

Castlepoint Ins. Co. v Kum

2018 NY Slip Op 32275(U)

August 20, 2018

Supreme Court, New York County

Docket Number: 156638/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 156638/2016

CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ELSA KUM, TAMALA JONES, an Infant by her Father and Natural
Guardian, THOMAS JONES, and THOMAS JONES, individually,

DECISION, ORDER AND
JUDGMENT

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14,
15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40
were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this declaratory judgment action, plaintiff Castlepoint Insurance Company (“Castlepoint”) moves, pursuant to CPLR 3212, for an order granting summary judgment on its first four causes of action against defendants Elsa Kum (“Kum”), Tamala Jones (“Tamala”), an infant, by her father and natural guardian Thomas Jones (“Jones”), and Jones individually (collectively “defendants”), declaring that Castlepoint has no duty to defend or indemnify Kum or to provide “medical payments to others” coverage to Tamala and Jones in an underlying personal injury action styled *Tamala Jones, An Infant by her Father and Natural Guardian, Thomas Jones, and Thomas Jones, Individually v The City of New York and Elsa Kum*, filed in the Supreme Court of the State of New York, Kings County under Index Number 508476/16 (“the underlying action”), and for such other and further relief as this Court deems just and proper. After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

The issue raised on this motion is whether Castlepoint is entitled to a declaration that it is not obligated to defend or indemnify Kum or to provide “medical payments to others” coverage to Tamala and Jones in connection with the underlying action. In the underlying action, Tamala and Jones alleged that, on March 3, 2015, Tamala slipped and fell (“the alleged incident”) at 426 East 35th Street, Brooklyn, New York (“the premises”) due to the negligence of The City of New York and Kum. Doc. 18.¹

Castlepoint issued a renewal homeowners policy (“the policy”) (policy number EHP1210015) to Kum for the residence located at the premises for the period of August 7, 2014 until August 7, 2015. Doc. 20. The policy described the premises as an owner occupied three family home located at 426 East 35th Street, Brooklyn, New York. Id. The declarations page of the policy reflected that the “residence premises” was the home at that location. The policy had a personal liability limit of \$300,000 and a “medical payments to others” limit of \$5,000. Doc. 12, at par. 5 and Ex. 1.

The policy obligated Castlepoint to pay its insured, Kum, for damages for which she was legally liable as a result of “‘bodily injury’ . . . caused by an ‘occurrence’”, which the policy defined, as is relevant herein, as an “accident.” Doc. 12, at Ex. 1.

Certain exclusions in the policy limited Kum’s coverage. One such exclusion applied to any claim for bodily injury arising at premises owned by Kum which were not an “insured location.” The policy defined “insured location”, in pertinent part, as follows:

4. “Insured location” means:
 - a. The “residence premises”;
 - b. The part of other premises, other structures and grounds used by you as a residence and:

¹ All references are to the documents filed with NYSCEF in this matter.

- (1) Which is shown in the Declarations; or
- (2) Which is acquired by you during the policy period for you as a residence;

Doc. 12, at Ex. 1, Policy Form HO 00 03 04 91.

The policy defined "residence premises" as follows:

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 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.

The policy also contained the following endorsement:

THREE OR FOUR FAMILY DWELLING

For an additional premium, the definition of "residence premises" is amended to include the three or four family dwelling described in the Declarations of this policy.

All other provisions of this policy apply.

Id.

The section of the policy covering personal liability states, in pertinent part, as follows:

SECTION II – LIABILITY COVERAGES

COVERAGE E – 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”;

* * *

COVERAGE F – 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.”

Id.

The policy contained the following exclusions:

SECTION II - EXCLUSIONS

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

* * *

b. Arising out of or in connection with a “business” engaged in by an “insured.” This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promises, owed or implied to be provided because of the nature of the “business”;

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”;

Id.

Castlepoint received notice of the alleged incident on or about May 12, 2015, assigned the matter claim number 15C1227-01 (later amended to claim number 6424444) and immediately began an investigation. Doc. 12, at pars. 11-12. On May 13 and 14, 2015, Castlepoint sent Kum correspondence acknowledging receipt of the claim. Id., at par. 13. On May 27, 2015, Castlepoint assigned a company called DJH to investigate the claim. Doc. 12, at par. 14; Doc. 26, at par. 4. The investigation, by Yant Suarez of DJH, revealed that Kum resided at 1304 New York Avenue, Unit 5A, Brooklyn, New York 11203 and had a telephone number at that address. Doc. 12, at pars. 15-16; Doc. 26, at par. 6. Suarez called Kum at that number and arranged to meet her at the premises on June 6, 2015. Doc. 12, at pars. 17-18; Doc. 26, at pars. 7-8. Suarez arrived early for the meeting on June 6 and saw Kum arrive on foot and knock on the basement door of the premises since it appeared that she did not have keys. Doc. 12, at par. 19; Doc. 26, at par. 9. During his meeting with Kum, Suarez photographed her New York State driver’s license, which reflected that her address was at 1304 New York Avenue in Brooklyn. Doc. 12, at par. 20; Doc. 26, at par. 10

and Ex. 1. Kum admitted during the meeting that she had resided at 1304 New York Avenue since 2012, including on the day of the alleged incident, and that her personal belongings were at that address. Doc. 12, at pars. 21, 22; Doc. 26, at pars. 11, 12.

