

Tower Ins. Co. of N.Y. v Spadaffora Contr., Inc.

2011 NY Slip Op 30292(U)

February 7, 2011

Sup Ct, NY County

Docket Number: 115585/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 115585/2009

TOWER INSURANCE COMPANY

INDEX NO. _____

vs

SPADAFFORA CONTRACTING, INC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

FEB 09 2011

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 2/07/11

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
TOWER INSURANCE COMPANY OF
NEW YORK

Plaintiff,

-against-

SPADAFFORA CONTRACTING, INC.,
DANI BOROHOV, RAFAEL RODRIGUEZ and
MIRIAM LOPEZ,

Defendants.
-----X

Decision/Order

Index No.: 115585/09
Seq. No. : 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

FEB 09 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Tower's n/m [SJ] w/JK affirm, LDA and DH affids, exhs	1
Def Rodriguez and Lopez's opp	2

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

Plaintiff, Tower Insurance Company of New York ("Tower") moves for summary judgment against Rafael Rodriguez ("Rodriguez") and his wife, Miriam Lopez ("Lopez"). Plaintiff seeks a declaration that it does not have a duty to defend or indemnify defendant, Spadaffora Contracting, Inc. ("Spadaffora"), its insured, in connection with a separate personal injury action pending in the Supreme Court, Bronx County ("the personal injury action") (*Rafael Rodriguez and Miriam Lopez v. Dani Borohov and Spadaffora Contracting Inc.*, Index No. 305116/08). Although Dani Borohov ("Borohov") has answered the complaint and appeared, pursuant to a correspondence to the court dated October 7, 2010, all claims have been dismissed against him. In any event,

Borohov takes no position on this motion, which was filed before he was dismissed from the case. Tower also moves pursuant to CPLR § 3215 for a default judgment against Spadaffora. Spadaffora has not answered the complaint or opposed plaintiff's motion.

Issue has been joined between the parties to plaintiff's motion for summary judgment and the filing of the note of issue has not yet occurred. Thus, this motion is appropriately before the court for consideration at this time. CPLR § 3212(a); Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 (1st Dept. 2001).

Background/Arguments

Defendant, Rafael Rodriguez ("Rodriguez"), alleges that on June 4, 2008, he was injured as a result of a work related accident. At the time, he was working at 67-07 147th Street, Kew Gardens, New York (the "Premises"), which was owned by Borohov. On June 16, 2008, Rodriguez commenced the personal injury action against Borohov and Spadaffora based on negligence and violations of New York's labor law.

Rodriguez testified during his EBT that, at the time of the accident, he was employed as a plumber for non-party, RJ Plumbing and Heating ("RJ Plumbing"). Rodriguez states that RJ Plumbing was owned by Ricardo Javier ("Javier"), his supervisor. Rodriguez testified that, on the date of the accident, Javier, Rodriguez, and three other workers went to the Premises to perform plumbing work. When asked what type of work the other RJ Plumbing employees were performing, Rodriguez responded, "plumbing, everybody's plumbing." Rodriguez stated that he met someone named Spadaffora when he arrived at the Premises and understood him to be the general

contractor ("GC") of the project, and that he had never met him before that time.

Rodriguez alleges in the personal injury action, however, that, on the date of the accident, he was employed by non-party, All Phase Plumbing & Heating, Inc. ("All Phase"). It is, therefore, unclear who exactly Rodriguez was employed by on the date of the accident. Apparently, All Phase filed a claim with Spadaffora's insurance company and the ACORD shows that All Phase named Spadaffora as an additional insured with respect to the work performed at the Premises.

Spadaffora has not appeared in this action, but James Spadaffora, the President of Spadaffora, provided an unsworn statement to plaintiff's investigator. According to his statement, James Spadaffora hired All Phase to perform all of plumbing work at the Premises and on the date of the accident he was at the Premises inspecting the work being done by All Phase.

Tower issued a Commercial General Liability policy (the "Policy") to Spadaffora, which was in effect on the date of the accident. The Policy provides, in relevant part, as follows:

Independent Contractors Exclusion (TG 43 [06/00])

It is agreed that this policy shall not apply to "bodily injury", "property damage", or "personal injury" arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations.

Classification Limitation Endorsement (TOW CG 50 [07/2004])

Coverage under this contract is specifically limited to those classification codes listed in the Policy. No coverage is provided for any classification code or operation performed

by the Named Insured not specifically listed in the Declaration of this Policy.

...

The Amended Declaration, in effect from March 23, 2008 through March 23, 2009, provides that the work being insured was "Interior Painting."

Tower was first notified of Ramirez's accident on June 26, 2008. After its investigation, Tower disclaimed coverage. The disclaimer was based on the exclusion in Spadaffora's policy for liability arising out of the operations of independent contractors. According to the disclaimer letter dated July 25, 2008, Spadaffora had sub-contracted work to All Phase. Therefore, since the damages arose from operations performed by an independent contractor on Spadaffora's behalf, no coverage was available under the Policy.

Coverage was also disclaimed because the insured risk was "interior painting," but Ramirez had been doing plumbing work. Nonetheless, Tower offered Spadaffora a defense, subject to the resolution of a declaratory judgment (this) action. Spadaffora has not, however, answered the complaint or appealed. It has taken no position on this motion, although the court adjourned the motion to allow Spadaffora to oppose the motion.

