Spencer v Tower Ins. Group Corp.
2014 NY Slip Op 30944(U)
April 10, 2014
Sup Ct, Kings County
Docket Number: 504928/2013
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of April, 2014.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

--------------------------------------X

DENISE SPENCER,

Plaintiff,

- against -

TOWER INSURANCE GROUP CORPORATION,

Defendant.

--------------------------------------X

DECISION, ORDER AND JUDGMENT

Index No. 504928/13

FILED KINGS COUNTY CLERK 2014 APR -8 AM 8:41

The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-6
Opposing Affidavits (Affirmations)	4-6 7
Reply Affidavits (Affirmations)	
____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff, Denise Spencer (Spencer), moves for an order, pursuant to CPLR 3212, granting her summary judgment in this action, brought under Insurance Law § 3420 (b) (1), to compel defendant, Tower Insurance Group Corporation (Tower) to pay a judgment against its former insured, Sara Zacharia. Tower, in turn, cross-moves for an order, pursuant to CPLR 3211 (5), dismissing the complaint on collateral

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estoppel or res judicata grounds, or, alternatively, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, or, alternatively, pursuant to CPLR 510 (1) changing this action's venue to New York County.

Spencer, was injured when she tripped and fell in January 2003 in Zacharia's premises. She thereafter, filed a personal injury action against Zacharia, among others, (collectively, the principal defendants) in January 2006 in Kings County Supreme Court entitled *Spencer v Monahan, et al.*, index No. 564/06 (the principal action). Zacharia notified Tower of the principal action more than seven months later in August 2006. In September 2006 she informed Tower's investigator that she never resided at the premises. Tower's investigation revealed that Zacharia received a letter in January 2004 from Spencer's attorney notifying her of Spencer's accident and Spencer responded via postcard that the premises had been sold in June 2003.

Tower sent a letter dated September 21, 2006 to Zacharia disclaiming coverage based on her non-residence at the premises and its use as a rental property, as well as her failure to notify them of the incident and claim "as soon as practicable." In addition, Tower advised Zacharia that it would provide counsel pending resolution of a forthcoming declaratory judgment action to confirm its disclaimer; and that the attorney would withdraw upon determination of the disclaimer's validity; and in that case, Zacharia would have to pay for her own defense. In December 2006, the declaratory judgment action was commenced in New York County entitled *Tower Insurance Company of New York v Zacharia, et al.*, Index No. 118268/06 (the DJ action. That action, brought against all the principal defendants and

Spencer, sought a declaration that Tower bore no duty to defend or indemnify Zacharia or any of the other principal defendants. The DJ action asserted Zacharia's non-residence at the premises, an exclusion as an insured location under the policy and Zacharia's failure to promptly notify Tower of Spencer's claim. Spencer, who did not challenge being properly served, never answered and thus never disputed the grounds for Tower's denial of coverage. Here, too she makes no such dispute.

Tower moved, in the DJ action, in part for default judgment against Spencer, and Spencer cross-moved to dismiss the complaint against her for Tower's failure to seek a default within one year (*see* CPLR 3215 [c]). Justice Joan A. Madden, in a decision and order dated May 21, 2009, denied Tower a default judgment against Spencer, granted Spencer's cross motion and dismissed Tower's complaint for "failure to timely move for a default judgment as required by CPLR 3215(c)."

Tower thereafter sought summary judgment in the DJ action against the principal defendants, and Justice Madden's February 16, 2010 memorandum decision and order granted that motion, declaring that Tower was "under no duty to defend or indemnify the [principal] defendants" in the principal action. More particularly, Justice Madden held that:

> "Tower provides evidence that Zacharia misrepresented the premises as owner occupied, even though she never lived there, and that this misrepresentation rendered the Policy void. Tower also provides evidence that the Policy does not extend to the underlying action based on the Policy exclusion from liability coverage for bodily injury arising out of a rental of premises by an insured . . . . Tower further provides evidence that Zacharia failed to provide Tower with timely notice of Spencer' accident. Specifically, the record demonstrates that the accident allegedly

> occurred on January 12, 2003, the action commenced on January 5, 2006 and Tower was notified on August 23, 2006. As Zacharia does not provide evidence controverting this showing, Tower is entitled to summary judgment."

Zacharia filed no appeal, and the ruling has thus become final.

In a July 19, 2010 order by Justice Donald Scott Kurtz of this court the Tower retained attorney representing Zacharia was relieved. A November 8, 2012 judgment, after inquest, against Zacharia followed, and this payment action has ensued.

