

Tower Ins. Co. v Parodi
2016 NY Slip Op 30425(U)
March 15, 2016
Supreme Court, New York County
Docket Number: 154979/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

TOWER INSURANCE COMPANY

Plaintiff,

INDEX NO. 154979/2015
MOTION DATE 02/29/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

-against-

HAROLD PARODI, JULY PARODI and
RICHARD KOZUCK,

Defendants.

The following papers, numbered 1 to 5 were read on this motion for a summary judgment and default judgment.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-5

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff’s motions for Summary Judgment against Defendants Parodi, and Default Judgment against Defendant Kozuck are granted on default.

Tower Insurance Company (herein “Tower”) commenced this declaratory judgment action in which it seeks a declaratory judgment that it has no duty to defend or indemnify Defendants Harold and July Parodi in a personal injury suit entitled *Richard Kozuck v. Harold Parodi and July Parodi*, pending in the Supreme Court of the State of New York, Bronx County, under Index No.: 20493/2014 (herein “the underlying action”). The underlying action arises out of an incident that Defendant Kozuck alleges occurred on October 12, 2013. Kozuck claims to have sustained personal injuries as a result of a trip and fall on the front stoop of 137-21 95th Street, Ozone Park, New York, (herein “the premises”) while lawfully on this premises which is owned by the Parodis. (see Exh. 2 annexed to Aff. Of Tracy Brogowski). At the time of the alleged incident, Defendants Parodi maintained a homeowners’ insurance policy with Tower Insurance in connection with the premises under policy number EHP2750684, effective June 17, 2013 through June 17, 2014 (herein “the policy”).

The policy coverage contained certain exclusions such as a bar on any recovery under the policy for claims of bodily injury arising out of the premises if the Parodis did not reside at the premises. (see Aff. In Supp. PP 4-6; see also Exh. 1, copy of the policy, attached to Brogowski Aff.). Additional exclusions of coverage include a rental exclusion applying to any claim for bodily injury arising out of the rental of the premises if the Parodis did not reside at the premises, and failure of the insured’s or the alleged injured party to promptly notify Plaintiff of the incident or the claim. (see Aff. In Supp. Exh. A; see also Aff. In Supp. P6).

Defendant Kozuck commenced the underlying action on January 30, 2014, however, Plaintiff Tower Insurance Co., did not receive notice of this underlying action until March 3, 2015. (see Aff. In Supp. PP 6 and Aff. Of Tracy Brogowski PP 2). After Plaintiff received notice of the underlying action and began processing the claim, a file was assembled and processed by Plaintiff's Administrative Unit. (see Aff. Of Tracy Brogowski PP 2-3). The claims administrator spoke with Defendant Harold Parodi on March 6, 2015, at which time Defendant Harold Parodi admitted not residing at the premises since 2008. (Id. at P. 3)

First Judicial Claims Service was then assigned to investigate the trip and fall incident, as well as policy coverage issues. Plaintiff received a written report from the investigator on April 9, 2015, which also contained a signed statement from Defendant July Parodi, also confirming that neither she nor Defendant Harold Parodi were residing at the premises on the date of the incident. (see Id. at P. 3 and Aff. Of Shvartsbart).

Plaintiff disclaimed coverage by mailing a disclaimer letter to Defendants Parodi on April 16, 2015. (see Brogowski Aff. Exh. 4). The disclaimer advised Defendants Parodi that their homeowner's insurance policy does not provide coverage for bodily injury arising out of incidents on the premises owned by an insured or rented to others by an insured that is not an "insured location," as well as bodily injury arising from an incident out of the rental or holding for rental of premises that is not an "insured location." (Id.) Plaintiff has provided Defendants Parodi with counsel to defend in the underlying action pending a determination of the instant action.

Plaintiff commenced the instant action on May 18, 2015, against Defendants Parodi and Defendant Kozuck seeking a declaratory judgment declaring that Plaintiff has no duty to defend or indemnify Defendants Parodi in the underlying action, based on the premises' failure to qualify on the date of the incident as an "insured location." (see Aff. In Supp. P. 8 and Exh. A attached thereto). Defendants' Parodi served an Answer on October 7, 2015, (see Exh. B attached to Aff. In Supp.), wherein Defendants failed to answer paragraph 10 of Plaintiff's complaint which states "[t]he insureds did not reside in the premises when the subject accident occurred..." (see Exh. A, line 10 and Exh. B). Defendant Kozuck has not appeared or answered in the instant action.

Plaintiff now moves pursuant to CPLR 3212 for summary judgment against Defendants Parodi, for a declaratory judgment declaring that Plaintiff has no duty to defend or indemnify Defendants Parodi in the underlying action because Plaintiff's have made a prima facie showing that Defendants Parodi did not reside on the premises at the time of Defendant Kozuck's alleged incident; Therefore, the premises did not qualify as an "insured location" due to Defendants Parodi not residing therein. Further, because

the premises did not qualify as an "insured location", Defendants Parodi are not entitled to coverage under their homeowner's policy for Kozuck's claim. Plaintiff also states that coverage is not warranted because Defendant Kozuck's claim in the underlying action involves injuries arising out of Defendants Parodi rental of the premises which was not an "insured location." The motion is unopposed.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

Admissions by an insured to a claims examiner and/or investigator that the insured did not reside at the subject premises on the date of an alleged injury sustained by a plaintiff in an underlying personal injury action, is prima facie proof entitling the insurance company to "summary judgment declaring that the insurance company has no obligation to defend or indemnify its insured..." (see *Tower Ins. Co. Of N.Y. v. Brown*, 130 A.D.3d 545 (1st Dep't 2015)).

Plaintiff has made a prima facie case for Summary Judgment. Defendants Parodi have failed to raise an issue of fact requiring a trial.

Plaintiff also moves pursuant to CPLR 3215 for entry of a default judgment against Defendant Kozuck for failing to answer, plead or appear in this action. The motion is unopposed.


Accordingly, it is hereby ORDERED that Plaintiff's motion for summary judgment against Defendants Parodi and Plaintiff's motion to enter a default judgment against Defendant Kozuck are granted on default, and it is further,

ORDERED, ADJUDGED and DECLARED that the defaulting Defendants Parodi have no rights under the homeowner's policy of insurance and plaintiff Tower Insurance Company owes no duty to the defaulting Defendants to defend or indemnify Defendants Parodi in the underlying action brought by Defendant Kozuck in the suit entitled *Richard Kozuck v. Harold Parodi and July Parodi*, pending in the Supreme Court of the State of New York, Bronx County, Index No.: 20493/2014, and it is further,

ORDERED, that within 20 days from the date of entry of this order the Plaintiff serve a copy of this Order with Notice of Entry upon all parties, and the Clerk of the Court who is directed to enter judgment accordingly.

ENTER:

Dated: March 15, 2016



MANUEL J. MENDEZ
J.S.C. ~~MANUEL J. MENDEZ~~
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE