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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Index Number : 106833/2010

TOWER INSURANCE COMPANY

vs

KHAN, CAMILLE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 106833/10

MOTION DATE 6/24/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 23 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + Memo of Law	1 - 14
Answering Affidavits — Exhibits X Motion + Opp Affirm + Memo of Law	15 - 17
Replying Affidavits + Opp to X Motion + Memo of Law Reply in support of X Motion	18 - 21, 22 - 23

Cross-Motion: [X] Yes [ ] No

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).

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

ORDER + Judgment

Dated: August 12, 2011

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: [X] 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 8

TOWER INSURANCE COMPANY OF NEW YORK,
Plaintiff,

-against-

CAMILLE KHAN and JOSE REYES,
Defendants.

DECISION, ORDER & JUDGMENT
INDEX NO.: 106833/2010
MOTION SEQ. 001

JOAN M. KENNEY, J.:

This is a declaratory judgment action in which plaintiff Tower Insurance Company of New York (Tower) asks for a judgment declaring that it has no duty to defend or indemnify defendant Camille Khan (Khan) in a personal injury action entitled, *Reyes v Khan*, Supreme Court, Index No. 32439/2007, Kings County (the Reyes Action).

Tower now seeks an Order, pursuant to CPLR 3212, granting movant summary judgment in its favor in the declaratory judgment action.

Defendant, Jose Reyes (Reyes) cross-moves for a declaration that Tower has a duty to defend or indemnify Khan in the Reyes Action.

Defendant Khan opposes Tower's motion and supports the Reyes cross motion.

FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2006, Reyes, an employee of Aerco Construction Company (Aerco), was allegedly injured while doing construction work at 106-18 Liberty Avenue, Queens County (the Property), owned by Khan. Reyes commenced the Reyes Action on August 28, 2007, asserting causes of action for negligence and violation of Labor Law §§ 200, 240 and 241.

Tower issued Khan a homeowner's policy on the Property for the period February 2, 2006 to February 2, 2007. Ex. 3 attached to motion. On February 8, 2008, Tower disclaimed coverage of Reyes's accident, because the Property did not qualify as an "insured location." Ex. G attached

to motion. Under the policy, Khan had to reside on the Property for it to be covered, and Tower claimed that Khan never resided there. It offered to defend Khan in the Reyes Action, through assigned counsel, subject to a declaratory judgment action to confirm Tower's disclaimer. The instant action was commenced on May 25, 2010 requesting a declaratory judgment that Tower has no duty to defend or indemnify Khan, because the Property did not qualify as an insured location and the Property was misrepresented in the application for the policy.

DISCUSSION

"A declaratory judgment action is an appropriate vehicle to establish and promulgate the rights of parties on a particular subject matter." *Matter of Peluso v Erie County Independence Party*, 13 NY3d 139, 140 (2009). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

The policy issued to Khan specifies that the Property is owner-occupied and a two-family residence. This comported with the application submitted to Tower in Khan's behalf by Northeast Agencies, Inc. (Northeast), a local insurance agency, dated February 2, 2006. Ex. 2 attached to motion. The application asks specifically if the applicant has "[a]ny other residence owned,

occupied or rented?" This is answered "No." The resulting policy lists "10618 Liberty Ave" as the "residence premises." The policy excludes coverage of personal injuries arising out of premises that are "not an 'insured location.'" Homeowners 3 Special Form, HO 00 03 04 91, Section II (1) (3).

The "Definitions" section of the policy states that the "'Insured location' means: [] The 'residence premises.'" *Id.*, ¶ 4 (a). In turn, "residence premises" are defined as "[t]he one family dwelling . . . where you [the policy holder] reside and which is shown as the 'residence premises' in the Declarations." *Id.*, ¶ 8. Residence premises "also means a two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations." *Id.* According to Edward Blomquist, vice president of Personal Lines Underwriting for Tower, the "Homeowners Selection Rules" offer Tower's underwriting guidelines. Blomquist Aff., ¶ 3. A copy of these rules, attached as exhibit 1 to the motion, identifies Tower's market as "1 or 2 family primary residence, owner occupied." Blomquist states that Tower set "such guidelines because owner-occupied primary residences generally pose a lesser degree of risk than non-owner-occupied or non-primary residences." Blomquist Aff., ¶ 3.

At Khan's deposition, on March 17, 2010, she stated that she owned the Property for about six months before the work started in April 2006. Khan Transcript, attached to motion at 9. She said that she was the sole owner and that she never lived there. *Id.* at 10, 8. She explained that the construction work on the Property was to convert the two-family residence into "commercial space and living quarters." *Id.* at 7, 12. A store would occupy the ground floor, with an apartment above. *Id.* She said that she did not have a particular commercial tenant or purpose in mind when she began construction. *Id.* at 8.

David Hertweck, investigating Khan's claim on Tower's behalf, met with Khan on December 26, 2007, at the Property. "She showed me the premises, which she told me had been converted

from a two-family residence into a residential and commercial building." Hertweck Aff., ¶ 6. He states that he transcribed her statement, which she reviewed and signed in his presence. *Id.* Tower submits a partially-redacted copy of this signed statement which stated that she hired Aerco "to convert the 2nd floor space into a 2 family space and to convert the 1st floor and basement into 2 commercial spaces." Ex. H attached to motion. The statement gave Khan's address as 97-07 109th Street, the same as she testified to at her deposition (Khan Transcript at 6). The statement, created in December 2007, also claimed that she owned the Property for about one year, which is consistent with her testimony that she bought the premises about six months before construction began in April 2006.

Reyes argues that Khan's unsigned and unsworn transcript has no probative value and must be disregarded, citing among others, *Myers v Polytechnic Preparatory Country Day School* (50 AD3d 868, 869 [2d Dept 2008]) ("the unsigned and unsworn deposition transcript attached to the plaintiffs' reply papers was not in admissible form and could not supply the basis for a showing of a meritorious cause of action"); *McDonald v Mauss* (38 AD3d 727, 728 [2d Dept 2007]) ("The deposition transcripts of two nonparty witnesses, submitted by the defendant without an explanation as to why they were unsigned and unsworn, were not in admissible form and should not have been considered by the court"). However, Khan signed and swore to an errata sheet to the transcript. Ex. A attached to Thomas Affirm.

Reyes also challenges Hertwick's submission. However, the only First Department case cited by Reyes on the use of an unsigned and unsworn transcript, *Horowitz v Kevah Konner, Inc.* (67 AD2d 38, 40-41 [1st Dept 1979]), buoys Hertwick to some degree.

> "The remaining evidentiary question is whether this court should consider the transcript of an alleged conversation between an insurance investigator and defendant Bowen before the latter's disappearance. The transcript itself is unsigned. The

> investigator has not submitted an affidavit in opposition to the motion nor has he in any way certified the correctness of the transcript. There is no certification from the transcriber that the transcription of the conversation is accurate. There is no indication in the record that Bowen was under oath at the time the statement was given. Therefore, it may be fairly concluded that the statement, if actually given by Bowen, was not given under oath.
>
> Since the insurance investigator did not confirm the accuracy, authenticity and reliability of the transcript, it cannot be considered on this motion for summary judgment."

In the instant motion, Herwick swears to the following: "At the end of our conversation, I accurately transcribed Khan's statement. She reviewed the statement and signed each page in my presence." The copy submitted has her purported signature at the bottom of each page.

Even if Khan's transcript and Hertwick's affidavit were to be ignored in considering Tower's motion, Khan's own affidavit in opposition to Tower's motion establishes her relationship to the Property. "My insurance agent was informed that I needed coverage so that I could buy the property located at 106-18 Liberty Avenue in Ozone Park, Queens. When this was done it was my intention to move into the property with my family and for it to be my primary residence." Khan Aff., ¶¶ 2-3. The move was clearly to follow the renovation. The Property was not her residence at the time of the accident and, thus, not the proper subject for Tower's policy. *McLaughlin v Nationwide Mut. Fire Ins. Co.*, 8 AD3d 739, 740 (3d Dept 2004) ("Plaintiff, through deposition testimony and affidavit, asserts that at the time of his application for insurance, he intended to move into such home with his family. His material misrepresentation, even if innocent or unintentional, is sufficient to warrant a rescission of the policy"). An insurance contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed, and "here there is no ambiguity since the words in the paragraphs of the policy under examination have a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, and concerning which there is no reasonable basis for a difference of opinion." *Breed v Insurance Co.*

of North America, 46 NY2d 351, 355 (1978).

