

Bahnuk v Countryway Ins. Co.

2020 NY Slip Op 35442(U)

July 27, 2020

Supreme Court, Broome County

Docket Number: Index No. EFCA2019000970

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the Broome County Courthouse,
Binghamton, New York, on the 5th day of June, 2020.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

PAUL BAHNUK,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2019000970

COUNTRYWAY INSURANCE COMPANY,

Defendant.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion of Defendant Countryway Insurance Company ("Countryway") seeking dismissal of this action pursuant to CPLR 3211; and the cross-motion of Plaintiff, Paul Bahnuk ("Bahnuk") for summary judgment. After due deliberation, and for the reasons set forth below, Countryway's motion is denied, and Bahnuk's cross-motion is denied, without prejudice.

BACKGROUND FACTS

On or about March 6, 2012, Bahnuk was working as a paramedic and was called to respond to 42 Tremont Avenue in Binghamton, NY. Bahnuk alleges that he fell while exiting and descending the front steps. The premises were owned by Pauline Williams and rented to Christine Wesko. Williams had a homeowner's insurance policy through Countryway.

Bahnuk commenced an action against Williams in March, 2013 in Broome County (Bahnuk v. Williams, Index No.: CA2013006424), seeking damages for injuries sustained in the fall, which he claimed was caused by the stairs being in a defective condition. Countryway sent a letter to Williams that this incident was not covered under the insurance policy because Williams did not live at the premises and because her rental of the premises constituted operating a business on the property, which was not covered. Eventually, in the underlying action, Williams signed a Confession of Judgment to Bahnuk for \$100,000, and a Judgment was entered in the County Clerk's office on January 28, 2019.

Thereafter, Bahnuk commenced this action against Countryway on April 2, 2019. Bahnuk's complaint alleges that he has a direct cause of action against Countryway pursuant to Insurance Law §3420(a)(2), for the amount of the judgment entered against Williams. The amount sought in the complaint is \$100,000, which is the amount of the judgment Bahnuk has against Williams. Countryway filed an Answer with Affirmative Defenses.

PROCEDURAL HISTORY AND PARTIES' ARGUMENTS

Countryway filed a motion seeking dismissal of Plaintiff's complaint on two different grounds. First, Countryway claims that the judgment obtained in the underlying action was obtained by collusion, and is therefore a nullity which cannot form the basis of an action under Insurance Law §3420(a)(2). Second, Countryway contends that it properly disclaimed coverage because Williams did not reside at the property and by renting it to Wesko, it is excluded as a business exception.

The motion was given a return date of April 3, 2020, but several Executive Orders and Administrative Orders issued as a result of the coronavirus pandemic closed courts and prevented the filing of papers. When filings were once again permitted, Plaintiff filed a cross motion on May 4, 2020. By Order of this Court dated May 5, 2020, both the motion and cross motion were given a return date of June 5, 2020, on submission only.

Bahnuk opposes the motion to dismiss, claiming that there is no evidence of any collusion between Bahnuk and Williams in the underlying action. Rather, both parties had risks in continuing the litigation as well as expenses, and the settlement was the result of valid, good-faith negotiations. Further, Countryway chose to disclaim and not be involved in the earlier action, so it cannot now complain about the final result. Bahnuk also filed a cross motion seeking summary judgment on the basis that Countryway failed to properly disclaim coverage because it did not do so with specific detail, or indicate what exclusion applied; and it failed to provide the notice to Bahnuk, an injured party, as required under Insurance Law §3420(d). Bahnuk also claims that, at the very least, there is a question of fact as to whether the claim is excluded under the policy.

On June 1, 2020, Countryway filed an attorney's affirmation in further support of its motion and in opposition to Plaintiff's motion. The affirmation continued to maintain that the evidence clearly establishes that the underlying judgment was the result of collusion, and the evidence supports the disclaimer of coverage. Bahnuk objected to Countryway's reply as being

untimely. Further, Bahnuk argued that even if Countryway's additional submission is considered, Countryway failed to list the exclusions in its disclaimer, and therefore is precluded from raising them now.

LEGAL DISCUSSION AND ANALYSIS

The Court will first address Plaintiff's objection to Countryway's opposition papers. As noted above, the motion and cross motion were given a return date of June 5, 2020. Plaintiff's cross motion papers required any reply papers to be filed at least 7 days before the return date of the motion. Countryway's opposition papers were not filed until June 1, 2020, less than 7 days prior to the return date.

CPLR 2214 sets forth the procedure for motions and the timing for the service of papers, including the "16-7-1" rule, that allows the movant to demand answering papers be served at least 7 days before the return date when the motion is made at least 16 days before the return date. Even though the opposition papers were not filed at least 7 days before the return date, the motion was on submission, so neither party had to physically appear and argue on June 5, 2020. Plaintiff was able to complete and file a reply on June 3, 2020, and if he had needed even more time, he could have asked for it. There is no evidence that Plaintiff suffered any prejudice from Countryway's late submission. In light of the minimal delay of one business day, the lack of prejudice to Plaintiff and a strong public policy of deciding cases on the merits, the Court exercises its discretion to consider Countryway's opposition papers, and all other papers submitted in regard to these motions.

Turning now to the merits, Countryway's Notice of Motion states that the motion is made "pursuant to CPLR 3211 and 5015 ... for an Order granting dismissal" of the Complaint. CPLR 5015 deals with relief from a judgment or order, and is based upon Countryway's argument that the underlying judgment was procured by collusion so it should be deemed a nullity. Countryway's motion does not specify which of the grounds under CPLR 3211 it relies upon. This is particularly problematic because this is a post-answer CPLR 3211 motion, and some of

the CPLR 3211 grounds are waived if not made in a pre-answer motion, or raised as an affirmative defense in the Answer. *See*, CPLR 3211 (e). Countryway's motion also does not specifically identify which of its affirmative defenses it might be relying upon. The Court does note that Countryway's Answer includes an affirmative defense of failure to state a cause of action, also found under CPLR 3211(a)(7), which is probably the broadest and most encompassing of the CPLR 3211(a) defenses. Although the motion lacks reference to a section of 3211 or any particular affirmative defense, it does reference CPLR 3211 as opposed to CPLR 3212 (motion for summary judgment). This is an important distinction. As the Third Department has stated, "[i]n contrast to a motion for summary judgment, a court resolving a motion to dismiss for failure to state a claim cannot base the determination upon submissions by the defendant — without regard to how compelling claims made in such submissions may appear." *Carr v. Wegmans Food Mkts, Inc.*, 182 AD3d 667, 668 (3rd Dept. 2020) *cit*ing *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 (2013) (other citation omitted). Under CPLR 3211 (c), the Court can treat a motion under CPLR 3211 as a motion for summary judgment, after adequate notice to the parties. Neither party has asked to convert Defendant's motion to a summary judgment motion, nor did the Court indicate that Defendant's motion would be considered a motion for summary judgment. Therefore, the Court must treat this as a true CPLR 3211 motion (*see*, *Siddiqui v. Nationwide Mut. Ins. Co.*, 255 AD2d 30 [3rd Dept. 1999]), and cannot rely upon Defendant's submissions.

In motions to dismiss, the Third Department has adhered to the rule that defendants' affidavits cannot be considered. *Henbest & Morrissey, Inc. v. W.H. Ins. Agency, Inc.*, 259 AD2d 829 (3rd Dept. 1999); *see also*, *Carr v. Wegmans Food Mkts, Inc.*, 182 AD3d 667; *Crepin v. Fogarty*, 59 AD3d 837 (3rd Dept. 2009); *cf. Liberty Affordable Housing, Inc. v. Maple Ct. Apts.*, 125 AD3d 85 (4th Dept. 2015); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.* 115 AD3d 128 (1st Dept. 2014). "The grounds for dismissal under CPLR 3211 (a) (7) are ... strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits." *Carr v. Wegmans Food Mkts, Inc.*, 182 AD3d at 668 *cit*ing *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635, (1976); *Sokol v. Leader*,

