SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TOWER INSURANCE COMPANY OF NEW YORK.,

Index No.153797/12

Plaintiff,

-against-

ORDER/JUDGMENT

RANJIT PERSAUD and MIRNA TORRES,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Tower Insurance Company ("Tower") has commenced this action for a declaratory judgment that it has no duty to defend or indemnify defendant Ranjit Persaud ("Persaud") in the underlying personal injury action commenced by defendant Mirna Torres ("Torres"). It has brought the present motion for a default judgment against Persaud, who has not appeared in this action, and for summary judgment against Torres. For the reasons set forth below, plaintiff's motion is granted.

Defendant Torres brought the underlying personal injury action for injuries she allegedly incurred when she slipped and fell on the exterior staircase at the property located at 1842 Amethyst Street, Bronx, New York (the "premises"). Defendant Persaud is the owner of the

premises. Tower has issued an insurance policy to Persaud for the premises where the incident occurred. The policy which Tower has issued contains an exclusion for bodily injury which occurs at a location where Persaud does not reside. Specifically, the policy excludes claims for bodily injury which occur at a premises "owned by" or "rented to" Persaud or "rented to others" by Persaud that is not the "insured location." The "insured location" is defined, in relevant part, as the place where Persaud resides. On this motion, Tower has presented both a recorded and written statement by Persaud confirming that he did not reside at the premises at any time but used the premises as a rental property. Based on this admission by Persaud, Tower disclaimed coverage to Persaud because the property is not an "insured location" since Persaud did not reside there when the loss took place as required under the policy. Furthermore, Tower denied coverage because the Torres claim involved injuries arising out of the rental of premises by an insured and because Persaud made material misrepresentations on the insurance application by stating that the premises would be owner occupied.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.* However, if "it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the

motion. . . ." CPLR § 3212(f).

In the present case, the court finds that Tower has made a prima facie showing that it is entitled to summary judgment declaring that it has no duty to defend or indemnify Persaud in the underlying action based on the fact that he did not reside at the premises when the underlying incident occurred. Both the recorded and written statement by Persaud unequivocally establish that he did not reside at the premises on the day Torres allegedly slipped and fell on the premises' exterior stairs. Indeed, Persaud's statements clearly establish that he never resided at the premises but used it exclusively as a rental property. Moreover, based on defendant Persaud's default in appearing in this action, defendant Persaud has admitted the allegations in the complaint that he did not reside in the premises when the incident occurred.

In opposition, defendant Torres has failed to raise an issue of fact as to whether Persaud resided at the premises at the time of her incident or to establish that discovery in this action may lead to admissible evidence sufficient to defeat plaintiff's motion for summary judgment. Torres fails to put forth any evidence establishing that Persaud lived at the premises when her accident incurred. Instead, Torres's entire opposition is based on her contention that plaintiff's motion is premature as there has been little to no discovery in this action. Torres's claimed need for discovery is without merit as the needed discovery she identifies only goes to the issue of whether Persaud made an initial misrepresentation on his policy application. However, the court need not even reach this ground for Tower's disclaimer in the underlying action as it is undisputed that Persaud did not reside there at the time Torres's claims arose and, as such, her claims are excluded under the policy whether or not Persaud's initial representations about his occupancy of the premises was accurate.

Accordingly, plaintiff's motion for summary judgment and a default judgment is gratned and it is hereby

ORDERED that plaintiff's motion is granted; and it is further

ADJUDGED and DECLARED that plaintiff has no duty to defend or indemnify defendant Persaud in the underlying personal injury action entitled *Mirna Torees v. Ranjit Persaud*, Index Number 300912/2014. This constitutes the decision, order and judgment of the court.

Dated: 4/20/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.