

**Tower Inc. Co. of N.Y. v Carranza**

2012 NY Slip Op 32668(U)

September 27, 2012

Sup Ct, NY County

Docket Number: 653233/2011

Judge: Lucy Billings

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

**PRESENT:** LUCY BILLINGS  
J.S.C.  
*Justice*

**PART** 46

Index Number : 101064/2009  
TOWER INSURANCE COMPANY  
vs.  
CARRANZA, MARIA  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. 653233/2011  
101064/2009  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for dismiss claims

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). <u>23</u>

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

*The court denies the motion by defendants Carranza and Romero to dismiss the complaint against them, pursuant to the accompanying decision. C.P.L.R. § 3211 (a) (1), (4), (5), and (7). The action under Index No. 101064/2009 was consolidated with the action under Index No. 653233, so that both actions are under No. 653233.*

**FILED**  
OCT 25 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/27/12

Lucy Billings, J.S.C.

LUCY BILLINGS

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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 46

-----x

TOWER INSURANCE COMPANY OF NEW YORK,

Index No. 653233/2011

Plaintiff

- against -

MARIA CARRANZA, JOSE ROMERO,  
TOWN OF ISLIP, and MELVA OTERO,

Defendants

-----x

**FILED**  
DECISION AND ORDER  
OCT 25 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

Insofar as the motion by defendants Carranza and Romero to dismiss the complaint against them in this consolidated action is based on plaintiff's failure to state a claim, the court denies the motion. Defendants rely not just on the complaint or undisputed documents, but rely primarily on their affidavits, which the court may not consider in the context of a motion on those grounds, as the affidavits simply dispute the facts alleged against defendants. C.P.L.R. § 3211(a)(1) and (7); Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). See Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009); Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dep't 2006).

As to plaintiff's first claim and ground for its disclaimer of insurance coverage, that the insured premises' owner did not

reside at the premises, defendants' defense relies on the affidavits of Carranza and Romero that they were co-owners and both resided there. As to plaintiff's second claim and ground for its disclaimer, that the injury for which coverage is claimed arose from the insured's business pursuits, an excluded injury, defendants' defense relies again on the affidavits of Carranza and Romero that they both resided at the insured premises and on Carranza's unsworn statement that she received no income from other occupants. Carranza and Romero do not attest that they engaged in no commercial pursuits at the premises, which in turn may have imposed liability on the owners for an unsafe abutting sidewalk condition that defendant Otero claims injured her.

As to plaintiff's third claim and ground for its disclaimer, that defendants' notice to plaintiff of Otero's claim was late, defendants' defense relies on Romero's affidavit that he notified plaintiff's agent the day after Romero and Carranza learned of Otero's claim. The defense that plaintiff has not shown prejudice from the late notice does not apply to the policy under which defendants claim coverage, because plaintiff issued the policy before the amendments to New York Insurance Law § 3420(a)(5) and (c)(2) became effective, allowing that defense. 25 Ave. C New Realty, LLC v. Alea N. Am. Ins. Co., 96 A.D.3d 489, 491 (1st Dep't 2012); Tower Ins. Co. of N.Y. v. Classon Hqts., LLC, 82 A.D.3d 632, 635 (1st Dep't 2011); Ponok Realty Corp. v. United Nat. Specialty Ins. Co., 69 A.D.3d 596, 597 (2d Dep't 2010). As to plaintiff's fourth claim and ground for its

disclaimer, that Carranza misrepresented the insured premises to be occupied by their owner, defendants' defense again relies on the affidavits of Carranza and Romero that they were co-owners and both resided at the premises.

The defense that the policy's one year limitations period bars plaintiff's action, C.P.L.R. § 3211(a)(5), relies on a policy provision that applies only to actions by the insured and thus not to this action by the insurer. The defense that another action alleging the same claims against Carranza and Romero is pending, C.P.L.R. § 3211(a)(4), refers to an action that is no longer pending against Carranza and Romero and now has been consolidated with this action. Since the first action already had been dismissed against them and otherwise consolidated with this action when they served this motion, this action is not subject to dismissal on the ground that another action is pending. Id.; L-3 Communications Corp. v. SafeNet, Inc., 45 A.D.3d 1, 7-8 (1st Dep't 2007). See Chang v. Zapson, 67 A.D.3d 435, 436 (1st Dep't 2009); Counsel Abstract, Inc. Defined Benefit Pension Plan v. Jerome Auto Ctr., Inc., 23 A.D.3d 274, 276 (1st Dep't 2005).

Finally, the dismissal of plaintiff's claims against Carranza and Romero in that prior action was not based on its merits, but was based on plaintiff's lack of excuse for failing to move for a default judgment against these two non-answering defendants within one year after their default. C.P.L.R. § 3215(c); Brown v. Andreoli, 81 A.D.3d 498 (1st Dep't 2001);

County of Nassau v. Chmela, 45 A.D.3d 722 (2d Dep't 2007).  
 Therefore that dismissal is of no preclusive effect. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 13 (2008); Kalisch v. Maple Trade Fin. Corp., 35 A.D.3d 291 (1st Dep't 2006); Espinoza v. Concordia Intl. Forwarding Corp., 32 A.D.3d 326, 328 (1st Dep't 2006). See C.P.L.R. § 3211(a)(5).

Consequently, the court denies the motion by defendants Carranza and Romero to dismiss the complaint against them on each of the grounds set forth. C.P.L.R. § 3211(a)(1), (4), (5), and (7). Until these defendants answer the complaint, C.P.L.R. § 3211(f), plaintiff's cross-motion for summary judgment against Carranza and Romero is premature and therefore denied. C.P.L.R. § 3212(a); City of Rochester v. Chiarella, 65 N.Y.3d 92, 101 (1985); Drezin v. New Yankee Stadium Community Benefits Fund, Inc., 94 A.D.3d 542, 543 (1st Dep't 2012); Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc., 27 A.D.3d 323 (1st Dep't 2006); Alexandru v. Pappas, 68 A.D.3d 690, 691 (2d Dep't 2009). See Stephanie R. Cooper, P.C. v. Robert, 78 A.D.3d 572, 573 (1st Dep't 2010).

This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

**FILED**

DATED: September 27, 2010 **OCT 25 2012**

**NEW YORK  
 COUNTY CLERK'S OFFICE**

*Lucy Billings*  
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 LUCY BILLINGS, J.S.C.  
 LUCY BILLINGS  
 J.S.C.