

**Tower Ins. Co. of N.Y. v Superior Laundry Servs.  
LLC**

2009 NY Slip Op 31993(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 113881/07

Judge: Marilyn Shafer

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

PRESENT:

*Hon. Marilyn Shafer*  
Justice

PART

*8*

Index Number : 113881/2007

TOWER INSURANCE COMPANY OF N. Y.

VS.

SUPERIOR LAUNDRY SERVICES, LLC

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO.

*11388107*

MOTION DATE

MOTION SEQ. NO.

*#001*

MOTION CAL. NO.

are read on this motion to/for

PAPERS NUMBERED

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 accord  
with the annexed memorandum.*

**FILED**

SEP - 2 2009

COUNTY CLERK'S OFFICE  
NEW YORK

MARILYN SHAFER  
J.S.C.

Dated:

*9/21/09*

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 8

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

Plaintiff,

Index No. 113881/07

-against-

Superior Laundry Services LLC,  
Christino Mateogarcia, All Island Truck  
Leasing Corporation, and Jesse Baldwin,

Defendants.  
-----X

**Marilyn Shafer, J.:**

Plaintiff Tower Insurance Company of New York (Tower), moves for an order, pursuant to CPLR 3212, declaring it has no duty to defend or indemnify co-defendants Superior Laundry Services LLC and Christino Mateogarcia (collectively Superior) or defendant All Island Truck Leasing Corp. (All Island) in a Nassau County personal injury action entitled *Jesse Baldwin v Christino Mateogarcia, Superior Laundry Services LLC and All Island Truck Leasing Corporation* (Sup Ct, Nassau County, Index No. 7201/07). Superior cross-moves for an order, pursuant to CPLR 3212, declaring that All Island is liable for all costs and attorney fees incurred in defending that action. All Island cross-moves for a change of venue and consolidation of the New York and Nassau County actions.

On July 26, 2006, Superior rented a "2006 Hino 338" truck from All Island. On August 6, 2006, the truck, which was being operated by Mateogarcia, a Superior employee, struck the rear of a car driven by Jesse Baldwin. All Island was notified of the accident, repaired the truck and returned it to Superior. In April, 2007, Baldwin commenced the underlying action in Nassau

\* 3 ]  
County. In May, 2007, Superior forwarded the complaint to All Island to defend and indemnify. All-Island's attorney answered on behalf of All Island only. A default judgment was entered against Superior and it contacted its insurer, Tower, who had previously declined coverage. Tower initiated the instant declaratory judgment action.

### Tower's Motion

The record reflects that Tower issued an insurance policy to Superior, for the period of April 28, 2006 through April 28, 2007, which provided coverage, including collision coverage, "for any covered auto" subject to certain exclusions.

Section 1 of the policy defines a covered auto as any auto designated by a numerical symbol listed in Item two of the declarations section. Item two limits to "Covered Autos" designated with a numerical "7" next to the type of coverage. Symbol "7" is for "Specifically Described Autos" Tower Insurance form CA-TOW09 0698, entitled "Item 3- Schedule Of Covered Autos You Own," reflects that Superior "owned" one covered auto, a "2006 Hino 338" box truck, "VIN #5PVN8JT562S10834," leased from All Island. Tower alleges the truck involved in the accident is not covered because it was not listed in "Item 3-Schedule of Covered Autos You Own." In addition, this truck was not listed on the certificate of insurance, sent to All Island by Superior's insurance broker.

The issue of obligations under an insurance contract is a matter for the court to decide. (*Sanabria v American Home Assurance Company*, 68 NY2d 866 [1986]) An insurance company has no obligation to cover a vehicle under an insurance policy wherein a disclaimer is timely and the policy clearly does not cover a disputed vehicle. (*August v New York Central Mutual Fire Insurance Company*, 98 NY2d 632 [2002]). Unambiguous policy provisions are to be given their

\* 4 ]  
plain and ordinary meaning. (*United States Fidelity & Guaranty Co. v Annunziata*, 67 NY2d 229 [1986]). Under the plain language of the policy, the truck involved in the accident is not a covered vehicle. Moreover, Superior had admitted that it (1) purchased insurance for the rental truck through All Island for \$35.00 dollars a day instead of through Tower; and (2) sent a post accident e-mail stating the truck involved in the accident was not insured with Tower.

