Tower Ins. Co. of N.Y. v Seto
2017 NY Slip Op 30072(U)
January 9, 2017
Supreme Court, New York County
Docket Number: 159676/15
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

CHUNG F. SETO, SHI Q. LEI and BENITA RIVERA,

Defendants.

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DECISION, ORDER AND JUDGMENT
Index No. 159676/15
Mot. Seq. No. 001

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION IN SUPPORT	1-2 (Exs. A-G)
SAMUELS AFFIDAVIT IN SUPPORT	3 (Exs. 1-3)
MITCHELL AFFIRMATION IN SUPPORT	4 (Ex. 1)
PLAINTIFF'S MEMO. OF LAW IN SUPPORT	5
DEFENDANTS' NOT. OF CROSS MOTION AND AFF. IN SUPP.	6 (Exs. 1-2)
PLAINTIFF'S REPLY AFFIRMATION	7 (Ex. A)
DEFENDANTS' REPLY AFFIRMATION	8

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Tower Insurance Company of New York ("Tower") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor against defendants Chung F. Seto and Shi Q. Lei (hereinafter collectively "defendants"), declaring that it has no duty to defend or indemnify defendants in the personal injury action commenced against them in an action entitled *Benita Rivera v Chung Fat Seto and Shi Qun Lei*, which case is currently pending under Supreme Court, Kings County Index Number 8636/2015 ("the underlying

action"). Tower also moves, pursuant to CPLR 3215, for a default judgment against defendant Benita Rivera (hereinafter "Rivera"), along with such other relief this Court deems just and proper. Defendants cross-move, pursuant to CPLR 3126, to preclude Tower from offering evidence at trial due to its alleged failure to respond to their combined discovery demands.

After oral argument, a review of the papers presented, and all relevant statutes and case law, this Court **grants** the motion in its entirety and **denies** the cross motion.

FACTUAL AND PROCEDURAL BACKGROUND:

Tower issued a residential dwelling fire policy number DFP2213340 covering the policy period from April 6, 2014 to April 6, 2015 ("the policy"). A copy of the policy is annexed as Exhibit 1to the affidavit of Robert Samuels, a Senior Claims Adjuster for National General Insurance Company, claims administrator for Tower, submitted in support of the motion. The residence premises covered by the policy was listed in the renewal certificate as 151 Hemlock Street, Brooklyn, New York, 11208.

The policy covered amounts defendants became obligated to pay as damages because of "bodily injury . . . caused by an 'occurrence'," which the policy defined, in relevant part, as an "accident." Ex. 1 to Samuels Aff., policy form DL 24 01 07 88, Coverage L - Personal Liability, p. 2; Definitions, p.1, par. 5. The coverage was subject to certain exclusions, one of which applied to any bodily injury claim arising at the premises if defendants did not reside there. The exclusion stated, in pertinent part, that:

> 1. Coverage L -Personal Liability and Coverage M-Medical Payments to Others do not apply to "bodily injury" or "property damage:"
>
> * * *
>
> d. Arising out of a premises:
>
> 1. Owned by an "insured";
>
> 2. Rented to an "insured"; or
>
> 3. Rented to others by an "insured";
>
> That is not an "insured location."

Id., at Exclusions, p. 2, par. 1 (d).

The policy defined "insured location", as it pertains to the facts herein, as the "residence premises." Id., at Definitions, p. 1, par. 4. According to the policy:

> 8. "residence premises" means:
>
> a. The one family dwelling, other structures, and grounds; or
>
> b. That part of any other building;
>
> Where you reside and which is shown as the "residence premises" in the Declarations.
>
> "Residence premises" also means a two, three or four family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations.

Id., at Definitions, p. 1, par. 8.

The policy defined "you" and "your" to mean the "named insured" shown in the declarations. Id., at Definitions, p. 1.

On August 6, 2014, Rivera was allegedly injured when she slipped on an exterior stairwell located at 151 Hemlock Street, Brooklyn, New York. Ex. 2 to Samuels Aff. On or about July 9, 2015, Rivera commenced the underlying action against defendants, the owners of the said premises, by filing a summons and verified complaint in which she alleged that she was injured as a result of their negligence in failing to provide safe steps and a properly maintained handrail. Id.

On July 31, 2015, a Tower claims examiner spoke with Seto by telephone and the latter admitted that he and his family did not live at 151 Hemlock Street on the date of the alleged incident. Samuels Aff., at par. 8. Based on this information, on August 24, 2015, Tower disclaimed coverage on the ground, inter alia, that, since Seto and Lei did not live at the premises on the date of loss, it did not qualify as an "insured location." Samuels Aff., at Ex. 3.

