SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

- v -

GONZALO CANTOS, ROSANNA CANTOS, and ROBERTA DAVIS,

Defendants.

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Index No. 154497/2015

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

Plaintiff Castlepoint Insurance Company ("CastlePoint") commenced the instant action, seeking a declaration that it is not obligated to defend or indemnify defendants Gonzalo Cantos ("Mr. Cantos") and Rosanna Cantos ("Ms. Cantos") (collectively, "Defendants") in an action entitled *Roberta Davis v. Gonzalo Cantos and Rosanna Cantos*, pending in the Supreme Court of the State of New York, Queens County, under Index No. 701411/2015 (the "Underlying Action"), under a homeowner's policy CastlePoint issued to Mr. Cantos, the named insured, because Mr. Cantos did not reside at the residence covered by the policy.

The Underlying Action

In the Underlying Action, Roberta Davis ("Ms. Davis"), seeks damages for personal injuries she allegedly sustained on December 26, 2012 at the insured premises located at 60-59 54th Street, Maspeth, New York (the "Insured Premises"). Ms. Davis is alleged to have been a tenant occupying a studio apartment at the Insured Premises. Ms. Davis alleges that Mr. Cantos and Ms. Cantos are responsible for the injuries she sustained. On August 17, 2015, Mr. Cantos filed a motion for summary judgment in the Underlying Action. In connection with the motion, Mr.

Cantos submitted a sworn affidavit stating that he moved to Virginia in 2004 and he has resided there since that time.

The Policy

The instant action involves a homeowners insurance policy issued by CastlePoint to Mr. Cantos for the Insured Premises (the "Policy"), with a policy period from October 24, 2012 through October 24, 2013. The Policy states that Mr. Cantos is the named insured and the residence premise covered by the Policy is the Insured Premises, a two-family, owner occupied building. Ms. Cantos, Mr. Cantos' ex-wife, is not a named insured or an additional insured under the Policy.

The "Homeowners 2 Broad Form" section of the Policy provides in relevant part:

> AGREEMENT
>
> We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.
>
> DEFINITIONS
>
> In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We," "us" and "our" refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:
>
> 3. "Insured" means you and residents of your household who are:
>
> a. Your relatives;
>
> * * *
>
> 4. "Insured location" means:
>
> 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. or 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 to four family dwelling is being built as a residence for an "insured;"

g. Individual or family cemetery plots or burial vaults of an "insured;" or

h. Any part of a premises occasionally rented to an "insured' for other than "business" use.

* * *

7. "Residence employee" means:

a. An employee of an "insured" whose duties are related to the maintenance or use of the "residence premises," including household or domestic services; or

b. One who performs similar duties elsewhere not related to the "business" of an "insured."

8. "Residence premises" means:

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.

"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 Policy provides coverage as follows:

SECTION II - LIABILITY COVERAGES

COVERAGE E – Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured";
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate . . .

COVERAGE F – Medical Payments To Others
We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury. . ." This coverage does not apply to you or regular residents of your household except "residence employees." As to others, this coverage applies only:

1. To a person on the "insured location" with the permission of an "insured"; or
***

The Policy contains the following exclusions:

SECTION II EXCLUSIONS
1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to "bodily injury" or "property damage":
* * *
e. Arising out of a premises:
(1) Owned by an "insured;"
(2) Rented to an "insured;" or
(3) Rented to others by an "insured;"
that is not an "insured location";
* * *

Disclaimer

CastlePoint disclaimed coverage as to Mr. Cantos for the Underlying Action in letters dated August 1, 2014 and March 25, 2015 on the grounds that Mr. Cantos did not reside at 60-69 54th Street, Maspeth, New York, the Insured Premises, on December 26, 2012, the date of Ms. Davis' underlying incident.

CastlePoint thereafter commenced this declaratory judgment action on May 6, 2015 against Defendants seeking a declaration that CastlePoint is not obligated to defend or indemnify Mr. Cantos with respect to any claims brought by Ms. Davis in the Underlying Action; declaring that CastlePoint may withdraw from the defense of Mr. Cantos in the Underlying Action; declaring that Ms. Cantos is not an insured under the Policy and that CastlePoint has no duty to defend or indemnify Ms. Cantos for any claims asserted in the Underlying Action; and awarding judgment to CastlePoint for the costs of defense and investigation incurred in the defense of Mr. Cantos in the Underlying Action.