74 AD3d 1180, 1181 (2nd Dept. 2010). “On a motion to dismiss made pursuant to CPLR 3211, a court should construe the pleadings liberally, accept the allegations as true and afford the party opposing the motion the benefit of every possible inference to determine whether the facts alleged fit within a cognizable legal theory.” *T. Lemme Mech., Inc. v. Schalmont Cent. School Dist.*, 52 AD3d 1006, 1008 (3rd Dept. 2008) (citations omitted); *see, EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005); *Leon v. Martinez*, 84 NY2d 83, 87 (1994); *Kreamer v. Town of Oxford*, 91 AD3d 1157 (3rd Dept. 2012); *Stainless Broad. Co. v. Clear Channel Broad. Licenses, L.P.*, 58 AD3d 1010 (3rd Dept. 2009). The “ultimate criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 AD3d 1314, 1315 (3rd Dept. 2009) (quoting *Leon v. Martinez*, 84 NY2d 83, 88). The court should not make factual determinations on a motion to dismiss. *See, Niagara Mohawk Power Corp. v. State*, 300 AD2d 949 (3rd Dept. 2002). “Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss ...[and] “[d]ismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC* 155 AD3d 1218, 1219 (3rd Dept. 2017) [internal citations omitted] quoting *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017). Furthermore, dismissal may also be warranted where the “factual claims ... are flatly contradicted by documentary evidence or are inherently incredible.” *Hyman v. Schwartz*, 127 AD3d 1281, 1283 (3rd Dept. 2015) quoting *DerOhannessian v. City of Albany*, 110 AD3d 1288, 1289 (3rd Dept. 2013); *Ozdemir v. Caithness Corp.*, 285 AD2d 961, 963 (3rd Dept. 2001) (“a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence.”).

Plaintiff’s complaint sets forth the basic facts, and basis of his claim. He obtained a judgment against Countryway’s insured (Williams) and now he is making a direct claim against Countryway, pursuant to Insurance Law § 3420(a)(2), to recover the amount of the judgment. On its face, and assuming all the facts to be true, Plaintiff has stated a cause of action, unless Countryway comes forward with proof that Bahnuk’s factual allegations are inherently incredible

or flatly contradicted by documentary proof. *See, Ozdemir v. Caithness Corp.*, 285 AD2d 961. Countryway does not argue that Bahnuk's allegations are inherently incredible, but rather Countryway contends that the documentary evidence utterly refutes Plaintiff's claim. Countryway advances two main arguments: 1) the underlying judgment was the product of collusion and therefore cannot form the basis of a claim under Insurance Law § 3420(a)(2); and 2) that Bahnuk cannot maintain an action because Countryway properly disclaimed coverage for this incident.

As discussed above, on this motion under CPLR 3211, the Court cannot consider all the evidence that Defendant seeks to submit in support of dismissal. It is not a summary judgment motion, so the consideration is whether Plaintiff has a cause of action, and Defendant is limited to trying to show by documentary evidence that Plaintiff does not have a cause of action. Documentary evidence can involve CPLR 3211(a)(1) and (a)(7) and there is overlap between those sections.

"A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Fontanetta v. John Doe 1*, 73 AD3d 78, 83-84 (2nd Dept. 2010), *quoting Fortis Fin. Servs. v. Fimat Futures USA*, 290 AD2d 383, 383 (1st Dept. 2002); *see, Leon v. Martinez*, 84 NY2d 83; *Jenkins v. Jenkins*, 145 AD3d 1231 (3rd Dept. 2016); *Haire v. Bonelli*, 57 AD3d 1354 (3rd Dept. 2008). "[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case." *Fontanetta v. John Doe 1*, 73 AD3d at 84-85; *see Koziatek v. SJB Dev. Inc.*, 172 AD3d 1486 (3rd Dept. 2019).

In this case, the analysis under CPLR 3211 (a)(7) [failure to state a cause of action] is essentially the same as under CPLR 3211 (a)(1). The question is whether the documentary evidence flatly contradicts the factual allegations made in the Complaint. "When documentary evidence is submitted by a defendant, 'the standard morphs from whether the plaintiff stated a

cause of action to whether [he] has one.” *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 135, quoting John R. Higgitt, *CPLR 3211[a][7] and [a][7] Dismissal Motions-Pitfalls and Pointers*, 83 NY St. BJ 32, 33 (2011). That is because the documentary evidence is being used to conclusively establish that no cause of action exists. See, e.g. *State Farm Fire & Cas. Co. v. Main Bros. Oil Co.*, 101 AD3d 1575 (3rd Dept. 2012).

In the present case, the underlying settlement stipulation and Judgment are judicial documents and can be considered documentary evidence. The policy can also appropriately be considered documentary evidence (see, e.g. *Craft v. New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 940 [3rd Dept. 2017]), but the other exhibits are not documentary evidence.¹ Therefore, the Defendant is essentially left with arguing that the underlying settlement papers establish the collusion-in other words, the stipulation of settlement in the amount of \$100,000 with an agreement not to pursue enforcement against Williams, and a confession of judgment, clearly establishes that the underlying action was settled through collusion of those parties, and cannot be enforced against Countryway. Where a judgment was the product of collusion and “offends ... a sense of justice and propriety [it] cannot be condoned.” *Bond v. Giebel*, 101 AD3d 1340, 1343 (3rd Dept. 2012). Countryway points to multiple circumstances that it claims prove the underlying judgment was the product of collusion. The settlement stipulation provided that Bahnuk would file a Satisfaction of Judgment when the action against Countryway was concluded, and that Bahnuk would not attempt to enforce the judgment during the pendency of the current action. In effect, it removed any financial risk to Williams. While those factors may be some evidence of collusion, they are not enough to conclusively establish collusion and entitle Countryway to dismissal of the complaint. If, as Plaintiff argues, the settlement was the result of true good faith negotiations with each party assessing its risks and exposure, then the settlement may have been entirely fair and reasonable. If there was some ulterior and nefarious intent, it

¹Without attempting to address all the possible CPLR 3211 defenses, the Court observes that Countryway has submitted exhibits including investigation interview transcripts, interrogatory responses and letters from the underlying action, but those submissions would not qualify as documentary evidence under CPLR 3211(a)(1). See, e.g. *State Farm Fire & Cas. Co. v. Main Bros. Oil Co.*, 101 AD3d 1575.

certainly is not discernable from just review of the settlement stipulation, affidavit of Confession of Judgment and Judgment which are the only “documentary evidence” submitted in Countryway’s motion to dismiss. Those are the only pieces of evidence that the Court can properly consider under CPLR 3211(a)(1) or (a)(7). Nevertheless, the Court will also address Countryway’s additional exhibits.

Countryway also included Bahnuk’s responses to interrogatories in support of the present motion. While those responses are part of this litigation, they are not the type of “essentially undeniable” evidence that can be considered “documentary evidence.” Affidavits, deposition testimony and letters are not considered “documentary evidence.” See, *Fontanetta v. John Doe I*, 73 AD3d 78. Interrogatory responses are similar to those items that are not in the “documentary evidence” category. In any event, the interrogatory responses do not definitively establish collusion either. The responses show that there were negotiations in the underlying action to settle, including the possibility of offering Williams’ home, or a lien on her home, to satisfy the claim. Even if the responses show Williams’ alleged inability to pay a judgment, any negotiations or discussions to give her property in satisfaction of the lawsuit would not establish that the settlement eventually negotiated was based on collusion. In fact, it supports the claim that Williams faced risks associated with continued litigation which she may have been trying to reduce by settling. The interrogatory responses do not establish collusion.

Countryway also submitted the transcripts of investigation interviews with Williams and Wesko. These are no more “documentary evidence” than depositions, so are not properly considered on this motion. They are even less reliable or “documentary” because they are not signed and sworn to. Even assuming, *arguendo*, the Court could consider the interview transcripts of Williams and Wesko, there is nothing in those interviews that clearly establishes collusion. Those interviews occurred shortly after the incident and long before any settlement. They do not address settlement at all.

The Court is treating this as a motion under CPLR 3211 and cannot consider Defendant’s affidavits or non-documentary evidence, but even if the Court considered all the Defendant’s

submissions, there is still not enough evidence to resolve all factual issues as a matter of law and definitively dispose of plaintiff's claim on the basis of collusion in the underlying settlement. At best, there is evidence that the underlying action may have been obtained by collusion.

Countryway is asking the Court to draw conclusions about the intentions and motivations of Bahnuk and Williams (who is not even a party to this action) in settling the underlying case. However, the evidence does not clearly resolve all the factual issue and definitively dispose of Plaintiff's claims. Therefore, the Court finds that Countryway has not established its entitlement to dismissal of this action on the basis of collusion in the settlement of the underlying action.