Andrew Mitchell of Bauer Trial Preparation was hired by Tower to investigate the claim on July 31, 2015. Mitchell Aff. Seto, speaking through his daughter, who translated for him, advised Mitchell that he did not live at the premises on the date of the alleged incident and that he and his family last lived there in 2005 or 2006. Mitchell Aff. Mitchell reduced plaintiff's statement to writing and represented, in an affidavit annexed to Tower's motion, that the written statement he recorded accurately reflected what he had been told by Seto. Id. Mitchell issued a written report to Tower on August 25, 2015. Id.

On September 21, 2015, Tower commenced this declaratory judgment action to confirm that it properly disclaimed coverage. Ex. A to Croteau Aff. The complaint in the captioned action seeks a declaration that Tower has no duty to defend or indemnify defendants in the underlying action on the ground that coverage is excluded under the policy because, among other things, defendants did not reside at the premises on the date of the alleged occurrence.

On September 29, 2015, Rivera was served with the summons and complaint. Croteau Aff., at Ex. C. The complaint stated that "Rivera is named in this lawsuit as a party in interest, but there are no allegations against Rivera contained herein." Croteau Aff., at Ex. A, par. 7.

On November 20, 2015, a verified answer to the complaint, with a crossclaim against Rivera, was filed by defendants. Croteau Aff., at Ex. B.

On December 29, 2015, Tower served Seto and Lei with a notice to admit. Items 1 and 2 asked Seto and Lei, respectively, to admit that they did not reside at 151 Hemlock Street, Brooklyn, New York on August 6, 2014, the date on which Rivera was allegedly injured. Croteau Aff., at Ex. F. In their response to the notice to admit, defendants failed to respond to these items. Croteau Aff., at Ex. G.

Tower now moves, pursuant to CPLR 3212, for summary judgment in its favor against defendants seeking a declaration that it has no duty to defend or indemnify defendants in the underlying action. In support of its motion, Tower submits: an attorney affirmation; the pleadings; the affidavit of Mitchell attaching Seto's statement; the affidavit of Samuels annexing the policy, the complaint in the underlying action and Tower's disclaimer; and a memorandum of law. Tower also seeks a default judgment against Rivera due to her failure to answer.

Defendants oppose the motion for summary judgment and cross-move to preclude Tower from introducing evidence at trial on the ground that it failed to respond to their discovery demands.

Tower and defendants each submit a reply affirmation in further support of their motions.

CONTENTIONS OF THE PARTIES:

Tower argues that it is entitled to summary judgment declaring that it is not required to

defend or indemnify defendants in connection with the underlying action. In support of this contention, they maintain that they have demonstrated that defendants did not live at the "residence premises" located at 151 Hemlock Street on the date of the alleged occurrence, thereby invoking an exclusion to the policy. It further asserts that they have demonstrated their entitlement to a default judgment against Rivera since she failed to answer in this action.

In support of their cross motion, defendants argue that Tower must be precluded from offering evidence in support of its motion for summary judgment because it failed to provide responses to their discovery demands. Defendants further assert that, even if Tower is not so precluded, its motion for summary judgment must be denied. In support of this contention, they assert that the signed statement submitted by Seto is not notarized, is redacted, and was translated by Seto's sister. They further assert that discovery in the possession of Tower could result in the denial of the summary judgment motion and that ambiguities in the policy, which should be construed against the drafter, Tower, warrant denial of the motion.

In its reply affirmation, Tower argues that, in his affirmation, defendants' attorney concedes that neither of his clients lived at the premises on the date of the alleged incident. Tower further asserts that, even if the statement made by Seto to Tower's investigator is inadmissible, Tower is entitled to summary judgment based defendants' response to Tower's notice to admit, in which defendants failed to deny that they did not reside at 151 Hemlock Street on the date of the alleged incident. Finally, Tower maintains that defendants have failed to establish how further discovery would lead to the exchange of relevant evidence.

In their reply affirmation, defendants reiterate their contention that Tower's motion is premature and must be denied due to outstanding discovery. They further assert that Tower's

complaint should be stricken based on its failure to provide discovery.

LEGAL CONCLUSIONS:

Summary Judgment Against Defendants Seto and Lei:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v City of New York*, 49 NY3d 557 (1989); *People ex rel Spitzer v Grasso*, 50 AD3d 535 (1st Dept 2008). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v New York Telephone*, 220 AD2d 728 (2d Dept 1985).

> "[T]he construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts." *Marshall v Tower Ins. Co. of NY*, 44 AD3d 1014, 1015 (2d Dept 2007), *quoting Raino v Navigators Ins. Co.*, 268 AD2d 419, 419-20 (2d Dept 2000); *Moshiko, Inc. v Seiger & Smith, Inc.*, 137 AD2d 170 (1st Dept 1988), *affd* 72 NY2d 945 (1988). Moreover, "where the provisions of [an insurance] policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." *Government Empl. Ins. Co. v Kligler*, 42 NY2d 863, 864 (1977).