The Court of Appeals has explained that "[c]ollateral estoppel, an equitable doctrine, is based upon the general notion that *a party, or one in privity with a party*, should not be permitted to relitigate an issue decided against it" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [emphasis added]) The *D'Arata* court stressed (at p 664) that "we have no difficulty in concluding that plaintiff [an injured claimant], in suing defendant [insurer] on the judgment he has recovered against [the insured], is in privity with [the insured] for the purpose of collateral estoppel." Therefore, a plaintiff who brings a direct action under Insurance Law § 3420 (b) (1) against an insurer "stands in the shoes of the insured and can have no greater rights than the insured" (*id.*). Such "[p]laintiff, by proceeding directly against defendant, does so as subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured" (*id.).* Indeed, "the inevitable consequence of plaintiff's election to proceed against defendant under Insurance Law § 3420 (b) (1) is that he is in legal privity with the claimed insured for the purpose of collateral estoppel analysis" (*id.*).

Justice Madden's decision in the DJ action relieving Tower of a duty to indemnify Zacharia thus binds Spencer as Zacharia's subrogee. "[A] judgment in a prior action is binding not only on the parties to that action, but on those in privity with them" (*Green v Santa Fe Indus.,* 70 NY2d 244, 253 [1987]). Here, Tower named Spencer as a party to the DJ action; she was personally served with the summons and complaint in that action; and process was also served on her counsel in the principal action (the same counsel which represents her in this action). Consequently, Justice Madden's ruling in the DJ action binds Spencer both under the privity principles and as a prior party to that action.

The foregoing factors distinguish this case from the Appellate Division, First Department's decision in *Zimmerman v Tower Ins. Co. of N.Y.* (13 AD3d 137, 139 [2004]) where "the declaratory judgment resulted from [the insured's] default and there [was] no legal privity between plaintiff and [the insured] . . . . because [the insured's] subrogees were prohibited from [contesting the declaratory judgment]." Here, however, the insured defended, not defaulted, in the DJ action. In addition, Spencer, as an originally named party, when faced with Tower's default judgment motion in the DJ action, had ample opportunity and, as Tower notes, an 'incentive," to contest the validity of Tower's disclaimer. Spencer's election to successfully seek dismissal of the DJ action still left her in privity with Zacharia as Zacharia's subrogee and codefendant. Certainly, Spencer may not escape the preclusive effect of Justice Madden's ruling by not litigating on the merits when she had a full and fair opportunity to litigate the same coverage issue as arises in this action.

Indeed, the Appellate Division, Third Department, in *New York Cent. Mut. Fire Ins. Co. v Kilmurray* (181 AD2d 40 [1992]) and the Appellate Term, Second Department in *Oest v Excelsior Ins. Natl.-Nederlanden N. Am. Prop. & Cas. Group* (170 Misc 2d 787 [1996]) each applied collateral estoppel in similar Insurance Law § 3420 (b) (1) cases. The *Kilmurray* court recognized (at p 41) that "[a]s the injured claimant seeking to recover damages in the tort action against one of the insureds, Czapko is probably the person most interested in the dispute between plaintiff [the insurer] and its insured concerning plaintiff's duty under its insurance policy . . . ." There, the insurer also brought a declaratory judgment action against the insureds and the injured claimant Czapko. The insureds consented to a judgment which declared that the insurer bore no duty to defend and indemnify them in an action by Czapko against them. The Appellate Division, Third Department upheld a declaration barring Czapko under the claim-preclusion doctrine from initiating a direct action against the insurer under Insurance Law § 3420 (b) (1).

The *Oest* court likewise concluded (at p 788) that a "prior declaratory judgment declaring that defendant [insurer] had no duty to defend and/or indemnify the insured in the underlying action is a conclusive final determination on the merits, and the insured is barred under the doctrine of res judicata from relitigating the identical claim for indemnification against the defendant."

Independently applying the policy provisions de novo warrants summary judgment relief dismissing Spencer's action even if collateral estoppel were inapplicable. No dispute exists that Zacharia never resided in the premises as the policy requires, that she rented the

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premises as the policy prohibited and that she failed to promptly notify Tower of Spencer's injury and claim. Spencer provided no evidence controverting Tower's prima facie showing. Hence, the same conclusion results that Tower owes no duty to indemnify Spencer. (Also see Justice Mikoll's concurrence in the *Kilmurray* case where he reasoned (at p 44) that "because Czapko stands in the shoes of the insureds and can have no greater rights than they have under the homeowner's policy . . . the entry of the consent judgment against the insureds extinguished their claim against plaintiff and with their claim, Czapko's claim as well. As there is no defense, plaintiff is entitled to judgment against Czapko as a matter of law."

In light of the above the issue of venue of improper is moot. Accordingly, it is

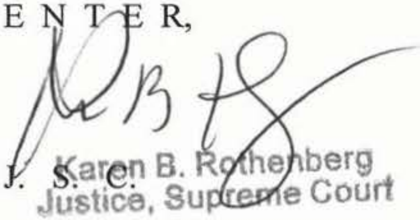
ORDERED that Spencer's summary judgment motion is denied; and it is further

ORDERED that the branch of Tower's motion to dismiss is granted, and Spencer's complaint is dismissed; and it is further

ORDERED that the remaining branch of Tower's motion to change venue is denied as moot.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.