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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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TOWER INSURANCE COMPANY OF NEW YORK, Index No. 653233/2011

Plaintiff

- against - DECISION AND ORDER

MARIA CARRANZA, JOSE ROMERO, TOWN OF ISLIP, and MELVA OTERO,

Defendants

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LUCY BILLINGS, J.S.C.:

I. UNDISPUTED FACTUAL BACKGROUND

Plaintiff Tower Insurance Company of New York issued a Homeowner's Policy insuring defendant Carranza for the premises at 157 Suffolk Avenue, Brentwood, New York. Aff. of Suzanne M. Saia Ex. B. The policy names Carranza as the only insured. Id. at 2. The deed to the premises, however, lists both Carranza and defendant Romero as the owners. Aff. of Howard A. Chetkof Ex. A. Only Romero resided at the premises. Id. Ex. C, at 20. Carranza's application to plaintiff for insurance did not list Romero as an owner of the premises, nor indicate that Carranza did not reside at the premises. Id. Ex. B.

Defendant Otero was injured September 22, 2007, when she fell on the sidewalk abutting the premises owned by Carranza and Romero. Saia Aff. Ex. A, at 4; Chetkof Aff. Ex. D. On July 23, 2008, Otero commenced an action in the Supreme Court in Suffolk County against Carranza and Romero, seeking damages for her injuries from her fall. Saia Aff. Ex. A. In a letter dated

November 21, 2008, plaintiff disclaimed coverage to Carranza for Otero's injuries in that underlying action. Id. Ex. E; Aff. of Doreen Rybak ¶ 16. Plaintiff disclaimed coverage because (1) the insured premises were not "residence premises" under the policy, (2) Carranza misrepresented that the premises were "owner-occupied" in her application, and (3) her notice to plaintiff of the claim was untimely. Rybak Aff. ¶ 16. See Saia Aff. Ex. E, at 4, 7. On April 17, 2014, Otero obtained a default judgment against Romero in the underlying action. Chetkof Aff. Ex. D.

II. PROCEDURAL POSTURE

Plaintiff initially commenced an action in January 2009 against Carranza, Romero, the Town of Islip, and Otero seeking a declaratory judgment that plaintiff bore no obligation to defend or indemnify Carranza. Saia Aff. ¶ 21. Neither Carranza nor Romero appeared in that action. Id. ¶ 24. In November 2011, plaintiff commenced this second declaratory judgment action against Carranza and Romero, id. Ex. I, and served them both with the summons and complaint. Id. Exs. J, K. The court then granted plaintiff's motion to consolidate the two actions and under this action's index number. Id. Exs. L, M; C.P.L.R. § 602(a). Plaintiff later discontinued its claims against Carranza. Saia Aff. ¶ 37.

The court denied Romero's pre-answer motion to dismiss the claims against Romero in a decision dated September 27, 2012, but plaintiff did not serve him with the order denying his motion until June 9, 2014, giving him until June 19, 2014, to answer the

complaint. Id. ¶ 36 and Ex. Q; C.P.L.R. § 3211(f). Romero still failed to answer the complaint, however, Saia Aff. ¶ 39, even after plaintiff notified him July 30, 2014, of his default. Id. Ex. R.

Plaintiff now moves for summary judgment against Otero, who has answered, and for a default judgment against Romero, declaring that plaintiff is not obligated to indemnify him under Carranza's insurance policy for the claims against him in Otero's underlying personal injury action. C.P.L.R. §§ 3001, 3212(b), 3215. Defendant Otero cross-moves for summary judgment declaring that plaintiff is obligated to indemnify Romero under Carranza's policy and thus to pay the judgment Otero obtained against him in her personal injury action. C.P.L.R. §§ 3001, 3212(b); N.Y. Ins. Law § 3240(a).

III. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005). If the moving parties satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A

Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of plaintiff's motion and Otero's cross-motion, the court construes the evidence in the light most favorable to the opposing parties. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d at 735; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If the moving parties fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

IV. OTERO IS NOT ENTITLED TO REFORMATION OF THE POLICY.

For Otero to obtain summary judgment declaring that plaintiff is obligated to indemnify Romero under Carranza's insurance policy, Otero must establish Romero's entitlement to reformation of the policy to add his name as an insured. The fact that she was not a party to the insurance contract does not deprive her of standing to seek reformation of that contract. Essex Ins. Co. v. Vickers, 103 A.D.3d 684, 688 (2d Dep't 2013). See Kyong Jae Lee v. Lancer Ins. Co., 104 A.D.3d 612, 612 (1st Dep't 2013); Ford Motor Credit Co. v. Atl. Mut. Ins. Co., 294 A.D.2d 206, 206-207 (1st Dep't 2002).

