Tower Ins. Co. of N.Y. v Cummings
2018 NY Slip Op 30838(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 158615/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 158615/2016

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

MOTION SEQ. NO. 001

- v -

KEITH CUMMINGS and STEPHANIE C. THOMPSON,

Defendants.

DECISION, ORDER AND JUDGMENT

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 36, 37, 43, 44

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this declaratory judgment action, plaintiff Tower Insurance Company of New York ("Tower") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor against defendants Keith Cummings ("Cummings") and Stephanie C. Thompson ("Thompson") (collectively "defendants"), declaring that it has no duty to defend or indemnify Cummings in a personal injury action styled *Stephanie C. Thompson v Keith Cummings*, which is pending in Supreme Court, Richmond County under Index Number 150566/16 ("the underlying action"). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

The issue raised on this motion is whether Tower is entitled to a declaration that it is not obligated to provide insurance coverage to Cummings in the underlying action. The underlying action arose from an incident ("the alleged incident") on March 23, 2015 in which Thompson was allegedly injured when she fell in front of 128 Campbell Avenue, Staten Island, New York ("the premises"), due to the negligence of Cummings, who owned the premises.

In February of 2014, Tower issued a renewal Homeowners' Policy ("the policy") to Cummings for the premises. Doc. 11.[1] The renewal policy, numbered HOP2312223, was effective from 4/28/14 through 4/28/15. Id. The policy obligated Tower to pay the insured, Cummings, for damages for which he was legally liable as a result of "'bodily injury' . . . caused by an 'occurrence'", which the policy defined, as is relevant herein, as an "accident." Id., at Policy Form HO 00 02 04 91, at Section II – Liability Coverages, Coverage E.

Certain exclusions in the policy limited Cummings' coverage. One such exclusion applied to any claim for bodily injury arising out of premises owned by Cummings that was not an "insured location." The said exclusion provided, inter alia, that:

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:

a. Owned by an "insured";

b. Rented to an "insured"; or

[1] All references are to the documents filed with NYSCEF in this matter.

c. Rented to others by an "insured";

that is not an "insured location".

See Policy Form HO 00 02 04 91 at Section II – Exclusions.

The "Definitions" section of the policy provided, in relevant part, that "insured" meant Cummings. See Policy Form HO 00 02 04 91 at Definitions, par. 3. The policy defined "[i]nsured location" as "[t]he residence premises". Id., at par. 4. "Residence premises" was defined 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.

"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.

See Policy Form HO 00 02 04 91 at Definitions, par. 8.

The policy also contained a rental exclusion which applied to any claim for bodily injury arising out of the rental of premises that was not an "insured location," stating specifically as follows:

Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to "bodily injury" or "property damage"

* * *

c. Arising out of the rental or holding for rental of any part of any premises by an "insured." This exclusion does not apply to the rental or holding for rental of an "insured location":

1. On an occasional basis if used only as a residence;
2. In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or
3. In part, as an office, school, studio or private garage

See Policy Form HO 00 02 04 91 at Section II – Exclusions, par. 1 (c).

Tower received notice of the alleged incident on or about June 2, 2015. Doc. 10, at par. 8; Ex. 2 to Doc. 10. Peter Catanzaro was assigned as claims adjuster on the file. Doc. 10, at par. 9. Catanzaro assigned an investigator to interview Cummings and, on June 6, 2015, Cummings signed an unsworn statement in which he represented that he had lived at 373 Naughton Avenue in Staten Island for 20 years and rented the premises to tenants. Ex. 3 to Doc. 10. Based on the statement, Catanzaro prepared a disclaimer letter, which was mailed to Cummings. Doc. 10, at pars. 14-16. The letter advised that:

> [B]ecause Cummings did not reside at the premises on the date of loss, it did not qualify as an "insured location", and the policy does not provide coverage for bodily injury arising out of premises owned by an insured or rented to others by an insured that is not an "insured location", nor does it provide coverage for bodily injury arising out of the rental or holding for rental of any premises by an insured that is not an "insured location."

Doc. 10, at par. 16; Ex. 4 to Doc. 10.

By correspondence dated June 22, 2015, Cummings' attorney acknowledged receipt of the disclaimer but represented that "[Cummings] does use part of the premises as a residence where

he does stay but does not stay there every night. He maintains part of the premises as a home which is fully equipped for him as a residence." Ex. 5 to Doc. 10.

Given the discrepancy regarding whether Cummings' lived at the premises, Tower requested that he appear for an examination under oath ("EUO"). On August 27, 2015, Tower conducted an EUO of Cummings at which he testified, inter alia, that, although the premises was legally a two family dwelling, it was comprised of three apartments and was used as a three family dwelling. Doc. 25, at p. 8-10. Each of the apartments had its own entrance, its own bathroom and kitchen, and its own meter. Doc. 25, at p. 9-16. As of the date of the alleged incident, Thompson rented one of the apartments, a tenant named George Washington rented another, and Cummings lived in the third unit part time. Doc. 25, at p. 9-15. Cummings admitted that he told the investigator that the premises was just an investment property because he did not want his wife to know that he stayed there. Doc. 25, at p. 17-18.

After Cummings failed to return a signed copy of his EUO transcript to Tower, Tower reiterated its disclaimer of coverage by correspondence dated November 13, 2015. Doc. 10, at par. 23; Doc. 21. In response to Tower's letter, Cummings' attorney admitted that, as of the date of the alleged incident, two apartments at the premises were rented to tenants and that Cummings resided in the third. Doc. 22.

On or about May 4, 2016, Thompson commenced the underlying action against Cummings. Doc. 23. Tower received the summons and complaint in the underlying action on or about September 12, 2016. Doc. 10 at par. 25. By correspondence to Cummings dated September 15, 2016, Tower again disclaimed coverage for the loss but agreed to defend Cummings pending resolution of the instant declaratory judgment action, which Tower said it would be commencing in order to determine its coverage obligations. Doc. 24.

Tower commenced this action against defendants by filing a summons and complaint on October 13, 2016. Doc. 1. In the complaint, Tower sought a judgment declaring that it had no duty to defend or indemnify Cummings in the underlying action based on the fact that the premises were not an "insured location" as of the date of the alleged incident. Doc. 1. Cummings and Thompson thereafter joined issue by service of their answers. Docs. 27 and 28, respectively.

On February 17, 2017, Tower filed the instant motion seeking summary judgment on its claim for declaratory relief. Doc. 8. Defendants oppose the motion. Docs. 33 and 38.

CONTENTIONS OF THE PARTIES:

Tower argues that it is entitled to summary judgment because it has established that the premises were not an "insured location" which, as applicable herein, means "the residence premises", and that the "residence premises" means "a two family dwelling where [Cummings] reside[s] in at least one of the family units." See Policy Form HO 00 02 04 91 at Definitions, par. 8. Specifically, Tower contends that, since the premises consisted of a three family dwelling, it is not obligated to provide coverage for the alleged loss. Tower further asserts that it is not obligated to provide coverage for the rental of any premises by an insured which is not an "insured location."

In opposition, Thompson argues that the motion must be denied as premature pursuant to CPLR 3212(f) because discovery, including depositions, has not been completed. Thompson further asserts that Tower failed to provide unredacted copies of Cummings' written statement and EUO transcript.

Cummings substantially reiterates Thompson's argument, asserting that the motion should be denied because discovery has not been completed.

In reply, Tower argues that it has established its prima facie entitlement to summary judgment and that defendants have failed to set forth any legally sound basis entitling them to conduct discovery.

LEGAL CONCLUSIONS:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980); *People ex rel Spitzer v Grasso*, 50 AD3d 535, 858 N.Y.S.2d 23 (1st Dept 2008). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v New York Telephone*, 220 AD2d 728 (2d Dept 1985).

> "[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 AD3d 1014, 1015 (2d Dept 2007), *quoting Raino v Navigators Ins. Co.*, 268 AD2d 419, 419-20 (2d Dept 2000); *Moshiko, Inc. v Seiger & Smith, Inc.*, 137 AD2d 170 (1st Dept 1988), *affd* 72 NY2d 945 (1988). Moreover, "where the provisions of [an insurance] 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 NY2d 863, 864 (1977).

Castlepoint Ins. Co. v Cantos, 2016 NY Misc LEXIS 4813 (Sup Ct New York County 2016).

That branch of Tower's motion seeking summary judgment against defendants is granted. Pursuant to the terms of the policy, coverage for liability excludes claims which do not arise at an "insured location." See Policy Form HO 00 02 04 91 at Section II – Exclusions. The policy defines "insured location", as it pertains to the facts herein, as the "residence premises." See Policy Form HO 00 02 04 91 at Definitions, par. 4. The policy defines "residence premises", as applicable herein, to mean a two family dwelling where Cummings resided in at least one of the family units and which was shown as the "residence premises" in the Declarations. See Policy Form HO 00 02 04 91 at Definitions, par. 8. The policy also contained an exclusion for claims arising from the rental of any premises by Cummings which was not an "insured location." See Policy Form HO 00 02 04 91 at Section II – Exclusions, par. 1 (c).

Tower has established its prima facie entitlement to summary judgment by submitting the sworn EUO testimony of Cummings in which he states, inter alia, that, as of the date of the alleged incident, the premises consisted of three apartments, each with its own kitchen, bathroom, entrance, and meter. Doc. 25, at p. 9-16. Thus, Tower has demonstrated "that the home was a three-family dwelling, and thus not covered by the policy, rather than a two-family dwelling, which would be covered by the policy (*Castlepoint Ins. Co. v Jaipersaud*, 127 AD3d 401, 401 [1st Dept 2015]; *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d 657, 658 [2d Dept 2014])." *Almonte v CastlePoint Ins. Co.*, 140 AD3d 658, 659 (1st Dept 2016); *see also Tower Ins. Co. of N.Y. v Atuana*, 127 AD3d 454 (1st Dept 2015).

This Court finds without merit defendants' claim that the instant motion must be denied as premature because discovery has not been completed. Defendants "neither submitted an affidavit demonstrating the existence of an issue of fact nor made any attempt to show that facts essential

to justify their opposition to the motion existed that could not be stated absent [further discovery] (*see* CPLR 3212[f]; *Guaman v Ansley & Co., LLC*, 135 AD3d 492, 492 [1st Dept 2016]). They failed to show that the proof they claim they need is within the exclusive knowledge or control of [Tower] and that their opposition to [Tower's] motion is supported by something other than mere hope or conjecture (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007])." *Safier v Saggio Rest. Inc.*, 151 AD3d 543, 544 (1st Dept 2017).

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

ORDERED that the branch of the motion by plaintiff Tower Insurance Company of New York seeking a declaratory judgment as against defendants Keith Cummings and Stephanie C. Thompson is granted; and it is further,

ORDERED, ADJUDGED AND DECLARED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendants Keith Cummings and Stephanie C. Thompson in the personal injury action commenced against them in the action styled *Stephanie C. Thompson v Keith Cummings*, which case is currently pending in Supreme Court, Richmond County under Index Number 150566/16; and it is further,

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

5/3/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE