

Tower Ins. Co. of N.Y. v Parris
2013 NY Slip Op 30278(U)
February 4, 2013
Supreme Court, New York County
Docket Number: 115760/2010
Judge: Richard F. Braun
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN
JSC Justice

PART 23

Index Number : 115760/2010
TOWER INS. CO. OF NEW YORK
vs.
PARRIS, WORRELL, et al.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE February 7, 2013
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) 2
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent of directing the entry of judgment on default against defendant Maxwell Parris.
This constitutes the decision and order of this Court. See separate Opinion.

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

FILED
FEB 07 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York, February 7, 2013 Richard F. Braun, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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

Index No. 115760/2010

Plaintiff,

OPINION

-against-

WORRELL PARRIS and ESTATE of DURWIN
WESLEY ENNIST, DECEASED by REPRESENTATIVE
AURELIA AMBER ENNIST,

Defendants.
-----X

RICHARD F. BRAUN, J.:

FILED
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This is a declaratory judgment action in which plaintiff seeks a declaration that it has no duty to defend and indemnify defendant Worrell Parris (Parris) in an underlying personal injury action known as *The Estate of Durwin Wesley Ennist deceased by representative Aurelia Amber Ennist v Worrell B. Parris*, pending in the Supreme Court, Kings County, Index No. 39622/04. In the underlying action, the estate of Durwin Wesley Ennist alleges that he, a tenant at the subject four family premises, slipped and fell while walking down the broken steps of the stoop thereat. Plaintiff moves for summary judgment contending that the subject policy excluded coverage for the premises because the insured did not reside there and that the claim arose out of the rental of the premises. In addition, plaintiff seeks a default judgment against the policy holder, defendant Parris, based upon his failure to timely answer the complaint.¹

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]);

¹ Defendant Worrell Parris did not oppose the motion, and that branch of the motion has been granted on default.

* 3]

Sumitomo Mitsui Banking Corp. v Credit Suisse, 89 AD3d 561, 563 [1st Dept 2011]). If the movant makes a prima facie showing of entitlement to summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

The policy definition of “insured location” includes “residence premises,” which is defined to include “a two, three or four family dwelling where you reside in at least one of the family units....” The policy excludes coverage for bodily injury arising out of premises rented to others by an insured that is not an “insured location.” The superceding Special Provisions-New York of the policy also includes an exclusion for claims arising out of “rental or holding for rental of any premises by an ‘insured’” but excepts from the exclusion the rental of an “insured location” used in part as a residence.² Thus, to the extent plaintiff did not reside in the four family building, it would not be an “insured location” under any of these provisions, and coverage would be excluded.

Plaintiff has come forward with evidence that defendant Parris did not reside at the subject premises, which was used as a rental property. Defendant Parris in his statement to plaintiff’s investigator indicated that he resided at another location and that the injured claimant was a renter at the premises. Defendant Parris’ mother also told the investigator that defendant Parris did not reside at the subject location. Consequently, coverage would be excluded under the policy (*see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471-472 [2005]; *Metropolitan Prop. & Cas. Ins. Co. v Pulido*, 271 AD2d 57, 61 [2nd Dept 2000]; *Ramos v Onebeacon Ins. Co.*, 21 Misc

² In its papers, plaintiff incorrectly relies on the exclusions superceded by the Special Provisions-New York, although they do not differ materially for these purposes.

3d 1136(A), 2008 NY Slip Op 52403(U) [Sup Ct, Queens County 2008]; *cf. Tower Ins. Co. of N.Y. v Corlette*, 34 AD3d 792, 793 [2nd Dept 2006] [the carrier was required to defend and indemnify the owner for a slip and fall accident where the policy did not define “roomer” in a rental exclusion]).

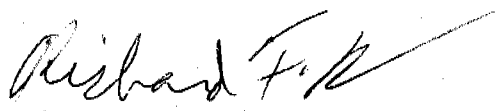
Defendant Estate of Durwin Wesley Ennist, deceased by representative Aurelia Amber Ennist (defendant) has come forward with evidence to the contrary raising an issue of fact.³ While defendant Parris’ default herein does amount to an admission by him of all allegations in the complaint (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]), contrary to plaintiff’s argument the admissions by his default would not apply against the appearing defendant and prevent it from raising any issues of fact. In the verified bill of particulars in the Kings County action, the deceased Durwin Wesley Ennist claimed that defendant Parris had constructive notice of the dangerous condition at the premises because defendant Parris lived there. Defendant notes that plaintiff has not established that defendant Parris did not reside at the subject premises on the date of the accident (October 1, 2004), as opposed to in April 2005, when the investigator spoke to defendant Parris and his mother. In addition, defendant relies on an affidavit of substituted service where the process server, who served the summons and complaint in the underlying action, attests to the fact that the person served confirmed that defendant Parris resided at the subject premises. Although there is no dispute that the premises were used for rental purposes, the issue of fact as to whether defendant Parris resided at the premises on the date of the accident is relevant to the rental exclusion because exceptions to the rental exclusion also turn on whether the premises were an

³ However, contrary to the contention of defendant Estate of Durwin Wesley Ennist, deceased by representative Aurelia Amber Ennist, plaintiff timely disclaimed coverage upon learning the pertinent facts, and plaintiff cannot be deemed to have waived its disclaimer by providing a defense (*see Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618, 619 [1st Dept 2012]).

“insured location,” which requires that he resided there.

Accordingly, by separate decision and order, a default judgment was granted on default against defendant Parris. The branch of the motion seeking summary judgment was denied as to defendant Estate of Durwin Wesley Ennist, deceased by representative Aurelia Amber Ennist.

Dated: New York, New York
February 4, 2013



RICHARD F. BRAUN, J.S.C.

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