

Tower Ins. Co. of N.Y. v Ovalles
2009 NY Slip Op 30733(U)
March 31, 2009
Supreme Court, New York County
Docket Number: 118265/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 49

Town Insurance Company
OF NY
JOSE OVACEZ

INDEX NO. 118265/06
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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 No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 31, 2009

J. Gische
HON. JUDITH J. GISCHE 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 10**

-----X
Tower Insurance Company of New York,

Plaintiff (s),

-against-

Jose Ovalles d/b/a Casanova Meat Market,
Casanova Meat Market Corp.,
870 Hunts Point Realty Group,
Everything 99 Cents, Inc., Dollar Goal, Inc,
James Ovalles and Maria Gonzalez,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 118265/06

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	Numbered
Def Ovalless OSC (§5015 etc.) w/JO and JO affid, JAA affirm, exhs	1
Pltf opp w/MLC affirm, exhs	2
Non-party Rosado reply w/exhs	3

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

This is plaintiff Tower Insurance Company of New York's ("Tower") action for a declaratory judgment that it does not have to provide any of the defendants with defense and/or indemnification in connection with a personal injury action pending in Supreme Court, Bronx County (*Gonzalez v. 870 Hunts Point Realty Group et al.*, Index No. 21133/05) (the "personal injury action"). This case was originally assigned to Hon. Herman Cahn who has since retired; the case has now been randomly reassigned to this court.

Tower previously moved for summary judgment against defendants Jose Ovalles d/b/a Casanova Meat Market, Casanova Meat Market Corp. and James Ovalles ("the Casanova defendants"). Justice Cahn granted Tower's motion on June 4, 2008 after it was

submitted and argued on default ("default order").

The Casanova defendants now move for an order permitting substitution of new counsel, Joseph A. Altman, Esq. ("Altman") for Nestor Rosado, Esq. ("Rosado"). They contend Rosado led them to believe he would oppose the motion, but instead let it be decided on default. The Casanova defendants also seek *vacatur* of the default order so they can defend the motion Tower previously made on the merits. Tower opposes this motion, arguing that the Casanova defendants have not demonstrated a reasonable excuse for their default and even if they have, they do not have a meritorious defense nor can effectively oppose plaintiff's motion for summary judgment. Rosado separately opposes the motion to the extent the defendants seek to have him substituted as counsel "for cause."

The court's decision is as follows:

Arguments

Tower alleges that although there was an accident at the subject premises located at 888 Seventh Avenue in New York City ("premises" or "property") on January 30, 2004 ("date of the accident"), none of the defendants timely notified Tower of an "occurrence," as they are required to do under the terms of the commercial insurance policy in effect at that time.

Gonzalez brought three separate actions involving her personal injury claims. The first action (Index No. 23723-04) was filed October 1, 2004 and only asserted claims against 870 Hunts Point Realty Group, the owner of the property located at 888 Hunts Point Avenue, New York, New York ("owner" and "property"). On September 7, 2005, Gonzalez filed a second action (Index No. 21133-05) asserting claims against the owner, Casanova Meat Market Corp. and "Everything 99 Cents, Inc.," another commercial tenant at the property. Gonzalez filed a third complaint (Index No. 20344-06) asserting claims against

the aforementioned parties and adding "Dollar Goal, Inc." and Francisco Hernandez as named defendants, yet another commercial tenant at the property.

Tower contends that it was not notified of an occurrence at the property, in front of the meat market, until after Gonzalez commenced her personal injury against the Casanova defendants. The Casanova defendants deny, however, that Gonzalez fell in front of their store. Jose and Jame Ovalles provide a combined sworn affidavit stating that it did not notify Tower about Gonzalez' fall because she "did not fall in [our] store or on the sidewalk in front of the store, [but] she fell in the street and it was not in front of [our] store either." The Casanova defendants contend further that although Gonzalez fell somewhere else, she fabricated her claim that fell in front of their meat market to enhance her claims. These defenses were also asserted in the answer with counterclaims by the Casanova in this action for a declaratory judgment.

