

**Tower Ins. Co. of N.Y. v Memories Lounge & Rest.,  
Inc.**

2011 NY Slip Op 30737(U)

March 29, 2011

Supreme Court, New York County

Docket Number: 109535/2009

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
*Justice*

PART SS

Index Number : 109535/2009  
TOWER INSURANCE COMPANY  
VS.  
MEMORIES LOUNGE & RESTAURANT  
SEQUENCE NUMBER : 001  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 11/1/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4

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 *Decided & Adjudged* is decided by the undersigned  
*Memorandum Decision, Order and Declaratory Judgment.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 3/29/11

*J.S.*  
JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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

Plaintiff,

-against-

MEMORIES LOUNGE & RESTAURANT, INC.,  
UNITED REALTY ASSOCIATES, INC., and  
MARLON BROWN

Defendants.

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SOLOMON, J.:

Index No. 109535/2009

DECISION, ORDER  
& DECLARATORY JUDGMENT

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Plaintiff Tower Insurance Company of New York (Tower) seeks a declaration that it has no duty to defend and indemnify defendants Memories Lounge & Restaurant, Inc. (Memories Lounge), and United Realty Associates, Inc. (United Realty), in a personal injury lawsuit brought against them by Marlon Brown (Brown) for injuries he sustained while a patron at Memories Lounge (*Brown v. Memories Lounge and Restaurant, Inc.*, [Sup Ct, Bronx County] Index No. 304424/2008). Only United Realty has appeared. Tower moves for a default judgment against Memories Lounge and Brown, and for summary judgment in its favor, and dismissal of the counterclaim asserted by United Realty.

On December 25, 2007, Brown was shot with a firearm by another patron. Brown sued both the club and United Realty, owner of the building, claiming damages for assault, negligence, negligent supervision, failure to maintain the premises, and violations of the building code (Complaint, ¶ 5).

Tower issued a General Commercial Liability policy to Memories Lounge that was in force at the time of the incident (Policy, attached to Aptman Affidavit, Ex. 1). The policy included general liability and liquor liability coverage. Both coverages contained the following exclusions:

ASSAULT AND BATTERY EXCLUSION

This insurance does not apply to Bodily Injury or Property Damage arising from, due to or caused by:

- a. Assault and/or Battery committed by any insured . . . or
- b. The failure to suppress or prevent any Assault and/or Battery . . . or
- c. The negligent hiring, supervision or training of any employee or agent

\* \* \*

FIREARMS EXCLUSION

It is understood that no coverage is afforded by this policy for any injury, death, claims or actions occasioned directly or indirectly or as an incident to the discharge of firearms by person or persons on or about the insured premises.

(Id.)

The policy also states that

No insured will, except at that insured's own cost . . . assume any obligation, or incur any expense, other than for first aid, without our consent

(Id., General Conditions, ¶ 2.d; and Liquor Liability Conditions, ¶ 2.d)

Memory Lounge first notified Tower of the underlying action on October 23, 2008, ten months after the incident occurred, when its insurance broker sent Tower a copy of a motion for default judgment in the underlying action. On December 3,

2008, Tower disclaimed coverage on the grounds that the injury was caused by an assault and battery and a firearm, and also because of late notice of suit (Disclaimer Letter, attached to Aptman Affidavit, Ex. 3). It assigned an attorney to defend Memories Lounge until this declaratory judgment action concluded. Tower contends that neither United Realty nor Brown ever gave it notice of the event or the lawsuit. On its counterclaim, United Realty contends that, under the terms of its lease with Memories Lounge, it was to be indemnified by the club and that it is an additional insured on its policy with Tower. United Realty seeks a declaration that Tower owes it a defense and indemnification in the underlying action. Tower argues that the exclusions apply to United Realty, so it does not owe it a defense or indemnification. United Realty also asserted a cross-claim against Memories Lounge for indemnification against any recovery had against it in this action.

#### DISCUSSION

##### **A. Defaulting Parties**

Tower supplies a copy of the affidavit of service on Brown (Motion, Ex. C) and Memories Lounge (Motion, Ex. E). Brown was served under CPLR 308(4), by affixing a copy of the summons and complaint to the door of his last known address and mailing a copy thereto. Memories Lounge was served under CPLR 306, by service of two copies to the Secretary of State. Neither party

has appeared, or responded to the motion for default. On the merits, Tower has provided legitimate grounds for its disclaimer.

#### **B. United Realty**

United Realty argues that it should be reimbursed for having to defend itself in the underlying action.

An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate ... defense of [the] insured," without regard to the insured's ultimate likelihood of prevailing on the merits of a claim (*General Motors Acceptance Corp. v. Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]).

Tower argues that the underlying action falls squarely within the policy exclusions. While this is a strong argument for refusing to indemnify United Realty, it is not dispositive regarding the broader duty to defend. On its face, the complaint alleges negligent maintenance of the property and that the injury arose from building code violations. As specious as these claims turned out to be, United Realty could have been entitled to a defense, had it requested one (*Fitzpatrick v. American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). However, in this case, United Realty neither made a timely request for coverage, nor did it seek consent to incur the expense of a defense such that Tower could be charged with its reimbursement (Policy, attached to

[\*6]

Aptman Affidavit, Ex. 1, General Conditions, ¶ 2.d; and Liquor Liability Conditions, ¶ 2.d). Moreover, where the allegations of the underlying action fall entirely within a policy exclusion, there is no duty to defend (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 163 [1991]). Although the complaint contains boilerplate allegations of premises negligence, the only particularized factual allegation concerning Brown's injury is that he was shot with a firearm. Accordingly, there is no duty to defend.

Finally, United Realty's cross-claim against Memories Lounge is dismissed sua sponte, because it seeks indemnification for the amount recovered by Tower against it in this action. Tower has not sought monetary damages against United Realty in this action, so the claim is meaningless.

For the foregoing reasons, it hereby is

ORDERED that Plaintiff's motion seeking default judgment against Memories Lounge & Restaurant, Inc. and Marlon Brown is granted; and it further is

ORDERED that Plaintiff's motion for summary judgment in its favor on the complaint and dismissing the counterclaim against it brought by United Realty, Inc. is granted; and it further is

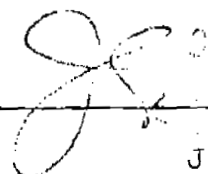
ORDERED that United Realty's cross claim against Memories Lounge is dismissed; and it further is

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York is not obligated to provide a defense to, or indemnify, defendants Memories Lounge and Restaurant, Inc. or United Realty Associates, Inc., in the underlying action against them entitled *Brown v. Memories Lounge and Restaurant, Inc.* (Supreme Court, Bronx County, Index No. 304424/2008); and it further is

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: March 1, 2011

ENTER:




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J.S.C.

**JANE S. SOLOMON**

**UNFILED JUDGMENT**

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