On June 9, 2015, Suarez went to 1304 New York Avenue and conducted interviews with several residents who advised him that Kum resided full time at that address. Doc. 12, at par. 24; Doc. 26, at par. 14.

DJH sent a written report to Castlepoint based on Suarez's investigation. Doc. 12, at par. 26; Doc. 26, at par. 16. Then, on August 4, 2015, Castlepoint sent Kum a letter disclaiming on the ground that the premises did not meet the policy's definition of a "residence premises" since she did not reside at the premises on the date of the alleged incident and, thus, it was not an "insured location." Doc. 12, at par. 27 and Ex. 4. The disclaimer also stated that the premises was not an insured location because the policy was written as a three family owner occupied residence and there were 4 units. *Id.* Further, Castlepoint maintained that the premises was not a "residence premises" because all four residential units were rented out by Kum. *Id.* Further, the disclaimer was based on the policy's exclusion for bodily injury arising at premises owned by an insured, such as Kum, and rented to others, that is not an "insured location." *Id.*

Castlepoint thereafter obtained the summons and complaint in the underlying action, in which Tamala and Jones alleged that Tamala was injured at the premises as the result of a slip and fall. Doc. 12, at p. 28 and Ex. 5.

On July 5, 2016, Castlepoint wrote to Kum to reiterate its disclaimer and to advise her that the company would provide her with a defense in the underlying action pending the outcome of a declaratory judgment action commenced to determine the propriety of the disclaimer. Doc. 12, at par. 29 and Ex. 6.

Castlepoint commenced this action against defendants by filing a summons and complaint on August 9, 2016. Docs. 1, 14. As a first cause of action, Castlepoint alleged that it had no duty to defend or indemnify Kum for any claims made against her in the underlying action since the premises do not constitute a “residence premises” or an “insured location” under the policy. *Id.* As a second cause of action, Castlepoint asserted that it had no duty to defend or indemnify Kum for claims made against her in the underlying action since the policy did not provide personal injury coverage, or medical payments to others coverage, for bodily injury arising from the rental of a premises which is not an “insured location.” *Id.* As a third cause of action, Castlepoint alleged that it had no duty to defend or indemnify Kum, or to provide coverage for claims made against her in the underlying action, since the premises did not qualify as a “residence premises” or “insured location” as defined by the policy. *Id.* As a fourth cause of action, Castlepoint alleged that it had no duty to defend or indemnify Kum for claims made against her in the underlying action because the policy did not provide personal liability coverage for bodily injury arising out of a premises “owned by an insured” or “rented to others by an insured” that is not an “insured location.” *Id.* As a fifth cause of action, Castlepoint alleged that, when Kum applied for coverage, she misrepresented that the premises was her primary residence and that it was a three family dwelling. *Id.*

Kum joined issue by service of her answer filed September 1, 2006. Docs. 7, 15. Tamala and Jones joined issue by service of their answer filed January 17, 2017. Docs. 8, 16.

On or about January 20, 2017, Castlepoint served a notice to admit on Kum asking that she admit or deny the following statement: “[o]n March 3, 2015, [d]efendant, Elsa Kum did not reside at the premises located at 426 E. 35th Street, Brooklyn, NY 11203.” Doc. 19. The parties do not dispute that Kum failed to respond to the notice to admit.

On September 28, 2017, Castlepoint filed the instant motion seeking summary judgment on its first four causes of action. Docs. 10-27. Defendants oppose the motion.

LEGAL CONCLUSIONS:

"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 New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); *People ex rel Spitzer v Grasso*, 50 AD3d 535, 858 N.Y.S.2d 23 (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), *aff'd* 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).

The complaint in the underlying action alleges that Tamala was injured at the premises. However, the policy does not provide coverage for Kum's personal liability arising at a premises that is not an "insured location." Nor does the policy provide medical payments to others coverage for bodily injury arising at a premises which is not an "insured location." On the contrary, the policy clearly excludes claims "arising out of premises ... owned by an 'insured' ... rented to others by an 'insured' ... that is not an 'insured location.'" "[I]nsured location" includes "residence premises," which the Policy defines as 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."

The foregoing provisions clearly required Kum to reside at the premises as a condition of coverage. Since Castlepoint's investigation established that Kum did not live there, Castlepoint established its prima facie entitlement to summary judgment on its first four causes of action. *See Tower Ins. Co. of NY v Hossain*, 145 AD3d 556 (1st Dept 2016) (plaintiff insurer established its prima facie entitlement to summary judgment by submitting affidavit of investigator stating the insured admitted she did not live at the insured premises as of the date of the accident); *Tower Ins. Co. of NY v Brown*, 130 AD3d 545 (1st Dept 2015) (insurer entitled to summary judgment based on affidavit of its claims adjuster stating that he spoke with insured, who admitted that he did not reside at premises when the incident occurred, as required by the policy) citing *Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1278 (4th Dept 2005).

