

**Rutgers Cas. Ins. Co. v Parada**

2008 NY Slip Op 30802(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0110579/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 19

*Justice*

Index Number : 110579/2007  
RUTGERS CASUALTY INSURANCE  
vs  
PARADA, ENRIQUE  
Sequence Number : 002  
DEFAULT JUDGMENT

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

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
MAR 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/12/08

JUDITH J. GISCHE, J.S.C. *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 10

-----X  
RUTGERS CASUALTY INSURANCE  
COMPANY,

Plaintiff,

-against-

ENRIQUE PARADA and INGRID LORENA  
RAMIREZ-PANCAN,

Defendants.  
-----X

**Decision/Order**

Index No.: 110579/07

Seq. No. : 002

Present:

Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

**Papers**

|  |          |   |
|--|----------|---|
| Pltf's motion [d j/mt] w/RJG affirm in support | Numbered | 1 |
| Def. ILRP affirm in partial opp (IA)           |          | 2 |

**FILED**

MAR 21 2008

COUNTY CLERK'S OFFICE  
NEW YORK

*Upon the foregoing papers, the decision and order of the court is as follows:*

In this action, plaintiff seeks: [1] to have the homeowner's insurance policy (the "policy") it issued to defendant Enrique Parada's ("Parada") rendered null and void; and [2] a declaration that it does not have an obligation to indemnify for or defend against any claims brought by defendant Ingrid Lorena Ramirez-Pancan ("Ramirez-Pancan") for personal injuries she sustained on February 22, 2007 at 119 Woodside Avenue, Freeport, New York 11520 (the "premises").

Plaintiff previously moved, pursuant to CPLR § 3215, for entry of a default judgment (sequence number 001) in its favor and against Parada and Ramirez-Pancan. The prior motion was denied, by order dated November 28, 2007, because plaintiff failed to provide a copy of the policy nor "any information from which to conclude that whatever was represented to it was false." Since the denial was without prejudice, permission to

renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1<sup>st</sup> Dept. 1979).

Plaintiff again moves, pursuant to CPLR § 3215, for entry of a default judgment in its favor and against Parada and Ramirez-Pancan. Ramirez-Pancan has submitted an affirmation in partial opposition “to inform the court that by a stipulation dated February 1, 2008, the motion for default judgment has been withdrawn against [Ramirez-Pancan] only.” Ramirez-Pancan has provided a copy of the stipulation. Although Parada has not opposed the motion or otherwise appeared in this action, this motion must be denied, for the reasons that follow.

Plaintiff has failed to properly serve Parada. Plaintiff served Parada by affixing the summons and verified complaint to the door of Parada’s “last known residence at 10 Lydia Street / Valley Stream, NY” (the “Valley Stream Address”) on August 21, 2007. However, Parada’s address on the policy is “119 Woodside Ave / Freeport, NY 11520-0000” (the “Freeport Address”). While plaintiff contends on this motion that Parada misrepresented in his insurance application that he resides at the Freeport Address, plaintiff nonetheless should have served Parada at the address indicated on its insurance policy in order to afford Parada proper notice and an opportunity to be heard in this proceeding.

Plaintiff has also provided a copy of the summons and complaint in an action brought in Nassau County by Ramirez-Pancan against Parada arising from the personal injuries she sustained on February 22, 2007 entitled: Rarmiez-Pancan v. Parada, Index No. 011995/07 (the “Nassau County Action”). Parada’s address on the summons and complaint in the Nassau County Action is the Freeport Address and the court takes judicial notice of the fact that Parada is represented by Daniel Friedman,

[\* 4 ]  
Esq. in that action.

Moreover, even if plaintiff properly served the summons and complaint, as well as the instant motion, on Parada, plaintiff could not prevail on this motion.

The first cause of action is against Parada, wherein plaintiff claims that Parada made certain misrepresentations in his application for a homeowner's insurance policy for the premises. Plaintiff states that Parada falsely represented he resided at the premises and that he did not own, occupy, or rent any other residence.

To support its contention that Parada made a misrepresentation of fact, plaintiff has provided a copy of Parada's application for insurance containing the alleged misrepresentation, dated June 28, 2006, and an affidavit from Edie Orr-Willis ("Orr-Willis"), a claims adjuster for plaintiff. The application provides that the "usage type" of the premises is "primary" and "# families" is "1."

