Tower Ins. Co. of N.Y. v Diaz
2008 NY Slip Op 31999(U)
July 11, 2008
Supreme Court, New York County
Docket Number: 0113448/2006
Judge: Doris Ling-Cohan
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SCANNED ON 7/15/2008

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 113448/2006
TOWER INSURANCE
vs
DIAZ, SEGUNDO, JR.
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

his motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion summary judgment by plaintiff is decided in accordance with the attached memorandum decision.

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. DORIS LING-COHAN

Dated: 8/11/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---x

Tower Insurance Company of New York,
Plaintiff,

Index No. 113448/06

-against-

Motion Seq. No.: 001

Segundo Diaz, Jr., Christina Diaz,
Rafael Pacheco and Francis Gayle,
Defendants.

---x

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Doris Ling-Cohan, J.:

In this declaratory judgment action involving coverage under the terms of the insurance policy, plaintiff Tower Insurance Company of New York (Tower) moves for an order, pursuant to CPLR 3212, granting it summary judgment. Co-defendants Segundo Diaz, Jr. (Segundo) and Christina Diaz (Christina) (the Diazes) request in their opposition papers that, pursuant to CPLR 3212 (b), they be granted summary judgment dismissing Tower's complaint in its entirety.

On March 10, 2006, co-defendants Rafael Pacheco (Pacheco) and Francis Gayle (Gayle) were injured when they fell from an elevated height while performing construction work on a building undisputably owned by the Diazes, and located at 2604 East 65th Street, Brooklyn, New York (the premises). Purportedly, the premises was purchased by the Diazes, in or about November 2005, and was to be used as their marital residence. Pacheco and Gayle allege that they were injured due to the failure of the owners to maintain the construction site premises in a safe condition. Pacheco and Gayle were employees of a subcontractor engaged by a general contractor to perform work on the premises. Some of the construction work included the addition of a second floor to the premises (*see* Notice of Motion, Williams Affidavit, Exhibit 1).

On March 21, 2006, an action was brought in Kings County Supreme Court, under Index No. 9589/06, by Pacheco and Gayle, as plaintiffs, against Segundo, as the sole defendant. Tower

was notified of the incident on May 5, 2006. On May 12, 2006, Brian K. Williams (Williams), an investigator employed by Tower, interviewed Segundo. As a result of that interview, in a June 2, 2006 letter, Tower notified the Diazes that it disclaimed any duty to defend or indemnify them in the Kings County action, and that it was commencing a declaratory judgment action seeking such relief. It informed the Diazes that it would defend them in the Kings County action until such time as the declaratory judgment action was resolved.

Tower's complaint alleges two causes of action. The first cause of action seeks a declaratory judgment that there is no duty to defend and indemnify the Diazes based on language in an exclusionary clause in the "Definitions" portion of Tower insurance form HO 00 03 04 91, subsection (4) (f). The second cause of action seeks a declaratory judgment that the insurance policy is void because the Diazes allegedly made a false material representation on the homeowners insurance policy application, in violation of Tower insurance policy form HO 01 31 08 00 Section I and II - Conditions, subsection (2). In paragraph 11 of their answer, the Diazes admit "so much of the allegations contained in paragraph '13' [of the complaint] as it asserts that the [Diazes] intended to occupy the premises following its renovation."

The Pertinent Policy Language

It is alleged that the material misrepresentation occurred when the Diazes submitted a homeowners insurance application, dated November 1, 2005, which listed 2604 East 65th Street as their "mailing address" while listing 2325 East 69th Street, Brooklyn, New York as their "previous address (if less than 3 years)" (*see* Affidavit in Opposition, Exhibit EE; Notice of Motion, Aptman Affidavit, Exhibit 2). The addresses were on a computerized or typed homeowners insurance application, which was allegedly prepared by Obinach Arroyo (Arroyo), an insurance salesman employed with Northeast Agencies, Inc. (Northeast). The application was

signed by the Diazes, and was then signed by Brenda Stitt, an agent with Northeast, and was then forwarded to Tower. The record shows that Tower, thereafter, issued an insurance policy for the premises for the period of November 7, 2005 through November 7, 2006. That policy number was HOS2561682. The premises was subsequently inspected by Tower on November 11, 2005.

Tower form HT001, the "Declarations" page of the insurance policy, lists the Diazes as the "Insured" with an "address" of "2604 E. 65th St., Brooklyn, New York." Under the box marked "Occupancy," "Owner" is typed in. Tower form HT001 also lists Northeast as the "Agent" "c/o Brenda Stitt." Tower form HO 00 03 04 91, entitled "Homeowners 3 Special Form," includes a "Definitions" section, a "Section - II Liability" section, and a "Section II - Exclusions" section.

