

**American W. Home Ins. Co. v Gjonaj Realty & Mgt.
Co.**

2018 NY Slip Op 33899(U)

February 22, 2018

Supreme Court, Westchester County

Docket Number: 60797/17

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
AMERICAN WESTERN HOME INSURANCE
COMPANY,

Plaintiff,

-against-

Index No. 60797/17
Mot. Seq. Nos. 001, 002, 003
Decision and Order

GJONAJ REALTY & MANAGEMENT CO.,
28-47 WEBB AVENUE ASSOCIATES, LLC and
VIKTOR GECAJ,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motions:

001 Plaintiff Notice of Motion/Affirmation in Supp/Exhibits A-AA/
Affidavit in Supp/Exhibits 1-2/Memorandum of Law/Aff of Serv/ (docs 11-44)

Affirmation in Opp to Cross Motions 002 and 003/Exhibits BB, CC/Affidavit
in Supp/Memorandum of Law in Further Supp of Motion and in Opp to Cross
Motions 002 and 003 (docs 68-75)

002 Notice of Cross Motion/Affirmation in Opp to Motion and in Supp of Cross Motion/
Affs of Serv/Exhibits A-G/Reply Affirmation (docs 48-58, 79-80)

003 Notice of Cross Motion/Affirmation in Opp to Motion and in Supp of Cross Motion/
Exhibits A-F/Affs of Service/Reply Affirmation/Exhibits A-H (docs 59-66, 74-78)

In this declaratory judgment action, plaintiff American Western Home Insurance Company (American Western) moves, under motion sequence number 001, for an order, pursuant to CPLR 3001 and 3212, declaring that: it has no obligation to provide coverage to defendants Gjonaj Realty & Management Co. (Gjonaj), and 28-47 Webb Avenue Associates, LLC (Webb) in the underlying action brought in Bronx County, *Viktor Gecaj v Gjonaj Realty &*

Management Corp., and 28-47 Webb Avenue Associates, LLC, under Bronx County index number 300014/11 (Bronx Action), based on a breach of duty under the event of a loss condition; and it is entitled to withdraw from any further coverage obligations in the Bronx Action, and to recover from Gjonaj and Webb all defense fees and costs incurred from May 2, 2017, to date.

American Western also seeks a dismissal of the counterclaim asserted by defendant Viktor Gecaj (Gecaj), and declaring that it has no obligation to make payment on any judgment he may obtain against Gjonaj and Webb. Gecaj cross-moves, under motion sequence number 002, for an order, pursuant to CPLR 3212, granting summary judgment declaring that American Western must provide insurance coverage to Gjonaj and Webb in the Bronx Action, and must satisfy any judgment entered against them in that action. Gjonaj and Webb cross-move, under motion sequence number 003, for an order, pursuant to CPLR 3212, granting summary judgment declaring that American Western must provide insurance coverage to Gjonaj and Webb in the Bronx Action and must satisfy any judgment entered against them in that action. The motions, under motion sequence numbers 001, 002 and 003, are consolidated for disposition, and upon the foregoing papers, the motion is granted to the extent set forth below, and the cross motions are denied in their entirety.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

American Western commenced the instant declaratory judgment action by filing a summons and complaint in the Office of the Westchester County Clerk on July 24, 2017. Issue was joined by service of Gjonaj and Webb's joint answer with affirmative defenses on or about August 23, 2017, and by service of Gecaj's answer with affirmative defenses and a counterclaim

against American Western on or about October 10, 2017. On or about October 17, 2017, American Western served both its reply to Gecaj’s counterclaim and its instant motion for summary judgment, after which defendants served their respective cross motions. The underlying facts, as relevant to the motions, are as follows.

Gecaj commenced the Bronx Action in or about January 2011, to recover damages for injuries he allegedly sustained on May 7, 2010, when he was caused to fall from a ladder while installing a camera at premises located at 28-47 Webb Avenue, Bronx, New York, that were, at all relevant times, owned by Webb and managed and controlled by Gjonaj. When neither Webb nor Gjonaj timely answered, moved or otherwise appeared in the Bronx Action, Gecaj moved for a default judgment, which was denied by order dated March 26, 2012, of the Honorable Julia Rodriguez, before whom the Bronx Action was pending, without prejudice to renew upon proper papers. Gecaj renewed his motion for default, and by decision and order dated November 23, 2013, Justice Rodriguez granted the unopposed motion, finding sufficient proof of service, proof of the default, and proof of the facts constituting the claim (CPLR 3215 [f]), and directed the court to schedule an inquest as to damages. The inquest took place on September 23, 2014, before the Honorable Lucindo Suarez, who issued a decision and order on September 26, 2014, directing the entry of judgment in the amount of \$900,000.00, against the defaulting defendants, Gjonaj and Webb. Together with costs and disbursements, a judgment against Gjonaj and Webb was ultimately entered in the total amount of \$975,900.00, by the Bronx County Clerk.

