

Tower Ins. Co. of N. Y. v Prosper
2008 NY Slip Op 30917(U)
March 25, 2008
Supreme Court, New York County
Docket Number: 0114654/2005
Judge: Paul G. Feinman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. PAUL G. FEINMAN Justice PART 52

Tower Insurance Company of New York

INDEX NO. 114654/05

- v -

MOTION DATE 2/4/08

MOTION SEQ. NO. 001

Joseph Prosper, Emilia Prosper, The City of New York and Tamar Drummond

MOTION CAL. NO. 93

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that this motion

DECLARATORY JUDGMENT ACTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 3/25/08

UNFILED JUDGMENT This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

[Signature]

J.S.C.

Check one: [x] FINAL DISPOSITION [] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 52

-----X

TOWER INSURANCE COMPANY OF NEW YORK,
Plaintiff,

-against-

JOSEPH PROSPER, EMILDA PROSPER, THE CITY OF
NEW YORK and TAMAR DRUMMOND,
Defendants.

-----X

Index No. 114654/05
Mot. Seq. No. 001
**DECISION, ORDER &
JUDGMENT**

Appearances: For Tower Insurance:
Law Office of Max W. Gershweir
By: Joseph A. Wiener, Esq.
120 Broadway, 17th Fl
New York NY 10271
(212) 655-4000

For the City of New York:
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York NY 10038
(212) 788-0303

For the Prospers:
Della Mura & Ciacci, LLP
977B Allerton Avenue
Bronx NY 10469
(718) 405-1500

For Drummond:
Sonin & Genis, Esqs.
1 Fordham Plaza, Ste. 204
Bronx NY 10458
(718) 561-4444

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room

PAUL G. FEINMAN, J.:

In this declaratory judgment action, Tower Insurance Company (Tower) moves for an order granting it summary judgment declaring that it has no duty to defend or indemnify defendants Joseph and Emilda Prosper (the Prospers) in a personal injury action captioned Tamar Drummond v The City of New York, Emilda Prosper and Joseph Prosper (Sup Ct, Bronx County, Index No. 6950/05), in which the plaintiff alleges that she sustained injuries due to a defective sidewalk located in front of a dwelling owned by the Prospers.

This action seeks to resolve whether the Prospers are entitled to coverage under an insurance policy that Tower issued to them covering the subject dwelling. Tower contends that it is entitled to summary judgment because the policy issued to the Prospers excludes coverage for

liability where the injury occurs in premises in which the insureds do not reside in one of the family units, and the Prospers did not reside in any such unit. The Prospers contend that they are entitled to coverage because the subject dwelling was their secondary residence.

For the reasons set forth below, plaintiff's motion is granted.

FACTS

Tower issued a Dwelling Package Policy to the Prospers under policy number DPP 2181042, effective August 30, 2003 to August 30, 2004 (see Aff. of Lowell D. Aptman, Tower's vice president of liability claims, Exh 1). The address listed on the policy is 1301 Needham Avenue, Bronx, New York 10469, a three-family dwelling (the Premises).

The policy provides coverage for liability due to bodily injury caused by an "occurrence" or accident. However, this coverage is subject to certain exclusions, one of which applies to any claim for bodily injury sustained at a location in which the Prospers do not reside in one of the family units of a one- to four-family dwelling. Specifically, the exclusion states that liability coverage does not apply to bodily injury:

arising out of a premises:

- (1) owned by an "insured;"
 - (2) rented to an "insured;" or
 - (3) rented to others by an "insured;"
- that is not an "insured location."

Policy, Exclusions, ¶ 1 (d).

The policy defines "insured location" as the "residence premises" (id.,

Definitions, ¶ 4 [a]). The policy defines "residence premises" as:

- a. the one family dwelling, other structures, and grounds; or

b. that part of any other building;

where you [the named insured] reside and which is shown as the “residence premises” in the Declarations.

“Residence premises” also means a two, three or four family dwelling where you reside in at least one of the family units and which is shown as the “residence premises” in the Declarations.

Id., Definitions, ¶ 8.

In the underlying complaint, Tamar Drummond (Drummond) alleges that, on February 28, 2004, she suffered bodily injury when she fell on the sidewalk in front of the Premises due to the Prospers’ negligence (Drummond Complaint, ¶ 14 [Aff. of Joseph S. Wiener, Exh A]).

On February 14, 2005, Tower received notice of the underlying claim (Aptman Aff., ¶ 5). Shortly after receiving notice, Tower initiated an investigation into Drummond’s claim (id., ¶ 6). As part of its investigation, Tower retained an investigator (id., ¶ 7). On February 22, 2005, the investigator interviewed Joseph Prosper, who provided a written statement (id.).

As a result of that interview, Tower learned the following facts: the Premises is a two-story house that the Prospers purchased in 1994, which was not their primary residence (2/22/05 Prosper Statement, at 1 [Wiener Aff., Exh B]). Drummond was the daughter of a tenant, and lived in Apartment 2F (id.). For the preceding 20 years, the Prospers resided at 3456 Eastchester Road, Apt. 2F, Bronx, New York, not the 1301 Needham Avenue address stated in the policy (id.). The Premises was located a few blocks from the Prospers’ residence on Eastchester Road (id.). Prosper allegedly went to the Premises on a daily basis “to check on it,”

and he put the garbage out for pickup on Tuesdays and Fridays (*id.*).

By letter dated March 4, 2005, Tower disclaimed coverage under the policy based on the exclusion for liability for bodily injury where the accident occurs in premises in which the insured does not reside (*see* Aptman Aff., Exh 3). Notwithstanding the disclaimer, Tower appointed counsel to defend the Prosper in the underlying action, pending this court's ruling on the propriety of the disclaimer.

Tower commenced this action on October 20, 2005. The complaint seeks a judgment declaring that Tower has no duty to defend or indemnify the Prosper in the underlying action based on the exclusion for bodily injury that occurs in a premises in which the insured does not reside.

On June 5, 2007, Joseph Prosper appeared for an examination before trial in this action. Emilda Prosper has repeatedly failed to appear, and has been precluded from offering evidence in this matter (*see* 9/15/2007 Order [Wiener Aff., Exh H]).

In his deposition, Mr. Prosper confirmed that his February 22, 2005 statement accurately reflects what he told the investigator on that date (Proper Dep. at 72-80 [Wiener Aff., Exh G]). Prosper confirmed that the investigator wrote out the statement as Prosper spoke to him (*id.* at 72). The statement was given to Prosper to read (*id.* at 74). Prosper glanced at it, did not see any errors, and did not ask that any changes be made (*id.* at 63, 74). He signed each page (*id.* at 73). He wrote at the end of his statement in his own handwriting "I read th[is] statement and it's true" (*id.* at 73-74; Prosper Statement, at 1).

Although he did not make this claim in his initial statement to the insurance investigator, Mr. Prosper testified during his deposition that, while 3456 Eastchester Avenue was

the Prosper's primary residence on February 28, 2004, the Premises was their secondary residence at the same time. Specifically, Mr. Prosper testified that, after purchasing the Premises in 1996, he moved with his wife and three daughters into the Premises' basement apartment (id. at 7, 20, 52). They stayed for approximately one year, but in 1997 moved back to their old address because his daughters suffered from asthma (id. at 21).

Although Mr. Prosper never told the insurance broker that the family moved back to their old address (id. at 53), he testified that, since that time, he and Mrs. Prosper have used the basement apartment to have "private sessions," to talk, and to "mingle" (id. at 14-15). He alleges that he and his wife slept there two to three times per month (id. at 16). However, Mr. Prosper also testified that the Prosper's kept no personal property in the apartment (id. at 82-82).

Mr. Prosper's driver's license lists his address as 3456 Eastchester Road (see Wiener Aff., Exh D). Although Mr. Prosper claimed in his deposition that he is registered to vote at both the Premises and 3456 Eastchester Road (see Prosper Dep., at 70), his voter registration record shows that he has been registered to vote at 3456 Eastchester Road since 1993 (see Wiener Aff., Exh J). Similarly, Emilda Prosper's voter registration record shows that she has been registered to vote at 3456 Eastchester Road since November 14, 1995 (see Wiener Aff., Exh K). In addition, Mr. Prosper confirmed that the Premises is listed as an investment property on the Prosper's 2003 income tax return (Prosper Dep., at 59).

DISCUSSION

Although an insurer's duty to defend its insured is determined by "compar[ing] the allegations of the complaint to the terms of the policy" (A. Meyers & Sons Corp. v Zurich Am. Ins. Group, 74 NY2d 298, 302 [1989]; accord Great Northern Ins. Co. v Kobrand Corp., 40

AD3d 462 [1st Dept 2007]), an insurer may escape its duty to defend under the policy where it can “be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy” (Judlau Contr., Inc. v Westchester Fire Ins. Co., 46 AD3d 482, * 2 [1st Dept 2007], quoting Spoor-Lasher Co. v Aetna Cas. & Sur. Co., 39 NY2d 875, 876 [1976]).

Stated otherwise, even if the complaint triggers a duty to defend, that duty is “not an interminable one, and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy” (Sturges Mfg. Co. v Utica Mut. Ins. Co., 37 NY2d 69, 74 [1975]).

“[T]he construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts” (Marshall v Tower Ins. Co. of N.Y., 44 AD3d 1014, 1015 [2d Dept 2007], quoting Rajno v Navigators Ins. Co., 268 AD2d 419, 419-420 [2d Dept 2000]; see also Briggs v Allstate Ins. Co., 1 AD3d 392 [2d Dept 2003]; Moshiko, Inc. v Seiger & Smith, Inc., 137 AD2d 170 [1st Dept], affd 72 NY2d 945 [1988]). Moreover, “where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement” (Government Empl. Ins. Co. v Kligler, 42 NY2d 863, 864 [1977]).

In this case, the underlying complaint alleges that Drummond’s accident took place on the sidewalk in front of the Premises. The policy at issue in this case clearly excludes claims “arising out of a premises ... owned by an ‘insured’ ... rented to others by an ‘insured’ ... that is not an ‘insured location’” (Policy, Exclusions, ¶ 1 [d]). The only portion of the policy definition of “insured location” relevant here is “residence premises,” which the policy defines as

a “two, three or four family dwelling where you reside in at least one of the family units and which is shown as the ‘residence premises’ in the Declarations” (id., Definitions, ¶ 8). These provisions are unambiguous, and operate to require insured residency as described, as a condition of coverage (see Marshall v Tower Ins. Co. of N.Y., 44 AD3d 1014, supra; Metropolitan Prop. & Cas. Ins. Co. v Pulido, 271 AD2d 57 [2d Dept 2000]; Tower Ins. Co. of N.Y. v McFarlane [Sup Ct, NY County, September 23, 2004, Index No. 113166/02]; Madera v Allstate Ins. Co., 12 Misc 3d 1162[A], 2006 NY Slip Op 51004[U] [Sup Ct, Kings County 2006]). Thus, any coverage for the Prospers with respect to the underlying action is contingent upon their residence at the Premises.

Although the Prospers concede that 3456 Eastchester Avenue is their primary residence, they assert that the Premises is their secondary residence and that thus, they are covered under the policy for the underlying action. While “[a] person can have more than one residence for insurance coverage purposes,” “[t]he standard for determining residency ... ‘requires something more than temporary or physical presence and ... at least some degree of permanence and intention to remain’” (Allstate Ins. Co. v Rapp, 7 AD3d 302, 303 [1st Dept 2004] [citation omitted]). The same standard applies in other contexts, such as determining proper venue (see Katz v Siroty, 62 AD2d 1011, 1012 [2d Dept 1978] [“to consider a place [a residence], he must stay there for some time and have the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency”]).

Here, the Prospers’ claim of residency arises out of their alleged use of the basement apartment at the Premises as a place to spend time privately together two or three times a month. However, this claim, even if true, fails to establish that they utilized the Premises as a

secondary residence, as they do not contend that they have resided at the Premises with any degree of permanence or intent to remain indefinitely (see e.g. Biundo v New York Cent. Mut., 14 AD3d 559 [2d Dept 2005]).

It is well settled that even regular and frequent overnight stays at a particular place do not render such a place a “residence,” as “[r]esidence requires more stability than a brief sojourn for business, social or recreational activities” (Katz v Siroty, 62 AD2d at 1012).

Sanchez v Tower Ins. Co. of NY (Sup Ct, NY County, January 3, 2006, Index No. 601433/04) is directly on point. In that case, the Dwelling Package Policy issued to the plaintiffs by defendant Tower contained the same exclusion at issue in this case. Tower asserted that the underlying personal injury claim was not covered under this policy because at the time of the alleged accident, the insureds no longer resided at the Brooklyn address cited in the policy, but had moved to Florida. Although the plaintiffs admitted that they had moved to Florida, they contended that the Brooklyn address was a secondary residence, given the fact that they “frequently visit their relatives, who reside in the Premises, for one and one half to two months at a time each year” (id. at 3). The court found that this allegation was “insufficient to support a finding that the Brooklyn address remained a viable residence for the Sanchezes” as they “have alleged, at best, that they have made lengthy visits to the premises, but they do not contend that they have resided in the household with any degree of permanence or intent to remain indefinitely” (id.). The court concluded that thus, “the Brooklyn address listed on the insurance policy did not constitute the Sanchez’s residence such that the Sanchezes were covered by the insurance policy at issue,” and granted Tower’s motion for an order declaring that it was not liable to defendant or to indemnify the plaintiffs in the underlying action (id., at 4-5).

Likewise, in Matter of Aetna Cas. & Sur. Co. v Gutstein (80 NY2d 773 [1992], reversing 169 AD2d 718 [2d Dept 1991]), the Court found that the insured's son, who maintained an apartment in Manhattan where he resided more than 80% of the time, was not a covered person entitled to uninsured motorist benefits under his father's policy, which provided coverage only for a "family member," defined as person who was a resident of the insured's household. The Court of Appeals reversed the Appellate Division, concluding that the facts found by the lower court, including that Gutstein spent "a substantial amount of time at his father's home; he maintain[ed] his own room there; he [kept] his own clothes, books and records there; he frequently stay[ed] overnight there; he [was] free to come and go as he wish[ed] there, and he ha[d] his own key to the house" (169 AD2d at 719), "more nearly comports with the weight of the evidence" that he was not a resident at his father's New Jersey home (80 NY2d at 775; see also Perez v Worby, Borowick, Groner, LLP, 290 AD2d 233, 233 [1st Dept 2002] ["[t]he affidavit submitted in support of the motion by one of the firm's partners in which he admits to renting a Manhattan apartment that he uses approximately three days a month does not show that such partner is a New York County resident" for venue purposes]; Doyle v Berley, 215 AD2d 349 [2d Dept 1995] [occasional use by defendant of apartment in New York County, which was connected with defendant's monthly trips to New York from his home in Illinois did not render defendant a "resident" of New York County for venue purposes]; Katz v Siroty, 62 AD2d at 1012 [court found that plaintiff, whose primary residence was in Scarsdale, did not reside, for venue purposes, at his sister's house in Brooklyn, even though he retained a bedroom there for more than 30 years that he furnished for himself and exclusively used, and where he would stay overnight between 50 and 100 times a year, as using a home "as a stopover for

convenience and to sleep there when in the area on business, does not establish a residence”]).

In opposition to the motion, the Prosperers fail to cite any relevant legal authority to support their claim that their use of the Premises for occasional liaisons is sufficient to constitute residency, or to create an issue of fact on that issue. While Mr. Prosper claims that he and Mrs. Prosper spent two to three nights per months at the Premises, it is undisputed that they kept no personal property at the Premises, and that they always returned to their 3456 Eastchester Road home, where they lived with their children. Mr. Prosper also does not dispute that his driver's license lists 3456 Eastchester Road as his address, that his 2003 tax return listed the Premises solely as investment property, or that the address on file for both him and Mrs. Prosper at the board of elections is 3456 Eastchester Road. Under these circumstances, the Prosperers cannot establish that they have resided at the Premises with any degree of permanence or intent to remain indefinitely.

In her opposition to the motion, Drummond also fails to create an issue of fact. Although Drummond attempts to use Mr. Prosper's February 22, 2007 deposition testimony from the underlying action in order to create an issue of fact as to residency, in fact, that testimony completely undermines Mr. Prosper's claim in this action that he and Mrs. Prosper used the Premises for their monthly rendezvous:

- Q. How often [did] Emilda Prosper come to the premises before February 28, 2004?
- A. She never come to the premises, never.
- Q. Has she seen the property?
- A. She saw the property when we bought the property. She never come to maintain or do anything. She don't anything about the property, just I take

the responsibility to do everything.

Prosper Dep., Drummond Action, at 135-136 (Aff. of Robert J. Genis, Exh A).

Accordingly, the Prospers' alleged occasional use of the basement for privacy, even if believed, amounts to nothing more than a "brief sojourn for ... social or recreational activities," and thus fails as a matter of law to rise to the level of residency (Katz v Siroty, 62 AD2d at 1012). Because the Prospers did not reside at the Premises, under the clear and unambiguous terms of the policy, there is no coverage for the underlying claim.

The court has considered the remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment declaring that it is not liable to defendants Joseph Prosper and Emilda Prosper for either defense or indemnification in the underlying action captioned Tamar Drummond v The City of New York, Emilda Prosper and Joseph Prosper (Sup Ct, Bronx County, Index No. 6950/05), is granted; and it is further

ADJUDGED AND DECLARED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendants Joseph Prosper and Emilda Prosper in Tamar Drummond v The City of New York, Emilda Prosper and Joseph Prosper (Sup Ct, Bronx County, Index No. 6950/05).

This is the decision, order and judgment of the court.

Dated: March 25, 2008
New York, New York

ENTER:

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141E).

2008 D&O_114654_2001_001_10