The court may reform the policy based on either a mutual mistake or a unilateral mistake. Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d 441, 443 (1st

Dep't 2007). To succeed on a reformation claim based on a mutual mistake, Otero must show that the contracting parties' signed agreement does not accurately express their intentions or previous oral agreement. Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573 (1986); Warburg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d 78, 86 (1st Dep't 2013); Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 443. Otero must establish the mutual mistake by clear and convincing evidence. Warburg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d at 85; EGW Temporaries, Inc. v. RLI Ins. Co., 83 A.D.3d 1481, 1481-82 (1st Dep't 2011).

To reform a contract based on a unilateral mistake, Otero must establish that one party to the contract fraudulently misled the other and that the written agreement thus does not express the intended agreement. Chimart Assoc. v. Paul, 66 N.Y.2d at 573; Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 443. Therefore Otero must establish the elements of fraud to support reformation based on a unilateral mistake. Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 443.

Because the court must presume that the written insurance policy accurately reflects the contracting parties' true intention, reformation is not a mechanism for the court to interject into the written agreement terms not previously agreed upon. Id. at 442-43. Otero, the proponent of reformation, therefore bears a heavy burden, Chimart Assoc. v. Paul, 66 N.Y.2d

at 574; Warburg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d at 85; Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 442-43, to present "evidence of a very high order," to "overcome the heavy presumption" that the written contract, deliberately prepared and executed, "manifested the true intention of the parties." George Backer Mgt. Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211, 219 (1978); Ford Motor Credit Co. v. Atl. Mut. Ins. Co., 294 A.D.2d at 206. See Chimart Assoc. v. Paul, 66 N.Y.2d at 574; Warburg Opportunistic Trading Fund, L.P. v. GeoResources, Inc., 112 A.D.3d at 85. The intention of the insured, Carranza, that another party, here Carranza's co-owner Romero, be insured under the policy is not enough to warrant reformation if Carranza did not communicate that intention to plaintiff, the insurer. Ford Motor Credit Co. v. Atl. Mut. Ins. Co., 294 A.D.2d at 206-207.

Otero fails to meet her burden to make a prima facie showing that Romero is entitled to reform Carranza's insurance policy to add him as an insured. Otero does not support a claim for reformation based on a mutual mistake, because she does not show that the insurance contract between plaintiff and Carranza, which did not name Romero as an insured, inaccurately expressed the parties' intentions. Chimart Assoc. v. Paul, 66 N.Y.2d at 574-75; Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 442-43. Otero presents no evidence that Carranza intended to procure a policy that insured Romero as well as her. Chimart Assoc. v. Paul, 66 N.Y.2d at 574-75. Otero

relies only on Romero's joint ownership of the premises to support her claim that Romero be added to the policy as an insured. Since Romero's ownership interest in the property, alone, does not entitle him to coverage under Carranza's policy, neither Carranza nor Romero may obtain reformation to cover him under the policy on that basis alone. White v. Kaufman & Co., 243 A.D.2d 255, 255 (1st Dep't 1997); Stainless, Inc. v. Employers Fire Ins. Co., 69 A.D.2d 27, 31-32 (1st Dep't 1979), aff'd, 49 N.Y.2d 924, 925 (1980). Nor may Otero succeed on a reformation claim based on a unilateral mistake, as she neither attests nor presents any other testimonial or any documentary evidence that plaintiff fraudulently misled Carranza and that the insurance contract thus does not express the parties' intended agreement. Chimart Assoc. v. Paul, 66 N.Y.2d at 575; Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 A.D.3d at 443; Ford Motor Credit Co. v. Atl. Mut. Ins. Co., 294 A.D.2d at 206-207.

V. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT.

The court must enforce the insurance policy as written as long as its provisions are unambiguous. Town of Harrison v. National Union Fire Ins. Co., 89 N.Y.2d 308, 316 (1996); United States Fid. & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 232 (1986); Quoizel, Inc. v. Hartford Ins. Co., 102 A.D.d 492, 493 (1st Dep't 2013); Ford Motor Credit Co. v. Atl. Mut. Ins. Co., 294 A.D.2d at 206-207. When resolving a dispute over insurance coverage, the court must look first to the policy's terms. Platek v. Town of

Hamburg, 24 N.Y.3d 688, 693 (2015). Interpretation of the policy's meaning and thus its coverage presents questions of law for the court to resolve. Vigilent Ins. Co. v. Bear Stearns Cos., Inc., 10 N.Y.3d 170, 177 (2008); White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Town of Harrison v. National Union Fire Ins. Co., 89 N.Y.2d at 316; Seaport Park Condominium v. Greater N.Y. Mut. Ins. Co., 39 A.D.3d 51, 54 (1st Dep't 2007). The court must construe the policy against plaintiff, which drafted the policy. State Farm Mut. Auto. Ins. Co. v. Fitzgerald, 25 N.Y.3d 799, 804 (2015); 69 W. Owners Corp. v. Admiral Indem. Co., 114 A.D.3d 469, 470 (1st Dep't 2014).

A. Romero Is Not Insured Under Carranza's Policy.

The insurance policy covers the named insureds and persons who fall under the policy's definition of an insured. Sanabria v. American Home Assur. Co., 68 N.Y.2d 866, 868 (1986); Sirius Am. Ins. Co. v. Burlington Ins. Co., 81 A.D.3d 562, 563 (1st Dep't 2011); Tribeca Broadway Assoc. v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198, 200 (1st Dep't 2004); Moleon v. Kreisler Borg Florman Gen. Constr. Co., 304 A.D.2d 337, 339 (1st Dep't 2003). From at least as early as Brownell v. Board of Educ. of Inside Tax Dist. of City of Saratoga Springs, 239 N.Y. 369, 374 (1925), insurance has been recognized as "a mere personal contract . . . to protect the interest of the insured," not the insurable interest, to whomever it belongs. The strictly contractual relationship between the parties to an insurance policy, the insurer and the insured, e.g., Batas v. Prudential Ins. Co. of

America, 281 A.D.2d 260, 264 (1st Dep't 2001), dictates "that the insurance runs to the individual insured, and not with the land." Brownell v. Board of Educ. of Inside Tax Dist. of City of Saratoga Springs, 239 N.Y. at 374. The policy does not attach to the property for which the insured has obtained coverage. Id.; White v. Kaufman & Co., 243 A.D.2d at 255. Therefore Romero's legal title to the property that his co-owner Carranza insured through plaintiff establishes only that he, too, owned an interest in the property that he was entitled to protect with insurance and does not entitle him to coverage under her policy where he was not named or defined as an insured. Brownell v. Board of Educ. of Inside Tax Dist. of City of Saratoga Springs, 239 N.Y. at 374. See Stainless, Inc. v. Employers Fire Ins. Co., 69 A.D.2d at 31, 34-35, aff'd, 49 N.Y.2d at 925. The court may not create coverage based solely on Romero's insurable interest where otherwise Romero is without coverage. Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 473 (2005); White v. Aron Kaufman & Co., Inc., 243 A.D.2d at 255.

The policy here names "Maria Carranza" as the only insured and does not list any additional insureds. Saia Aff. Ex. B, at 2. The policy defines an "Insured" as "you and residents of your household who are: Your relatives; or Other persons under the age of 21 and in the care of any person named above." Id. at 19. "You" and "your" refer to the named insured, Carranza. Id. Carranza testified at her deposition without contradiction that Romero lived at the premises "alone." Chetkof Aff. Ex. C, at 20.

Romero therefore was not a resident of Carranza's household, as the policy's definition of an insured requires. Saia Aff. Ex. B, at 19.

Consequently, Romero is not entitled to coverage under Carranza's policy because he neither is named as an insured in the policy, nor falls under its definition of an insured, and his insurable interest in the premises alone is insufficient to create coverage. Since he is not an insured under the policy, he is not entitled to a defense or indemnification by plaintiff in the underlying action.

