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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Tower Insurance Company of New York

-against-

Sarah Dademadi and Kenneth L. Stewart

INDEX NO. 104118/2011

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A, 1B
Answering Affidavits — Exhibits	2A, 2B
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Plaintiff's motion is granted to the extent set forth in the accompanying decision/~~order~~ judgment dated September 13, 2012.

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: 9-13-12

MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

☐ 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

- against -

SARAH DADEMADI and KENNETH L. STEWART,

Defendants.

Index No.: 104118/11

DECISION/JUDGMENT

In this action, plaintiff Tower Insurance Company of New York (Tower) is seeking a declaratory judgment that Tower has no duty to defend and indemnify defendant Sarah Dademade (sued as Dademadi) in an underlying personal injury action brought by defendant Kenneth L. Stewart against Dademade. Tower moves for summary judgment against Dademade and Stewart.

It is undisputed that on March 1, 2005, Dademade, through an insurance agent, applied for an insurance policy issued by Tower to cover a dwelling located at 916 Linden Boulevard, Brooklyn, New York. (S. Dademade Aff., ¶ 5.) The application stated that "owner occupies 1 unit and rents out 3 others." (Application [Ex. A to Aff. of Elliott Martin [Dademade's attorney] in Opp.].) According to Dademade, at the time of the application, she and her husband were "making use of Apartment 2F." (S. Dademade Aff., ¶ 7.) She also states that they "used the apartment throughout 2005 and moved out in or about December 2005 or early January 2006."

(Id.) According to Tower, it relied on the information provided in Dademade's application when issuing a personal line-policy for an owner-occupied primary residence, effective March 1, 2005 to March 1, 2006. (Aff. of Edward Blomquist [Tower Vice-President], ¶ 8.) It is undisputed that the dwelling package policy was subsequently renewed each year and was effective on the date of Stewart's accident. (Aff. of J. Kotlyarsky [P.'s Attorney] in Support, ¶ 12 [P.'s Aff.].)

On November 18, 2010, Stewart sued Dademade in a personal injury action entitled Kenneth L. Stewart v. Sarah Dademade (Sup Ct, Kings Co., Index No. 29037/2010). (Summons & Complaint [Ex. A to P.'s Aff.].) In the underlying complaint, Stewart alleges that on October 9, 2010 he sustained personal injuries when he tripped and fell on the public sidewalk abutting Dademade's property located at 916 Linden Boulevard, Brooklyn, New York. (Id., ¶ 9.) Stewart further alleges that the injuries incurred were the result of Dademade's negligence. (Id., ¶¶ 10-11.) On December 15, 2010, Tower received notice of the Stewart incident and action, and created a file for the incident. (P.'s Aff., ¶ 20.) Shortly thereafter, Jason Krumenaker, an investigator acting on behalf of Tower, took Dademade's statement. (Krumenaker Aff., ¶¶ 3-4.) By letter dated January 7, 2011, Tower disclaimed coverage to Dademade and Stewart. (Letter [Ex. 2 to Aff. of Lowell Aptman [Tower Managing Vice President]].)

The Exclusion section of the policy issued by Tower to Dademade provides in pertinent part:

> "1. Coverage L-Personal Liability and Coverage M-Medical Payments to Others do not apply to 'bodily injury' or 'property damage':
>
> . . .
>
> d. Arising out of a premises:
> (1) owned by an 'insured;'
> (2) rented to an 'insured;' or
> (3) rented to others by an 'insured;'

that is not an 'insured location.'"

(Policy [Ex. 4 to Blomquist Aff.].) Under Definitions §4(a) of the policy, "insured location" is defined as, among other things, "the 'residence premises.'" Section 8 further defines "residence premises" as:

> "a. the one family dwelling, other structures, and grounds; or
> b. that part of any other building;
> where you reside and which is shown as the 'residence premises' in the Declarations.
> 'Residence premises' also means a two, three or four family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations."

Even though the policy issued to Dademade was renewed each year, plaintiff Tower alleges that because Dademade never informed Tower that she had moved out of the dwelling, she is not entitled to coverage under the policy. Dademade contends that she did not misrepresent her residence when the 2005 policy was issued and that Tower did not notify her of the requirement to provide updated residence information. Stewart contends that Dademade is entitled to coverage under the policy because Dademade's niece, who is away in college, retains a residence at the dwelling in question and therefore qualifies as an "insured" under the terms of the policy.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party

must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is further settled that "to negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." (Continental Cas. Co. v Rapid-Am. Corp., 80 NY2d 640, 652 [1993].) "To the extent that there is any ambiguity in an exclusionary clause, [courts] construe the provision in favor of the insured." (Cragg v Allstate Indem. Corp., 17 NY3d 118, 122 [2011]; see also Insurance Co. of Greater New York v Clermont Armory, LLC, 84 AD3d 1168, 1170 [2d Dept 2011], lv denied 17 NY3d 714.) Nevertheless, "the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning . . . . Moreover, when interpreting the policy, the court may not make or vary the contract of insurance to accomplish its notion of abstract justice or moral obligation." (Broad St., LLC v Gulf Ins. Co., 37 AD3d 126, 130-131 [1st Dept 2006] [internal citations, quotation marks and brackets omitted].)