The Casanova defendants further allege that they have another meritorious defense which is that Tower failed to timely disclaim coverage. They contend that even if they did not timely notify Tower of an occurrence or file their claim, Tower's failure to timely disclaim is a waiver of the affirmative defense of late notice.

Tower argues that there is no basis for the court to vacate its decision granting plaintiff summary judgment not only because the Casanova defendants have no excusable default, but also because they do not have a meritorious defense to Tower's claims of late notice. Tower heavily relies upon a written stipulation that the Casanova defendants' attorney at the time (Rosado) signed. The undated stipulation ("stipulation") predates Tower's motion for summary judgment and sets forth certain statements that the Ovalles brothers made to a Tower's investigator in October 2005 while investigating the claim.

Among them are statements by James Ovalles that although a woman had fallen in front of their store in January 2004, he did not know the precise location of where the fall had taken place. One of the brothers took pictures of the sidewalk to show the area in front of their store was clean and that she had fallen on the street. James told the investigator he had received correspondence from Gonzalez lawyer several months before the investigator came to take their statement and when he was served with the complaint in September 2005, James brought the papers to their insurance broker. The final statement in that stipulation is that "Prior to September 30, 2005, neither Jose Ovalles, James Ovalles, Casanova Meat Market, Corp., nor anyone acting on their half provided notice of the incident, referred to in paragraphs 5 and 5 of this Stipulation, to the Tower Insurance Company of New York."

Tower argues that although the stipulation makes no reference to Tower's motion for summary judgment, the stipulation resolves all the pertinent issues of fact in connection with plaintiff's motion and since the motion was never opposed by the Casanova defendants, Tower was properly granted summary judgment. It is undisputed that Rosado never filed written opposition to the motion nor appeared for oral argument. The owner, however, did oppose Tower's motion arguing that Tower's duty to defend was triggered by the allegations of the complaint and the plaintiff was notified of the claims against the meat market in a reasonably practicable manner. The owner takes no position on this motion to vacate the prior default order.

Rosado, however, opposes the Casanova defendants' motion to have him substituted. He claims he was retained to prepare, file and serve an answer to this action for a declaratory judgment and appear at the preliminary conference. He alleges he met

with plaintiffs' lawyers and attended to discovery matters. Rosado acknowledges he signed the stipulation as to certain facts and he reviewed the stipulation with his clients. Rosado states further he advised his clients that "Justice Herman Cahn was going to grant the motion for summary judgment" because of the statements in the stipulation. Rosado states he advised the defendants their best alternative was to fight the personal injury action by Gonzalez so they could prove the accident did not occur as Gonzalez claims it did. Rosado denies he ever refused to turn over the Casanova defendants' file to their new lawyer, and agrees to do so now. He does not represent the Casanova defendants in the personal injury action.

According to the Casanova defendants they learned the motion was granted on default only after their defense counsel in the Bronx action moved to be relieved since Tower was no longer obligated to provide them with defense.

Discussion

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of action or defense. CPLR § 5015 (a) (1). What constitutes a reasonable excuse for default lies within the sound discretion of the trial court. Incorporated Village of Hempstead v. Jablonsky, 283 A.D.2d 553 (2nd Dept. 2001). Although law office failure can be considered by the court to be a "reasonable excuse" for the default, the movant must still provide the court with an affidavit demonstrating the meritorious nature of its claims or defenses. Coakley v. Gabel, 158 A.D.2d 954 (4th Dept 1990).

Here, the Casanova defendants state that they expected Rosado to oppose Tower's motion for summary judgment because he had told them they had a valid defense to

Tower's claims. Rosado, however, states he did not think it was a winnable motion and he let it be decided without opposition. Although he states this was expressed to his clients, they disagree. Rosado provides no written correspondence to support his claims. Since it appears that there was a misunderstanding about how Tower's motion would be handled, and the Casanova defendants have presented a reasonable explanation for why the motion was submitted, argued and granted on default, the court finds that the defendants have an excusable default, even though they were represented by counsel. See Wynyard v. Antique Co. of New York, Inc., 247 AD2d 265 [1st Dept. 1998].

