

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

2007 NY Slip Op 30724(U)

April 11, 2007

Supreme Court, New York County

Docket Number: 0100420/2006

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 100420/2006

TOWER INSURANCE

vs

SAID, AMANY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 100420/06

MOTION DATE _____

MOTION SEQ. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/11/07

**BARBARA R. KAPNICK, S.C.
J.S.C.**

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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

Plaintiff,

-against-

AMANY SAID and AHMED HASSAN,

Defendants.
-----X

DECISION/ORDER
Index No. 100420/06
Motion Seq. No. 001

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK, J.:

Plaintiff Tower Insurance Company of New York ("Tower") moves for summary judgment declaring that it has no duty to defend or indemnify defendant Amany Said in the underlying personal injury action, Ahmed Hassan v. Amany Said, pending in the Supreme Court, Queens County, under Index Number 16442/05, which arises out of a trip and fall on June 25, 2005 at a two-family house owned by defendant Said and located at 35-36 9th Street in Long Island City.

There is no dispute that Tower issued a Homeowner's Policy to defendant Said with respect to said premises. However, Tower contends that the instant claim falls within an exclusion in the policy for claims arising out of a premises at which the insured does not reside.

Under the policy, "Insured location" is defined as:

- a. The "residence premises";
- b. The part of other premises, other structures and grounds used by you as a residence and:
 - (1) Which is shown in the Declarations; or

- (2) Which is acquired by you during the policy period for your use as a residence;
- c. Any premises used by you in connection with a premises in **4.a.** and **4.b.** above;
- d. Any part of a premises:
 - (1) Not owned by an "insured"; and
 - (2) Where an "insured" is temporarily residing;...

* * *

"Residence premises" is defined as:

- a. The one family dwelling, other structures, and grounds;
or
 - b. That part of any other building;
where you reside and which is shown as the "residence premises" in the Declarations.
- "Residence premises" also means 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.

As part of Tower's investigation of the claim, it retained an investigator who conducted an interview on August 24, 2005 of defendant Said and the property manager, Jim Issa.

The investigator, David W. Hertweck, has submitted an affidavit claiming that during this conversation, Said admitted that she has lived at a different location in Long Island City for the past 15 years and that Ahmed Hassan, the injured plaintiff in the underlying lawsuit, was a tenant with his wife and children in the apartment on the first floor of the house at 35-36 9th Street. Mr. Hertweck also stated that Issa stated that the Saids live at the other location and that they bought the premises at 35-36 9th Street as an investment property. The investigator represents that

he reduced the statements given by Said and Issa to writing, and that Said and Issa signed their respective statements in his presence.

By letter dated September 8, 2005, Tower disclaimed coverage on the grounds, inter alia, that "the subject premises is not a 'residence premises,' and, therefore, it does not qualify as an 'insured location' with respect to this claim."

Notwithstanding the disclaimer, Tower appointed counsel for defendant Said in the underlying action, pending this Court's ruling on the propriety of the disclaimer.

Defendant Hassan argues that the policy is ambiguous because it was issued specifically for the premises located at 35-36 9th Street and does not state in clear English/bold letters that the insured must reside at the premises.

Defendant Said, through an attorney's affirmation only, argues that the motion should be denied on the grounds that any statement regarding his true residency to Tower's investigator was not made under oath, and that depositions of the parties have not yet been held in this case.

Tower argues in reply that admissions attributed to defendant in the investigator's affidavit constitute admissible evidence. See, e.g., Schaaf v. Pork Chop, Inc., 24 A.D.3d 1277 (4th Dep't 2005). Moreover, defendant Said herself has not submitted an affidavit in opposition to the motion denying Tower's claim as to her residency.

Finally, contrary to defendant Hassan's contention, this Court does not find the exclusion in the policy to be ambiguous, notwithstanding the inherent inequity of Tower's acceptance and retention of premiums paid by defendant Said on the premises.

Accordingly, based on the papers submitted and the oral argument held on the record on December 6, 2006, plaintiff's motion is granted and it is hereby

ORDERED and DECLARED that Tower has no duty to defend or indemnify defendant Amany Said in the underlying action pending in the Supreme Court, Queens County under Index No. 16442/05.

This constitutes the decision and order of this Court.

Date:

April

11

2007

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.