On this record, plaintiff Tower makes a prima facie showing of entitlement to summary judgment. The court holds that the policy provisions unambiguously provide that the insured was required to reside at the residence premises listed in the Declarations, 916 Linden Boulevard, Brooklyn, New York, in order to receive coverage under the policy. New York courts which have construed the same or substantially identical policy provisions have reached the same result. In McLaughlin v Nationwide Mutual Fire Insurance Company (8 AD3d 739, 740 [3d Dept 2004]), the court granted summary judgment to the insurer after finding that the insured did not reside at the premises and materially misrepresented that he lived there in his original application

for insurance. In Marshall v Tower Insurance Company of New York (44 AD3d 1014, 1015 [2d Dept 2007]), the court held that insurance coverage was properly disclaimed because the policy had a residency requirement and the insured did not "reside" at the subject premises. In Metropolitan Property & Casualty Insurance Company v Pulido (271 AD2d 57, 60 [2d Dept 2000]), the court held that, even though the insureds owned the property and their daughter and son-in-law resided there, they were not entitled to indemnification in a personal injury action because the policy required that they "reside" at the residence and they failed to do so. (See also Zises v New York Cent. Mut. Fire Ins. Co., 2012 NY Slip Op 50020U [Sup Ct, Dutchess County 2012]; Tower Ins. Co. of New York v Monroy, 2008 NY Slip Op 33518U [Sup Ct, New York County 2008].) Dean v Tower Insurance Company of New York (84 AD3d 499, 499-500 [1st Dept 2011]) is not to the contrary. There, the court found that the failure of the policy to define the term "resides" rendered the policy ambiguous. In Dean, however, the insured purchased the policy in advance of closing, and intended to live at the residence but could not do so due to unforeseen circumstances (need to remediate termite damage). In the instant case, in contrast, Dademade intentionally moved away and did not intend to live at the dwelling.

Moreover, the undisputed evidence shows that although Dademade may have lived at the residence premises at the time of the initial application, neither she nor any other insured lived there when the policy was renewed on March 1, 2010 or on October 9, 2010, the date of defendant Stewart's alleged accident. Indeed, Dademade forthrightly acknowledges that she moved out of the residence in December 2005 or January 2006. (S. Dademade Aff., ¶ 7.)

Dademade opposes Tower's motion on the ground that Tower never requested updated information about her address at the times she renewed the policy. (See id., ¶ 8.) The law is

clear, however, that having received the initial policy and Declarations, Dademade "must be held to have [had] conclusive presumptive knowledge" of the terms and limits of the policy and its subsequent renewals – here, that the policy covered the residence only if occupied by the insured. (See McLaughlin, 8 AD3d at 740; Chase's Cigar Store v Stam Agency, 281 AD2d 911, 912-913 [4th Dept 2001].)

As to Stewart, the court holds that the complaint on its face fails to state a cause of action against him. However, as Stewart has submitted opposition to the motion, it will be considered insofar as it bears on Tower's entitlement to a declaratory judgment that Dademade is not entitled to coverage. Stewart argues that because Dademade's niece lived at the premises and is an "insured" under the policy, coverage is available to Dademade.

This contention is without merit. As discussed above, Definitions §8 of the policy defines "residence premises" as the premises "where you reside and which is shown as the 'residence premises' in the Declarations." (emphasis supplied). The Definitions section states at the outset: "In this policy, 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household." Definitions §3 further provides that "'insured' means you and residents of your household who are: a. your relatives." Thus, even assuming arguendo that Dademade's niece lived in the premises after Dademade and her husband moved out, she did not live there as part of Dademade's household. Her residence was therefore ineffective to confer coverage. The court notes, in addition, that in her statement to Tower's investigator, Dademade acknowledged that her niece moved out of the premises to attend college in 2009 "and has not resided on the property since that time." (Statement [Ex 1 to Krumenaker Aff.].) Under New York law, the standard for determining residency for insurance

coverage purposes requires that the insured manifest some degree of permanence and intention to remain in the household that goes beyond a temporary or physical presence. (See Allstate Ins. Co. v Rapp, 7 AD3d 302, 303 [1st Dept 2004].) In opposing Tower's motion, Dademade does not make any showing and, indeed, does not so much as assert, that she is entitled to coverage based on her niece's residency.

The court has considered Dademade's remaining contentions and finds them without merit. Summary judgment will therefore be granted in Tower's favor against her.

It is hereby ORDERED that the motion of plaintiff Tower Insurance Company of New York is granted to the extent of awarding summary judgment to plaintiff Tower Insurance Company of New York and against defendant Sarah Dademade; and it is further

ORDERED, ADJUDGED, and DECLARED that plaintiff Tower Insurance Company of New York has no obligation to defend or indemnify defendant Sarah Dademade in an underlying personal injury action entitled Stewart v Dademade (Sup Ct, Kings Co., Index No. 29037/10.)

This constitutes the decision and judgment of the court.

Dated: New York, New York
September 13, 2012

MARCY S. FRIEDMAN, J.S.C.

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).