Castlepoint Ins. Co. v Cantos, 2016 NY Misc LEXIS 4813 (Sup Ct New York County 2016).

That branch of Tower's motion seeking summary judgment against defendants is granted. Pursuant to the terms of the policy issued to defendants by Tower, coverage for liability excludes claims which do not arise at an "insured location." Samuels Aff., at Ex. 1, Exclusions, p. 2, par. 1

(d). The policy defines "insured location", as it pertains to the facts herein, as the "residence premises." Id., at Definitions, p. 1, par. 4. According to the policy, "residence premises" means a "one family dwelling, other structures, and grounds" or [t]hat part of any other building" or a "two, three or four family dwelling" where defendants "reside" and which is "shown as the 'residence premises' in the Declarations." Id., at Definitions, p. 1, par. 8.

Tower has made a prima facie showing to its entitlement to summary judgment by establishing that defendants did not reside at the premises in question and thus properly invoked the exclusion above. Initially, Seto admitted in a written statement that he did not reside at the premises. Ex. 1 to Mitchell Aff. Although Seto's statement is unsworn, it is attached to Mitchell's affidavit and Mitchell attests to the fact that Seto made the admission in question, in his presence through a translator. It is well-settled that admissions by a party of a fact material to the litigation constitute competent evidence against that party. *See Tower Ins. Co. of N.Y. v Kravtchouk*, 21 Misc3d 1137 (Sup Ct New York County 2008), citing *Reed v McCord*, 160 NY 330, 341 (1899).[1]

Although Seto's statement only established that he did not reside at 151 Hemlock Street on the date of the alleged incident, defendants' response to Tower's notice to admit establishes that neither he nor Lei resided at the premises at that time. Exs. F and G to Croteau Aff. As noted above, Items 1 and 2 of Tower's notice to admit asked Seto and Lei, respectively, to admit that they did not reside at that address on August 6, 2014. Croteau Aff., at Ex. F. In their response to the notice to admit, defendants failed to respond to Items 1 and 2. Croteau Aff., at Ex. G. Since a failure to respond to a notice to admit constitutes an admission, defendants thus admitted that they did not

[1]Although defendants maintain that the Seto's statement was improperly redacted, this Court requested an unredacted copy of the same from defendants' attorney and confirms that no redacted material relates to the issues raised by this motion.

reside at the said location on that date. *See* CPLR 3123(a). Indeed, defendants concede that "[b]ased on the admissible evidence, the only thing that [Tower] has established, is that defendants did not reside at the subject premises on the date of the alleged accident..." Woolfson Aff., at par. 13.

Default Against Rivera:

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial. . ., the plaintiff may seek a default judgment against him [or her]." On such a motion, "the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011); *see Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

Here, Tower established that proper service was made on Rivera by submitting an affidavit of service. Croteau Aff., at Ex. C. Proof of the facts constituting the claim was submitted by Tower via its verified complaint. Croteau Aff., at Ex. A. Further, Tower established that Rivera failed to answer the complaint by submitting the affidavit of its attorney, Croteau. Croteau, Aff., at par. 30. Thus, Tower has established its entitlement to a default judgment against Rivera.[2]

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[2]As noted above, although Rivera was named as a defendant party in interest, there were no specific allegations made against her in the complaint. Croteau Aff., at Ex. A, par. 7.

Cross Motion To Preclude By Seto and Lei:

Since summary judgment is granted to Tower, defendants' cross motion necessarily fails. In any event, defendants fail to explain how any of the discovery which they claim is outstanding has any relevance to the insurance coverage issues raised herein.[3] Further, although they claim that "other interpretations" of the policy are "clearly possible", they do not elaborate on this contention and thus fail to persuade this Court that summary judgment is premature or that an issue of fact exists precluding summary judgment in Tower's favor. *See Tower Ins. Co. of N.Y. v Brown*, 130 AD3d 545 (1st Dept 2015).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Tower Ins. Co. of New York seeking a declaratory judgment as against defendants Chung F. Seto and Shi Q. Lei is granted; and it is further,

ORDERED, ADJUDGED AND DECLARED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendants Chung F. Seto and Shi Q. Lei in the personal injury action commenced against them in the Supreme Court, Kings County entitled *Benita Rivera v Chung Fat Seto and Shi Qun Lei*, which case is currently pending under Supreme Court, Kings County Index Number 8636/2015; and it is further,

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[3]This Court also notes that, on May 24, 2016, Tower responded to defendants' combined discovery demands and provided a bill of particulars.

ORDERED that the branch of the motion by plaintiff Tower Ins. Co. of New York seeking a default judgment as against defendant Benita Rivera is granted; and it is further,

ORDERED that the cross motion by defendants Chung F. Seto and Shi Q. Lei is denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: January 9, 2017

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT