

<b>Dupree v Scottsdale Ins. Co.</b>
2013 NY Slip Op 31826(U)
August 1, 2013
Sup Ct, New York County
Docket Number: 653412/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 653412/2011
DUPREE, COURTNEY
vs
SCOTTSDALE INSURANCE COMPANY
Sequence Number : 004
VACATE ORDER/JUDGEMENT

INDEX NO.
MOTION DATE 7/12/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 121-136

Answering Affidavits — Exhibits No(s)

Replying Affidavits No(s)

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Scanned to on 8/13

Dated: 8/1/13

SHIRLEY WERNER KORNREICH J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
COURTNEY DUPREE and RODNEY WATTS,

Index No.: 653412/2011

Plaintiffs,

**DECISION & ORDER**

-against-

SCOTTSDALE INSURANCE COMPANY,

Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Defendant Scottsdale Insurance Company (Scottsdale) moves (1) to vacate the temporary restraining order that this court issued on January 4, 2012 (the TRO); and (2) for summary judgment and dismissal of plaintiff Courtney Dupree’s claims. Neither Dupree nor plaintiff Rodney Watts, whose claims are not impacted by this motion, filed opposition papers. The motion is granted on default for the reasons that follow.

*Background and Procedural History*

The court assumes familiarity with the underlying facts, which are set forth at length in this court’s order dated June 28, 2012 (the June 2012 Order). In short, Dupree commenced this action to compel Scottsdale to pay his legal fees under an insurance policy pending the adjudication of fraud claims asserted against him in a criminal action in federal court (EDNY) and a separate civil action in this court. It is undisputed that if a judgment finding that Dupree committed fraud was issued in the criminal action, Dupree would not be entitled to coverage pursuant to the subject policy’s exclusions and Scottsdale would be entitled to reimbursement of Dupree’s legal fees. Specifically, the threshold issue was whether Dupree had “knowledge and active participation in the conspiracy” before August 2008.

On January 4, 2012, while Dupree's criminal trial was pending, the court issued the TRO compelling Scottsdale to pay Dupree's legal fees in the related criminal and civil actions. *See* NYSCEF Doc. No. 39, aff'd 96 AD3d 546. After Dupree was convicted of conspiracy to commit bank fraud, but before he was sentenced, Scottsdale moved to vacate the TRO. That motion was denied in the June 2012 Order. *See* 36 Misc3d 1210(A), aff'd 100 AD3d 467. In an order dated October 25, 2012, the federal court denied Dupree's motion to vacate the verdict. On May 29, 2013, a judgment was entered in federal court that sentenced Dupree to 84 months in prison, which, as a matter of law, is considered the final judgment in the federal criminal proceeding under both federal and New York law. *See United States v Weissman*, 1997 WL 334966, at \*10 (SDNY 1997); *In re Pan Am Corp.*, 166 BR 538, 545 (SDNY 1993) ("It is well settled that under New York law, a judgment is final upon entry of judgment by the trial court, and is not affected by the pendency of an appeal."), citing *In re Bailey*, 265 AD 758 (1st Dept 1943). Scottsdale now moves to vacate the TRO on the grounds that there is no question of fact that it no longer has a duty to defend Dupree and that it is entitled to reimbursement of the legal fees that it paid on his behalf. Additionally, Scottsdale seeks summary judgment on Dupree's claim for coverage under the subject policy.

#### *Discussion*

Pursuant to CPLR 6314, "a party enjoined by a preliminary injunction may move at any time to vacate or modify it, upon notice to the other party." *Morris v 702 E. Fifth St. HDFC*, 8 AD3d 27, 29 (1st Dept 2004).

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving

party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Scottsdale is entitled to vacator of the TRO and summary judgment because there has been "a final adjudication that [Dupree's] alleged wrongdoing does indeed fall under the policy's exclusions." See *Dupree*, 96 AD3d at 546. Now that Dupree has been convicted, there is no question of fact that Dupree's fraudulent conduct precludes coverage because the record in the criminal action establishes that Dupree had "knowledge and active participation in the conspiracy" before August 2008. It should be noted that Dupree was duly given notice of this motion because he was served at the prison where is he is currently incarcerated and additional

service was made upon the attorney who is currently representing him on his criminal appeal.

Accordingly, it is

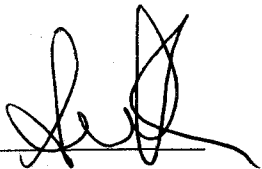
ORDERED that the motion by defendant Scottsdale Insurance Company to vacate the temporary restraining order that this court issued on January 4, 2012 (the TRO) and for summary judgment and dismissal of plaintiff Courtney Dupree's claims is granted on default, the TRO is hereby vacated, and said defendant is directed to submit an order on notice directing the Clerk to enter judgment (1) dismissing the Complaint against it; (2) for reimbursement of Dupree's legal fees (which amount must be supported by appropriate documentation); and (3) for a declaratory judgment that Scottsdale is no longer obligated to pay for any of Dupree's legal fees; and it is further

ORDERED that the plaintiff Rodney Watts' claims against defendant Scottsdale Insurance Company are severed and shall continue; and it is further

ORDERED that a telephone status conference will be held on October 2, 2013 at 3:00 in the afternoon, at which time the parties will update the court on the status of Watts' criminal conviction.

Dated: August 1, 2013

ENTER:

  
\_\_\_\_\_  
J.S.C.

**SHIRLEY WERNER KORNREICH**  
**J.S.C.**