

Delos Ins. Co. v Citywide Home Bldg. Corp.
2012 NY Slip Op 31731(U)
June 4, 2012
Sup Ct, New York County
Docket Number: 110966/2010
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.

PART 46

Index Number : 110966/2010
DELOS INSURANCE COMPANY
VS.
CITYWIDE HOME BUILDINGS CORP.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~:

The court denies plaintiff's motion for a default declaratory judgment against defendant Citywide Home Building Corp. pursuant to the accompanying decision. C.P.L.R. §§ 3215 (f), 3001.

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

FILED

JUL 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/4/12

Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

DELOS INSURANCE COMPANY f/k/a SIRIUS
AMERICA INSURANCE COMPANY,

Index No. 110966/2010

Plaintiff

- against -

DECISION AND ORDER

CITYWIDE HOME BUILDING CORP., VISTAMAR
COMPLEX LTD., and LB NORTHEAST
DEVELOPERS, LTD.,

Defendants

FILED

JUL 02 2012

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LUCY BILLINGS, J.:

I. BACKGROUND

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Plaintiff moves for a default judgment against plaintiff's insured, defendant Citywide Home Building Corp., declaring that plaintiff is not obligated to defend or indemnify Citywide Home Building in an action by defendant Vistamar Complex Ltd. against the insured, Vistamar Complex Ltd. v. Citywide Home Building Corp, Index No. 16629/2006 (Sup. Ct. Bronx Co.). C.P.L.R. §§ 3215, 3001. Plaintiff claims it validly disclaimed coverage under its policy issued to Citywide Home Building, on the ground that the insured willfully failed to cooperate in the defense of Vistamar Complex's action, according to the policy's conditions of coverage.

Even assuming plaintiff's service of its summons and complaint on Citywide Home Building was adequate, plaintiff has not shown, in the first instance, that its policy imposed a condition of cooperation. Further assuming that the policy did

impose such a condition, however, for the reasons explained below, plaintiff still has not met its heavy burden to show its insured's willful noncooperation and thus a valid disclaimer.

II. STANDARD FOR A DEFAULT JUDGMENT

To obtain a default judgment against the non-answering defendant Citywide Home Building, plaintiff must support its motion with evidence of the facts constituting its claim.

C.P.L.R. § 3215(f); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70 (2003). An affidavit, a personally verified complaint, or other admissible evidence establishing a viable claim satisfies this requirement. Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d at 71; Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007).

III. THE POLICY REQUIREMENTS

Plaintiff insurer bears the burden to prove an adequate factual foundation for a disclaimer based on willful noncooperation, as it penalizes an injured party for a potentially liable party's uncooperative conduct, over which the injured party has no control, and frustrates the law's purpose to afford compensation for injuries caused by unlawful acts. New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d 315, 316 (1st Dep't 2004). See Rucaj v. Progressive Ins. Co., 19 A.D.3d 270, 271-72 (1st Dep't 2005); Eagle Ins. Co. v. Villegas, 307 A.D.2d 879, 880 (1st Dep't 2003); New York Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d 716 (2d Dep't 2004); New York State Ins. Fund.

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v. Merchants Ins. Co. of N.H., 5 A.D.3d 449, 450-51 (2d Dep't 2004). Plaintiff must establish that (1) it acted diligently in seeking to secure its insured's cooperation; (2) its efforts were reasonably calculated to achieve that end; and (3) the insured deliberately failed to cooperate, with an attitude of "willful and avowed obstruction." Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 410 (1st Dep't 2010); City of New York v. Continental Cas. Co., 27 A.D.3d 28, 32 (1st Dep't 2005); Rucaj v. Progressive Ins. Co., 19 A.D.3d at 271; New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 316.

Most fundamentally, part of plaintiff's burden to prove an adequate factual foundation for a disclaimer based on willful noncooperation is to establish that the insured policyholder violated plaintiff's policy provisions. The policy violation plaintiff urges is the insured's willful failure to cooperate with plaintiff's defense of Vistamar Complex's litigation against the insured.

The source of any condition that persons seeking coverage cooperate is, of course, the applicable insurance policy. Although plaintiff admits that it insured Citywide Home Building, and the other parties have not disputed that fact, they have not admitted or stipulated to any policy provisions. Because no party has presented plaintiff's policy, plaintiff thus fails to show that the policy issued to Citywide Home Building imposed any duties on it following a claim against it. AIU Ins. Co. v. Rodriguez, 303 A.D.2d 181, 182 (1st Dep't 2003); New York Cent.

Mut. Fire Ins. Co. v. Marchesi, 238 A.D.2d 135 (1st Dep't 1997); Allstate Ins. Co. v. Ganesh, 8 Misc. 3d 922, 923 (Sup. Ct. Bronx Co. 2005). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); De Oleo v. Charis Christian Ministries, Inc., 94 A.D.3d 541, 542 (1st Dep't 2012); Wong v. Wong, 86 A.D.3d 439, 440 (1st Dep't 2011); Colburn v. ISS Intl. Serv. Sys., 304 A.D.2d 369 (1st Dep't 2003).

Without the insurance contract itself, any recitation of the contract's terms through an affidavit or other documents is rank hearsay and contrary to the best evidence rule. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Schozer v. William Penn Life Ins. Co. of N.Y., 84 N.Y.2d 639, 643 (1994); NW Liquidating Corp. v. Helmsley-Spear, Inc., 248 A.D.2d 304, 305 (1st Dep't 1998); Schiffren v. Kramer, 225 A.D.2d 757, 758 (2d Dep't 1996). See Brown v. Rosedale Nurseries, 259 A.D.2d 256, 257 (1st Dep't 1999). Consequently, the absence of plaintiff's insurance policy, as a threshold point, prevents any finding that the disclaimer under that policy, based on a violation of policy conditions, is valid. AIU Ins. Co. v. Rodriguez, 303 A.D.2d at 182; Colburn v. ISS Intl. Serv. Sys., 304 A.D.2d 369; Allstate Ins. Co. v. Ganesh, 8 Misc. 3d at 924. See Molean v. Kreisler Borg Florman Gen. Constr. Co., 304 A.D.2d 337, 338-39 (1st Dep't 2003).

IV. NONCOOPERATION

A. Plaintiff's Evidence Regarding Its Efforts Toward Citywide Home Building's Cooperation

Robert Angotta, a claims representative for plaintiff's claims administrator, attests that a co-worker initially wrote a letter to Peter Kaywood at Citywide Home Building May 3, 2007. Angotta does not indicate whether he even worked for plaintiff's claims administrator in 2007, nor does he attest to any mailing or other transmittal of this letter. In any event, the letter advises the insured of its obligation to cooperate in the defense of Vistamar Complex's litigation, requests the insured to telephone the defense attorney and provides his telephone number, and further advises that, if "we do not hear" from the insured in 10 days, plaintiff would deny coverage. Aff. of Regis E. Staley Jr. Ex. D, at 2. No evidence indicates Peter Kaywood's capacity, if any, at Citywide Home Building.

Plaintiff shows no further attempt to contact Citywide Home Building until at least late 2009. In Angotta's letter to Peter Kaywood at Citywide Home Building January 6, 2010, Angotta presents his hearsay account of an investigator's recent visit to the insured's business, where, via an intercom, "Robert" referred the investigator to "Amanda" at a specified telephone number, where the investigator left messages. Id., Ex. E, at 1. No evidence indicates the content of the messages or whether plaintiff ever attempted to find out Amanda's full name, her address, or her capacity in relation to Citywide Home Building, let alone whether plaintiff ever attempted to visit the person

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identified. Nor does any evidence indicate whether "Robert," with whom the investigator first communicated at Citywide Home Building's premises, was associated with the insured. Angotta's letter of January 6, 2010, further advises of the obligation to cooperate and the forthcoming disclaimer absent the insured cooperation within 10 days.

B. Citywide Home Building's Willful Noncooperation

Plaintiff's representatives never returned to the premises that the investigator visited to seek out a Citywide Home Building officer or employee or to determine whether the address was in fact the insured's place of business. Hence plaintiff issued its disclaimer without any personal, direct oral communication with or personal visit to an officer or employee of the insured. Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d at 410.

Having failed in each of these respects, plaintiff may not rely on only messages and mailings, particularly with no assurances that its address for Citywide Home Building was the insured's place of business or even the address of anyone associated with the insured or that any such person received either the messages or the mailings. New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 317-18. See State Farm Fire & Cas. Co. v. Imeri, 182 A.D.2d 683, 684 (2d Dep't 1992). In fact, without evidence of Kaywood's capacity, the court may not conclude that plaintiff ever communicated at all with its insured before its disclaimer. See Utica First Ins. Co. v. Arken, Inc.,

18 A.D.3d 644, 645 (2d Dep't 2005). Even accepting the full parameters of the communications to which Angotta attests, however, they fall short of diligent actions reasonably calculated to obtain the intended recipient's cooperation and therefore fail to demonstrate its deliberate noncooperation. Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d at 411; New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 317-18; New York Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d at 717.

At best, plaintiff has shown the insured's inaction in response to letters or messages. Inaction is not enough. City of New York v. Continental Cas. Co., 27 A.D.3d at 32; New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 316; New York State Ins. Fund v. Merchants Ins. Co. of N.H., 5 A.D.3d at 451. Aside from the one unannounced and hence unproductive visit to the address of Citywide Home Building's premises, plaintiff made no visits to the insured's known addresses, to ascertain whether an officer or employee of the insured actually worked or resided there, or attempts to communicate with other sources, to verify or ascertain addresses or otherwise reach the insured. Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d at 410; Rucaj v. Progressive Ins. Co., 19 A.D.3d at 272; New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 316-17; New York Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d at 717. See State Farm Fire & Cas. Co. v. Imeri, 182 A.D.2d at 684.

In fact, nothing indicates the insured ever received a

single written communication from plaintiff before its disclaimer. New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 317-18. See State Farm Indem. Co. v. Moore, 58 A.D.3d 429, 431 (1st Dep't 2009); State Farm Fire & Cas. Co. v. Imeri, 182 A.D.2d at 684. Its failure to make any effort beyond the single visit, messages, and letters to unverified locations does not warrant a disclaimer of insurance coverage based on willful noncooperation. Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d at 410; Rucaj v. Progressive Ins. Co., 19 A.D.3d at 272; New York Cent. Mut. Fire Ins. Co. v. Salomon, 11 A.D.3d at 318; New York Cent. Mut. Fire Ins. Co. v. Bresil, 7 A.D.3d at 717. See State Farm Indem. Co. v. Moore, 58 A.D.3d at 431; State Farm Fire & Cas. Co. v. Imeri, 182 A.D.2d at 684.

V. CONCLUSION

From the bare facts presented, plaintiff has shown neither diligent efforts calculated to secure its insured's cooperation, nor the insured's willful and avowed obstruction, after plaintiff sought the insured's cooperation. Moreover, even if plaintiff showed its grounds for a disclaimer to the extent that Citywide Home Building willfully failed to cooperate with plaintiff's defense of Vistamar's litigation, plaintiff has failed to show that the policy plaintiff issued to Citywide Home Building in fact required it to cooperate in the insurer's defense of litigation against the insured.

For all the above reasons, the court denies plaintiff's motion for a default judgment declaring that plaintiff is not

obligated to defend or indemnify Citywide Home Building in
Vistamar Complex Ltd. v. Citywide Home Building Corp, Index No.
16629/2006 (Sup.. Ct. Bronx Co.). C.P.L.R. §§ 3215(f), 3001.
This decision constitutes the court's order.

DATED: June 4, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**

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