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

PRESENT: HON. PAUL WOOTEN Justice PART 7

RUTGERS CASUALTY INSURANCE COMPANY,

Plaintiff,

- against-

GERARDO OROZCO, MONICA HERNANDEZ-QUINTERO and LUIS QUINTERO,

Defendants.

INDEX NO. 116614/2007

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7, were read on this motion by plaintiff for summary judgment, or alternatively, for a default judgment against defendant Gerardo Orozco.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3,4,5,6,7

FILED
JUN 27 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

This is a declaratory judgment action by plaintiff Rutgers Casualty Insurance Company ("plaintiff"), a general insurer, against defendant Gerado Orozco ("Orozco" or "defendant"), and defendants Monica Hernandez-Quintero ("Hernandez-Quintero") and Luis Quintero (collectively "the Quintero defendants"),[1] seeking a declaration that plaintiff is not liable to defend or indemnify Orozco for claims brought against him by the Quintero defendants in an underlying personal injury action. Plaintiff alleges that the homeowner's insurance policy that it issued to Orozco should be rescinded because Orozco made material misrepresentations about his primary residence in his application for the policy. Discovery is not complete and the Note of Issue has not been filed. Before the Court is plaintiff's motion for summary judgment, pursuant

[1] Orozco and the Quintero defendants are collectively referred to as "defendants."

to CPLR 3212, seeking a declaratory judgment in its favor, or alternatively, for a default judgment against Orozco, pursuant to CPLR 3215. The Quintero defendants have responded in opposition to the motion. Orozo has not appeared or responded to the motion.

BACKGROUND

In support of its motion, plaintiff submits an affidavit of Edie Orr-Willis ("Orr-Willis"), a Claims Representative with plaintiff; the Disclaimer letter issued to Orozco; the pleadings; and affidavits of service. In opposition, the Quintero defendants submit the pleadings from the underlying lawsuit and other documentation pertaining to that action. In reply, plaintiff submits the subject insurance policy; the application for the policy; a transcript of a statement given by Orozco on October 16, 2007; Orozco's deposition in the underlying personal injury lawsuit; plaintiff's underwriting guidelines; and an affidavit of Rachel Kraushar, an Underwriter for plaintiff.

Plaintiff and the Quintero defendants also submit sur-replies addressing whether the Court should consider the evidence submitted by plaintiff for the first time with its reply papers, and further addressing the merits of such evidence in the event the Court deems its submissions proper. However, as the Court has not granted either side permission to file sur-replies, the Court declines to consider the unauthorized sur-replies (*see* CPLR 2214; *Boockvor v Fischer*, 56 AD3d 405, 406 [2d Dept 2008]; *cf. Pena-Vazquez v Beharry*, 82 AD3d 649, 649 [1st Dept 2011]).

A. The Underlying Facts

According to Orr-Willis' affidavit, on November 11, 2005, Orozo submitted an application to plaintiff for a homeowner's insurance policy for coverage of property located at 51 Columbus Avenue, Brentwood, New York ("51 Columbus") ("the Homeowner's Application"). Orozco purportedly stated in the Homeowner's Application that he resided at 51 Columbus, and that said address was his primary residence. In reliance thereupon, plaintiff issued a Homeowners

Insurance Policy, No. HOY-0010120 ("the Policy"), to Orozco.

On January 17, 2006, Hernandez-Quintero was allegedly involved in a slip-and-fall accident at 51 Columbus, which resulted in the commencement of a personal injury lawsuit by the Quintero defendants against Orozco in the Supreme Court, Suffolk County (*see Hernandez-Quintero v Orozco*, No. 07-08483 [Sup Ct Suffolk County]) ("the Quintero action"). A subsequent investigation by plaintiff purportedly revealed that Orozco did not reside at 51 Columbus or occupy it as his primary residence, and that he had purchased it for investment purposes only and rented it out to another family. Based on that determination, plaintiff sent Orozco a Disclaimer letter on December 17, 2007, informing him that there was no coverage under the Policy for the Quintero action due to the misrepresentations of material facts as to the occupancy of the premises as an owner-occupied dwelling, as well as the fact that the Policy only covered owner-occupied residence premises, defined in the Policy as the primary residence premises occupied by the insured.

B. Procedural Background

Plaintiff commenced the present action seeking a declaration that it is not liable to defend or indemnify Orozco for the Quintero defendants' claims by filing a summons with notice on December 14, 2007. Plaintiff submits an affidavit of service indicating that service of the summons with notice was effectuated on Orozco on January 10, 2008.

