

**Wesco Ins. Co. v Hi-Rise Steel, Inc.**

2021 NY Slip Op 30361(U)

February 8, 2021

Supreme Court, New York County

Docket Number: 160190/2019

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12

Justice

-----X

WESCO INSURANCE COMPANY,

Plaintiff,

- v -

INDEX NO. 160190/2019

MOTION DATE

MOTION SEQ. NO. 002

HI-RISE STEEL, INC., AMRAM TUIZER, JOHN
DOE, SAMUEL SAINPLICE,

Defendants.

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29-71
were read on this motion for summary judgment.

In this declaratory judgment action, plaintiff moves for an order granting it summary
judgment against defendant Samuel Sainplice and a default judgment against defendants Hi-Rise
Steel Inc. (Hi-Rise), Amram Tuizer, and John Doe, a natural person using the fictitious name
Amram Tuizer, and a judgment declaring that Wesco has no duty to defend or indemnify Hi-Rise
or Tuizer in an action pending in the Supreme Court, Kings County, entitled Samuel Sainplice v
Amram Tuizer, et al., Index Number 512152/2016 (Kings County action). Sainplice opposes.

I. PERTINENT BACKGROUND

A. Insurance policy

In 2015, plaintiff issued a commercial insurance package policy to Hi Rise Supply Corp.
(Supply Corp.) and HR Steel Inc. (collectively, named insureds), both located at 1274 49th Street,
Suite 498, Brooklyn (49th Street address), which provided commercial automobile coverage from
May 6, 2015 to May 6, 2016; defendant Hi-Rise is not named as an insured. The policy covers
certain automobiles, including a 2014 Ford F150 pick-up truck bearing vehicle identification

number 1FTFW1EF9EKF59540 (truck). It also covers the named insureds for use of the covered automobiles, as well as anyone else while using, with permission, a covered automobile owned, hired or borrowed by the named insureds, but not the owner or anyone else from whom the named insureds hire or borrow a covered automobile. The policy permits plaintiff to disclaim its duty to provide coverage if the insured does not cooperate in the investigation of a claim. (NYSCEF 49).

B. Relationship between Hi-Rise and named insureds

According to plaintiff, Hi-Rise is an active New York corporation, incorporated in 2004, with an address for service of process at the 49<sup>th</sup> Street address, which is also the address of its chief executive officer and the principal executive office. Supply Corp. was incorporated in 2005 and dissolved by proclamation in 2016. HR Steel was incorporated in 2010 and dissolved by proclamation in 2016, with an address for service of process at its principal executive office at the 49<sup>th</sup> Street address; its chief executive officer is Levi Hirschfeld. Another active corporation named Hi-Rize Steel Inc. lists the 49<sup>th</sup> Street address for service of process. (NYSCEF 31-34).

Workers Compensation Board records reflect that:

- (1) Hi-Rise (employer number 2314182) carried workers compensation insurance from February 9, 2005 until May 15, 2011;
- (2) Supply Corp. (employer number 2579570) has no history of carrying workers compensation insurance;
- (3) HR Steel (employer number 2637981) carried workers compensation insurance from February 2, 2011 until January 4, 2016; and
- (4) Hi-Rize Steel (employer number 2927367) was added to HR Steel's policy effective January 4, 2016, and it remained insured until December 1, 2016.

(NYSCEF 35).

In an action filed in Kings County in 2009, wherein injured Hi-Rise employees were

plaintiffs, Hirschfeld stated by affidavit, as pertinent here, that he is the chief executive officer and principal officer of Hi-Rise, that he changed Hi-Rise's name to Hi-Rize Steel for insurance purposes, and that the 49<sup>th</sup> Street address is where he receives mail but that it is not the company's actual office address. (NYSCEF 37).

The truck at issue here is owned and registered by Hi-Rise. (NYSCEF 38).

#### C. Underlying action

In 2016, Sainplice commenced the Kings County action against Tuizer and Hi-Rise, alleging that he was injured on December 13, 2013 while he was riding a bicycle and struck by a vehicle owned by Hi-Rise and operated by Tuizer. (NYSCEF 39).

A certified police report reflects that on December 13, 2015, Tuizer, while operating the truck registered to Hi-Rise, allegedly collided with Sainplice. Tuizer gave his address to the responding police officer as the 49<sup>th</sup> Street address. (NYSCEF 40).

By order dated July 31, 2019, Hi-Rise and Tuizer were precluded "from offering any evidence in opposition to any dispositive motion and at the time of trial" due to their failure to appear for depositions in the Kings County action. (NYSCEF 41).

#### D. Instant action

On October 28, 2019, plaintiff served its pleadings on Hi-Rise via delivery to the New York Secretary of State (NYSCEF 44), and served the required additional notice on November 14, 2019 (NYSCEF 45).

On November 5, 2019, Sainplice filed his answer. (NYSCEF 2).

By order dated February 3, 2020, plaintiff was permitted to serve Tuizer by publication (NYSCEF 22), and did so by March 12, 2020 (NYSCEF 24).

While Wesco has been defending Hi-Rise and Tuizer in the Kings County action, it

disclaims coverage on the basis of their breach of the cooperation clause. It thus seeks a judgment declaring that it has no duty to defend them in that action. (NYSCEF 1).

## II. CONTENTIONS

### A. Plaintiff (NYSCEF 58)

#### 1. Cooperation

According to plaintiff, it was first notified of the accident on January 4, 2016, when it received a copy of the police report at its email address for the reporting of claims. According to an Acord Automobile Loss Notice, also dated January 4, 2016, the claim was reported by Sainplice's counsel. (NYSCEF 48).

Plaintiff attempted to contact Tuizer and Hi-Rise's principals numerous times between 2016 and 2019, including by conducting database searches, but was unable to find either of their whereabouts, although it discovered a home address for Hirschfeld. When an investigator reached Hirschfeld by telephone, he was told that Hi-Rise was Hirschfeld's company but was out of business and that he did not know Tuizer or anything about Sainplice's accident. Thereafter, Hirschfeld failed to respond to plaintiff's calls and letters, including demands that he appear for a deposition in the Kings County action. (*Id.*).

By letter dated September 10, 2019, addressed to Hi-Rise and Tuizer at the policy address and to Hirschfeld at his residence, plaintiff disclaimed coverage based on their breach of the policy's cooperation clause, following the court's preclusion order in the Kings County action; the letter does not address their status as non-insureds under the policy. (NYSCEF 57).

#### 2. Insured status

Plaintiff argues that as the policy names as insureds only Steel Corp, and HR Steel, Hi-Rise and Tuizer do not qualify as insureds. While these companies may share the same principal,

plaintiff maintains that Hi-Rise is a separate company, and that nothing in the policy provides for coverage of separate companies with common ownership.

Moreover, while the truck was identified as a covered automobile if owned by one of the named insureds, the fact that it was owned by Hi-Rise negates any coverage. Given the defaults of Hi-Rise and Tuizer in answering or appearing, they are precluded from raising any triable issues in opposition.

### 3. Prompt disclaimer

While plaintiff now raises the issue that defendants do not qualify as insureds under the policy, it is not estopped from denying coverage on that ground, as defendants are not named insureds and thus coverage, which would not otherwise exist, is not created by estoppel.

#### B. Sainplice opposition (NYSCEF 61)

Sainplice argues that plaintiff fails to establish, *prima facie*, that the policy does not cover Tuizer and Hi-Rise, as it fails to submit admissible, non-hearsay evidence, observing that the supporting affidavit is by one unrelated to the entity that is a party to the insurance policy, and that the affiant's statements thus constitute inadmissible hearsay, as do the various documents filed by plaintiff.

Sainplice observes that the truck is listed in the policy and may be covered if leased to or borrowed by Hi-Rise from one of the named insureds, and that plaintiff submits no evidence that it was not leased or borrowed. He also contends that plaintiff's disclaimer on the basis of a lack of cooperation presumes that Hi-Rise and Tuizer are named insureds as they would have no duty to cooperate otherwise, and thus it constitutes an admission that, or at the very least creates a triable issue as to whether they are covered under the policy.

According to Sainplice, plaintiff should be estopped from disclaiming coverage now

based on its argument that defendants are not named insureds, and the motion is premature as no discovery has been exchanged.

C. Reply (NYSCEF 70)

Plaintiff submits proof that it responded to Sainplice's discovery demands before it filed the instant motion (NYSCEF 69), and denies that its evidence is inadmissible, alleging that the submitted documents are authenticated based on its agent's personal knowledge. It again argues that estoppel does not apply and that having prove no coverage in the first instance, it need not be determined whether it properly disclaimed based on Hi-Rise's and Tuizer's non-cooperation.

III. ANALYSIS

Plaintiff establishes that it properly served Hi-Rise and Tuizer and that they have failed to appear or answer. The documents submitted by plaintiff are admissible as they are submitted through the affidavit of its agent who has personal knowledge based on his review of plaintiff's business records (*see JP Morgan Chase Bank, Ntl. Assn. v Shapiro*, 104 AD3d 411 [1st Dept 2013] [plaintiff submitted affidavit of employee who had personal knowledge based on review of plaintiff's books and records]), and they establish, *prima facie*, that Hi-Rise and Tuizer are not named insureds under the insurance policy, that the truck was not owned or registered by any of the named insureds, and that Hi-Rise's principal and Tuizer failed to cooperate in plaintiff's investigation of the accident.

As plaintiff establishes that Hi-Rise and Tuizer are not named insureds, and thus not covered under the policy, the burden shifts to defendants to establish that an exception applies that would confer coverage. Sainplice submits nothing to support his speculation that the truck was leased or borrowed by one of the named insureds to Hi-Rise and/or Tuizer, and thus fails to raise a triable issue in that regard.

Plaintiff's actions in the Kings County action do not estop it from now disclaiming coverage, as no coverage exists. (*Matter of U.S. Specialty Ins. Co v Navarro*, 169 AD3d 415 [1st Dept 2019], *lv denied* 34 NY3d 903 [2019] [equitable estoppel could not be invoked to create coverage as respondent not insured under policy]). Plaintiff also establishes that it responded to Sainplice's discovery demands, and Sainplice does not specify what needed discovery it seeks or is outstanding. (Cf CPLR 3212[f]).

In light of this result, there is no need to consider plaintiff's alternative argument regarding Hi-Rise's and Tuizer's failure to cooperate with its investigation.

IV. CONCLUSION

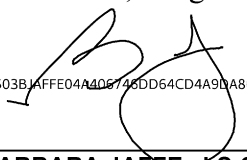
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment as against defendant Samuel Sainplice is granted; it is further

ORDERED, that plaintiff's motion for a default judgment as against defendants Hi-Rise Steel Inc. and Amram Tuizer is granted; and it is further

ORDERED and ADJUDGED, that plaintiff is granted a judgment declaring that it has no duty to defend or indemnify Hi-Rise Steel Inc. or Amram Tuizer in the action entitled *Samuel Sainplice v Amram Tuizer, et al.*, pending in the Supreme Court of New York, Kings County, under Index Number 512152/2016

2/8/2021  
DATE

  
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BARBARA JAFFE, J.S.C.

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