The parties do not dispute that Gjonaj and Webb were, at all relevant times, insured under a policy of liability insurance issued by American Western (Policy), that such Policy was in effect at the time of Gecaj’s accident, and that, under the terms of the Policy, Gjonaj and Webb

were entitled to coverage for the Gecaj incident. It is undisputed that the Policy was procured for Gjonaj and Webb prior to the accident by nonparty ARM-Capacity of New York, LLC (ARM-Capacity), an insurance brokerage company duly authorized to sell and place insurance policies from various insurers, one of which is American Western.

It is undisputed that Gecaj effected service of the Bronx Action summons and complaint on Gjonaj and Webb on or about January 3, 2011, and that on or about January 20, 2011, Gjonaj and Webb forwarded copies of the summons and complaint to ARM-Capacity on or about January 20, 2011, seeking coverage for Gecaj’s accident under the Policy. When Gjonaj and Webb were served with Gecaj’s motion for default judgment on or about December 11, 2011, they forwarded the motion papers to ARM-Capacity. When Gjonaj and Webb were served with another motion for default judgment on or about October 15, 2013, they again forwarded the motion papers to ARM-Capacity. As indicated above, in the latter part of 2014, the default motion was granted, and the inquest resulted in an award of damages and entry of judgment against Gjonaj and Webb.

That parties do not dispute American Western’s claim that it received its first notification of Gecaj’s accident and of the Bronx Action when it received a faxed copy of Justice Suarez’s inquest order from Gjonaj, together with a request for coverage for both Gjonaj and Webb, on or about October 2, 2014. Approximately one week later, by letter dated October 9, 2014, American Western advised Gjonaj and Webb that it was denying coverage based on their breach of the Policy’s notice conditions. The letter specifically advised that Gjonaj and Webb’s failure to provide notice of Gecaj’s accident until after a finding of liability and a determination as to damages, creates an irrebuttable presumption of prejudice to American Western. The letter

further advised Gjonaj and Webb that it would not retain counsel to defend them, nor would it contribute toward any payment of defense fees and costs, or toward the satisfaction of the judgment or toward a settlement of the lawsuit, and that it had provided separate written notification to Gecaj of the determination. The October 9, 2014 letter did, however, advise that:

“if Gjonaj or Webb are able to set aside the default and damages judgment due to improper service and otherwise prove that they did not have any notice of the occurrence, claim or suit until recently, American Western may reconsider its denial of coverage. We must advise you, however, that under New York law, even if the default is set aside if Gjonaj and/or Webb had knowledge of the occurrence, claim or suit more than two years prior to providing notice to American Western, the burden will be on Gjonaj and Webb to prove that the breach of the notice conditions did not prejudice American Western”

(notice of motion, exhibit P).

Thereafter, by notice of motion dated December 10, 2014, retained counsel for Gjonaj and Webb moved to vacate the default. Central to the motion was Gjonaj and Webb’s joint explanation that, while they continued to forward all the legal papers they received to their insurance broker, ARM-Capacity, ARM-Capacity repeatedly forwarded such papers to the wrong insurance company, causing Gjonaj and Webb to fail to interpose an answer or motion in a timely manner. They supported their motion with the sworn affidavit of David Anthony Sarasky (Sarasky), an employee of ARM-Capacity, who acknowledges ARM-Capacity’s responsibility for the repeated errors (see notice of motion, exhibit P). Sarasky explains that, while Gjonaj provided him with numerous legal documents between January 21, 2011 and February 12, 2014, which he forwarded to ARM-Capacity’s claims department, it was not until later that he realized that ARM-Capacity’s claims department had sent the documents to the incorrect insurance company (id. ¶¶ 3-8). The motion to vacate was also supported by the sworn affidavit of

Gjonaj’s president, Viktor Gjonaj, who denies ever hiring Gecaj for this or any other job at the location of the accident.