B. The Policy Excludes Coverage of the Premises Where Otero Was Injured.

Even if Romero did fall under the policy's definition of an insured, the policy would exclude coverage for Otero's injury. The policy provides that it does not apply to bodily injury arising from premises that an insured owns, but are not an "insured location." Id. at 31. The policy defines "Insured location" as the "residence premises." Id. at 19. The policy's declarations provide that: "The residence premises covered by this policy is located at the above insured address," which is "157 Suffolk Ave Brentwood, NY," "unless otherwise stated below." Id. at 2. Below, the policy defines "Residence premises" as:

> 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.

Id. at 19.

Although a construction applying the phrase "where you reside" set off below subsections (a) and (b) to both the above subsections renders the semicolons at the end of each subsection superfluous, the court is bound by the appellate authority so construing the policy's definition of "Residence premises" and finding it unambiguous. Vela v. Tower Ins. Co. of New York, 83 A.D.3d 1050, 1051 (2d Dep't 2011); Marshall v. Tower Ins. Co. of New York, 44 A.D.3d 1014, 1015 (2d Dep't 2007). Since the policy defines "you" as Carranza, the premises at 157 Suffolk Avenue, Brentwood, are only "Residence premises" if the Carranza resides there. Saia Aff. Ex. B, at 19. Based on Carranza's undisputed testimony that Romero lived at the premises alone, Chetkof Aff. Ex. C, at 20, the premises at 157 Suffolk Avenue, Brentwood, are not "Residence premises" and thus not an "Insured location." Saia Aff. Ex. B, at 19. Therefore the policy's exclusion of bodily injury arising from premises that an insured owns, but are not an "insured location," id. at 31, bars coverage for Otero's bodily injury at those premises. Id. at 2, 19.

VI. PLAINTIFF IS ENTITLED TO A DEFAULT JUDGMENT AGAINST ROMERO.

To obtain a default judgment against Romero, plaintiff must present admissible evidence of (1) service of the summons and complaint on him, (2) the facts constituting plaintiff's claim against him, and (3) his default. C.P.L.R. § 3215(f); Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.2d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007). See

Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 202-203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't 2013). Plaintiff must move for a default judgment within one year after Romero's default. C.P.L.R. § 3215(c); Utak v. Commerce Bank, 88 A.D.3d 522, 522-23 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517, 517 (1st Dep't 2010).

Plaintiff presents an affidavit of personal service of the summons and complaint on Romero, Saia Aff. Ex. K, to which he responded with a pre-answer motion to dismiss the complaint against him, but which he failed to answer after the court denied his motion and plaintiff served that order with notice of entry on him. Id. Exs. N, P, Q. As set forth above, Romero's time to answer expired June 19, 2014, C.P.L.R. § 3211(f), after which, in September 2014, plaintiff moved for a default judgment, well within one year after Romero's default. Saia Aff. Ex. Q. Finally, as further detailed above, plaintiff presents admissible evidence that Romero is not entitled to coverage under the policy plaintiff issued to Carranza. C.P.L.R. § 3215(f). Plaintiff therefore is entitled to a default judgment declaring that Romero is not entitled to a defense or indemnification by plaintiff in Otero's underlying action against Romero.

VII. CONCLUSION

For all the reasons explained above, the court grants plaintiff's motion for summary judgment and declares and adjudges that plaintiff is not obligated defend or indemnify defendant Romero under the policy plaintiff issued to defendant Carranza

against the claims in defendant Otero's underlying personal injury action, Otero v. Town of Islip, Index No. 08-38659 (Sup. Ct. Suffolk Co.). C.P.L.R. §§ 3001, 3212(b). Similarly, the Court grants plaintiff's motion for a default judgment against Romero and declares and adjudges that plaintiff is not obligated defend or indemnify him under the policy plaintiff issued to Carranza against the claims in that action. C.P.L.R. §§ 3001, 3215(f). The court denies Otero's cross-motion for summary judgment seeking a reformation of the policy plaintiff issued to Carranza, to add Romero as an insured, and a declaration that plaintiff is obligated defend and indemnify him under the policy against the claims in Otero's underlying action. C.P.L.R. §§ 3001, 3212(b). This decision constitutes the court's order and judgment in favor of plaintiff and against defendants Carranza and Romero.

DATED: December 24, 2015

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.