

<b>CastlePoint Ins. Co. v Bowford</b>
2018 NY Slip Op 32271(U)
September 12, 2018
Supreme Court, New York County
Docket Number: 153064/2015
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

CASTLEPOINT INSURANCE COMPANY

INDEX NO. 153064/2015

- v -

MOT. DATE

MARSHALET BOWFORD et al.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Replying Affidavits

NYSCEF DOC No(s). \_\_\_\_\_

This is a declaratory judgment action. Plaintiff CastlePoint Insurance Company ("CastlePoint") moves for an order granting it summary judgment against Defendants, Marshalet Bowford and Carolyn Burke, declaring that CastlePoint has no obligation to defend or indemnify Bowford in the underlying personal-injury action entitled Carolyn Burke v. Marshalet Bowford, pending in the Supreme Court of the State of New York, Westchester County, under Index No. 71303/2014 (the "underlying action"). Defendant Burke opposes the motion and cross-moves for an order striking CastlePoint's pleadings for failure to provide a response to defendant's notice to produce dated November 24, 2015. The court has not received any opposition from Bowford, despite notice and an opportunity to respond. Plaintiff opposes the cross-motion.

In an interim order dated August 1, 2017, the court noted that it received correspondence from the parties and directed the parties to file affirmations on or before August 25, 2017 addressing the issue of whether plaintiff was subject to a certain Liquidation Order (see order dated 8/1/17). Due to an inadvertent calendar error, this motion was not properly marked submitted until August 7, 2018.

Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

In the underlying action, Burke seeks damages for personal injuries she sustained when she slipped and fell at the premises owned by Bowford and located at 34 Orchard Street, Yonkers, NY 10703 (the "premises") on February 3, 2014.

The policy

CastlePoint issued Policy No. HOS1358817 to Bowford for the premises for the period commencing July 1, 2013 through July 1, 2014 (the "policy"). The policy, which has been provided to the court,

Dated: 9-12-18

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, 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

Provides homeowners' insurance coverage to Bowford for the premises.

CastlePoint contends that it is not obligated to defend or indemnify Bowford in the underlying action based upon the policy's "insured location" exclusion. The policy defines "insured location" as follows:

- a. The "residence premises;"
- b. The part of other premises, other structures and grounds used by you as a residence and:
  - (1) Which is shown in the Declarations; or
  - (2) Which is acquired by you during the policy period for your use as a residence;
- c. Any premises used by you in connection with a premises in 4.a. or 4.b. above;
- d. Any part of a premises:
  - (1) Not owned by an "insured;" and
  - (2) Where an "insured" is temporarily residing;
- e. Vacant land, other than farm land, owned by or rented to an "insured;"
- f. Land owned by or rented to an "insured" on which a one to four family dwelling is being built as a residence for an "insured;"
- g. Individual or family cemetery plots or burial vaults of an "insured;" or
- h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

The policy further defines "Residence premises" as follows:

- 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 family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations.

SECTION II - LIABILITY COVERAGES further provides as follows:

**COVERAGE L - Personal Liability**

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate.

COVERAGE M - Medical Payments to Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury." Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household except "residence employees." As to others, this coverage applies only:

1. To a person on the "insured location" with the permission of an "insured"...

Form HO 00 02 04 91, Personal Liability, also contains certain Exclusions which provide in pertinent part as follows:

EXCLUSIONS

1. Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to "bodily injury" or "property damage":

...

c. Arising out of the rental or holding for rental of any part of any premises by an "insured." This exclusion does not apply to the rental or holding for rental of an "insured location":

(1) On an occasional basis if used only as a residence;

(2) In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

(3) In part, as an office, school, studio, or private garage;

...

e. 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";

SECTIONS I AND II - CONDITIONS of Endorsement Form HO 01 31 04 09 -SPECIAL PROVISIONS - NEW YORK, further provides as follows:

CONDITIONS

H. Concealment Or Fraud

We do not provide coverage for the "insured" who, whether before or after a loss, has:

1. Intentionally concealed or misrepresented any material fact or circumstance; or
2. Engaged in fraudulent conduct; relating to this insurance. \* \* \* \* \*

#### The underlying action and disclaimer

The underlying action was commenced on December 17, 2014. According to a letter dated February 13, 2015 from CastlePoint to Bowford, CastlePoint was disclaiming coverage in connection with the underlying action after it received a copy of the complaint in the underlying action (the "disclaimer"). The disclaimer states in pertinent part as follows:

On your application for insurance, you indicated that the subject premises was a two family home. Our investigation indicates that the subject premises is a three family home. Had we known that the premises was a three family home we would not have issued the subject policy. Accordingly, your representation concerning the number of units was material. Since you misrepresented a material fact relating to this insurance, no coverage is available under the policy as set forth in the above-cited provisions for this additional reason

CastlePoint has provided to the court a copy of Bowford's application for insurance in connection with the policy. The application indicates that the premises is a two family dwelling which is owner occupied. The application further includes a statement above the applicant's signature line which states:

I HAVE READ THE ABOVE APPLICATION AND ANY ATTACHMENTS. I DECLARE THAT THE INFORMATION IN THEM IS TRUE, COMPLETE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. THIS INFORMATION IS BEING OFFERED TO THE COMPAY AS AN INDUCEMENT TO ISSUE THE POLICY FOR WHICH I AM APPLYING.

CastlePoint has also provided the sworn affidavit of Suzanne Knudsen, a Senior Injury Claim Representative for National General Insurance Company, CastlePoint's claims administrator. Knudsen details CastlePoint's investigation into the underlying action and the premises. According to Knudsen, after CastlePoint received a copy of the summons and complaint in the underlying action, it retained Franklin Insurance Adjustors, Inc. ("Franklin") to act as its independent adjuster on or about January 6, 2015.

CastlePoint has also provided the sworn affidavit of Craig Wheeler, a field adjuster employed by Franklin, which is based upon his review of Franklin's records. Wheeler claims that Franklin assigned the investigation into the underlying action to Adolfo Laborde, who is no longer employed by Franklin. According to Wheeler, the premises is a three-family dwelling with two levels above-grade, a basement and a sub-basement. "Each level of the Premises has a separate residence and each residence has a separate electric meter." Wheeler further maintains that Bowford informed Laborde on January 12, 2015 in a recorded statement that "she resides with her husband in the basement level of the premises and rents the two apartments above on the first and second floors to tenants." Wheeler has also provided a copy of a transcript of a statement made by Bowford's husband, Donovan Scott, who confirms that the premises was a three-family dwelling on the date of loss.

Finally, CastlePoint has provided copies of two notices to admit served on Bowford which Bowford failed to respond to. According to same, CastlePoint maintains that Bowford has admitted, *inter alia*, that on the date of loss there were three separate residences at the premises.

#### Parties' arguments

CastlePoint argues that there is no coverage under the policy for the underlying action because Burke's alleged personal injuries did not occur at an "insured location" as that term is defined by the

policy. In turn, Burke argues that CastlePoint's motion should be denied because CastlePoint "has wholly failed to respond to outstanding discovery demands and to conduct outstanding depositions that are necessary for the defendants to defend this claim."

Substantively, Burke maintains that CastlePoint has failed to demonstrate that Bowford "in any way, much less fraudulently, misrepresented who was living at the premises." Specifically, Bowford contends that the application was truthful since the two other tenants that reside at the premises are mother and daughter, therefore, "Bowford and another family, two in total, reside on the premises." Finally, Burke contends that CastlePoint's disclaimer is untimely.

## Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

An insurance policy is a contract subject to rules of contract interpretation (*Universal Am. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). Therefore, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v. Continental Cas. Co.*, 9 NY3d 264, 267, [2007]). The party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]).

At the outset, the court rejects Burke's argument that outstanding discovery can defeat CastlePoint's motion. Summary judgment is premature when "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). Burke cannot point to what item of discovery not presently in her possession and, importantly, in CastlePoint's possession, would enable her to oppose the motion-in-chief. Therefore, summary judgment is not premature.

Next, the court finds that CastlePoint's motion must be granted. Contrary to Burke's counsel's contention, CastlePoint has established that the application for insurance upon which the policy was granted contained a material misrepresentation of fact. On this record, CastlePoint has established that the Premises was not a "residence premises" as defined by the policy on the date of loss. To wit, the policy defines "residence premises" as "a two family dwelling where you reside in at least one of the family units." Here, the Premises contained three separate dwelling units on the Date of Loss. Therefore, CastlePoint has established that the underlying action did not arise from a personal injury arising out of a "residence premises."

In turn, Burke has failed to raise a triable issue of fact on this point. It is of no moment whether the dictionary would define Bowford's tenants as a family, when it is undisputed that there were three separate residences at the premises.

Lastly, Burke's argument that the disclaimer is untimely must be rejected, since CastlePoint has established that the policy did not provide coverage in connection with the underlying action (see *State Farm & Cas. Co. v. Guzman*, 138 AD3d 503 [1st Dept 2016]).

Accordingly, CastlePoint's motion for summary judgment is granted in its entirety.

In light of the foregoing, the balance of the cross-motion which seeks to strike and/or compel is denied as moot.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that CastlePoint's motion for summary judgment is granted in its entirety; and it is further

**ORDERED and DECLARED** that CastlePoint has no obligation to defend or indemnify Defendant, Marshalet Bowford in the underlying personal-injury action entitled Carolyn Burke v. Marshalet Bowford, pending in the Supreme Court of the State of New York, Westchester County, under Index Number 71303/2014; and it is further

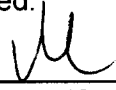
**ORDERED** that the cross-motion is denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

9/17/18  
New York, New York

So Ordered:

  
Hon. Lynn R. Kotler, J.S.C.