Mountain Val. Indem. Co. v Coen
2024 NY Slip Op 34091(U)
November 15, 2024
Supreme Court, New York County
Docket Number: Index No. 652749/2022
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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MOUNTAIN VALLEY INDEMNITY COMPANY,

Plaintiff,

- v -

JULIA COEN and NORMA MOREIRA

Defendants.

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INDEX NO. 652749/2022

MOTION DATE 08/10/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff's motion for summary judgment is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 8, 10-11, 35, 37) and the exhibits attached thereto, in which the court concurs, as summarized herein. The cross-motion of defendant Norma Moreira to dismiss the action is denied.

In this insurance coverage declaratory judgment action, plaintiff seeks a declaration of no coverage for its policy holder, defendant Julia Coen, for injuries claimed by defendant Norma Moreira in an action captioned *Moreira v Coen*, bearing Index No. 611949/2022, and pending before the Supreme Court of the State of New York, Suffolk County (the "underlying action"). The policy provides coverage for bodily injury, except where such injury, among other things, arises out of a business engaged in by the insured, the rental of any premises owned by the insured, rented to an insured, or rented to others by an insured, other than the "insured location" (policy, NYSCEF Doc. No. 16 at 31). As relevant herein, "insured location" is defined as the "residence premises," which in turn is defined as the premises where the insured resides and is

identified in the declarations, including a two family dwelling where the insured resides in one of the units (*id.* at 21). The residence premises defined in the policy is located at 64 West 13th Street, Huntington Station, New York 11750 (the "underlying premises") (*id.* at 5).

Moreira commenced the underlying action against Coen after slipping and falling at the underlying premises on December 13, 2021 (underlying summons and complaint, NYSCEF Doc. No. 17). During its investigation of the claim, plaintiff interviewed Coen, who stated that at the time of the accident she was not living at the underlying premises but had moved to 420 Commack Road, Commack, New York 11725 (Coen statement, NYSCEF Doc. No. 18). Plaintiff then disclaimed coverage on July 23, 2022, on the grounds that the underlying premises was no longer the residence premises and was not otherwise an insured location under the policy (disclaimer, NYSCEF Doc. No. 19). Coen later testified in the underlying action in 2023 that she had moved away from the underlying premises at least five years previously and had not moved back in (Coen EBT tr., NYSCEF Doc. No. 33 at 7-10). An interpreter was present at the deposition (*id.* at 5). Plaintiff now seeks summary judgment declaring that it is not obligated to defend or indemnify plaintiff in the underlying action.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is

insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, plaintiff has established prima facie entitlement to summary judgment by submission of the policy[1] and Coen's statement regarding her residence. Plaintiff is entitled to a default judgment against Moreira on the same grounds, as Moreira appeared by counsel (NYSCEF Doc. No. 4) but never filed an answer to the complaint or sought an extension of her time to do so.

Coen asserts that she speaks little English and did not understand the questions being put to her (Coen aff., NYSCEF Doc. No. 28, ¶ 5). Assuming this is true, Coen later testified that she no longer resided at the underlying premises under oath, at a deposition where an interpreter was present, the transcript of which she reviewed and signed (*id.*, ¶¶ 6-8; Coen EBT tr., NYSCEF Doc. No. 33 at 7-10). To the extent her affidavit conflicts with her testimony, a later filed affidavit cannot be used to contradict sworn testimony given at a deposition (*e.g. Feaster-Lewis v Rotenberg*, 93 AD3d 421, 422 [1st Dept 2012]).

Coen also testifies that she has never understood or had explained to her the provisions of the policy (Coen aff., NYSCEF Doc. No. 28, ¶ 9). Coen's papers are not clear as what import

[1] Coen's contention that plaintiff failed to provide a certified copy of the policy is unavailing, as she does not allege that the policy provided is not her policy. At best, the failure to provide a certified copy is a technical defect which may be disregarded (CPLR 2001).

this should have, but the court assumes that perhaps she means to argue that she did not know that if she moved away from the underlying premises, she would lose coverage. Nevertheless she does not deny that she is the insured, and therefore when obtaining the policy signed an application. Indeed, she also renewed the policy more than once, as evidenced by the renewal certificate included with the policy documents (policy, NYSCEF Doc. No. 16 at 5).

It is an axiom of the law that one who signs a document is presumed to have read and understood its contents. As the Court of Appeals has explained:

> Ordinarily, the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material. If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him.

(*Pimpinello v Swift & Co.*, 253 NY 159, 162-63 [1930].)

Before entering into an agreement, a party is "under the obligation to exercise ordinary diligence to ascertain the terms of the document" (*PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268, 272 [1st Dept 2001]). Coen cannot now claim ignorance of the policy when she has not sought to have it provided to her in a language that she can read fluently (Coen aff., NYSCEF Doc. No. 28, ¶ 9). Coen also does not provide any authority for the position that it was plaintiff's responsibility to discover her need for translation and provide translated copies of the policy and related documents. Coen's argument the discovery is necessary to defend the motion is unavailing; she does not establish that facts "essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] [The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion"]).

Moreira's cross-motion to dismiss the complaint against her is denied. Moreira argues that she is not a proper party, relying on *Lang v Hanover Ins. Co.* (3 NY3d 350 [2004]) and *Clarendon Place Corp. v Landmark Ins. Co.* (182 AD2d 6 [1st Dept 1992]), both of which stand for the unremarkable proposition that a party claiming against an insured may not sue an insurer in advance of a decision in its favor. Neither case bars an insurer from seeking to determine its coverage obligations while the underlying action proceeds. As Moreira makes no other arguments, the cross-motion must be denied.

Accordingly, it is hereby

ORDERED that the motion of plaintiff for summary judgment on its causes of action seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendant Julia Coen in the action of *Moreira v Coen*, Index No. 611949/2022, pending before the Supreme Court of the State of New York, Suffolk County, or provide coverage to defendant Norma Moreira, 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 defendant Julia Coen in the said action pending in Suffolk County, or provide coverage to defendant Norma Moreira; and it is further

ORDERED that defendant Norma Moreira's cross-motion to dismiss the action is denied.

This constitutes the decision and order of the court.

ENTER:

11/15/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE