

**Mountain Valley Indem. Co. v Thelison**

2019 NY Slip Op 30984(U)

April 5, 2019

Supreme Court, New York County

Docket Number: 1506012/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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INDEX NO. 150612/2017

MOUNTAIN VALLEY INDEMNITY COMPANY,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

JEAN SERGE THELISMON, JUNIE THELUSMOND, and ELDA  
SULLY,

**DECISION AND ORDER**

Defendants.

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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, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39 were read on this motion to/for SUMMARY JUDGMENT AND DEFAULT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this declaratory judgment action, plaintiff Mountain Valley Indemnity Company (“MVIC”) moves: 1) pursuant to CPLR 3215, for a default judgment against defendant Elda Sully (“Sully”); 2) pursuant to CPLR 3212, for a default judgment on its first three causes of action against defendants Jean Serge Thelison a/k/a Jean Serge Thelismond (“Jean”) and Junie Thelison a/k/a June Thelismond a/k/a Junie Thelusmond (“Junie”) (collectively “the insureds”), declaring that MVIC has no duty to defend or indemnify the insureds or to provide “medical payments to others” coverage to Sully in a personal injury action styled *Elda Sully v The City of New York, Jean Serge Thelison and Junie Thelison*, filed in the Supreme Court of the State of New York, Kings County under Index Number 511519/16 (“the underlying action”); and 3) for such other and further relief as this Court deems just and proper. Sully, who has not appeared in this action, does not oppose the motion. The insureds oppose that branch of the motion seeking

summary judgment against them. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted in its entirety**.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

The initial issue raised on this motion is whether MVIC is entitled to a default judgment against Sully based on her failure to answer or otherwise appear in this matter. The other issue is whether MVIC is entitled to a declaration that it is not obligated to defend or indemnify the insureds or to provide "medical payments to others" coverage to Sully in connection with the underlying action. In the underlying action, Sully alleged that, on January 26, 2016 ("the date of loss"), she was injured when she slipped and fell ("the alleged incident") at 1209 East 56<sup>th</sup> Street, Brooklyn, New York ("the premises") due to the negligence of The City of New York ("the City") and the insureds. Doc. 19.<sup>1</sup>

MVIC issued a homeowners policy ("the policy") (policy number HOS2767089) to the insureds for the residence located at the premises for the period of November 21, 2015 - November 21, 2016. Doc. 18. The policy described the premises as an owner occupied two-family home located at 1209 East 56<sup>th</sup> Street, Brooklyn, New York. Id. The declarations page of the policy reflected that the "residence premises" was located at the foregoing address. The policy had a personal liability limit of \$500,000 and a "medical payments to others" limit of \$1,000. Id.

The policy obligated MVIC to pay the insureds for damages for which they were legally liable as a result of "'bodily injury' . . . caused by an 'occurrence'", which the policy defined, as is relevant herein, as an "accident." Doc. 18, Policy Form HO 00 03 04 91 at p. 12 of 18.

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

Certain exclusions in the policy limited the insureds' coverage. One such exclusion applied to any claim for bodily injury arising at premises owned by the insureds which was 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) Which is shown in the Declarations; or
- (2) Which is acquired by you during the policy period for you as a residence;

Doc. 18, Policy Form HO 00 03 04 91, at p. 1 of 18.

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.

Doc. 18, Policy Form HO 00 03 04 91, at p. 1 of 18.

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.” As to others, this coverage applies only:

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

Doc. 18, Policy Form HO 00 03 04 91, at p. 12 of 18.

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”:

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b. Arising out of or in connection with a "business" engaged in by an insured

....

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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";

Doc. 18, Policy Form HO 00 03 04 91, at p. 12-13 of 18.

Sully commenced the underlying action by filing a summons and complaint in the Supreme Court, Kings County on July 7, 2016. Doc. 19. As set forth above, Sully claimed that she was injured at the premises due to the negligence of the City and the insureds. Doc. 19.

MVIC received notice of the alleged incident on or about August 16, 2016, assigned the matter claim number 2523515, and, in November of 2016, assigned Bauer Trial Preparation ("Bauer") to investigate the claim. Doc. 12, at pars. 11-14; Doc. 13, at par. 4. The investigation was conducted by Rock Geffrard of Bauer. Doc. 12 at par. 14; Doc. 13 at par. 5.

On November 22, 2016, Geffrard met with, and obtained a signed written statement from, Junie at the premises. Doc. 13 at par. 6; Doc. 22. Junie advised Geffrard that, as of the date of loss, she and her husband's cousin owned the premises which, as of that time, were being used as a three-family dwelling with separate living units on the first floor, second floor, and basement levels. Doc. 13 at par. 7. Junie advised Geffrard that, as of the date of loss, she and her husband lived on the second floor of the premises (Doc. 13 at pars. 8, 11); Marie Gatson and her family lived on the first floor (Doc. 13 at par. 12); and Gary Sully and his family lived in the basement (Doc. 13 at par. 13).