The court also finds that the Casanova defendants have not only established they have a meritorious defense to Tower's claims, they have also raised triable issues of fact that defeat Tower's motion for summary judgment. Clark v. MGM Textiles Industries, Inc., 307 A.D.2d 520 (3rd Dept 2003); Bergen v. 791 Park Ave. Corp., 162 A.D.2d 330 (1st Dept. 1990); see also Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Despite the statements made by the investigator that, according to Tower, not only resolve many facts in favor of the insurer, the Casanova defendants raise an issue of fact whether Tower timely disclaimed coverage. An insurer may demand that its insured provide timely notice of an "occurrence" that may result in a claim against the insured, or of a claimant's lawsuit. This is so that the insurer can appear and defend the matter, or try to settle it without litigation. American Transit Insurance Company v. Sartor, 3 NY3d 71 (2004). Where, however, the insurer itself delays in disclaiming coverage the failure to timely disclaim may result in a waiver of the affirmative defense of late notice. see Matter of arbitration between Allcity Ins. Co. and Jimenez, 78 N.Y.2d 1054 (1991). The burden is on

the insurer to explain its delay. First Financial Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64 (2003).

According to plaintiff, the Casanova defendants notified Tower of the Gonzalez action against them on September 30, 2005. Tower then retained an investigator who interviewed the Ovalles brothers. That interview took place on October 5, 2005. The investigator then prepared an investigatory report dated October 24, 2005 and Tower issued its disclaimer of coverage on November 1, 2005.

The timeliness of an insurer's disclaimer is measured from the date it first receives information that would allow it to disqualify the claim. Where the sole ground for disclaimer is late notice by the insured, and this is obvious from the documents delivered to the insurer, presumably the insurer has no reason to conduct an investigation before determining whether to disclaim coverage. Insurance Law § 3420(d); West 16th Street Tenants Corp. v. Public Service Mut. Ins. Co., 290 A.D.2d 278 (1st Dept 2002). There is, however, no clearly defined quantum of time that makes a disclaimer "timely" or "untimely," as a matter of law. *see* Ace Packing Co. Inc. v. Campbell Solberg Associates, Inc., 41 A.D.3d 12 (1st Dept. 2007). In the First Department, a delay in disclaiming coverage of as few as thirty (30) days has been found unreasonable. West 16th Street Tenants Corp. v. Public Service Mut. Ins. Co., *supra*. In this case Tower contends it was first notified of the Gonzalez claim on September 30, 2005; it disclaimed coverage November 1, 2005. Therefore, the issue of the timeliness of Tower's disclaimer is for the jury to decide because it presents an issue of fact. McEachron v. State Farm Ins. Co., 7 A.D.3d 929 (3rd Dept. 2004).

Having decided that the defendants have an excusable default in opposing Tower's

motion for summary judgment and not only having shown that they have a meritorious defense to Tower's claims, but also that there are triable issues of fact, the Casanova defendants have proved that they are entitled the relief sought. The court hereby vacates the default order entered against the Casanova defendants and having considered the merits of Tower's motion, denies Tower's motion for summary judgment in its favor since there are triable issues of fact. This decision and order supercedes the prior order of Justice Cahn dated June 4, 2008 which allowed Tower to discontinue its representation of the Casanova defendants in the Bronx action.

The motion for a substitution of counsel is granted. The Casanova defendants may retrieve their file from Rosado on one day's written notice. The court takes no position about whether this substitution is "for cause," since the attorney client relationship was at will.

Conclusion

The motion by defendants Jose Ovalles d/b/a Casanova Meat Market, Casanova Meat Market Corp. and James Ovalles to vacate the default order entered against them awarding summary judgment to Tower hereby granted. The motion for substitution of counsel is granted upon the conditions stated.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
 March 31, 2009

FILED
APR 02 2009
So Ordered
COUNTY CLERK'S OFFICE
NEW YORK
Hon. Judith J. Gische, J.S.C.