

**Azor v Tower Ins. Co. of N.Y.**

2015 NY Slip Op 32361(U)

December 17, 2015

Supreme Court, Kings County

Docket Number: 500979/15

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7<sup>th</sup> day of December, 2015.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

-----X

MCHÉLINE AZOR,  
Plaintiff,

- against -

TOWER INSURANCE COMPANY OF NEW YORK,  
Defendant.

-----X

**DECISION, ORDER,  
AND JUDGMENT**

Index No. 500979/15

Mot. Seq. No. 1-2

The following e-filed papers read herein:

NYSCEF No.

Notice of Motion/Cross Motion, Affirmations  
(Affidavits) and Memorandum of Law Annexed \_\_\_\_\_  
Affirmation in Reply and Memorandum of Law Annexed \_\_\_\_\_

4-8; 11-18  
19-20

Defendant Tower Insurance Company of New York (Tower) issued a homeowner’s policy (the policy) to plaintiff Michelle Azor (plaintiff) for a residential property in South Ozone Park, New York (the premises). The policy contains a “residence premises” condition, pursuant to which coverage is provided for the dwelling on the “residence premises” as shown in the Declarations. The term “residence premises” is defined as “[t]he one family dwelling, other structures, and grounds; or . . . [t]hat part of any other building; where you [i.e., the insured] reside and which is shown as the residence premises in the Declarations.” The term “residence premises” also includes “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.”

After the premises sustained fire damage, Tower disclaimed coverage on the ground, inter alia, that plaintiff never resided at the premises. Thereafter, plaintiff commenced this action to recover damages for breach of the policy. Tower moves for summary judgment dismissing the complaint, and plaintiff cross-moves for partial summary judgment on the issue of liability.

The Court finds that Tower has demonstrated its prima facie entitlement to judgment as a matter of law by submitting, among other things, the policy and its declaration page indicating that the “residence premises” is the premises at issue herein, along with plaintiff’s EUO testimony in which she conceded that she never resided at the premises (*see Vela v Tower Ins. Co. of New York*, 83 AD3d 1050, 1051 [2d Dept 2011], *appeal withdrawn* 18 NY3d 881 [2012]; *Marshall v Tower Ins. Co. of New York*, 44 AD3d 1014, 1015 [2d Dept 2007]).

In opposition, plaintiff has failed to raise a triable issue of fact. Contrary to plaintiff’s contention, Tower has not waived the lack of coverage on the ground that it issued a similar homeowner’s policy to plaintiff at her residence in Brooklyn, New York, which policy was also in effect at the time of the loss. “A waiver is the voluntary abandonment or relinquishment of a known right” (*Jeppaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]). A known right may not be waived except when there is an intention to do so (*see Jeppaul Garage*, 61 NY2d at 446). “Where the issue is the existence or nonexistence of coverage (*e.g.*, the insuring clause and exclusions), the doctrine of waiver is simply inapplicable” (*Albert L. Schiff Assoc., Inc. v Flack*, 51 NY2d 692, 698 [1980]).

Although coverage can be created by estoppel (see Sphere Drake Ins. Co., PLC v Block 7206 Corp., 265 AD2d 78, 81 [2d Dept 2000]), that doctrine does not apply here. For estoppel to exist, three requirements must be demonstrated: (1) lack of knowledge of the true facts, (2) reliance on the insurer's conduct, and (3) a prejudicial change in the insured's position (see Ferber v Farm Family Cas. Ins. Co., 272 AD2d 747, 749 [3d Dept 2000]). Here, plaintiff has not shown, or even alleged, that Tower took any affirmative act upon which she (plaintiff) relied to her detriment other than to issue her a policy of insurance which she requested. Contrary to plaintiff's contention, this case is not about forfeiture because Tower is not seeking to rescind the policy. Tower merely disclaimed coverage for a particular loss.

More fundamentally, plaintiff's contention that Tower, by issuing her a separate homeowner's policy, knew that she had another home is irrelevant to the "residence premises" defense. Courts have recognized that "a person may have more than one residence for the purposes of insurance coverage" (Hochhauser v Electric Ins. Co., 46 AD3d 174, 184 [2d Dept 2007]).

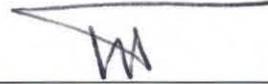
Given that Tower's disclaimer of coverage for lack of residency is sufficient to completely adjudicate this matter on the merits, the Court need not address Tower's alternative disclaimer on the grounds that the house at issue was a three-family, rather than a two-family, residence.

Accordingly, Tower's motion for summary judgment dismissing the complaint is granted. Conversely, plaintiff's cross motion for partial summary judgment on the

issue of liability is denied. The complaint is dismissed without costs and disbursements.

This constitutes the Decision, Order and Judgment of the Court.

ENTER



Hon. Wavny Toussaint  
J.S.C.

Nancy T. Sunshine

NANCY T. SUNSHINE  
Clerk

*ncs*  
KINGS COUNTY CLERK  
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