Rodriguez and Lopez contend that plaintiff has failed to make out its *prima facie* case that All Phase was an independent contractor and not subject to Spadaffora's control. Rodriguez and Lopez further contend that the classification code is ambiguous and painting interior is not actually limited to painting the interior and can be interpreted to include the work performed by All Phase. Rodriguez also argues that Tower's motion

is premature because discovery has not been completed.

Applicable Law - Motion for Summary Judgment

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. If the proponent fails to make out its *prima facie* case for summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). If the proponent meets its burden, then the opposition must lay bare its proof to raise real issues of fact and not just shadowy semblances.

Where the language of an insurance contract is clear and unambiguous, interpretation of that contract and construction of its provisions are questions of law that should be resolved by summary adjudication. Loblaw, Inc. v. Employers' Liability Assurance Cas. Corp., 57 N.Y.2d 872 (1982); Sheehan v. State Farm Fire and Cas. Co., 239 A.D.2d 486 (2d Dept. 1997).

Where a party opposed to summary judgment contends that discovery is

incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006) (internal citations omitted).

Discussion

Tower has met its *prima facie* case that it has no duty under the policy to defend or indemnify Spadaffora. Tower has shown that All Phase, Rodriguez's employer, was hired as Tower's insured independent contractor and that the work done by Rodriguez was plumbing. Both of these circumstances exclude coverage. Rodriguez has failed to show that Tower has a duty to defend or indemnify Spadaffora for his accident. Here, the Policy unambiguously states that the Policy "shall not apply to 'bodily injury' . . . or 'personal injury' arising out of operations performed for any insured by independent contractors." Regardless of whether Rodriguez was employed by RJ Plumbing or All Phase, Rodriguez has failed to establish that either sub-contractor is not an independent contractor. Although Rodriguez provides an ACORD demonstrating that All Phase, his employer, named Spadaffora as an additional insured, a certificate is not evidence of coverage, and merely establishes that there is a general contractor/sub-contractor relationship between these parties. Horn Maintenance Corp. v Aetna Cas. & Sur. Co., 225 A.D.2d 443 (1st Dept. 1996). However, the ACORD shows that All Phase is a separate entity from Spadaffora and, therefore, an independent contractor with an agreement to provide services to Spadaffora.

Ramirez's own deposition testimony is that he was employed by RJ Plumbing. Whether employed by RJ Plumbing, or All Phase, as he states in his complaint in the personal injury action, Ramirez was not employed by Spadaffora. Thus, Ramirez is either himself an independent contractor or employed by an independent contractor.

Although Rodriguez contends that he needs discovery, there is no evidence to show that RJ Plumbing and/or All Phase and Spadaffora are related entities and that RJ Plumbing and/or All Phase are not independent contractors. The mere hope, however, that Rodriguez can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion, and Rodriguez has failed to demonstrate how further discovery might yield material facts that would warrant the denial of summary judgment at a later time. Seelig v. Burger King Corp., 66 A.D.3d 986 (2d Dept 2009). Therefore, this motion is not premature although brought before discovery is complete.

Even if the court was convinced that Rodriguez could establish the companies were related or that RJ Plumbing and/or All Phase were not independent contractors (arguments not directly raised by anyone in this record), Rodriguez's injury falls outside the scope of risk that Tower insured. The amended policy unambiguously shows that it only applies to "interior painting." Therefore, the plumbing work being performed by Rodriguez at the time of the accident is not within the scope of the Policy and is not covered by Tower.

Accordingly, plaintiff has established its *prima facie* case and Rodriguez has failed to raise any triable issues of fact. Zuckerman v. City of New York, *supra*.

Tower's motion is hereby granted.

Motion for Default Judgment against Spadaffora

Spadaffora was served through the Secretary of State on November 13, 2009. BCL § 306(b). Plaintiff has also complied with the additional notice requirements of CPLR § 3215(g)(4)(i) by mailing a copy of the summons 20 days prior to filing for a default judgment. Spadaffora has not opposed or otherwise appeared in this action within the time provided for in the CPLR. This court gave Spadaffora additional time to be heard on the motion and Spadaffora failed to appear. Therefore, Spadaffora has defaulted in this action.

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 [1st Dept. 1984]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

Plaintiff's motion for a default judgment against Spadaffora is, therefore, granted.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that plaintiff, Tower Insurance Company of New York's motion for summary judgment against RAFAEL RODRIGUEZ and MIRIAM LOPEZ is GRANTED in all respects; and it is further

ORDERED that plaintiff's motion for a default judgment against SPADAFFORA CONTRACTING, INC., is GRANTED; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff, Tower Insurance Company of New York, does not have a duty to defend or indemnify defendant, SPADAFFORA CONTRACTING, INC., in connection with a separate personal injury action pending in the Supreme Court, Bronx County (*Rafael Rodriguez and Miriam Lopez v. Dani Borohov and Spadaffora Contracting Inc.*, Index No. 305116/08); and it is further

ORDERED that any requested relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 7, 2011

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

FEB 09 2011

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