Plaintiff filed the complaint on July 17, 2009. Plaintiff submits an affidavit of service indicating that the complaint was mailed to Orozco on July 13, 2009.

The Quintero defendants filed an answer on August 6, 2009. Orozco has not responded, answered or appeared in the action.

On August 31, 2009, plaintiff filed the present motion for summary judgment. As of the date of the motion, discovery had not yet been exchanged. The Quintero defendants opposed the motion on October 13, 2009.

DISCUSSION

Plaintiff moves for summary judgment granting a declaration of its rights and responsibilities under the Policy. Specifically, plaintiff seeks a declaration that: (1) material misrepresentations were made in the Homeowner's Application, vitiating coverage for the Quintero defendants' personal injury action against Orozco; (2) there is no coverage under the terms of the Policy since the Policy only covers owner-occupied residence premises; and (3) plaintiff is not liable to defend or indemnify Orozco in the Quintero action. In the alternative, plaintiff requests a default judgment against Orozco based on his failure to answer and appear.

The Quintero defendants maintain that plaintiff has failed to demonstrate its entitlement to summary judgment because, *inter alia*, it did not submit copies of either the Policy or the Homeowner's Application with its motion, and therefore, cannot establish the terms of the Policy or the alleged misrepresentations. They also argue that there are numerous unresolved material issues of fact, and further, that the motion is premature since discovery is incomplete.

In reply, plaintiff submits copies of the Policy and the Homeowner's Application, and argues that these additional documents establish its entitlement to judgment as a matter of law. Plaintiff also contends that summary judgment is not premature since it has proffered the relevant discovery with its reply.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, the Court finds that plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Winegrad*, 64 NY2d at 853). Although plaintiff seeks a declaration that Orozco made material misrepresentations in the Homeowner's Application, and that there is no coverage under the terms of the Policy, plaintiff has failed to include either the Policy or the Homeowner's Application with its moving papers. In the absence of these documents, which are essential to plaintiff's case, plaintiff cannot sustain its initial burden of proof (*see Empire Ins. Co. v Insurance Corp. of New York*, 40 AD3d 686, 688 [2d Dept 2007]; *Guishard v General Security Ins. Co.*, 32 AD3d 528, 529 [2d Dept 2006]; *Halali v Evanston Ins. Co.*, 245 AD2d 422, 422 [2d Dept 1997]; *Zurich American Ins. Co. v Argonaut Ins. Co.*, 204 AD2d 314, 314 [2d Dept 1994]).

Though plaintiff seeks to cure the deficiency of its proof by submitting copies of the Policy and Homeowner's Application with its reply papers, the Court will not consider this evidence as it is improperly submitted for the first time with the reply. It is well established that matters "improperly raised for the first time in a reply should be disregarded" (*McNair v Lee*, 24

AD3d 159, 160 [1st Dept 2005]; *see also* CPLR 2214; *Mohsin v Port Authority of New York*, 83 AD3d 536 [1st Dept 2011]). Indeed, the First Department has stated:

> "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion. This rule is generally employed in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply, thereby shifting to the non-moving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond" (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006] [internal quotations and citations omitted]).

Moreover, the present case does not fall within the exception to the general rule permitting the Court, in the exercise of its discretion, to "consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (*id.*). The Court has not granted the defendants leave to file sur-replies addressing the merits of the evidence plaintiff submits with its reply, and, to the extent that the Quintero defendants have addressed the merits in their sur-reply, the Court has ruled that such arguments will not be considered (*see Boockvor*, 56 AD3d at 406). Further, consideration of this evidence would be particularly prejudicial under the present circumstances, where discovery is incomplete.

Since plaintiff has failed to meet its initial burden of establishing its prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the adequacy of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Horne v John*, 68 AD3d 722, 722 [2d Dept 2009]). Accordingly, plaintiff's motion for summary judgment is denied.

With respect to plaintiff's alternate request for a default judgment against Orozco, the motion is denied for failure to supply the Court with "enough facts to enable [the Court] to determine that a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see also* CPLR 3215; *Guzetti v City of New York*, 32 AD3d 234, 235-36 [1st Dept

2006]; *Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]; *Drake v Touba Harou gCayor Transp., Inc.*, 19 Misc 3d 1102(A), 2008 WL 660441, at *2 [Sup Ct Bronx County 2008]).

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment, or alternatively, for a default judgment against Orozco, is denied; and it is further,

ORDERED that the parties are directed to appear at a preliminary conference on July 27, 2011, at 11:00 a.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that the Quintero defendants shall serve a copy of this Order, with Notice of Entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: June 13, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**