

<b>Tower Ins. Co. of N.Y. v Kreft</b>
2018 NY Slip Op 32786(U)
October 30, 2018
Supreme Court, New York County
Docket Number: 158967/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

LAURA E. KREFT, PAUL KREFT, ALLA  
LIPINA-SKYBA, as Administrator of the Goods,  
Chattels and Credits which were of OLYA LPINA  
Deceased, and ALLA LIPINA-SKYBA, Individually,

Defendants.

-----X  
ALLSTATE INSURANCE COMPANY,

Plaintiff,

-against-

TOWER INSURANCE COMPANY OF NEW YORK,  
LAURA E. KREFT, PAUL KREFT, ALLA  
UPINA-SKYBA, as Administrator of the Goods,  
Chattels and Credits which were of OLYA LIPINA  
Deceased, and ALLA LIPINA-SKYBA, Individually,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.:

**MEMORANDUM DECISION**

This is an action for declaratory judgment. Plaintiff, Tower Insurance Company of New York (Tower), now moves pursuant to CPLR 3212 for summary judgment on its complaint, which seeks a declaration that Tower has no duty to defend defendants Laura E. Kreft and her son, Paul Kreft (the Krefts), in an underlying action entitled *Alla Lipina-Skyba, as Administrator of the Goods, Chattels and Credits which were of Olya Lipina Deceased, and Alla Lipina-Skyba, individually v. Laura Edith Kreft, Daniel Finer, Linda Finer, Paul Kreft (formally Doe #1) and*

*Does 1-100*, pending in the Supreme Court, State of New York, County of Kings, index number 509980/2016 (underlying action), and dismissing the complaint of the intervening plaintiff, Allstate Insurance Company (Allstate). Allstate cross-moves, pursuant to CPLR 3212, for summary judgment of its complaint, declaring that Tower must defend and indemnify the Krefts in the underlying action, and that the Allstate Personal Umbrella Policy (Allstate policy) provides excess coverage to the Krefts over the homeowner's insurance policy issued to Laura Kreft by Tower.

*Factual Background*

The instant litigation arises out of the July 10, 2014 death of Olya Lipina (Lipina). Lipina drowned in a swimming pool at the premises owned by Laura Kreft, located at 23 Wakeman Road, Hampton Bays, New York (the premises). The amended complaint in the underlying action alleges that the Krefts, among others, were negligent in permitting or causing Lipina to consume liquor, alcohol and/or ethanol resulting in her intoxication and, in her intoxicated state, permitting her to use the swimming pool located on the premises (Berberich Aff., Underlying Compl., Ex. E, ¶¶24-38). The underlying complaint also alleges that the Krefts, among others, failed to seek appropriate aid or assistance for Lipina (*id.*, ¶44). According to Allstate's affirmation in opposition, Lipina was at the premises as a guest of Paul Kreft when she drowned (Berberich Aff., ¶3).

Prior to the incident, Tower issued a homeowner's policy to Laura Kreft in connection with the premises, bearing policy number 1001 and effective, as relevant here, from June 14, 2014 through June 14, 2015 (the policy). The policy contains a personal liability coverage, part of which covers those sums that the insured becomes legally obligated to pay as damages because of "bodily injury . . . caused by an 'occurrence' to which this coverage applies" (Bracho Aff., Ex. 1, Policy, Section II - Liability Coverages, 12).

On or about June 16, 2016, Tower received its initial notice of the incident. On that date, Laura Kreft notified Tower of the suit against her and requested defense and indemnification pursuant to the terms of the policy.

On August 26, 2016, Tower disclaimed coverage under the policy. The disclaimer advised that, among other things, because Laura Kreft did not reside at the premises on the date of loss, it did not qualify as an "insured location" (Bracho Aff., Ex. 4). Further, the disclaimer letter advised that Laura Kreft breached the policy's condition to coverage by failing to notify Tower of the incident as soon as reasonably possible. On October 12, 2016, Tower disclaimed coverage to Paul Kreft citing the same basis of Tower's disclaimer to his mother (*id.*, Ex. 7).

Tower thereafter commenced this action to confirm the propriety of its disclaimers. In its complaint seeking judgment declaring that it has no duty to defend or indemnify the Krefts in the underlying action, Tower first alleges that the property where the incident took place was not an "insured location" (Compl., ¶¶6-17). Tower further alleges that the policy required that Laura Kreft and/or Paul Kreft notify Tower as soon as reasonably possible of any occurrence that may result in a claim, but that the Krefts failed to notify Tower of the incident until almost two years after, resulting in prejudice against Tower (*id.*, ¶¶18-28).

Thereafter, Laura Kreft's excess carrier, Allstate, moved, and this Court granted, Allstate's motion to intervene as a plaintiff in the instant action. Allstate filed an intervening complaint dated May 3, 2017, seeking, *inter alia*, judgment declaring that Tower is obligated to defend and indemnify the Krefts in the underlying action and that Allstate is not obligated to indemnify the Krefts in the underlying action until the Tower policy has been exhausted.

Although Tower denied and disclaimed coverage for the underlying action, Tower agreed to provide the Krefts with a defense until the court relieved Tower of any obligation to defend or indemnify them.

*Tower's Motion*

In support of its motion, Tower first argues that it owes no duty to defend or indemnify the Krefts in the underlying action, since the policy does not provide liability coverage for accidents occurring at the premises if the named insured does not reside there, and that Laura Kreft, the named insured, did not reside at the premises on the date of the incident. Tower further argues that it owes no duty to defend or indemnify Krefts, as they breached a condition to coverage by failing to notify Tower of the incident as soon as reasonably possible. Specifically, Tower contends that Laura Kreft's failure to notify Tower of the incident until two years after, despite being aware of the incident on the date of occurrence, was prejudicial against Tower. Tower further argues that Allstate's intervening complaint against Tower should be dismissed, since Tower does not owe a duty to provide coverage to the Krefts.

*Allstate's Opposition and Cross-Motion<sup>1</sup>*

In opposition to Tower's motion and in support of its cross-motion,<sup>2</sup> Allstate argues that the Krefts are entitled to coverage, since the premises is an "insured location" pursuant to the

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<sup>1</sup> The court notes that on July 11, 2018, counsel for Laura Kreft filed a document, without prior court approval, entitled "Supplemental Affirmation in Opposition," which was filed separately from, and in addition to her opposition to Tower's motion. The next day, and one day before the return date of Tower's motion, defendant Lipina Skyba filed an Affirmation in Opposition. Thereafter, counsel for Tower filed the July 18, 2018 letter requesting that the Kreft and Skyba's filings not be considered by the court. On August 1, 2018, counsel for Kreft, Skyba and Allstate filed a letter in opposition to Tower's request. On August 15, 2018, the court sent an e-mail to the parties permitting the submissions and permitting Tower to respond to both submissions.

<sup>2</sup> Laura Kreft and Lipina Skyba (Skyba) adopt and incorporate the factual contentions and legal arguments within the Allstate attorney's, Karen Berberich, Esq., affirmation in opposition to Tower's summary judgment motion and in support of Allstate's cross-motion for summary judgment and Allstate's Memorandum of Law (Balzano Aff., ¶15; Grinsberg Aff., ¶13).

policy. Specifically, Allstate contends that Laura Kreft was using the property as a residence at the time of the incident. Allstate further contends that Laura Kreft resided both at the premises, and at her home located in Queens, New York. Moreover, Allstate contends that the Tower policy itself identifies the premises as the “residence premises” under the policy. In further support of its argument, Allstate contends that Paul Kreft maintained the premises and visited the premises on four occasions from June 2014 through August 2014. Next, Allstate argues that the underlying claims against the Krefts did not arise out of the property. Allstate contends that the exclusion upon which Tower relies excludes coverage for bodily injury “arising out a property,” but that the underlying complaint does not allege that the incident was caused by the Krefts’ failure to maintain the property or that they allowed a dangerous condition to exist on the property.

Further, Allstate argues that Laura Kreft did not give Tower late notice of the incident. Allstate claims that Laura Kreft did not notify Tower of the “accident sooner because she was told by police that the death was an accident and not anyone's fault” (Berberich Aff., ¶62). As such, Allstate claims that she had no reason to believe that a claim would be filed against her or that she might be blamed for the accident. Additionally, Allstate argues that even if the claim was untimely, Tower has not shown that it has been prejudiced or denied any ability to thoroughly investigate the claim.

#### *Discussion*

“Summary judgment must be granted if the proponent makes ‘a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

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The court notes that while counsel for Laura Kreft requests that the court set “down this matter for a hearing to determine the consequential damages and attorney’s fees incurred” by Kreft to defend this action (Ginsberg Aff., ¶¶5-6), in her affirmation in opposition, she has not cross-moved for such relief. Thus, her request is defective and not considered by the court.

absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, " 'regardless of the sufficiency of the opposing papers' " (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

"Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Cragg v Allstate Indent. Corp.*, 17 NY3d 118, 122 [2011]). "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citations omitted]). Courts "may not make or vary the contract of insurance to accomplish [their] notions of abstract justice or moral obligation" (*Teichman by Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520 [1996], quoting *Breed v. Insurance Co.*, 46 N.Y.2d 351, 355 [1978]).

"The standard for determining residency for purposes of insurance coverage requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain" (*Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704 [2012], quoting *Gov't Employees Ins. Co. v. Paolicelli*, 303 A.D.2d 633, 633 [2d Dept 2003]; see *Allstate Ins. Co. v. Rapp*, 7 A.D.3d 302, 303 [1st Dept 2004]; *A. Cent. Ins. Co. v. Williams*, 105 A.D.3d 1042, 1043 [2d Dept 2013] ["residency in [the insurance coverage] context generally entails something more than mere temporary or physical presence, and requires some degree of permanence and intention to remain"]). Further, a person may have more than one residence for

purposes of insurance coverage (*Hochhauser v. Elec. Ins. Co.*, 46 AD3d 174, 844 [2d Dept 2007]; *Allstate Ins. Co.*, 7 AD3d at 303).

Here, Tower makes a *prima facie* showing of entitlement to summary judgment by demonstrating that the Tower policy unambiguously requires that the named insured, Laura Kreft, reside at the premises in order to receive coverage under the policy, but that she did not reside at the premises at the time of the incident. Moreover, since the Tower policy clearly requires the named insured resides at the subject premises, the inquiry is focused on Laura Kreft and any arguments as to Paul Kreft's residence at the premises are irrelevant.

As relevant herein, the policy's personal liability coverage part does not afford coverage for any claim for bodily injury sustained at location owned by an insured that is not an "insured location" (Bracho Aff., Ex. 1, Section II - Exclusions, 13, ¶1 e). The policy reads as follows:

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

The policy further states that: "In this policy, 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household" (*id.*, Definitions, 1). In addition, the term "Insured" is defined as "you [Laura Kreft] and residents of your household who are: a. Your relatives; or b. Other persons under the age of 21 and in the care of any person named above" (*id.*, ¶3).

The term "Insured location" is defined, relevant herein, as "a. The 'residence premises' . . . b. The part of other premises . . . used by you as a residence . . . ." (*id.*, Definitions, 8).

The term "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.

(*id.*).

The Declarations page identifies the premises as the "residence premises." Accordingly, the deciding factor in determining whether Laura Kreft, the named insured on the policy, is entitled to coverage hinges on whether she resided at the premises.

Tower's investigation into the incident and coverage and Laura Kreft's deposition testimony both demonstrate that she did not reside the at premises on the date of the incident. The affidavit of Gregory Hibbard, an employee of Roman & Associates, an investigative firm retained to investigate the incident and coverage, indicates that Laura Kreft did not live at the premises, and that she used the premises as a temporary home for summer vacations (Hibbard Aff., ¶3). Hibbard affirms that Laura Kreft resided at her residence located in Queens, New York. Hibbard further affirms that Kreft stated that she would only stay at the property during the summer months, until her husband's death in 2012 (*id.*). Hibbard also states that "Ms. Kreft estimated that since 2012, she spends no more than one (1) week per year at the premises and confirmed that she was at her Elmhurst home at the time of the July 10, 2014 incident" (*id.*).

Laura Kreft's deposition testimony further supports the contention that she did not reside at the premises. She testified at her deposition that she lived in her home located in Queens, New York for the past forty years (Croteau Aff., Ex N, 11:3-6). She further testified that she did not visit the property in the calendar year for 2017 and that she could not remember how many times she visited the premises and the last time she was there (*id.*, 15:18-16:9). Significantly, at her deposition, which took place on October 3, 2017, Kreft testified that she could not remember whether she visited the property in the preceding five years (*id.*, 16:13-16). Laura Kreft's

admission suggests that, first, she did not reside at the property in the two years preceding the incident, including on the date of the incident and, second, that she did not return to the premises in the years following the following the incident.

In opposition, defendants fail to raise an issue of fact to rebut Tower's showing. Allstate's argument that Laura Kreft owned the premises and paid utilities and Kreft's affidavit stating that the premises was intended to be used as a summer home, and that the premises contains her personal items, including mementos and clothing, does not demonstrate some degree of permanence and intention to remain at the premises, especially in light of the fact that she is unable to demonstrate that she visited the premises from 2012 through 2017 (*see, e.g., Dean*, 19 N.Y.3d 704; *Allstate Ins. Co.*, 7 A.D.3d at 303; *Biundo v. New York Cent. Mut.*, 14 A.D.3d 559, 560 [2d Dept 2005]; *State Farm Mut. Auto. Ins. Co. v. Nicoletti*, 11 A.D.3d 702, 703 [2d Dept 2004]; *New York Cent. Mut. Fire Ins. Co. v. Kowalski*, 222 A.D.2d 859, 860 [3d Dept 1995]). Further, Laura Kreft's statement that she "hop[es] to spend more time at the [premises] this summer should [her] health permit it" (Kreft Aff., ¶13), without more, does not raise an issue of fact, since the "mere intention to reside at the premises" is "insufficient to [a] 'residence premises' requirement" (*Vela v. Tower Ins. Co. of New York*, 83 A.D.3d 1050, 1051 [2d Dept 2011]).

Next, Allstate's argument that the exclusionary language relied on by Tower to disclaim coverage is inapplicable also fails to raise an issue of fact. The term "arising out of," in the insurance coverage context, is "ordinarily understood to mean originating from, incident to or having connection with" (*Maroney v. New York Cent. Mut. Fire Ins. Co.*, 5 N.Y.3d 467, 472 [2005], quoting *Aetna Cas. & Sur. Co. v. Liberty Mut. Ins. Co.*, 91 A.D.2d 317, 321 [4th Dept 1983]). According to the underlying complaint, the Krefts "permitted Olya Lipina to enter

into and otherwise use the swimming pool . . . . [and] were negligent in permitting and/or causing Olya Lipina to become intoxicated and, in such intoxicated state, permitting and/or causing Olya Lipina to enter into and use [the] swimming pool” at the premises (Underlying Complaint, ¶¶39, 41). Since Lipina’s bodily injuries (*i.e.*, her death) resulted from drowning in a swimming pool at the premises, there is “some causal relationship between the injury and the risk for which coverage is provided” (*Maroney*, 5 N.Y.3d at 472).

As addressed above, Tower is not required to defend and indemnify Laura Kreft in the underling action. Accordingly, Allstate’s cross-motion seeking a declaration that Tower must defend and indemnify the Krefts in the underlying action is denied. Moreover, Allstate’s application to have its policy declared excess to Tower’s policy in moot, as the court has determined that the Tower’s denial of coverage is valid.

### CONCLUSION

Accordingly, it is hereby

**ORDERED, ADJUDGED AND DECLARED** that the branch of Tower Insurance Company of New York’s (Tower) motion seeking a declaration that Tower has no duty to defend Laura E. Kreft and Paul Kreft, in the action entitled *Alla Lipina-Skyba, as Administrator of the Goods, Chattels and Credits which were of Olya Lipina Deceased, and Alla Lipina-Skyba, individually v. Laura Edith Kreft, Daniel Finer, Linda Finer, Paul Kreft (formally Doe #1) and Does 1-100*, pending in the Supreme Court, State of New York, County of Kings, index number 509980/2016, is granted; and it is further


**ORDERED** that the branch of Tower’s motion seeking dismissal of the Intervening Plaintiff, Allstate Insurance Company’s Intervening Complaint is granted. It is further

**ORDERED** that the Clerk of the Court shall enter judgment accordingly. It is further

**ORDERED** that the cross-motion of Allstate is denied; and it is further

**ORDERED** that Tower shall serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry.

Dated: October 30, 2018

  
Hon. Carol Robinson Edmead, J.S.C.  
**HON. CAROL R. EDMEAD**  
**J.S.C.**