Tower Ins. Co. of N.Y. v Burrell
2017 NY Slip Op 32273(U)
October 18, 2017
Supreme Court, New York County
Docket Number: 157093/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

EDWIN BURRELL, E.G., minor by and through his Father and Natural Guardian, EMMANUEL GEORGES and EMMANUEL GORGES,

Defendants.

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Index No. 157093/2016
Motion Seq: 001

DECISION

HON. ARLENE P. BLUTH

The motion for summary judgment by plaintiff on causes of action one through four is granted.

Background

This declaratory judgment action arises out of an insurance policy plaintiff issued to defendant Edwin Burrell commencing August 31, 2014 and ending August 31, 2015. This policy provides homeowners' insurance coverage to Burrell for his home located at 144-20 181 Pl., Springfield Gardens, New York.

In July 2016, plaintiff claims it was told about a loss at the premises stemming from a slip and fall accident that occurred on August 6, 2015 that resulted in litigation in Kings County. Plaintiff alleges that after conducting an investigation it discovered that Burrell was not living at the premises at the time of the accident and had not lived at this address since 2008. Plaintiff submits the affidavit of its investigator, Rock Geffrard, who claims that Burrell told him he lives in St. Albans, New York and that Burrell had owned and managed the premises (a 2-family home) since 2005 (NYSCEF Doc. No. 13,

¶¶ 7, 8). Geffrard further states that Burrell informed him that he lived at the premises until 2008 and that on the date of the underlying accident (which led to the claim), two separate tenants lived at the premises in Springfield Gardens (*id.* ¶¶ 8, 9).

Plaintiff insists that the policy provided to Burrell does not offer coverage for bodily injury arising out of a rental property because that is not an insured location. Plaintiff observes that the policy required that Burrell reside in at least one of the two units.

In opposition, Burrell acknowledges that he was not residing at the premises at the time of the accident. Instead, Burrell claims that plaintiff knew that Burrell had moved because Burrell sent letters to plaintiff from a different address. Burrell argues that plaintiff was fully aware that Burrell was not living at the insured premises when the accident occurred.

In reply, plaintiff denies that Burrell notified plaintiff that he moved and claims that even if it was aware of the change in residency, that knowledge could not extend coverage in an insurance policy.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then

produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The renewal certificate for the homeowners policy plaintiff issued to Burrell for his property in Springfield Gardens states that "Insured location means . . . the 'residence premises'" (NYSCEF Doc. No. 14). "Residence premises" is defined as "The one family dwelling, other structures, and grounds" or "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" (*id.*).

Burrell acknowledged to plaintiff's investigator that he lived elsewhere at the time the loss (the underlying injury) occurred. Burrell does not dispute this account. Therefore, plaintiff is entitled to summary judgment on Counts I-IV in the complaint (*see Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d 644, 24 NYS3d 10 [1st Dept 2015] [holding that Tower had no duty to defend or indemnify Hossain in an underlying personal injury action where Tower submitted an affidavit from its investigator stating that Hossain admitted that he no longer resided at the premises on the date of the accident]). In fact, Burrell submits his own affidavit in which he admits that he did not live at the insured premises at the time of the accident (*see* NYSCEF Doc. No. 26).

Further, just because Burrell may have mailed plaintiff letters from another address does not

No. 26).

Further, just because Burrell may have mailed plaintiff letters from another address does not create an issue of fact. To embrace Burrell's argument would require insurance companies to assume someone has moved and automatically and affirmatively change addresses if they receive any correspondence or bill payment from an insured if the return address or letterhead address is different than the one on file. That, of course, is ridiculous. People can mail letters from another address; people can mail letters from their offices or while on vacation, some people have off-site family members or money managers or accountants who pay their bills, others prefer to use a post office box to consolidate and keep their mail safe – that does not give an insurance company notice that the person is *residing* in their accountant's office or in a post office box. No, to inform the insurance company that you have moved your residence you must write a letter informing the insurance company that you have moved your residence; this Mr. Burrell admits he never did.

In this action, Burrell decided to continually renew and pay the premiums for a homeowner's insurance policy for an income producing property rather than informing plaintiff that he no longer lived at the insured premises. He decided not to obtain insurance meant for a landlord (which, presumably would be more expensive). Burrell cannot now seek coverage for a claim specifically excluded in the policy he obtained from plaintiff.

Plaintiff's motion is granted and plaintiff is directed to submit an order to the Courtroom on or before November 21, 2017.

Dated: October 18, 2017
New York, New York

ARLENE P. BLUTH, JSC

 HON. ARLENE P. BLUTH