On October 15, 2015, Ms. Davis interposed an Answer in this action. On January 21, 2016, Mr. Cantos interposed an Answer, with Counterclaims, in this action. Mr. Cantos' counterclaim alleges that CastlePoint violated General Business Law § 349 by accepting premiums from him and for failing to change the name on the Policy. Ms. Cantos, to date, has not answered the Complaint.

CastlePoint's Motion for Summary Judgment and Default Judgment

CastlePoint now moves for summary judgment, pursuant to CPLR 3212. CastlePoint seeks a declaration that it has no duty to defend or indemnify Mr. Cantos and Ms. Cantos in the Underlying Action. CastlePoint also moves to dismiss Mr. Cantos' counterclaim alleging CastlePoint violated General Business Law 349 for failure to state a cause of action. CastlePoint also moves for default judgment, pursuant to CPLR 3215, against Ms. Cantos.

CastlePoint submits the attorney affirmation of Brian D. Barnas, Esq., dated February 26, 2016; the affidavit of Theodore Gass, a Senior Injury Claims Representative, sworn to on February 25, 2016; pleadings; a copy of the Policy; the attorney affirmation of Michael J. Dorry and the affidavit of Mr. Cantos submitted in connection with Mr. Cantos' motion for summary judgment made in the Underlying Action; statement provided by Rosana Cantos-Marin on July 24, 2014 obtained by CastlePoint in connection with its investigation and disclaimer; and CastlePoint's letters disclaiming coverage.

CastlePoint disclaimed coverage as to Mr. Cantos for the Underlying Action on the grounds that Mr. Cantos did not reside at 60-69 54th Street, Maspeth, New York, the Insured Premises, on December 26, 2012, the date of Ms. Davis' underlying incident

In support of its motion, CastlePoint submits the affidavit of Mr. Cantos that he submitted in connection with his motion for summary judgment made in the Underlying Action. In his affidavit, sworn to on July 31, 2015, Mr. Cantos states that he moved to Virginia in 2004 and he has resided there since that time. Mr. Cantos attests:

> I purchased the premises, a two-family house, in 1994, and my wife [Rosana Marin Sanchez] moved into the house. In 2004, my wife and I separated, and I moved to Virginia, and have resided in Virginia since that time. My wife continued to live and reside at the premises. On October 21, 2009, my wife and I were divorced. By Deed dated October 21, 2009, I deeded the premises to my wife. As of the date of plaintiff's accident, December 26, 2012, I did not own, occupy or possess the premises at 60-69 54th Street, Maspeth, NY. I was not responsible for maintenance and/or repairs at the premises after October 21, 2009, and I did not make any repairs at the premises. I did not use the premises for any purpose after October 21, 2009.

CastlePoint also submits a statement obtained from Ms. Cantos in the course of its investigation of the underlying incident. In that statement, Ms. Cantos states that she resided at 60-69 54th Street, Maspeth, New York on the date of Ms. Davis incident. She states that she was divorced from Mr. Cantos in 2009, and that Mr. Cantos permanently moved to Virginia after their separation. She states that Ms. Davis was a tenant at the Insured Premises for approximately four years. Ms. Davis resided in a studio apartment in the rear of the property, and she paid seven hundred dollars ($700) per month in rent. Ms. Davis moved out in 2013.

In opposition to CastlePoint's motion for summary judgment, Mr. Cantos submits an affidavit and the attorney affirmation of Marshal Coleman.

Mr. Cantos argues that CastlePoint has failed to come forward with evidence to satisfy its burden of demonstrating that Mr. Cantos did not reside at the Insured Premises on the date of the underlying accident. Mr. Cantos argues that the copy of the affidavit he purportedly made "does not contain Cantos' signature, instead, a black blotch appears where the signature should be." He also argues that the affidavit is inadmissible because it is not properly notarized; he claims "[a]lthough [the affidavit] states on the first page that it was signed in the State of New York, it was notarized by someone whose commission was issued by the State of Virginia" and

does not indicate that the "notary public was also licensed in New York." He also argues that even if Mr. Cantos signed the affidavit in Virginia, the affidavit is not accompanied by a document certifying the notary's commission in the foreign state in accordance with CPLR 2309.

In its reply, concerning the alleged deficiencies of Cantos' affidavit, CastlePoint explains, "[I]t does appear that the copy of Mr. Cantos' Affidavit uploaded as Exhibit J contains a blotch on the signature line. However, this was an inadvertent error associated with the e-filing of the document, which may be corrected on reply." CastlePoint submits a copy of Cantos' Affidavit with a legible signature as Exhibit A to Barnas' affirmation. With respect to Defendant's argument that Cantos' affidavit is not valid because it states it was signed in New York and it was notarized by a Virginia notary, CastlePoint states "careful review of the document shows that it was signed in Manassas, Virginia, not New York" and "Mr. Cantos' signature was also notarized by a notary public commissioned in Virginia." With respect to Defendant's argument that Mr. Cantos' affidavit is inadmissible despite its lack of a certification pursuant to CPLR 2309(c), CastlePoint states "the lack of a certificate of conformity is not a fatal defect," and that "Defendant, by merely pointing out that the Affidavit is not accompanied by a certificate, has not contested the authority of the notary, the veracity of Mr. Cantos' statements, or demonstrated any prejudice from the lack of certification."

Mr. Cantos further argues that the purported statement made by Ms. Cantos in connection with CastlePoint's investigation is inadmissible because it is not in the form of an affidavit and is not signed by Ms. Cantos.

Mr. Cantos further argues that the affidavit of Gass is inadmissible because it was notarized out of state and is unaccompanied by the certification required by CPLR 2309, and does not adequately substantiate Ms. Cantos' statement. Defendant argues, "While Mr. Gass states that Castlepoint 'obtained a statement from Rosanna Cantos, he does not say that he himself obtained it. And even if he had elicited the statement, his 'affidavit' describing what Ms. Cantos supposedly said would still be hearsay as against Mr. Cantos, and what she said would constitute an admission or a declaration against interest on his part since he was not the declarant." In reply, CastlePoint submits a proper certification pursuant to CPLR 2309(c) to Gass's affidavit. CastlePoint states, "As a defect pursuant to CPLR 2309(c) may be corrected nunc pro tunc, both Affidavits by Mr. Gass are admissible in support of this Motion."

Alternatively, Mr. Cantos argues that CastlePoint has failed to prove that Mr. Cantos would not be covered under the Policy even if he did not reside at the Insured Premises where the underlying loss occurred. Mr. Cantos claims he was covered for the subject loss under the Policy, subject to any applicable policy exclusions, and CastlePoint has failed to provide proof that the policy exclusion it relies on applies. More specifically, Mr. Cantos argues that CastlePoint seeks to disclaim coverage on the grounds that it need not defend or indemnify Mr. Cantos because the Policy "excluded coverage for bodily injury or property damage arising out of a premises owned or rented to others that is not an 'insured location." Defendant argues, however, that CastlePoint has failed to prove this policy exclusion applies because it has submitted no evidence "that at the time of the underlying loss, the premises where the occurrence took place were owned by an insured [i.e., Mr. Cantos], rented to an insured, or rented by an insured to others." Defendant further argues that even if the policy exclusion applied, "it is unenforceable because the policy does not define the word 'reside.'"

Lastly, Mr. Cantos argues that even if coverage were excluded under the Policy, CastlePoint waived its right to avoid covering Mr. Cantos by failing to issue a timely disclaimer.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251–252 [1st Dept. 1989].

Although an insurer's duty to defend its insured is determined by "compar[ing] the allegations of the complaint to the terms of the policy" (*A. Meyers & Sons Corp. v. Zurich Am., Ins. Group,* 74 N.Y.2d 298, 302 [1989]; *accord Great Northern Ins. Co. v. Kobrand Corn.,* 40 A.D.3d 462 [1st Dept 2007]), an insurer may escape its duty to defend under the policy where it can "'be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of

the insurance policy.'" (*Judlau Contr., Inc. v. Westchester Fire Ins. Co.*, 46 A.D.3d 482, * 2 [1st Dept 2007], quoting *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875, 876 [1976]). Stated otherwise, even if the complaint triggers a duty to defend, that duty is "not an interminable one, and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy" (*Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 74 [1975]).

When interpreting an insurance policy, it is "fundamental" that it be read "in light of 'common speech' and the reasonable expectations of a business person." *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (citations omitted). Policy exclusions are to be given a "strict, narrow construction, with any ambiguity resolved against the insurer." (*Id.* at 383 (citations omitted)). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." (*Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 652 (1993) [citations omitted]).

"'[T]he construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts.'" (*Marshall v. Tower Ins. Co. of NY.*, 44 A.D.3d 1014, 1015 [2d Dept 2007], quoting *Raino v. Navigators Ins. Co.*, 268 A.D.2d 419, 419-20 [2d Dept 2000]; *Moshiko. Inc. v. Seiger & Smith, Inc.*, 137 A.D.2d 170 [1st Dept], aff'd 72 N.Y.2d 945 [1988]). Moreover, "where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." (*Government Empl. Ins. Co. v. Kligler*, 42 N.Y.2d 863, 864 [1977]).

In this case, the complaint in the Underlying Action alleges that Davis' accident took place at the Premises. The policy at issue in this case excludes claims "arising out of premises ... owned by an 'insured' ... rented to others by an 'insured' ... that is not an 'insured location.'" "[I]nsured location" includes "residence premises," which the Policy defines as a "two, three or four family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations." These provisions are unambiguous, and operate to require that the insured resides at the premises as described, as a condition of coverage. Accordingly, any coverage for Mr. Cantos with respect to the Underlying Action is contingent upon his residence at the Premises.

Here, through Mr. Cantos' Affidavit, CastlePoint has met its burden of demonstrating that there is no coverage for Mr. Cantos under the Policy issued to him because Mr. Cantos did not reside at the premises on December 26, 2012, the date of Ms. Davis' accident. In opposition, Mr. Cantos never argues that he resided at the premises on the date of the underlying accident, and thus has not raised any triable issue of fact precluding summary judgment in CastlePoint's favor. Furthermore, "Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding." (*Bender v. Carroll*, 2012 WL 3767561 [N.Y.Sup., August 28, 2012]). "Its purpose is to protect the sanctity of the oath or to preserve judicial integrity and avoid inconsistent results." (*Id.*). As such, there is no coverage for Mr. Cantos under the Policy issued to him by CastlePoint.

Turning to the issue of disclaimer, Insurance Law 3420(d) states, in relevant part:

> If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

"Disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed." (*Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-89 [2000]). However, "[b]y contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered. Failure to comply with section 3420(d) precludes denial of coverage based on a policy exclusion." (*Id.*).

Here, where Mr. Cantos' claim falls outside of the scope of the Policy's coverage (the insured location by definition does not include premises not owned or used as a residence by Mr. Cantos), the timeliness of CastlePoint's disclaimer is not an issue.

In addition, Plaintiff has demonstrated entitlement to default judgment against Ms. Cantos. The Court notes that while Ms. Cantos has defaulted, Castlepoint has provided proof of its disclaimer of coverage to her for the underlying incident on the grounds that she is not listed as a named insured or additional insured under the Policy, and is not a "relative" of Mr. Cantos under the Policy because of their divorce in 2009. Thus, any claim by Ms. Cantos would fall outside of the scope of the Policy's coverage as well, and timeliness of any disclaimer would not be an issue.

Wherefore it is hereby,

ORDERED that plaintiff CastlePoint Insurance Company's motion for summary judgment against defendants Gonzalo Cantos and Roberta Davis is granted; and it is further

ORDERED and ADJUDGED that CastlePoint Insurance Company is not obligated to defend or indemnify Gonzalo Cantos with respect to any claims brought by Roberta Davis in the Underlying Action; and it is further

ORDERED that plaintiff CastlePoint Insurance Company's motion for default judgment against defendant Rosanna Cantos is granted without opposition; and it is further

ORDERED and ADJUDGED that defendant Rosanna Cantos is not an insured under the Policy and that CastlePoint Insurance Company has no duty to defend or indemnify Rosanna Cantos for any claims asserted in the Underlying Action;

ORDERED that Plaintiff's motion to dismiss Gonzalo Cantos' counterclaim alleging violations of General Business Law § 349 against plaintiff CastlePoint Insurance Company is granted without opposition.

This constitutes the decision and order of the Court. All other relief requested is denied.

December 21, 2016

DATED: ~~JANUARY~~ ___, ~~2017~~

DEC 2 1 2016

EILEEN A. RAKOWER, J.S.C.