In his affidavit, Orr-Willis states that plaintiff conducted an investigation into the facts and circumstances concerning Parada's application for insurance, including an interview of Parada, to determine whether the representations made by Parada were true. He maintains that the investigation indicates that Parada did not live at the insured premises, but rather "that he lived at 10 Lydia Street, Valley Stream, New York." According to Orr-Willis, this information was "substantiated through an in person interview of [Parada] on May 7, 2007 at 10 Lydia Street, Valley Stream, New York by John Scanlon, an investigator employed by [plaintiff] in this matter, wherein [Parada] made that admission." A copy of John Scanlon's ("Scanlon") report dated May 11, 2007 has been provided to the court.

Plaintiff further alleges that the premises is being rented to tenants. Orr-Willis

claims that this information was substantiated by Scanlon through an interview with a person at the premises named Helder C. Welchez ("Welchez"), who "advised that he had rented a room at the insured premises, where he lived with his wife, for the prior year." According to Scanlon, Welchez also stated that Parada did not live at the premises. Scanlon also states that Parada admitted to renting out the premises to various tenants, beginning in November 2006.

Plaintiff has also provided a copy of the report of Maryellen Shook ("Shook") of United Claims Service, dated March 31, 2007, who plaintiff also retained to investigate this matter. Parada provided Shook with a signed statement acknowledging that there were six other tenants living at the premises. A copy of Parada's statement has also been provided to the court. At the end of the signed statement, Parada writes "I have had my son Enrique Parada Jr. 20 years old, to read this 2 page statement to me and it is true an correct to the to the (sic) best of my knowledge and recollection."

To support its contention that the misrepresentation was material, Orrs-Willis maintains that plaintiff "would not have issued its Homeowners Policy of insurance [to Parada] for [the premises] if it was known that [Parada] did not reside there, but resided elsewhere, or it was known that there were six other tenants residing in the [premises]."

### **Discussion**

Plaintiff is entitled to a default judgment against Parada, provided it otherwise demonstrates that it has a prima facie cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001). Parada's default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King,

[\*6]  
Inc., 63 NY2d 728 (1984).

In this action, plaintiff must demonstrate that Parada "made a false statement of fact as an inducement to making the contract and the misrepresentation was material." Federal Ins. Co. v Kozlowski, 18 AD3d 33, 39 (1<sup>st</sup> Dept 2005), quoting Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 436 (1st Dept. 2003). Insurance Law § 3105 (a) provides that a representation is a "statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. Insurance Law § 3105 (b); Zilkha v Mutual Life Ins. Co. of New York, 287 AD2d 713 [2d Dept. 2001).

The evidence adduced on this motion does not establish that the representation at issue was false at the time the application was made. The application is dated June 28, 2006 and, accepting the facts set forth by plaintiff, Parada has only admitted to renting the premises as of November 2006. In addition, the signed statement by Parada raises questions of fact and credibility, wherein Parada seems to "write" that he has had the statement read to him. Schook also states in her report that Parada "advised that his command of the English language was not that good and requested that his son be available at the time of his interview in order to interpret" and that "the interview [with Parada] was somewhat difficult due to the translation/interpretation and it seemed as if the insured was not forthcoming with all information."

Moreover, plaintiff has failed to establish that the alleged misrepresentation was material. Materiality of the misrepresentation is typically a question of fact unless "the

[\* 7 ]

evidence of the materiality is clear and substantially uncontradicted, at which point the issue becomes one of law for the court to decide. 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." Feldman v. Friedman, 241 A.D.2d 433 (1<sup>st</sup> Dept. 1997) (internal citations omitted); see also Carpinone v. Mutual of Omaha Ins. Co., 265 A.D.2d 752 (3d Dept. 1999).

Here, plaintiff has merely stated that it would not have issued the insurance policy but for Parada's alleged misrepresentations. This statement alone does not satisfy plaintiff's burden of proof on this motion.

Accordingly, for at least the reasons stated herein, plaintiff's motion for entry of a default judgment is denied.


The court hereby schedules a preliminary conference to be held on April 24, 2008 at 9:30 a.m. at 80 Centre Street, Room 122. All parties who have appeared in this action are directed to appear at that time.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
March 12, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
MAR 21 2008  
NEW YORK  
COUNTY CLERKS OFFICE