In an attempt to defeat Castlepoint's motion by creating an issue of fact, Kum submits an affidavit in which she states, inter alia, that the premises are her primary residence but that she frequently stays with her elderly ailing sister at 1304 New York Avenue in Brooklyn. Doc. 37. However, this affidavit is insufficient to raise an issue of fact given that Kum has already admitted, by failing to respond to the notice to admit served by Castlepoint (Doc. 19), that she did not reside

at the premises as of the date of the alleged incident. CPLR 3123(a). Given that Kum has already admitted this fact, she cannot now submit an affidavit containing different facts to avoid the consequences of her prior admission. *See Garzon-Victoria v Okolo*, 116 AD3d 558 (1st Dept 2014).

Kum's attorney claims that there was no response to the notice to admit because it was "inadvertently misplaced" (Kum Aff. In Opp., at par. 10). However, this does not warrant a different result. Although "the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just" (CPLR 3123[b]), Kum made no attempt to amend or withdraw her admission until she was faced with this motion approximately eight months after the notice to admit was served. Kum's attorney does not even state when he first received the notice to admit or discovered that it had been misplaced.

Kum also asserts that the notice to admit was improper because it addressed an ultimate issue in the case. This Court disagrees. The notice to admit simply asked Kum to admit or deny that she lived at the premises on the date of the alleged incident. It did not ask her to admit or deny whether she was entitled to coverage under the Castlepoint policy, which, by definition, is the ultimate factual issue in this declaratory judgment action.

Kum further asserts that the motion must be denied because "the policy does not require that the premises be her 'primary residence' but merely her 'residence' which implies that coverage is provided by the policy if [the premises] is one of [her] residences." Kum Aff. In Opp., at par. 15. However, since Suarez's investigation revealed that Kum did not reside at the premises, but was rather a permanent resident of 1304 New York Avenue, Brooklyn, New York, this claim is without merit. Indeed, in addition to failing to respond to the notice to admit, thereby admitting that she did not reside at the premises, Kum admitted to Suarez that she had been living at the New York Avenue address since 2012, including on the date of the alleged incident. The Court further

notes that Suarez contacted Kum at a telephone number which was associated with her 1304 New York Avenue address and that Kum produced a driver's license listing the same New York Avenue address. Also, Suarez reported that Kum told him she did not keep any personal items at the subject address nor did she have utility bills in her own name for the subject address. (Suarez Aff. Doc 13. Paras 6-13). Thus, Castlepoint established its prima facie entitlement to summary judgment, which was not rebutted by Kum's vague and self-serving statements that she sometime resides at the subject premises.

Castlepoint does not seek summary judgment on its fifth cause of action which, as noted above, alleged that Kum improperly procured the policy based on certain misrepresentations. However, this claim is duplicative insofar as it essentially seeks the same relief as the first four causes of action, i.e., a declaration that Castlepoint has no duty to defend or indemnify Kum for any claims made against her in connection with the underlying action. Since Castlepoint is being awarded this relief on the first four causes of action, the fifth cause of action is therefore academic and need not be addressed by this Court.

In light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Castlepoint Insurance Company seeking summary judgment on its first through fourth causes of action seeking a declaratory judgment as against defendants Elsa Kum, Tamala Jones, an infant, by her father and natural guardian Thomas Jones, and Thomas Jones individually, declaring that Castlepoint has no duty to defend or indemnify Kum or to provide "medical payments to others" coverage to Tamala Jones and Thomas Jones in the personal injury action styled *Tamala Jones, An Infant by her Father and Natural Guardian, Thomas Jones, and Thomas Jones, Individually v The City of New York and Elsa Kum*, filed in the

Supreme Court of the State of New York, Kings County under Index Number 508476/16, is granted; and it is further,

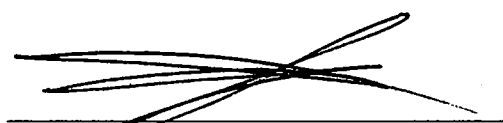
ORDERED, ADJUDGED AND DECLARED that plaintiff Castlepoint Insurance Company has no duty to defend or indemnify defendant Elsa Kum or to provide "medical payments to others" coverage to Tamala Jones and Thomas Jones pursuant to Castlepoint policy number EHP1210015, claim number 6424444 in the personal injury action styled *Tamala Jones, An Infant by her Father and Natural Guardian, Thomas Jones, and Thomas Jones, Individually v The City of New York and Elsa Kum*, which case is currently pending in the Supreme Court of the State of New York, Kings County under Index Number 508476/16; and it is further,

ORDERED that, in light of the relief granted above, the fifth cause of action asserted by plaintiff Castlepoint Insurance Company is rendered academic; and it is further,

ORDERED that plaintiff Castlepoint Insurance Company shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further

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

8/20/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE