

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

2008 NY Slip Op 33377(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 118267/06

Judge: Jane S. Solomon

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: JANE S. SOLOMON

PART 55

Index Number : 118267/2006

TOWER INSURANCE CO OF

VS.

BLAKE, DESMOND

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

8/4/08

this motion to/for _____

PAPERS NUMBERED

1-9

10-14

15-18

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

*is decided in
accompanying Decision Order + Declaratory
Judgment.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notices 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 1422).

Dated: 12/16/08

J.S.C.

JANE S. SOLOMON

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

INDEX NO. 118267/06

DESMOND BLAKE, MARILYN BLAKE, and
COREY PENNEGAN,

DECISION, ORDER and
DECLARATORY JUDGMENT

JANE S. SOLOMON, J.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and made a part of the record. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1010).

Tower Insurance Company (Tower) seeks declaratory judgment that it is not obligated to defend or indemnify its insureds, defendants Desmond Blake (Blake) and Marilyn Blake, with respect to a personal injury claim made by defendant Corey Pennegan (Pennegan). The Blakes have not appeared in this lawsuit. This motion seeks a default judgment against the Blakes and summary judgment against Pennegan. Pennegan cross-moves to dismiss the complaint as against the Blakes for lack of personal service, to dismiss the complaint as abandoned under CPLR 3215(c), for summary declaratory judgment in defendants' favor, to dismiss the complaint or, alternatively, to preclude Tower from offering certain evidence due to its failure to provide discovery, and to deny summary judgment to Tower under CPLR 3212(f) for its discovery failures.

Blake purchased from Tower a homeowner's insurance policy for a property he owned, located at 1422 Park Place,

Brooklyn. In the application, Blake represented that the premises would be occupied by him as his primary residence, and that he did not own, occupy or rent any other residence (see, Homcowner Application, annexed to Affidavit of Edward Blomquist at Ex. B). Tower issued a homeowner's policy, which defines 1422 Park Place as the "residence premises", and defines an "insured location" as the "residence premises" (Policy, Blomquist Aff., Ex. C). The policy further defines a "residence premises" 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 (Policy, Definitions, paragraph 8).

Tower alleges that 1422 Park Place was an investment property Blake rented out, and that Blake and Marilyn lived elsewhere, both when he made the application and thereafter. According to Tower, it would not have issued the homeowner's policy had it known the true circumstances, because the policy it issued is intended for an owner occupied primary residence. Tower further contends that 1422 Park Place is not an "insured location"

because the designation of that property as an "insured location" was premised on Blake's false statement on the application.

The Policy provides coverage for personal injury claims arising from use of an "insured location", but not from other premises owned by the insured. If a personal injury claim arises from an "insured location", coverage is excluded if it arises from a business, or from the renting out of the premises by the insured, but the exclusion does not apply if the insured rents out the premises only on an occasional basis (Policy, Section II, paragraph 1[c][1]).

Pennegan alleges that he tripped and fell on a staircase in the building on March 13, 2005, while the Tower policy was in effect. He retained a lawyer who, on May 26, 2005, sent a letter regarding Pennegan's claim to the Blakes at an address on East 82nd Street in Brooklyn. A notice of claim dated June 30, 2005 was sent to Tower on behalf of Blake, together with a copy of the letter from Pennegan's lawyer. The notice of claim reports that Pennegan is the son of the insured's tenant.

In response to the notice of claim, Tower sent an investigator to Blake, who gave a written statement. Blake stated he had resided on East 82nd Street since 1989 (Statement, Affidavit of Ronald Jean, Ex. A). He described 1422 Park Place as a two-story brick building with two three-bedroom apartments on the first and second floor, and a two-bedroom apartment in the

basement. He stated that the basement apartment was occupied by a "Ms. Vivian", who paid monthly rent, and had been living there with her son for about ten years.

On July 29, 2005, Tower sent a disclaimer letter to Blake. The grounds for disclaimer were failure to provide timely notice of the occurrence; that the claim was not covered under the policy because it does not qualify as an "insured location" and based on Blake's fraud and intentional concealment in misrepresenting his residence address on the application (Disclaimer Letter, Affidavit of Lowell Aptman, Ex. B). A copy of the Disclaimer Letter was sent to Pennegan's lawyer.

Pennegan commenced a negligence lawsuit (the Underlying Action) against the Blakes in Supreme Court, Kings County, on June 22, 2006. Tower disclaimed coverage for the lawsuit, but nevertheless assigned counsel to defend Blake. That matter was still pending when this motion was filed.

In this action, Tower seeks a declaration that it is not obligated to defend or indemnify the Blakes in the Underlying Action because (1) Desmond Blake failed to provide timely notice of the occurrence; (2) Marilyn Blake is not an insured under the policy; (3) Desmond Blake made false representations in the application, and Tower would not have issued the policy had the application been truthful; and (4) the policy excludes coverage for bodily injury damages arising out of a premises that is not

an "insured premises" under the policy, and 1422 Park Place is not an "insured premises" (Amended Complaint, Affirmation of Francis A. Garufi, Esq., Ex. B). The Blakes have not answered the complaint. Pennegan answered with two counterclaims. First, Pennegan alleged that the Blakes purchased the subject policy in reliance upon Tower's expertise in providing the correct type of insurance, that Tower engaged in a deceptive business practice in providing the policy, so that Pennegan is entitled to attorney's fees under General Business Law § 349 because he has been harmed by Blake's failure to procure the appropriate insurance. The second counterclaim seeks to recover attorneys fees for litigating this action. This lawsuit was filed on December 8, 2006, and an amended complaint was filed pursuant to a stipulation with Pennegan's counsel on August 16, 2007.

In the Underlying Action, Blake was deposed on February 18, 2008. Tower is not a party to that lawsuit, and was not represented by counsel at the deposition. Blake denied knowing about this lawsuit. He also testified that he was going through a divorce in March 2005, so he was living in the basement at 1422 Park Place.

On this motion, Tower seeks declaratory judgment against the Blakes on default. Tower submits affidavits of service showing that it caused the summons and complaint to be served at the 82nd Street residence on a Ronald Blake, described

as Blake's son, aged 25-35 years of age, on December 19, 2006, and the summons and complaint were subsequently mailed to that address. The affidavits of service bear a stamp indicating they were filed with the clerk of the court on January 4, 2007, twenty-seven days after this lawsuit was commenced. Also submitted are affidavits of service showing that the amended summons and complaint were served on Blake personally on September 4, 2007, and the affidavit bears a stamp indicating it was filed on September 12, 2007.

The complaint sets forth a prima facie claim for the relief sought, which is bolstered by the supporting affidavits and exhibits. Pennegan's opposition and cross-motion fail to rebut Tower's argument. He argues that the complaint should be dismissed under CPLR 321(a)(8) because Blake claimed to be unaware of the Tower lawsuit at his deposition, raising the inference that the summons and complaint were not served. Not only does Blake's statement fail to rebut Tower's showing that service was made, Pennegan does not have standing to raise that defense on behalf of the Blakes. The transcript also shows that Blake was put on notice of this lawsuit on February 18, 2008, nearly six months before this motion was submitted. Likewise, Blake's deposition testimony in the Underlying Action to the effect that he lived in the basement at 1422 Park Place at the time of the accident because he was going through a divorce does

[* 8]

not negate the fact that he falsely claimed on the application that the property was his only residence. Moreover, Blake's admission that he did not live at the property is not inadmissible hearsay, as Pennegan contends, but evidence of the facts admitted (see, Prince, Richardson on Evidence, §§ 8-201 and 8-202).

Pennegan's motion under CPLR 3215(c) also is denied. That provision permits the court to dismiss as abandoned, on a motion or sua sponte, an action where plaintiff fails to seek entry of judgment for one year after the default. Here, Tower seeks a default judgment on the amended complaint, filed on August 16, 2007, and served on Blake on September 4, 2007. This motion, therefore, is made less than one year after the default.

Pennegan's cross-motion with respect to Tower's alleged discovery failures also is denied. Pennegan made discovery demands in April 2007, which were responded to a month later. After this motion was filed, Pennegan served a demand for a bill of particulars that allegedly was not responded to. However, it appears that the bulk of the material requested in this demand was already provided either in previous discovery or in Tower's motion, and Pennegan does not identify any prejudice arising from Tower's non-disclosure.

Finally, summary judgment dismissing the counterclaims is granted. The first counterclaim alleges that Tower is liable

to Pennegan in the amount of his legal fees because it sold a policy to Blake using a deceptive business practice in violation of GBL § 349. Pennegan has no standing to make this claim on Blake's behalf, and he alleges no contact with Tower in connection with a deceptive business practice. The second cause of action also seeks legal fees. It does not state a viable cause of action, and Pennegan offers no argument in defense of the claim apart from an alleged failure by Tower to provide disclosure. Accordingly, it hereby is

ORDERED that Pennegan's cross-motion is denied; and it further is

ORDERED that the branch of plaintiff Tower's motion for default judgment against defendants Desmond Blake and Marilyn Blake is granted; and it further is

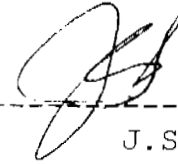
ORDERED that the branch of Tower's motion for summary judgment dismissing the counterclaims of defendant Pennegan is granted, and the counterclaims hereby are dismissed, with costs and disbursements to Tower as taxed by the Clerk of the Court; and it further is:

DECLARED and ADJUDGED that 1422 Park Place is not an "insured location" under the terms of the Tower policy (Policy number HOS2451847); Marilyn Blake is not an insured under the Policy; Blake failed to provide timely notice of the occurrence; and Tower is not obligated to indemnify or defend Desmond Blake

or Marilyn Blake in the Underlying Action; and it further is
ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: December 16, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be mailed based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1402).