

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

2009 NY Slip Op 30274(U)

February 4, 2009

Supreme Court, New York County

Docket Number: 111779/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

TOWER INSURANCE COMPANY of NEW YORK,  
Plaintiff,

Index No.: 111779/07

Motion Date: 07/22/08

- v -

Motion Seq. No.: 002

MORRIS LAWRENCE and ROSA IRIZARRY,  
Defendants.

Motion Cal. No.: 25

The following papers, numbered 1 to 3 were read on this motion for a declaratory judgment.

- Notice of Motion/Order to Show Cause - 1
- Answering Affidavits - Exhibits 2, 3
- Replying Affidavits - Exhibits 2, 3

PAPERS NUMBERED

1

2, 3

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and a copy of every document submitted hereon. To obtain entry, counsel or representative must appear in person at the Judgment Clerk's Desk (Room 147B).

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall grant the plaintiff's motion for a declaratory judgment that it has no duty to defend or indemnify defendant Lawrence Morris in an action captioned Rosa Irizarry v Lawrence Morris pending in New York State Supreme Court, County of Bronx, under Index No. 15968/07 ("the underlying action) on the basis of material misrepresentations made in the defendant's application to procure insurance.

Defendant purchased the subject premises ("the premises") in June or July 2004. By application dated May 25, 2005, defendant Morris applied for insurance from the plaintiff. The application

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):

consists of a form with various check boxes for the selection of different characteristics. The box for "structure type" has the "dwelling" box checked and the "usage type" has the "primary" box checked and the "occupied by" has the "owner" box checked. In response to the question on the second page of the form stating "Any other residence owned, occupied or rented?" neither the "Yes" nor "No" box is checked.

Based upon the application the plaintiff issued a homeowner's policy to defendant Morris, including personal liability up to \$300,000, covering the premises for the period May 25, 2005 to May 25, 2006. On March 28, 2006, plaintiff issued a renewal certificate, except as to additional endorsements, for the period May 25, 2006 to May 25, 2007.

Defendant Irizarry, who resided with one of the tenant's in the premises, claims that on February 17, 2007, she suffered injuries when she slipped and fell on snow and ice on the public sidewalk adjoining such premises. On June 21, 2007, she commenced an action against defendant Morris. It is uncontested that at the time of the accident the defendant Morris did not reside at the premises.

By letter dated July 20, 2007, the plaintiff disclaimed coverage on the grounds that at the time of the accident the premises were not owner-occupied and that the defendant Morris failed to notify plaintiff of the incident until four months

after its occurrence, even though he admitted that a few weeks after the alleged injury, one of the tenants of the premises told him about it.

Plaintiff argues that pursuant to Insurance Law 3105 the plaintiff's statements in the application for insurance are misrepresentations supporting its disclaimer of coverage and warranting dismissal of the action. As stated by the First Department

[W]here the evidence concerning materiality is clear and substantially uncontradicted, it is for the court to decide as a matter of law. To demonstrate materiality as a matter of law, an insurer need only show that the misrepresentation substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken. The question in such case is not whether the company might have issued the policy even if the information had been furnished; the question in each case is whether the company had been induced to accept an application which it might otherwise have refused.

Aguilar v U.S. Life Ins. Co. in the City of New York, 162 AD2d 209, 210 -211 (1<sup>st</sup> Dept. 1990) (internal citations and quotations omitted). "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." Kroski v Long Island Sav. Bank FSB, 261 AD2d 136 (1<sup>st</sup> Dept. 1999) citing Feldman v Friedman, 241 AD2d 433 (1<sup>st</sup> Dept. 1997).

Plaintiff submits with its motion an affidavit of its underwriter setting forth that "Tower only issues homeowner

policies for owner-occupied primary residences. Tower . . . established such guidelines because owner-occupied primary residences generally pose a lesser degree of risk than non-owner occupied or non-primary residences." Plaintiff also submits homeowner selection rules reflecting the same standards as set forth in the affidavit.

Defendant Morris argues that there is an issue of fact as to whether a misrepresentation that premises are owner-occupied is in fact material. Defendant Morris claims that his cousin's occupancy of the premises, where he performed superintendent services and resided rent-free, constitutes owner-occupancy, and that plaintiff treated defendant's cousin as an owner during its investigation. He also asserts that the insurance policy is ambiguous, and that the renewal policy, which covers the period in question, contained no owner-occupancy condition. He argues also that he notified plaintiff of the claim by transmitting by teletacsimile a copy of correspondence he received from defendant Irizarry's counsel to plaintiff and that plaintiff is not prejudiced by any delay.

Defendant Morris's arguments are unpersuasive. The Homeowner Policy is not ambiguous as it clearly defines "insured location" as the "residence premises" and "residence premises" as "that part of any building where you [the named insured] reside". It states that "'Residence premises' also means a two family

dwelling where you reside in at least one of the family units". In addition, the Renewal Certificate, renewed the original policy on the same terms, except for certain endorsements that are not relevant here.

This is not a case where the defendant filed an insurance application prior to closing on a new residence that was intended to be owner occupied, but rather here, the defendant applied for the insurance nearly one year after the sale had closed, and about a year after he moved and admits that he was residing elsewhere. The role of defendant Morris's cousin does not rebut the fact that at the time of the application through the time of the accident, defendant Morris did not occupy the premises. Defendant Morris's statement on the application with regard to occupancy was a misrepresentation and the proofs adduced by the plaintiff establish that the misrepresentation was material and therefore plaintiff is entitled to a declaratory judgment in its favor.

Moreover, defendant Morris provides no documentary evidence that he notified plaintiff of the claim prior to the commencement of the underlying action. Nor is defendant correct on the law that plaintiff need show prejudice before it can assert a defense of non-compliance with the notice provisions of the policy. Security Mutual Insurance Company of New York v Acker-Fitzsimons Corp., 31 NY2d 436 (1972).

Though defendant Irizarry opposes the relief sought by plaintiff, any declaratory as to her is premature, as no judgment against defendant Morris has been entered in the underlying action pursuant to CPLR § 3420.

Accordingly, it is

ORDERED that the plaintiff's motion for a declaratory judgment is GRANTED; and it is further

ORDERED AND ADJUDGED that the plaintiff TOWER INSURANCE COMPANY of NEW YORK has no duty to defend or indemnify defendant LAWRENCE MORRIS in an action captioned Rosa Irizarry v Lawrence Morris pending in New York State Supreme Court, County of Bronx, under Index No. 15968/07 , and the Clerk is directed enter judgment as aforesaid.

This is the decision and order of the court.

Dated: February 4, 2009

ENTER:

[Signature]  
J.S.C.

HON. DEBRA A. JAMES

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and neither of any court or court clerk hereon. To obtain entry, counsel or interested representative must appear in person at the Judgment Clerk's Desk (Room 1413).