By decision and order dated November 12, 2015, Justice Rodriguez vacated the judgment, and granted Gjonaj and Webb leave to serve and file their proposed verified answer, with affirmative defenses, to the Bronx Action complaint. On or about December 14, 2015, Gecaj filed a notice of appeal to the Appellate Division, First Department, arguing that the motion court improvidently exercised its discretion in vacating the default judgment.

By letter dated November 30, 2015, counsel for Gjonaj and Webb advised American Western, via its counsel, of the November 12, 2015 order vacating the default judgment, and requesting that American Western immediately take over Gjonaj and Webb’s defense in the Bronx Action (notice of motion, exhibit W). By letter dated December 9, 2015, counsel for American Western advised counsel for Gjonaj and Webb, among other things, that: (1) it would provide coverage for Gjonaj and Webb in the Bronx Action, and had retained Ron Berman, Esq., to defend its insureds; and (2) it was reserving its rights under employer’s liability exclusion and under the notice condition, as it was not then aware whether it had been prejudiced in its investigation or in its ability to defend the law suit (*id.*, exhibit X).

Two and a half months later, by letter dated February 18, 2016, counsel for American Western notified counsel for Gjonaj and Webb that, in view of the notice of appeal filed by Gecaj, and the possibility that the default judgment might be reinstated, it (American Western) was modifying its position as to coverage. American Western also advised Gjonaj and Webb that: (1) if the judgment is reinstated, it was denying any obligations to provide any further coverage with respect to the Bronx Action; (2) it would, nevertheless, continue its retention of

Ron Berman, Esq., to appear and handle their defense to the allegations in the Bronx Action until and unless Gecaj’s appeal is successful: and (3) because Ron Berman, Esq., was not involved in the motion to set aside the default, which is the subject of Gecaj’s appeal, Gjonaj and Webb should retain the counsel who represented them in that motion to handle the current appeal, and that American Western would share in the costs and fees associated with that retainer (*id.* exhibit Y).

On or about June 3, 2016, the Supreme Court, Bronx County issued a decision and order dismissing a separate action for negligent misrepresentation brought by Gjonaj and Webb against ARM-Capacity. To reach this decision, the court concluded that Gjonaj and Webb could not demonstrate actual damages from the broker’s purported negligence in view of Justice Rodriguez’ decision and order vacating the default judgment. The court did not preclude Gjonaj and Webb from again bringing an action to recover damages from ARM-Capacity for negligent misrepresentation should events materialize that result in actual injury.

By decision and order dated April 25, 2017, the Appellate Division, First Department reversed the lower court’s decision and order of November 12, 2015, to the extent that it reinstated the default judgment against Gjonaj and Webb as to liability on the basis that they failed to demonstrate a reasonable excuse for their delay in appearing. Among the factors which convinced the Appellate Court to reverse the lower court’s order vacating the default, was the failure of Viktor Gjonaj, who identified himself as a successful business person with multiple properties, to properly address the fact that legal papers (summons and complaint, two motions for a default judgment, a letter from the court and the court’s decision awarding Gecaj a \$900,000.00 judgment) continued to be sent directly to him, rather than counsel. for a period of

over three years, “without tak[ing] any further action to determine if the insurance carrier was in fact responding to plaintiff’s claims” (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 603 [1st Dept 2017]). The Appellate Court noted that:

“it was not until October 2014, when [Viktor] Gjonaj received the decision granting [Gecaj] a monetary award, that he finally became ‘alarmed and reached out to an attorney,’ and even then, despite being ‘alarmed,’ it took an additional two months for defendants to file their motion to vacate the default”

(*id.*). Next, the Appellate Court found unavailing Gjonaj and Webb’s claim that they will be prejudiced by a reinstatement of the default judgment due to the insurance carrier’s (American Western) disclaimer of coverage, noting that they commenced their action against ARM-Capacity a mere six days after filing their motion to vacate the default (*id.* at 608). Finally, the Appellate Court remanded the matter for a new inquest based on its finding that the award of \$900,000.00, was excessive based on the proof presented at the prior inquest (*id.*).

In early May 2017, American Western advised Gjonaj and Webb, as well as counsel for Gecaj, that, based on the Appellate Court’s reinstatement of the default judgment, and based on its reservation of rights under the notice conditions, it was denying coverage to Gjonaj and Webb for the Bronx Action, and its was reserving its right to recover any fees and costs that it incurred in defending them in the Bronx Action. American Western also stated its intention not to make payment toward any judgment Gecaj obtains as a result of the new inquest ordered by the Appellate Court.

On July 24, 2017, American Western commenced the instant declaratory judgment action claiming that they need a judicial declaration because Gjonaj and Webb refuse to accept it’s denial of coverage and its attempted tender back of their defense in the Bronx Action.

Approximately two months later, on September 28, 2017, the Clerk of the Appellate Division, First Department issued an order denying Gjonaj and Webb’s joint motion for leave to appeal to the Court of Appeals from the decision and order of April 27, 2017.

Regarding the parties’ respective motions for summary judgment, it is well settled that:

"[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. . . . [O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]).

In support of a judicial declaration that it has no obligation to provide coverage to Gjonaj and Webb, or to make payment to Gecaj for any damage award obtained against Gjonaj and Webb with respect to the Bronx Action, American Western supports its motion with copies of, among other things, the: pleadings, prior decisions, orders and judgments of the lower courts and of the Appellate Court relating to the Bronx Action; letters exchanged between the parties and between counsel for the parties regarding questions of coverage; the Policy; and the sworn affidavit of Connie Rockett, a claims advisor for nonparty E&S Claims Management, Inc. (E&S), the third-party administrator for American Western. In her affidavit, Rockett attests to American Western’s issuance of the Policy to Gjonaj and Webb for the policy period of August 1, 2009 to August 1, 2010, inclusive of the date of loss, and to the first notice received by American Western relative to the Gecaj incident and Bronx Action. Rockett avers that the notice, which

was received via fax from Gjonaj on October 2, 2014, consisted of a copy of Justice Suarez' September 26, 2014 inquest order awarding Gecaj \$900,000.00 in damages. Rockett also avers, among other things, that ARM-Capacity was the retail insurance broker retained by Gjonaj and Webb, that ARM-Capacity is not an agent of American Western or E&S, that it has no authority to receive notices of claims on behalf of American Western, and that it does not have a contract, agreement or any affiliation with either American Western or E&S (*see* Rockett aff).

American Western contends that, by its submissions, it has established that Gjonaj and Webb had an obligation under the Policy to timely notify it of the Bronx Action, as it specifically requires, under Section § IV (2) (a) and (b), that its insureds provide such notification "as soon as practicable of an occurrence or an offense which may result in a claim" or "suit." Therefore, by failing to provide American Western with notice of Gecaj's accident and his lawsuit (the Bronx Action) until after Gecaj obtained a judgment against them some four years after the incident, and over three years after Gecaj commenced the Bronx Action and effected service of the summons and complaint on Gjonaj and Webb, they breached the Policy's notice conditions. Gjonaj and Webb's late notice, has, according to American Western, caused it irreparable prejudice, in that it has been deprived of an opportunity to defendant Gjonaj and Webb against Gecaj's causes of action, and/or to negotiate an acceptable settlement. This, American Western contends, is the precise circumstance contemplated under Insurance Law § 3420 (c) (2) (A) and (B).

The parties do not dispute that Insurance Law § 3420 (c) (2) (B) creates an irrebuttable presumption of prejudice in the insurer's favor when an insured fails to provide notice of the occurrence and/or lawsuit until after a default judgment has been obtained against the insured,

and that Insurance Law § 3420 (c) (2) (A) creates a presumption in the insurer’s favor when it does not receive notice of an underlying occurrence and/or lawsuit until more than two years have passed since the occurrence. American Western argues that, because both of these conditions have occurred, it is entitled to summary judgment and a judicial declaration in its favor.

In opposition and in support of his cross motion, Gecaj argues that American Western’s disclaimer of May 2, 2017, is untimely, and that any purported reservation of rights in communications issued prior to May 2, 2017, is irrelevant, and does not effect the lateness of the disclaimer. Gjonaj and Webb argue that the May 2, 2017 disclaimer is ineffective because it was, and is, untimely, and that the Appellate Court’s reinstatement of the default judgment did not restart the insurer’s time to disclaim. They also argue that American Western’s purported reservation of rights is irrelevant to the timeliness of the attempted disclaimer, and that they have been prejudiced both in their defense of the Bronx Action and in their prosecution of an action against ARM-Capacity for negligent misrepresentation, as their renewed action may be time-barred. Finally, Gjonaj and Webb argue that they have been prejudiced by American Western’s handling of the Bronx Action by virtue of the fact that the attorney they engaged to do so, Ron Berman, Esq., did not pursue liability discovery in an expeditious manner, resulting in no discovery as to the merits of Gecaj’s underlying Labor Law claims.

There is little question that the legislative intent behind Insurance Law § 3420, is to prevent insurers, which collect premiums for coverage from their insureds, from disclaiming coverage under circumstances which do not cause actual prejudice. However, where, as here, there has already been a finding by a court of competent jurisdiction that Gjonaj and Webb are

not entitled to a vacatur of the default judgment, because they acted unreasonably in failing to ensure that American Western received notification as soon as practicable (see *Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d at 603), there is an irrebutable presumption of prejudice to American Western. Defendants' scattershot criticisms and objections notwithstanding, the result of Gjonaj and Webb's failure to provide the required notice to American Western, prior to a determination of liability by a court of competent jurisdiction, prevents the insurer, American Western, from defending its insureds against Gecaj's allegations. The prejudice is irreparable.

The Court also finds no merit to defendants' argument that American Western's May 2, 2017 disclaimer was untimely. To the contrary, under the particular circumstances presented here, the Court finds that American Western promptly and justly disclaimed upon receipt of the post-judgment notice in October 2014. The Court further finds that American Western acted in good faith: by promptly withdrawing its disclaimer upon vacatur of the default judgment in December 2015, so long as its ability to investigate and defend against the lawsuit had not been prejudiced; by promptly notifying Gjonaj and Webb in February 2016, that, in the event the vacatur was overturned, it intended to disclaim; and by then promptly disclaiming upon the Appellate Court's issuance of its decision and order in May 2017. Contrary to Gjonaj and Webb's assertion that they have been placed at a genuine disadvantage and severely prejudiced in the Bronx Action by American Western's shifting positions with regard to coverage in that action, the Appellate Court correctly noted that they created their own disadvantage by failing to act promptly to protect themselves in the Bronx Acton (*id.* at 606).

Also unavailing, is Gjonaj and Webb's current attempt to blame American Western's choice of counsel, Ron Berman, Esq., for their situation. It was the Appellate Court's

modification of the lower court’s decision and order, to the extent of reinstating the default judgment, and not America Western’s “shifting positions” or choice of counsel, that precluded any challenge as to liability, and provided the justification for American Western to disclaim.

Furthermore, given that the Appellate Court also modified the lower court’s decision and order to the extent of ordering a new inquest, Gjonaj and Webb are not precluded from presenting a defense to Gecaj’s claims of injury, and to do so with counsel of their own selection.

Finally, the Court grants that aspect of American Western’s motion that seeks to recover from its insureds, Gjonaj and Webb, defense fees and costs incurred from May 2, 2017, to date, as that aspect of the motion is not meaningfully opposed.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obligated to provide a defense to, and provide coverage for, defendants Gjonaj Realty & Management Co., and 28-47 Webb Avenue Associates, LLC, in the action of *Viktor Gecaj v Gjonaj Realty & Management Corp., and 28-47 Webb Avenue Associates, LLC*, under Bronx County Index No. 300014/11, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendants Gjonaj Realty & Management Co., and 28-47 Webb Avenue Associates, LLC, in the said action pending in Bronx County; and it is further

ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obligated to pay any judgment to the plaintiff in the action of *Viktor Gecaj v Gjonaj Realty & Management Corp., and 28-47 Webb Avenue Associates, LLC*, under Bronx County Index No. 300014/11, is granted; and it is

ADJUDGED and DECLARED that plaintiff herein is not obliged to pay any judgment to the judgment the plaintiff may obtain in the said action pending in Bronx County; and it is further

ORDERED that the cross motion of defendants Gjonaj Realty & Management Co., and 28-47 Webb Avenue Associates, LLC, is denied; and it is further

ORDERED that the cross motion of defendant Viktor Gecaj is denied; and it is further

ORDERED that any requests for relief not expressly set forth above have been considered and are denied; and it is further

ORDERED that the parties appear at the Settlement Conference part on Tuesday, March 20, 2018 at 9:15 a.m. to schedule a hearing to determine reasonable attorneys' fees.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
February 22, 2018

ENTER:


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