#### Superior's Cross Motion

Superior cross moves for a declaration that All Island was responsible for insurance under the truck rental agreement. The law is well settled that the insured has the burden of establishing that a vehicle is covered under a particular insurance policy (*Kidalso Gas Corp. v Lancer Insurance Co.*, 21 AD3d 779 [1<sup>st</sup> Dept 2005]). The All Island rental contract provides the "Renter must comply with Insurance Option (a) or (b)." Option (a) provides: "Renter shall provide a certificate of insurance to the owner which contains limits of combined bodily injury and property damage ... naming owner as loss payee and additional insured." Option (b) provides that the renter elects to purchase insurance obtained by the rental agency. The July 25, 2006 rental agreement reflects that Option (b) was signed by the "X" and that there would be an insurance charge of \$35.00 "per day." In a separate column, the rental agreement listed rental charges of \$99.95 and \$35.00 for insurance.

All Island argues that it does not have a duty to defend Superior because it is listed as an additional insured on the certificate of insurance issued by Superior's insurance which provides:

All Island Truck Leasing Corp. is included as additional insured and loss payee with respect to all vehicles leased or rented from all Island Truck Leasing Corp.

It argues that the phrase "all vehicles leased or rented" creates an ambiguity. This Court finds this allegation to be without merit. A party claiming to be an additional insured bears the

burden of proving its entitlement to coverage. (*Consolidated Edison Co. of New York, Inc. v Allstate Insurance Co.*, 98 NY2d 208 [2002]) A certificate of insurance is not a contract of insurance and is not conclusive proof of coverage. (*Kermanshah Oriental Rugs, Inc. v Gollender*, 47 AD3d 438 [1<sup>st</sup> Dept 2008]) This Court finds that, pursuant to the rental agreement, All Island was responsible for insuring the truck.

#### All Island's Cross Motion

All Island cross moves for a change of venue and for consolidation of the New York and Nassau County actions. The law is clear that, in a transitory action, venue should be a matter of the plaintiff's choice, limited only by the parties' counties of residence, (CPLR 305 [a]) and the ends of justice. (CPLR 510 [2] or [3]; *Johanson v J.B. Hunt Transport. Inc.*, 15 AD3d 268 [1<sup>st</sup> Dept 2005]).

However, even where an action has been properly commenced based solely on the principal place of business premise, venue may be transferred pursuant to CPLR 510 (3) based on the convenience of witnesses and promotion of the ends of justice. (*Aguanno v Kostopoulos*, 2 AD3d 177 [1<sup>st</sup> Dept 2003])

All Island and Superior have their principal places of business in Nassau County; Baldwin is a resident of Nassau County; Tower transacts business in Nassau County; and the subject of the New York County action is business transacted in the County of Nassau. This Court finds that venue is properly transferred to Nassau County.

Insofar as consolidation is concerned, this Court finds that issue to be more properly raised in the Nassau County Court.

Accordingly, it is hereby

ORDERED that the motion by the Tower Insurance Company of New York is granted;  
and it is further

ORDERED that all cross claims and counterclaims against Tower in this action are  
dismissed; and it is further

ORDERED that the cross-motion by Superior Laundry Services LLC and Christino  
Mateogarcia is granted; and it is further

ORDERED that All Island's motion to transfer venue from New York County to Nassau  
County is granted; and it is further

ORDERED that All Island's motion to consolidate the New York County action with the  
underlying Nassau County action is denied without prejudice to renewal in Nassau County.

Settle order.

Dated:

8/31/09

ENTER:

**MARILYN SHAFER**  
**J.S.C.**

J.S.C.

**FILED**

SEP - 2 2009

**COUNTY CLERK'S OFFICE**  
**NEW YORK**