While at the premises with Junie, Geffrard entered the first and second floor apartments, which each had its own separate entrance, kitchen, living room bathroom and bedroom. Doc. 13. He also saw a separate entrance leading to the basement apartment at the premises. Doc. 13. Thus, concluded Geffrard, the premises were configured as a three-family dwelling. Doc. 13 at par. 15.

On December 12, 2016, MVIC disclaimed liability and medical payments coverage to the insureds on the ground that the premises was not an “insured location” since the underlying action “involve[d] damages arising out of a premises owned by [the insureds] or rented to others by [them] that is not an ‘insured location’”. Doc. 21. Specifically, MVIC stated that, although the insureds represented on their application for insurance that the premises consisted of a two-family dwelling, MVIC’s investigation revealed that it was in fact a three-family dwelling on the date of loss. Doc. 21.

MVIC commenced this action against defendants by filing a summons and complaint on January 19, 2017. Docs. 1, 14. As a first cause of action, MVIC alleged that it had no duty to defend or indemnify the insureds against any claims made against them in the underlying action since the premises do not constitute a “residence premises” or an “insured location” under the policy. Doc. 14 at pars. 15-18. As a second cause of action, MVIC asserted that it had no duty to defend or indemnify the insureds for claims made against them 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.” Doc. 14 at pars. 20-25. MVIC further alleged that the policy did not provide personal liability coverage or coverage for medical payments to others arising from a business engaged in by the insureds. Doc. 14 at par. 21. As a third cause of action, MVIC alleged that it had no duty to defend or indemnify the insureds, or to provide coverage for claims made against them in the underlying action, since

the premises did not qualify as a “residence premises” or “insured location” as defined by the policy. Doc. 14 at pars. 27-30. As a fourth cause of action, MVIC alleged that it had no duty to defend or indemnify the insureds for claims made against them in the underlying action because they misrepresented on their policy application that the premises was a two-family dwelling. Doc. 14 at pars 32-35.

Sully was served with the summons and complaint on January 25, 2017 but failed to answer or otherwise appear in this action. Doc. 15; Doc. 11 at par. 31.

The insureds joined issue by their answer filed March 7, 2017. Doc. 8.<sup>2</sup>

On January 2, 2018, MVIC filed the instant motion seeking summary judgment on its first three causes of action against the insureds. Docs. 10-23. MVIC argues that it is entitled to such relief based on the “insured location” exclusion in the policy because the premises was not a “residence premises” as defined by the policy on the date of loss. Specifically, MVIC seeks a declaration that it has no obligation to defend or indemnify the insureds in the underlying action. MVIC further asserts that it is entitled to a default judgment against Sully declaring that it has no duty to provide medical payments to others coverage to Sully.

In opposition, the insureds assert that the motion must be denied because the certificate of occupancy, as well as an “Affidavit of Compliance with Smoke Detector Requirement for One and Two Family Dwellings” (“the smoke detector affidavit”), reflects that the premises was a two-family dwelling. They further allege that the motion must be denied because the phrase “two-family dwelling”, as used in the definition of “residence”, is ambiguous. Next, the insureds assert

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<sup>2</sup> The policy was issued to “Junie Thelusmond” and “Jean Serge Thelison.” Doc. 18. The statement Junie signed for Geffrard was signed “Junie Thelusmond.” Doc. 22. The denial letter spells the insureds’ names as “Jean Serge Thelison” and “Junie Thelison”, as they are spelled in the pleadings in the underlying action. Docs. 19, 21. Although the names are not spelled with uniformity throughout the motion papers, this Court will spell the names based on the way the insureds answered the complaint in the captioned action, i.e., “Jean Serge Thelison” and “Junie Thelusmond.” Doc. 8.

that the motion is premature because MVIC owes them discovery consisting of documents concerning its decision to commence the captioned action as well as its decision to disclaim coverage.

In reply, MVIC argues, inter alia, that it is clearly entitled to summary judgment based on the "insured location" exclusion since that term, as well as the term "residence premises", is clearly defined by the policy.

## LEGAL CONCLUSIONS:

### MVIC's Motion for Summary Judgment

"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 (1980). "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).

Although the complaint in the underlying action alleges that Sully was injured at the premises due to the negligence of the insureds and the City, the policy does not provide coverage for the personal liability of the insureds 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, inter alia, "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."

The foregoing provisions clearly provide for coverage where the insureds occupy one of the family units in a two-family dwelling. However, since Geffrard's investigation revealed that the premises actually consisted of three separate family units, MVIC established its prima facie entitlement to summary judgment on its first three causes of action. *See Almonte v Castlepoint Ins. Co.*, 140 AD3d 658, 659 (1<sup>st</sup> Dept 2016) (plaintiff insurer established its prima facie entitlement to summary judgment by demonstrating, "through the insured[']s admission in a statement to [the insurer's] investigator and the investigator's inspection of the premises, that the home was a three-family dwelling, and thus not covered by the policy, rather than a two-family dwelling, which would be covered by the policy").<sup>3</sup>

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<sup>3</sup> In an affidavit in opposition to the motion, Junie admits that she rented out the basement and ground floor of the premises. Doc. 32.

The insureds argue that the smoke detector affidavit and certificate of occupancy warrant a contrary result because they reflect that the premises consisted of a two-family dwelling on the date of loss. However, as MVIC argues, the certificate of occupancy is not annexed to the insureds' motion papers and, even if it did reflect that a two-family dwelling existed, neither it nor the smoke detector affidavit would trigger coverage since the actual configuration of the premises was a three-family dwelling, and not a two-family dwelling. *See Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401 (1<sup>st</sup> Dept 2015). Plaintiff's argument regarding the ambiguity of the policy is also undermined by the fact that the structural configuration of the premises is the determinative factor in establishing that the premises are a three-family dwelling.

This Court rejects the insureds' argument that MVIC's summary judgment motion is premature and should be denied pursuant to CPLR 3212(f) because discovery it is owed can be used to defeat the application. Summary judgment is premature when "facts essential to justify opposition may exist but cannot then be stated." CPLR 3212(f). Although the insureds argue that certain responses to their discovery demands remain outstanding, they do not point to what item of discovery not presently in their possession, and in MVIC's possession, would enable them to oppose the motion. Therefore, summary judgment is not premature. *See Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 (1<sup>st</sup> Dept 2014) (facts did not warrant denial of motion for summary judgment pursuant to CPLR 3212[f] absent an allegation of what additional information existed in movants' possession or a claim regarding the veracity of movants' affidavits).

MVIC does not seek summary judgment on its fourth cause of action which, as noted above, alleged that the insureds improperly procured the policy by misrepresenting that the premises consisted of a two-family dwelling. 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 MVIC has no duty to defend or indemnify the insureds for any claims made against them in connection with the underlying action. Since MVIC is being awarded this relief on the first three causes of action, the fourth cause of action is therefore academic and need not be addressed by this Court.

### **MVIC's Motion for a Default Judgment**

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.” It is well settled that in order to establish its entitlement to a default judgment pursuant to CPLR 3215, a party must 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. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1<sup>st</sup> Dept 2016). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, MVIC submits an affidavit of service establishing that Sully was served with process. Doc. 15. Additionally, in affidavits submitted in support of the motion, Claire Fleisher, a claims adjuster for MVIC, and Geffrard set forth facts constituting the claim. Docs. 12 and 13. Further, counsel for MVIC avers in an affirmation in support of the motion that Sully failed to answer or otherwise appear in this action. Doc. 11 at par. 31. Thus, MVIC is entitled to a default judgment against Sully.

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

ORDERED that the motion by Mountain Valley Indemnity Company seeking summary judgment on its first through third causes of action seeking a declaratory judgment as against defendants Jean Serge Thelison and Junie Thelusmond, declaring that Mountain Valley Indemnity Company has no duty to defend or indemnify defendants Jean Serge Thelison and Junie Thelusmond or to provide "medical payments to others" coverage to defendant Elda Sully in the personal injury action styled *Elda Sully v The City of New York, Jean Serge Thelison and Junie Thelison*, filed in the Supreme Court of the State of New York, Kings County under Index Number 511519/16, is granted; and it is further,

ORDERED that the motion by Mountain Valley Indemnity Company seeking a default judgment against defendant Elda Sully is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff Mountain Valley Indemnity Company has no duty to defend or indemnify defendants Jean Serge Thelison and Junie Thelusmond or to provide "medical payments to others" coverage to Elda Sully pursuant to Mountain Valley Indemnity Company policy number HOS2767089, claim number 2523515, in the personal injury action styled *Elda Sully v The City of New York, Jean Serge Thelison and Junie Thelison*, filed in the Supreme Court of the State of New York, Kings County under Index Number 511519/16; and it is further,

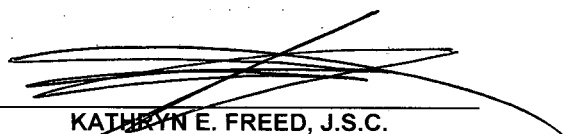
ORDERED that, in light of the relief granted above, the fourth cause of action asserted by plaintiff Mountain Valley Indemnity Company is rendered academic; and it is further,

ORDERED that plaintiff Mountain Valley Indemnity 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.

4/5/2019

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: