LISA OLIVO,

Defendants.

-----x

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DECISION AND ORDER

**FILED**

MAR 06 2012

JEFFREY K. OING, J.:

In this declaratory judgment action, plaintiff insurer, Castlepoint Insurance Company ("Castlepoint"), moves, pursuant to 3215, for a default judgment against defendant insured, Wanda Santana ("Santana"), and, pursuant to CPLR 3212, against the remaining three defendants, Eddie Aponte ("Aponte"), Angel Olivo, and Lisa Olivo (collectively referred to as the "Olivo defendants"), for an order declaring that it has no duty to defend or indemnify Santana in an underlying personal injury action commenced against her by Aponte (the "underlying personal injury action").

Aponte cross moves for summary judgment seeking a declaration that a defense and indemnification duty exists.

**Background**

Castlepoint issued a homeowners insurance policy to Santana for a two family house in Staten Island that she allegedly owned

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located at 59 Ada Drive (the "premises"). The policy was in effect during the relevant period of time. Santana rented the upstairs apartment to the Olivo defendants. Aponte, defendant Lisa Olivo's father, commenced the underlying personal injury action against Santana alleging that on February 13, 2010 he injured himself when he slipped on ice that had formed on the premises' exterior front stairway, and fell down the stairway. Aponte also named the Olivo defendants as defendants in the underlying personal injury action.

Pursuant to a disclaimer notice, dated May 17, 2010, Castlepoint disclaimed coverage for the underlying personal injury action (Moving Papers, Aptman Aff., Ex.D). It provided in the disclaimer the following basis for denying coverage:

Our investigation indicates that [Aponte] is the father of one of your tenants and was at the premises visiting his daughter when he fell. Our investigation reveals that you did not reside at 59 Ada Drive, Staten Island, New York on the date of loss. Since you did not reside at the subject premises on the date of loss, it is not a "residence premises" and thus does not qualify as an "insured location" as defined in the policy for this matter. As this matter involves injuries or damages arising out of the rental of premises that is not an "insured location," no coverage is available for this matter as set forth in the above-cited provision.

(Id.). Nonetheless, Castlepoint provided Santana with a defense of the underlying personal injury action pending resolution of a declaratory judgment action. This action ensued.

**Discussion**

To begin, given that Castlepoint named Aponte and the Olivo defendants as defendants in this declaratory judgment action, these individuals have standing to challenge Castlepoint's disclaimer. Indeed, Aponte and the Olivo defendants are within the "zone of interest" protected by Insurance Law § 3420 (cf. Utica Ins. Co. v RJR Maintenance Group, Inc., 90 Ad3d 554, 555 [1<sup>st</sup> Dept 2011]).

As to that branch of the motion for a default judgment against Santana, although Castlepoint appears to have satisfied the requirements set forth in CPR 3215, the instant record compels a different outcome. Here, Santana is not the sole defendant. Aponte, as a named defendant, has cross moved for summary judgment for a declaration that the disclaimer is invalid, and that Castlepoint has to provide a defense and indemnification to Santana in the underlying personal injury action. Thus, under these circumstances, if this Court were to grant the motion for a default judgment, then the action would be concluded in the sense that Castlepoint would prevail with respect to the declaration it seeks herein. That result is not sustainable without resolving Aponte's cross-motion, and Castlepoint's motion seeking summary judgment against Aponte and the Olivo defendants.

With regard to Castlepoint's motion for summary judgment, it

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relies on the affidavit of Mark Nucci, its investigator, to establish that Santana did not reside at the premises during the relevant period. Nucci states that he "obtained a statement from CastlePoint's insured, Wanda Santana ... regarding an alleged accident that occurred on February 13, 2010 (Nucci Aff., July 18, 2011, ¶ 2). He then states:

On or about May 5, 2010, I transcribed a statement from a person who identified herself as Wanda Rodriguez Santana, setting forth her knowledge of the accident. Santana read the statement and signed the bottom of each page to attest to its accuracy. Annexed hereto as Exhibit "A" is a copy of Santana's statement, redacted by CastlePoint's attorneys to omit material that is irrelevant to the within coverage action.

(Id., ¶ 3).

Castlepoint's reliance is misguided. To begin, the statement is evidentiarily insufficient because it is unsworn. Further, absent from the record is any proof to establish that Nucci's transcription is accurate. Indeed, there are several alterations and edits throughout the statement. As if these evidentiary shortcomings were not enough to warrant denial of the motion, two pages of the statement are redacted because Castlepoint's attorneys took the position that they are irrelevant. The determination of whether information is relevant is generally reserved for judicial scrutiny. Such redactions, standing alone, provides a sufficient basis for this Court to conclude that Castlepoint has failed to carry its prima facie

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burden on its motion for summary judgment. Similarly, contrary to Aponte's counsel's argument, the record demonstrates sharp factual disputes as to whether the premises can be deemed Santana's residence pursuant to the homeowners insurance policy.

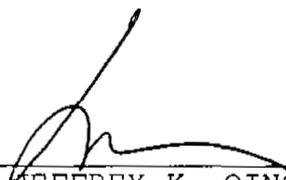
Accordingly, it is

ORDERED that Castlepoint's motion for a default judgment against Santana is denied; and it is further

ORDERED that that branch of the motion and the cross-motion for summary judgment are denied.

Counsel are directed to telephone Part 48 at 646-386-3265 to schedule a status conference.

Dated: 2/29/12

  
HON. JEFFREY K. OING, J.S.C.

**FILED**

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