The "Definitions" portion of form HO 00 03 04 91, section (4), entitled "'**Insured location' means**," provides, in pertinent part, that the "Insured location" includes:

> **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 your use as a residence;
> c. Any premises used by you in connection with a premises in 4.a. and 4.b. above;
> d. Any part of a premises:
> (1) not owned by an "insured"; and
> (2) where an "insured" is temporarily residing;
> e. Vacant land, other than farm land, owned by or rented to an "insured";
> **f. Land owned by** or rented to **an "insured" on which a one or two family dwelling is being built as a residence for an "insured"** ...

[emphasis added].

Section 8, entitled "'**Residence premises' means,**" provides, in pertinent part, that "**Residence premises**" **includes**:

> 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.**

[emphasis added].

> "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.

The "Section II - Exclusions" portion of form HO 00 03 04 91 under "Section II -Liability Coverages," the "Coverage E - Personality Liability" portion of that section, which deals with when a claim is brought against an "insured," delineates in subsection (1) that the insurer will pay up to the limit of liability for the insured, and in subsection (2) that the insurer will provide a defense. The "Coverage - Medical Payment to Others" portion delineates in subsection (1) that necessary medical expenses will be paid to a person injured on the "insured location" with the permission of the "insured."

The "Section II - Exclusions" portion of form HO 00 03 04 91, under section (1) of "Section II - Exclusions," which states that "Coverage E - Personal Liability and Coverage F- Medical Payments to Others do not apply to 'bodily injury' or 'property damage'," section (1) provides in, pertinent part, that such coverage is not provided:

> e. **Arising out of a premises**:
> (1) owned by an "insured"; ...
> **that is not an "insured location**."

[emphasis added] (*see* Notice of Motion, Aptman Affidavit, Exhibit 1 [Policy form HO 00 03 04 91, Section II - Exclusions, (1) (e) (1), at 13 of 18 for Insurance Policy HOS561682).

In Tower policy form HO 01 31 08 00, the "Section I and II - Conditions" portion addresses the matter of making a false representation on the insurance policy application. The pertinent language provides:

> 2. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an "insured" has:

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a. Intentionally concealed or misrepresented any material fact or circumstance;
b. Engaged in fraudulent conduct; or
c. Made false statements;
relating to this insurance

(*see* Notice of Motion, Aptman Affidavit, Exhibit 1, Policy form HO 01 31 08 00, Section I and II - Conditions subsections (2) (a), (b) and (c), at 17 of 18).

The Insurer's, Insurance Agent's, and Insured's Business Relationship History

Christine argues that she did not misrepresent a material fact on the application. She represents in her affidavit that for a number of years she and her family have obtained coverage for vehicles and apartments through Arroyo. Though those policies had previously been with Allstate Insurance, at some point, Arroyo switched their policies to Tower Insurance. Christine, who apparently handles the family insurance matters, was directed by Arroyo to contact Brenda Stitt, another Northeast agent. Ms. Stitt used Northeast stationary and identified herself as a Northeast agent in her correspondence with Christine (see Diaz Affidavit in Opposition, Exhibits DD, EE and FF). In paragraphs 9, 14, 19 and 20 of Christine's affidavit, she alleges that at all times, Arroyo and Northeast were aware of the purpose for which the insurance policy on the premises had been procured, that being that it was purchased as their residence and that it was undergoing renovations prior to their intended occupancy of the premises (*ibid* paragraph 6). Christine states that Tower inspected the premises four (4) days after the its policy was issued. The inspection report noted the premises' vacancy as a concern.

First Cause of Action

Tower's position is that it is not obligated to defend and indemnify the Diazes pursuant to exclusion clause subsection (1) (e) (1) because 2604 East 65th Street was neither a "residence premises" nor an "insured location" under the terms of the insurance policy. Their reliance on

that exclusion clause is based upon the fact that the Diazes were not actually residing at 2604 East 65th Street on the date of the incident. The allegation of non-residence is based upon a transcript statement signed on May 12, 2006 by Segundo and given to Williams. Williams states in his affidavit that at the end of a conversation between himself and Segundo, he accurately transcribed Diaz's statement, then he reviewed it with Segundo, who then reviewed those transcribed statements and signed the transcription (see Notice of Motion, Williams affidavit). The court record reflects that only a redacted copy of Segundo's alleged statement, referred to in Williams's affidavit, is attached to the Notice of Motion (see Notice of Motion, Williams Affidavit, Exhibit 1). That redacted copy provides the following:

> File #406-0877
> Mr. Segundo Diaz, Jr.
>
> > My name is Segundo Diaz Jr. **[redaction]** I purchased a vacant two (2) family private home at 2604 E. 65th Street, Brooklyn, N.Y. in December 2005 or January 2006. I purchased 2604 East 65th Street with my wife Christina Diaz. We have resided at 2176 E. 38th Street since the purchase of 2604 East 65th Street in December 2005/January 2006, as we are having another floor added and are converting the property from a two (2) family to a one (1) family dwelling. We have never resided at 2604 East 65th Street, however we should be able to move in after construction is complete (in a few weeks). **[redaction]**. I have read the above statements and find them to be true and accurate to the best of my knowledge.
>
> [signed] Segundo Diaz Jr.

Segundo was not provided with an unredacted copy of the transcript (see Diaz Memorandum of Law, at 8, footnote 4; Tower Memorandum of Law, at 3, footnote 10).

In his October 29, 2007 affidavit, Lowell Aptman, the vice president handling liability claims for Tower, in reliance on the Williams Affidavit and attached exhibit, states, in paragraph 7, that, on the date of the accident, the Diazes "resided at 2176 E. 73th [*sic*] St., Brooklyn, New York and awaited the completion of construction on the subject premises located at 65th Street

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before moving in." He states that the application submitted by the Diazes "through their insurance broker" represented that they occupied the premises as their primary residence. He further states that the policy excludes coverage for an injury sustained at a location which the insureds own but in which they do not reside.

In paragraphs 14, 19 and 21 of her affidavit, Mrs. Diaz, in reliance on policy form HO 00 03 04 91, section (4) (f), interprets the language found in policy form HO 00 03 04 91, Section II - Exclusions, (1) (e) (1) differently from Mr. Altman. She points out, in paragraph 14 in particular, that, in its Notice of Motion, Tower limits the definition of "Insured location" to that of the phrase "the residence premises" found in subsection (4) (a), and makes no mention of subsection (4) (f), upon which the Diazes rely. Her position is that the land, referred to in section (4) (f), that being land owned by or rented to an "insured" on which a one- or two-family dwelling is being built as a residence for an "insured," includes land, such as the subject premises, upon which construction in an existing building is taking place. Thus, she argues that 2604 East 65th Street is an "insured location" pursuant to subsection (4) (f), and falls within an exception to the subsection (1) (e) (1) exclusion language. Tower's position is that the activity on the existing structure at 2604 East 65th Street is "renovation" and is not encompassed within the plain meaning of the subsection (4) (f) term "***built***," or phrase "***being built as a residence***" [emphasis added].

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such [unambiguous] provisions is a question of law [to be determined by] the court" (*White v Continental Casualty Company*, 9 NY3d 264, 267 [2007]) (citation omitted). If an ambiguity is determined to exist in an insurance policy, it must be construed against the preparer of the policy, the insurer, and in favor of the

Here, section (4) (e), which specifically refers to "vacant land," when compared with section (4) (f), which more broadly refers to "[l]and owned by ... an "insured" on which a one or two family dwelling is being built as a residence for an "insured," seems to distinguish vacant land from land with something on it. Both subsections fall within exceptions to the exclusionary language in the policy. Additionally, the policy language in subsection (f), does not specify that the structure being "built" on the land must be only a completely new structure versus a structure that is being constructed, reconditioned, renovated, added onto, or rebuilt. The facts show that there was construction being done on a pre-existing building on the land identified as the premises. It is significant that the building work being done was done to convert the property to a one (1) family residence for the defendant homeowners. In the redacted Williams transcript, Segundo states that a second floor was being added to the premises, a construction done to convert the two family dwelling to a one family residence so that he and his wife could move in after construction was completed. In paragraph (7) of his affidavit, Aptman refers to the building activity as being "construction on the subject premises." The fact that a second floor is being added to a building is identical to as a second floor being built, or, using Mr. Aptman's own words, a second floor being "constructed."

Tower's assertion that "land" as used in subsection (4) (f) would only encompass land on which an entirely new structure is being built is not supported by the plain meaning of the language in that subsection. To apply Tower's interpretation of subsection (4) (f) would theoretically require an insured to tear down an existing structure and rebuild it from scratch in order for subsection (4) (f) of insurance policy HOS2561682 to apply.

This court finds that, based on Segundo's statements in the Williams transcript, the statement in paragraph 7 of the Aptman affidavit, and the plain meaning of the term "build" as

used in the language of subsection (4) (f), the premises located on 2604 East 65th Street is an "insured location." The addition of a second floor to the structure on the premises makes it land on which a one family dwelling is being built. As an insured location, there is a duty to defend and indemnify as long as the insurance policy is not voided due to a material misrepresentation on the application. Upon searching the record, the court may grant summary judgment to the non-moving party where appropriate (see CPLR 3212 [b]; *Triple M. Roofing Corp. v Farmingdale Union Free School District*, 26 AD3d 323, 325 [2d Dept 2006]). Here, summary judgment should be granted to the non-moving co-defendants on the first cause of action, for the above reasons.

The Second Cause of Action

The court recognizes that the exclusionary language in a homeowner's insurance policy is specifically based on the assumption that the residence of the insured is their home, or in this case, will be their home (see 9A, Couch on Insurance 3D § 128:1, *et seq.*). The second cause of action implies that, based on the statements in the May 12, 2006 Williams transcript discussed above, the mailing address on the application form was fraudulently filled out.

Lowell Aptman states in paragraph 8 of his October 19, 2007 affidavit that "[t]he application submitted by the Diazes through their insurance broker, dated November 1, 2005, represented that they occupied the premises as their primary dwelling, and did not own, occupy or rent any other residence." The court notes that the application form, identified as an "ACORD HOMEOWNER APPLICATION" prepared on an Acord Corporation 1981 form identified as "ACORD 80(2002/01)," was allegedly prepared by the "Agent Northeast Agencies, Inc." The application, which has spaces for a "mailing address" and a "previous address," lists 2604 East 65th Street as the Diazes' "mailing address" and lists 2325 East 69th Street, Brooklyn New York

as the "previous address." The court reiterates that the Tower policy's "Declarations" page was prepared on Tower's form HT001. Under the name of the insured, it listed 2604 East 65th Street as the Diazes' "address." Neither of the terms "mailing address" or "address" are defined anywhere on either the ACORD application or in the Tower insurance policy. Nor do any of the parties address whether or not the Diazes actually received mail at the premises address.

Tower refers to the "Sections I and II - Conditions" portion of "Special Provisions - New York" section (2), which provides, in subsection (2) (a), that it will not provide coverage for the "insured" who, whether before or after the loss, has intentionally concealed or misrepresented any material fact or circumstance. In reliance on subsection (2) (a), the fourth last paragraph of the June 2, 2006 disclaimer letter from Aptman indicated that Tower would not provide insurance coverage for an insured who, either before or after a loss, misrepresented any material fact or circumstance, nor would it have issued a homeowner's policy, had it known that the disputed premises was not owner-occupied (*see* Notice of Motion, Aptman Affidavit, Exhibit 4).

The Insurance Law defines a representation as a statement regarding past or present fact "made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105 [a]). "'[A] material misrepresentation [], if proven, would void the insurance policy ab initio'" (*Tyras v Mount Vernon Fire Insurance Company*, 36 AD3d 609, 610 [2d Dept 2007][citation omitted]). "'[T]o establish [a] right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation (*Schirmer v Penkert*, 41 AD3d 688, 690 [2d Dept 2007][citation omitted]).'" "To establish materiality as a matter of law, an insurer must present [documentary evidence] concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show

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that it would not have issued the same policy if the [allegedly] correct information had been disclosed in the application"(at 690-691). "Conclusory statements by insurance company employees, [such as Mr. Aptman] [which are] unsupported by documentary evidence, are insufficient to establish materiality as a matter of law" (at 691).

Here, other than the Aptman affidavit, the record is devoid of any Tower documentation concerning its underwriting practices to show that it would not have issued the same policy if the allegedly correct information had been disclosed in the application. Even assuming that there was a material misrepresentation made, the evidence proffered is insufficient to establish materiality as a matter of law (*Parmar v Hermitage Insurance Company*, 21 AD3d 538, 541 [2nd Dept 2005]). "The issue of materiality is generally a question of fact for the jury" (*Schirmer v Penkert*, 41 AD3d at 690). At this juncture, there is no basis to grant Tower summary judgment on its second cause of action.

Moreover, the Diazes are not entitled to summary judgment on the second cause of action. In stating that they did not misrepresent any facts on either their homeowners application or in their explanation to the insurance agent prior to obtaining the disputed homeowners insurance policy, they indicated that, as a subsection (4) (f) exception to the exclusion, they would be moving in after the construction work on the premises was completed. Segundo indicated in the May 12, 2006 transcript that such a move would be occurring within a few weeks. No such proof that they actually moved into the premises has been provided. Thus, there is triable question of fact as to whether the Diazes fall within the subsection (4) (f) exception under the insurance policy terms.

Accordingly, based on the record before this court, it is

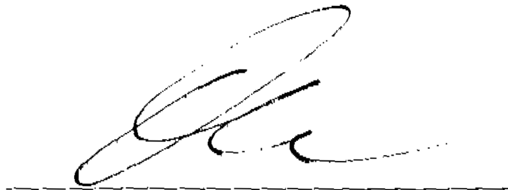
ORDERED that that portion of the motion seeking summary judgment on the first cause

of action is denied as to the movant but is granted as to the non-moving parties and the court finds that there is a duty to defend and indemnify the Diazes subject to plaintiffs's defenses stated in the second cause of action, and it is further

ORDERED that that portion of the motion seeking summary judgment on the second cause of action premised upon material misrepresentation is denied as to all parties; and it is further

ORDERED that within 30 days of entry of this order, the Diazes shall serve a copy upon all parties with notice of entry.

Dated: July 11, 2008



Hon. Doris Ling-Cohan, J.S.C.

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