

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

2009 NY Slip Op 30546(U)

March 11, 2009

Supreme Court, New York County

Docket Number: 110481/06

Judge: Doris Ling-Cohan

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. Doris Ling-Cohan  
Justice

PART 36

Index Number : 110481/2006

TOWER INSURANCE COMPANY OF

INDEX NO. 110481/06

vs

UBAH, FLORENCE

MOTION DATE ~~002~~

Sequence Number : 002

MOTION SEQ. NO. 002

VACATE

MOTION CAL. NO. \_\_\_\_\_

**FILED**

MAR 13 2009

COUNTY CLERK'S OFFICE  
NEW YORK

this motion to/for vacate

PAPERS NUMBERED

1, 2

3

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

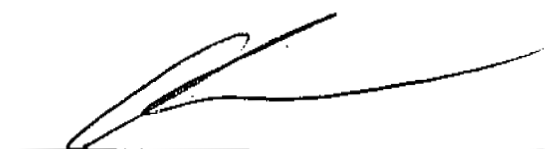
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is disposed in accordance with the accompanying memorandum decision.

Dated: 3/11/09



J.S.C.

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 36

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

Plaintiff,

Index No. 110481/06

-against-

Motion Seq. No. 002

FLORENCE UBAH and JOANN FIGUEROA,

Defendants.

----- x

DORIS LING-COHAN, J.:

**FILED**  
MAR 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendant Florence Ubah (Ubah) moves to vacate a default judgment entered in favor of plaintiff and against Ubah when she failed to timely move or answer. Ubah also seeks leave to reargue plaintiff's summary judgment motion (seq. no. 001).

Plaintiff Tower Insurance Company of New York (Tower) commenced this action, seeking a declaration that it has no duty to defend or indemnify Ubah in the underlying action entitled *Joann Figueroa v Florence Utah*, Index No. 237545/06, pending in the Supreme Court of New York, Bronx County, because Ubah failed to promptly notify Tower of the underlying accident, as required by the insurance policy. Ubah failed to timely move or serve an answer and, subsequently, plaintiff made a motion for summary judgment, which was unopposed. On April 14, 2008, the motion was granted and it was declared that Tower had no duty to defend or indemnify Ubah in the underlying action since Ubah had not

provided timely notice (Court's Order, Florence Ubah Aff, Exh A).

CPLR 5015 (a)(1) permits a court to vacate a default judgment where there has been an "excusable default" by defendant. A defendant seeking to vacate a default judgment on the ground of excusable default bears the burden of demonstrating both a justifiable excuse for the default and a meritorious defense (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 [1st Dept 2001]).

Ubah has not met her burden of establishing excusable default. While Ubah argues that she did not timely answer because she was under the mistaken impression that Tower would be defending her in this action, Ubah admittedly received prompt notice of disclaimer of coverage from Tower in the underlying action and was informed that Tower would be bringing this declaratory judgment action against her. Therefore, Ubah knew or should have known that her insurer was not providing coverage<sup>1</sup> (*see Smolinski v Smolinski*, 13 AD3d 1188, 1189 [4<sup>th</sup> Dept 2004]). Ubah also failed to present any facts to demonstrate law office failure as a basis of excusing her attorney's failure to oppose Tower's motion for summary judgment, despite being given two months to oppose the motion. Therefore, Ubah's motion must be

---

<sup>1</sup>The Court notes that it is implausible that Ubah truly believed Tower would defend and represent her in an action where Tower is suing Ubah.

denied.

Even assuming that Ubah met her burden of establishing a reasonable excuse, she still failed to demonstrate a meritorious defense. Ubah's duty to give notice to her carrier "as soon as is practical" pursuant to her policy, arose when, from the information available that related to the accident, she could "glean a reasonable possibility of the policy's involvement" (*Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 239-40 [1st Dept 2002]). Here, as stated by the Court in its Order, dated April 14, 2008 on the summary judgment motion, it would have been "practical" to immediately notify her carrier after the accident since Ubah learned of the accident soon after it occurred and she also learned that an ambulance and fire truck responded to the scene at that time (Court's Order, Ubah Aff, Exh A, at 5-6). Ubah's defense that she did not notify her carrier because she did not have sufficient details regarding the individual's name or address fails as her policy merely required her to give notice of any "[r]easonably available information" (*Id.* at 2). Finally Ubah's ignorance of her legal requirement to notify her insurer is not a valid legal defense (*Awad v Severino*, 122 AD2d 242, 242 [2d Dept 1986]). Therefore, Ubah's motion to vacate is denied.

Finally, reargument is improper in this case because once a

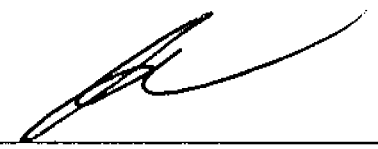
default judgment is entered, the defaulting party's "exclusive remedy [is] to move to vacate its default" (*Kurth v Susskind*, 200 AD2d 572 [2d Dept 1994]). Even if Ubah's request for reargument were properly before the Court, Ubah failed to demonstrate that this Court overlooked and misapprehended matters of fact or law in granting Tower's motion, as required by CPLR 2221(d), and, therefore, reargument is denied as well.

Accordingly, it is

ORDERED that defendant Ubah's motion is denied in its entirety; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve upon defendants a copy of this order with notice of entry.

Dated: 3/11/09

  
Doris Ling-Cohan, J.S.C.

**FILED**

MAR 13 2009

**COUNTY CLERK'S OFFICE  
NEW YORK**

J:\Default Judgments\VACATE DEFAULT JUDGMENTS\Tower.Ubah, kerr-rappy, deny vacate.wpd