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| <b>Tower Ins. Co. of N.Y. v Kashaka</b>  |
| 2016 NY Slip Op 31884(U)   |
| September 27, 2016   |
| Supreme Court, New York County   |
| Docket Number: 153516/2015   |
| Judge: Kathryn E. Freed  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

**DECISION/ORDER**  
Index No. 153516/2015  
Mot. Seq. No. 001

MAKEDA KASHAKA, MARLON BONNY, and  
JOHN OSTRATICKY,

Defendants.

-----X  
**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS   | NUMBERED <sup>1</sup> |
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| NOTICE OF MOTION, REILLY AFF. IN SUPP. AND EXHIBITS ANNEXED..... | 4-6                   |
| SHANNON AFF. IN SUPP. AND EXHIBITS ANNEXED.....                  | 7-8                   |
| TUTAK AFF. IN SUPP. AND EXHIBITS ANNEXED.....                    | 9-13                  |
| GONDIOSA AFF. IN SUPP. AND EXHIBITS ANNEXED.....                 | 14-31                 |
| MEMORANDUM OF LAW IN SUPP.....                                   | 32                    |

UPON THE FOREGOING CITED PAPERS, THIS DECISION, ORDER AND JUDGMENT ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff moves for an order, pursuant to CPLR 3215, granting it a judgment on default against defendant Marlon Bonny for failure to appear in this action and a declaratory judgment that plaintiff has no obligation to defend or indemnify Bonny in an underlying personal injury action brought by defendant John Ostraticky against defendant Makeda Kashaka, pending in Supreme Court, Kings County, bearing index No. 14210/2014. The motion is unopposed. After a review of plaintiff's motion papers, as well as the relevant case law and statutes,

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<sup>1</sup> The papers are numbered herein according to the document numbers assigned to them by NYS Courts Electronic Filing (NYSCEF).

plaintiff's motion is **granted, in part**.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

In the underlying action, Ostraticky claims that, in July 2014, he was injured during the course of his duty as a firefighter when a portion of the fire escape at 1929 Bergen Street, Brooklyn, New York failed. (Ex. 1 to Gondiosa Aff.) Ostraticky alleges, in separate paragraphs, that Kashaka owned, controlled, maintained, managed, operated and repaired the building. (*Id.*) Bonny is not a named party in the underlying action. (*Id.*)

According to plaintiff, Bonny and Kashaka submitted an application to purchase insurance coverage for the premises in April 2007. (Ex. 1 to Tutak Aff.) As a result of the application, an insurance policy was issued to Bonny and Kashaka, which was extended to include a period of time that encompassed the date of Ostraticky's alleged injury. (Ex. 2 to *Id.*) Plaintiff claims in this action that certain answers to the questions in the application were false and, as a result, plaintiff was fraudulently induced to extend insurance coverage. In September 2014, plaintiff sent Bonny and Kashaka a letter informing them that it was disclaiming coverage on the ground that, despite stating in their application that the building was owner-occupied, it was, in fact, "purchased as an investment property," and "contains two residential and one commercial unit." (Ex. 4 to Gondiosa Aff.) In January 2015, National General Insurance sent Kashaka and Bonny a notice that, while it was disclaiming coverage, it would defend them in the underlying suit pending the resolution of a declaratory judgment action. (Ex. 6 to *Id.*)

Plaintiff commenced the instant action in April 2015, and now moves for a default judgment against Bonny. Included as exhibits to plaintiff's motion papers are what appear to be an answer

filed in this action on behalf of Ostraticky and an answer with counterclaims filed in this action on behalf of Kashaka. (Exs. 10 and 11 to Gondiosa Aff.) There is no official county clerk stamp appearing at the top of either exhibit, however, and there is no indication, based on this Court's independent review of NYSCEF (*see Matter of Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029, 1041 n 1 [1st Dept 2014]), that either document was properly filed with the court. Nevertheless, plaintiff's motion concerns only Bonny, and this Court will address only whether a default judgment should be issued against him.

#### **POSITION OF PLAINTIFF:**

Plaintiff asserts that, as Bonny has failed to appear in this action, and inasmuch as it has submitted documentary and other evidence establishing that the insurance policy issued to him was procured fraudulently, it is entitled to a default judgment and declarations against him.

#### **LEGAL CONCLUSIONS:**

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . , the plaintiff may seek a default judgment against him [or her].” On such a motion, “the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011); *see Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

“[A] declaratory judgment is a proper remedy when the record presents a real controversy, involving substantial legal interests, and it is shown that a declaratory judgment would be useful.” *Abate v All-City Ins. Co.*, 214 AD2d 627, 629 (2d Dept 1995); *see* CPLR 3001; *Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 (2004); *Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 (1st Dept 2006), *appeals dismissed* 8 NY3d 956 (2007), 9 NY3d 1003 (2007); *Standardbred Owners Assn. v Yonkers Raceway*, 1 AD2d 882, 882 (1st Dept 1956); *Dugan v London Terrace Gardens, L.P.*, 45 Misc 3d 362, 383 (Sup Ct, NY County 2013); Siegel, NY Prac § 436 (5th ed.); *cf. Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 (2003).

The affidavit of service and attorney affirmation establish proper service by the affix-and-mail method and that Bonny has failed to appear in this action. In addition, the insurance policy (Ex. 2 to Tutak Aff.), underwriter’s affidavit (Tutak Aff.), and transcripts of interviews and depositions of Bonny in a separate breach of contract action<sup>2</sup> establish proof of the facts constituting plaintiff’s claim that the insurance was procured based on the misrepresentation that the building was owner-occupied. (Ex. 9 to Gondiosa Aff., at 6). Thus, plaintiff has established its entitlement to a default judgment.

Nevertheless, plaintiff has not demonstrated that it is either necessary or appropriate for this Court to issue any declarations at this juncture. Bonny is not a named defendant in the underlying action and, as such, there is an absence of an actual controversy as to whether plaintiff should provide him defense or indemnification. Plaintiff has made no representation or otherwise proved

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<sup>2</sup> The breach of contract action was brought by Kashaka against, among others, plaintiff, to recover for plaintiff’s refusal to reimburse her for expenses incurred as a result of fire damage to the property. It is entitled *Kashaka v Tower Ins. Co.*, pending in Supreme Court, Kings County, bearing index No. 16257/2014. (Ex. 7 to Gondiosa Aff.)

that there is a possibility that Bonny will eventually be joined in any capacity in the underlying action. Thus, this Court declines to issue a declaration as to the underlying action.

As for plaintiff's request that this Court declare that plaintiff need not honor the insurance policy on the basis of Bonny and Kashaka's fraudulent misrepresentation in their application, while Bonny's status as a named insured under the policy does potentially give rise to an actual controversy, that issue is not ready for determination. The two remaining defendants in this action have served answers on plaintiff, and this Court must interpret that gesture to indicate that they intend to dispute whether plaintiff must honor the insurance policy and provide defense and indemnification to Kashaka. Since any declaration at this point would necessarily affect the rights of Kashaka and Ostraticky, this Court will reserve judgment on the issue of whether a declaration should be issued until there is a complete disposition of this action against the remaining defendants. *See Merchants Ins. Co. of N.H. v Long Is. Pet Cemetery*, 206 AD2d 827, 828 (4th Dept 1994); *Allied World Natl. Assur. Co. v NYCT Contr. Ltd.*, 2015 WL1744953, Sup Ct, NY County, April 9, 2015, Kern, J., index No. 156243/2014, NYSCEF Doc. No. 43, at \*2; *Hermitage Ins. Co. v Bronx Steel Fabricators Inc.*, 42 Misc 3d 1229(A), 2014 NY Slip Op 50266(U), at \*3 (Sup Ct, NY County 2014); *Certain Underwriters at Lloyd's of London v Bellettieri, Fonte & Laudonio, P.C.*, 19 Misc 3d 1136(A), 2008 NY Slip Op 51018(U), at \*8 (Sup Ct, Westchester County 2008).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion for a default judgment against defendant Marlon Bonny is granted; and it is further


ORDERED that the branch of plaintiff's motion seeking a declaratory judgment as to plaintiff's duty to defend and indemnify Marlon Bonny in the action entitled *John Ostraticky v Makeda Kashaka*, pending in Supreme Court, Kings County, bearing index No. 14210/2014, is denied; and it is further

ORDERED that the issue of further entitlement to a declaratory judgment is reserved until the disposition of this action against the remaining defendants Makeda Kashaka and John Ostraticky; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: September 27, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**