Reyes contends that Tower's disclaimer was untimely as a matter of law, failing to comply with Insurance Law § 3420 (d) (2), in that Tower waited 61 days to issue its disclaimer letter. *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70 (2003) ("The insurer's 48-day delay in giving written notice, . . . [to investigate the existence of other, third-party sources of insurance], was unreasonable as a matter of law"). Tower argues that the instant action does not involve the issue of an untimely disclaimer, in that material misrepresentation invalidates the policy from its inception. Tower claims that there never was any coverage to disclaim because the Property was not the owner-occupied residence that the application and policy reflected. *Precision Auto Accessories, Inc. v Utica First Ins. Co.*, 52 AD3d 1198, 1201 (4th Dept 2008) ("when an insurance policy is void ab initio based on material misrepresentations in the application, it is as if the policy never came into existence, and an insured cannot create coverage by relying on the terms of a policy that never existed").

The absence of a signature on the insurance application is not significant, as Reyes maintains. *Stein v Security Mut. Ins. Co.*, 38 AD3d 977, 978 (3d Dept 2007). Even if Khan's agent misrepresented the Property to Tower, without Khan's knowledge, which is not apparently the case,[1] she cannot avoid the implications of the misrepresentation. Insurance Law § 3105; 2A NY Jur, Agency and Independent Contractors § 291.

Finally, Reyes contends that Tower is estopped from disclaiming coverage so long after it assumed Khan's defense in the Reyes Action, citing, among others, *Albert J. Schiff Associates, Inc. v Flack* (51 NY2d 692 [1980]) (equitable estoppel applied where insurer undertook insured's defense although not obligated to provide coverage); *United States Fid. & Guar. Co. v New York,*

[1]Khan states only that "I do not recall signing any forms [for Northeast]." Khan Aff., ¶ 3. She nowhere denies that the application or the policy misrepresents her view of the Property.

Susquehanna & Western Ry. Co. (275 AD2d 977 [4th Dept 2000]) (disclaimer barred when first asserted by insurer on the eve of a settlement conference); *Boston Old Colony Ins. Co. v Lumbermens Mut. Casualty Co.* (889 F2d 1245 [2d Cir 1989]) (equitable estoppel applied because of untimely disclaimer). In all of these cases, as distinguished from the instant action, the insurer attempted to disclaim years after assuming the insured's defense. Here, disclaimer came first in Tower's letter of February 8, 2008.

In sum, defendants' opposition attempts to create coverage that never existed. *Sirius Am. Ins. Co. v Burlington Ins. Co.*, 81 AD3d 562, 563 (1st Dept 2011) ("the policy was void ab initio on account of material misrepresentations made by [defendant] in the application process to procure the insurance"). The policy language is clear, as is Khan's absentee ownership of the Property. "[T]he doctrine of waiver is simply inapplicable where, as here, the defense is the nonexistence of coverage." *Axelrod v Magna Carta Cos.*, 63 AD3d 444, 445 (1st Dept 2009). Tower's motion is granted.

Accordingly, it is

ORDERED that Tower Insurance Company of New York's motion for summary judgment seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendant Camille Khan in the personal injury action of *Reyes v Khan*, Supreme Court, Index No. 32439/2007, Kings County, is granted; and it is further

ADJUDGED and DECLARED that Tower Insurance Company of New York is not obliged to provide a defense to, and provide coverage for, the defendant Camille Khan in the said action pending in Kings County; and it is further

ORDERED that defendant Jose Reyes's cross motion for summary judgment is denied; and it is further

ORDERED that Tower Insurance Company of New York shall be awarded costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

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).

DATED: August 12, 2011

ENTER:

JOAN M. KENNEY
J.S.C. J.S.C.