Countryway's second ground for seeking dismissal is on the basis that there was no coverage for this incident because: 1) Williams did not reside on the property, and/or 2) Williams rented the property to Wesko, so it is subject to the "business exclusion." The rights of an injured party to pursue a direct action under Insurance Law §3420 can be no greater than those of the insured. *See, Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 60 AD3d 128 (1st Dept. 2008). Thus, if the policy did not afford coverage for Williams, Bahnuk cannot maintain a direct action. The insurance policy was submitted as part of this motion, and insurance contracts are the type of proof can be considered documentary evidence.

Countryway claims there was no coverage because Williams did not live at 42 Tremont Avenue. The insurance policy defines "insured location" as the "residence premises." Further, "residence premises" is defined as "[t]he one family dwelling where you reside ... and which is shown as the 'residence premises' in the Declarations." The declarations page listed 42 Tremont Avenue as the "residence premises."

The Third Department considered this exact language and disclaimer in the case of *Craft v. New York Cent. Mut. Fire Ins. Co.*, 152 AD3d 940. In *Craft*, the insured's daughter-in-law was residing at the premises, which were insured by Defendant, and the premises were damaged by fire. The trial court had granted summary judgment to the insurance company, and the Third Department reversed, and observed:

As the party seeking to disclaim coverage, defendant bore the burden of “establishing that the exclusions or exemptions apply . . . and that they are subject to no other reasonable interpretation” (*Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708, 979 NE2d 1143, 955 NYS2d 817 [2012] [internal quotation marks and citation omitted]; see *Pichel v Dryden Mut. Ins. Co.*, 117 AD3d 1267, 1268, 986 NYS2d 268 [2014]). If a term is ambiguous, it should be construed against the insurer (see *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d at 708; *Pichel v Dryden Mut. Ins. Co.*, 117 AD3d at 1268). Here, because the insurance policy does not define the term “reside,” the term “residence premises” is ambiguous (see *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d at 709). “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” (*id.* at 708 [internal quotation marks and citations omitted]). A person can, however, have more than one residence for purposes of insurance coverage (see *Matter of Allstate Ins. Co. [Rapp]*, 7 AD3d 302, 303, 776 NYS2d 285 [2004]; *Walburn v State Farm Fire & Cas. Co.*, 215 AD2d 837, 838, 626 NYS2d 315 [1995]).

Craft v. New York Cen. Mut. Fire Ins. Co., 152 AD3d at 941.

The Third Department reversed the trial court’s granting of Defendant’s summary judgment motion, concluding that there were issues of fact regarding Plaintiff’s residence, even though Plaintiff had given a notarized statement to the insurance adjuster on the morning after the fire saying that she had rented the property to her son, and later her daughter-in-law lived there and that Plaintiff lived at another address. Plaintiff had also given a deposition confirming that information, and that she had changed her voter registration to the new address. The Third Department found that the evidence still did not warrant summary judgment because there were other factors, such as Plaintiff’s contention that she did not intend to fully move out, and that she kept some personal items at the insured premises. She kept that address on her driver’s license and some of the utility bills at the insured premises were still in her name.

In the present case, the evidence to support Countryway’s claim is much weaker. To start, this is a motion to dismiss (while *Craft* was a summary judgment motion after discovery), so the Court can only consider Plaintiff’s allegations in the complaint, unless Defendant produces documentary evidence completely negating any of Plaintiff’s claims. Countryway points to the transcripts of the investigation interviews wherein Williams stated that she did not reside at this

location, and both Wesko and Williams agreed that the premises were rented to Wesko. However, the unsworn interview transcripts and interrogatory responses are not the type of undeniable materials that the Court can consider on the motion to dismiss.² The insurance policy itself is not enough to entitle Countryway to a dismissal, and in fact contains ambiguities such as the term “residence premises.” (*See Craft, supra*). Countryway concedes that the policy does not contain a definition of the term “reside”, just like the insurance policy in *Craft*. Thus, the policy is ambiguous. Since ambiguities must be construed against Countryway, the Court cannot say that Countryway has shown a right to disclaim on the basis of Williams’ residence. The terms of the insurance contract do not, standing alone, definitively negate Plaintiff’s claim. The other “documentary evidence” are the settlement stipulation and Confession of Judgment. While those do provide an address in Brooklyn for Williams, that fact would not preclude a second residence in Binghamton. Thus, the documentary evidence does not definitively establish Plaintiff’s residence or that Plaintiff has no cause of action .

Even if the Court does consider all the additional evidence and exhibits submitted by Countryway, there are still questions of fact that remain. Countryway places great weight on the transcripts of the recorded statements from Williams and Wesko. While Williams’ statement certainly suggests that Williams was not living at 42 Tremont Avenue on the date of the incident, it also shows that her son used to live at the premises, and Williams had been there on several occasions. On the question of residence, Williams could have more than one residence, and there is no evidence as to her intention of possibly living there at some future point. “Whether a person resides in any particular location is generally a fact-based determination.” *Cotillis v. New York Cent. Mut. Fire Ins.Co.*, 158 AD3d 1030, 1030 (3rd Dept. 2018) (citation omitted). The evidence submitted by Defendant is simply some proof that Williams may have lived somewhere other than 42 Tremont Avenue, but does not rule out that 42 Tremont Avenue may have also

²Countryway claims the transcripts are admissible as business records. Without deciding that question, since this is a motion to dismiss as opposed to summary judgment, the Court is not weighing the evidence, but determining if Plaintiff has a cause of action. For Countryway to succeed in this posture, it must rely on documentary evidence, and not merely “admissible evidence”.

been one of her residences. Intention to remain is a key component of residency, and here, Countryway has not provided competent evidence as to Williams' intentions, or lack thereof, in being a resident of 42 Tremont Avenue. Particularly on a motion to dismiss, where the Plaintiff is entitled to every favorable inference, Defendant would have to submit conclusive proof that 42 Tremont Avenue was not at least one of Williams' residences. Countryway's evidence falls far short of that threshold.

Countryway also seeks dismissal on the basis of a "business exclusion" because the property was rented by Williams to Wesko. In pertinent part, the policy defines "business" as "any other activity engaged in for money or other compensation, except for ... [activity] for which no 'insured' receives more than \$2,000 in total compensation for the 12 months before the beginning of the policy period." There is no evidence as to the amount of compensation received by way of rent, so there is insufficient evidence that this exclusion applies.

Therefore, the Court concludes that Countryway's motion to dismiss must be DENIED.

The Court will next consider the cross motion filed by Bahnuk for summary judgment on the basis that Countryway failed to properly disclaim. Insurance Law §3420(d)(2) provides that if the insurer disclaims coverage for an event, "it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." Bahnuk claims that even though he was an injured person or claimant, he was not given written notice of any disclaimer.

The record reflects that Countryway sent correspondence to its insured, Williams, on April 5, 2013, setting forth the grounds upon which it relied for disclaiming coverage. There is no evidence that any letter was sent to Bahnuk, but there is also no affidavit from Bahnuk as to whether he received a letter or otherwise became aware of the denial. At this point, there is insufficient evidence on the question of notice to Bahnuk, and the parties have not engaged in discovery. It is settled law "that where a party is unable to effectively oppose a motion for summary judgment because the evidence needed is within the exclusive knowledge of the

moving party, the court may deny the motion without prejudice or refrain from ruling on the motion pending further disclosure.” *Denkensohn v. Davenport*, 130 AD2d 860, 861 (3rd Dept. 1987) (citations omitted); *see* CPLR 3212(f). Here, there has been no development of the record on the issue of any notice to Bahnuk, and Countryway needs development of the record to obtain the proof with regard to the question of notice to Bahnuk. Thus, the Court finds that the motion is premature. Based on that finding, the Court is denying Bahnuk’s cross motion for summary judgment (without prejudice) and need not determine the merits of Countryway’s disclaimer at this time.

CONCLUSION

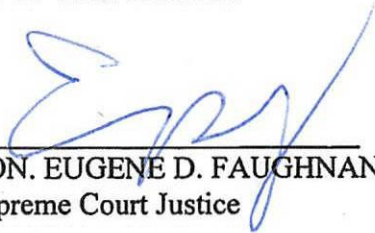
Based on all the foregoing, it is hereby

ORDERED, that Countryway’s motion to dismiss the Complaint under CPLR 3211 and 5015 is denied, and it is further

ORDERED, that Bahnuk’s motion for summary judgment is denied, without prejudice.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: July 27, 2020
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice