SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

Index No.
650614/2016

WALTER GININ, NELLY CAMPOVERDE and
JOSE LUIS CRESPO,

Defendants.

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Cohen, D., J.:

Plaintiff Tower Insurance Company of New York (Tower) moves for an order, pursuant to CPLR 3212, granting it summary judgment against defendant Jose Luis Crespo (Crespo): (i) declaring that Tower has no duty to defend or indemnify defendants Walter Ginin (Ginin) and Nelly Campoverde (Campoverde) against the claims by Crespo in the personal injury action entitled *Jose Luis Crespo v Nelly Campoverde and Walter Ginin*, Index No. 51946/2015 (Sup Ct, Westchester Co) (Underlying Action); and (ii) dismissing Crespo's counterclaim asserted against Tower.

In this declaratory judgment action, Tower seeks a declaration that it has no duty to defend and indemnify Ginin and Campoverde because they were not entitled to insurance coverage under a homeowner's insurance policy it had issued to Ginin for the claims in the Underlying Action. The Underlying Action arises out of Crespo's slip and fall at premises Crespo was renting from Ginin, the property owner. Tower submits proof Ginin did not reside at the premises at the time of the occurrence as required for coverage under the policy, and a default judgment has already been entered against Ginin and Campoverde. Crespo contends that

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he needs discovery, particularly since Campoverde, Ginin's former wife, has always resided at the premises, they were married at the time of the accident, and they had lived there as a married couple at one time. The motion is granted.

BACKGROUND

On February 16, 2014, Crespo was injured when he slipped and fell at the premises located at 10 Howard St., Sleepy Hollow, NY (the "Premises") (exhibit A to notice of motion, complaint, ¶ 9). Crespo was a tenant, and Ginin and Campoverde were the owners of the Premises (*id.*, ¶¶ 5, 8). Campoverde resided at the Premises, but Ginin resided at 48 South Washington St, Apartment 1, Tarrytown, NY (*id.*, ¶ 6-7). On February 12, 2015, Crespo commenced the Underlying Action for general negligence and premises liability.

Tower issued policy number HOS2666287 to Ginin, as the named insured, for the Premises for one year commencing on November 15, 2013 to November 15, 2014 (the "Policy"). The Policy describes the home as a two-family home, which is owner occupied (exhibit A to notice of motion, complaint ¶ 13). The declarations page indicates that Ginin is the only "named insured," and that the "residence premises" covered by the Policy is the Premises (*id.*, ¶ 14; *see* exhibit 2 to affidavit of Kenneth Rogers, dated July 14, 2016 [Rogers aff], Policy, declarations page).

The Policy provides, in its Definitions, that: "[i]n this policy, 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household" (exhibit 2 to Rogers aff, Policy, Homeowners 3 Special Form at 1). It also defines "insured" as "you and residents of your household who are: a. Your Relatives; or b. Other persons under the age of 21 and in the care of any person named above" (*id.*, ¶ 3 at 1). It specifies that the "insured location" means "the residence premises," or the "part of other premises . . . used by you as a

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residence and . . . [w]hich is shown in the Declarations; or . . . [w]hich is acquired by you during the policy period for your use as a residence" (*id.*, ¶ 4 at 1). It further defines:

> "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"

(*id.*, ¶ 8 at 1).

The Policy also contains exclusions covering the rental or holding out for rental of a premises which does not qualify as an "insured location," and covering bodily injury arising out of a premises "rented to other by an 'insured'" that is not an "insured location" (*id.*, at 12-13, 14-15). Specifically, it provides, in relevant part:

> "SECTION II – EXCLUSIONS
> **1. 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 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;
> * * *
> 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"

(*id.*).

On November 30, 2015, Tower received notice of Crespo's accident, and later obtained a copy of the pleadings in the Underlying Action (Rogers aff, ¶ 11). It assigned a claims examiner to the claim (*id.*, ¶ 12), and initiated an investigation through Northern Intelligence Agency, Inc. (affidavit of Renan P. Mogollon, dated July 14, 2016 [Mogollon aff], ¶¶ 4-5). During the investigation, Tower discovered that Ginin did not reside at the Premises, and had not resided there since 2008 (Rogers aff, ¶ 14; Mogollon aff, ¶¶ 6-10). Ginin confirmed to Tower's investigator in a signed written statement that he resided at 48 South Washington St, Apartment 1, Tarrytown, NY on a full-time basis on the date of the accident (Mogollon aff, ¶ 9 and exhibit 1 annexed thereto, Ginin's signed statement).

On December 28, 2015, Tower disclaimed coverage under the policy to Ginin and Campoverde, because Ginin had not resided at the insured address since 2008. Thus, the insured address was not a "residence premises" and was not an "insured location" as defined in the Policy. Tower also disclaimed coverage to Campoverde, because she was not an "insured" under the Policy (exhibit A to notice of motion, complaint, ¶ 18). Tower further disclaimed based on the exclusion covering the rental or holding out for rental of a premises which does not qualify as an "insured location," given that the insured received business income from the rental of the apartment unit at a premises which does not qualify as an "insured location" (*see id.*, ¶ 19; Rogers aff, ¶ 37 and exhibit 3 annexed thereto, disclaimer letter). Finally, it disclaimed coverage for Crespo's injuries,

because the Policy excludes coverage for bodily injury arising out of a premises "rented to others by an 'insured'" that is not an "insured location" (Rogers aff, ¶38 and exhibit 3 annexed thereto).

Tower previously moved for a default judgment against all three defendants, which was granted as against defendants Ginin and Campoverde, and it was declared that Tower had no duty to defend or indemnify Ginin and Campoverde in the Underlying Action (exhibit F to notice of motion). Crespo's cross motion to vacate his default, however, was granted, and, he served an answer with a counterclaim, seeking a declaration that Tower had a duty to defend and indemnify Ginin and Campoverde in the Underlying Action (exhibit G to notice of motion). Tower replied to the counterclaim, asserting various defenses, including res judicata and collateral estoppel (exhibit H to notice of motion).

Tower now moves for summary judgment against Crespo, asserting that the Policy does not provide coverage for the personal liability of an insured for: (i) bodily injury arising out of a premises that is not an "insured location;" (ii) bodily injury arising out of a rental or holding out for rental of a premises which does not qualify as an "insured location;" and (iii) medical payments to others for bodily injury arising out of a premises which does not qualify as an "insured location" (exhibit B to notice of motion, Policy at 12-15). Tower also points to the fact that the Policy defines "insured location" as, in relevant part, the "residence premises," which is defined as a "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" (exhibit A to notice of motion, Tower's affirmation

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of counsel in support of motion for default [Tower Default aff] at 12-13). It submits the affidavits of both its investigator and its claims adjuster, as well as Ginin's signed written statement, to demonstrate that Ginin, the only named insured, did not reside at the Premises (Rogers aff, ¶¶ 14-32; Mogollon aff, ¶¶ 5-10 and exhibit 1 annexed thereto, Ginin's signed statement). Tower states that, while on the date of the accident Ginin and Campoverde were still legally married, they were not residents of the same household. Ginin was residing at 48 South Washington St, Apartment 1, Tarrytown, NY on a full-time basis, and had been since 2008, and Campoverde was residing at the Premises. Campoverde, however, was not a named insured, and a spouse of the named insured does not meet the definition of insured unless the spouse resides in the same household as the named insured (exhibit A to notice of motion, Tower default aff at 13). Tower further points out that upon Ginin's and Campoverde's default, they admitted the allegations of the complaint, including that Ginin did not reside in the Premises, and the court has already declared that Tower has no duty to defend and indemnify Ginin and Campoverde in the Underlying Action, which demonstrates that there is no coverage for Crespo's claims.

In opposition, Crespo urges that discovery is incomplete and he has not had the opportunity to explore the factual basis for Tower's disclaimer. He argues that it is improper for Tower to rely on its prior affirmations from the default motion. Further, he contends that as husband and wife during a portion of their joint ownership and occupancy of the Premises, Ginin and Campoverde are entitled to insurance coverage on the date of the accident. He states that the

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Policy identifies the "insured" as "you and residents of your household who are . . . your relatives," and as the "'named insured' shown in the Declarations and the spouse if a resident of the same household" so that at least for some period of time, when Ginin and Campoverde were living together, the Policy definition of "you" applied to them both. He argues that Tower is attempting to capitalize on their marital difficulties, and the clerical error in failing to update the Policy after they were married.

DISCUSSION

Tower's motion for summary judgment as against defendant Crespo is granted, and it is declared that Tower has no duty to defend and indemnify Crespo, and Crespo's counterclaim is dismissed.

Tower has presented prima facie proof that there was no insurance coverage, based on its submission of the Policy, as well as the affidavits of its investigator and claims adjuster and Ginin's signed statement. "[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 N.Y.*, 44 AD3d 1014, 1015 [2d Dept 2007] [internal quotation marks and citation omitted]).

Here, the Policy provisions are clear, and do not provide coverage for the personal liability of an "insured" for bodily injury arising out of an occurrence at a premises that is not an "insured location" (exhibit A to notice of motion, Policy at 12-13). In order for a premises to be an "insured location" it must be a

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"residence premise," which is defined as the "one family dwelling . . . or [t]hat part of any other building; where you reside and which is shown as the 'residence premises' in the Declarations" or a "two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premise' in the Declarations" (*id.*). The Policy clearly specifies that Ginin was the named insured, and the word "you" in the Policy refers to the "'named insured' shown in the Declarations and the spouse *if a resident of the same household*" (*id.*, Policy, Definitions at 1[emphasis supplied]). The definition for "insured" is "you and *residents of your household*" who are you relatives or persons under 21 years old "and in the care of any person named above" (*id.*). The Policy repeatedly and unambiguously requires that for the premises to be covered, Ginin must reside there, and for Campoverde to be covered as a spouse, she had to be a resident of the same household with Ginin. Identical policy definitions of "residence premises" have been held unambiguous, and do not afford coverage for the loss at a dwelling in which the insured does not reside on the date of the loss (*Tower Ins. Co. of N.Y. v Zaroom*, 145 AD3d 556, 557 [1st Dept 2016]; *Tower Ins. Co. of N.Y. v Brown*, 130 AD3d 545, 545-546 [1st Dept 2015]; *Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d 644, 644 [1st Dept 2015]; *Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d at 1015).

Tower presents Ginin's written statement that he did not reside at the Premises at the time of the accident, and had not resided there since 2008, six years before the accident. This statement is further supported by the affidavit of Renan Mogollon, Tower's investigator, who attests that Ginin stated that he

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resided at 48 Washington St, Apartment 1, Tarrytown, NY on the date of the accident, he had been residing there for the previous eight years, and then Ginin signed the statement (Mogollon aff and exhibit 1 annexed thereto). Tower also submits the affidavit of its claims adjuster, Kenneth Rogers, who further affirms that Ginin signed the statement that he did not reside at the Premises on the date of the accident (Rogers aff, ¶¶ 14-16), and that Campoverde was not a resident of the same household as Ginin, and as such was not an "insured" under the Policy (*id.*, ¶¶ 30-31). This undisputed evidence is sufficient to establish Tower's prima facie case (*Tower Ins. Co. of N.Y. v Zaroom*, 145 AD3d at 557; *Tower Ins. Co. of N.Y. v Brown*, 130 AD3d at 545-546; *Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d at 644).

Moreover, based on Ginin's and Campoverde's defaults in appearing in this action, and the subsequent judgment that was entered against them declaring that Tower has no duty to defend or indemnify them, Ginin and Campoverde have admitted the allegations in the complaint that Ginin did not reside in the Premises when the incident occurred (*see Tower Ins. Co. of N.Y. v Brown*, 130 AD3d at 546; *Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d at 644; *see also Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 540 [1st Dept 2013]).

Crespo fails to raise a triable issue of fact. First, his contention that he needs discovery is supported only by a conclusory and speculative affirmation by counsel, which contains no evidence Ginin resided at the Premises when the accident occurred. This fails to meet his burden on summary judgment (*see Tower Ins. Co. of N.Y. v Brown*, 130 AD3d at 546 [conclusory affirmation of

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counsel containing no evidence insured resided at insured location insufficient to oppose summary judgment to insurer]). In addition, he failed to demonstrate how further discovery might reveal the existence of evidence that was in the insurer's exclusive knowledge (*see Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d at 644; *Atomergic Chemetals Corp. v Hartford Acc. & Indem. Co.*, 193 AD2d 551, 551 [1st Dept 1993]). Further, Crespo's counsel's assertions that Tower accepted renewals of this Policy, which therefore raises questions about Tower's prior communications with Ginin, and whether they spoke about his marriage to Campoverde, and whether he asked to have Campoverde added as a named insured, is based on pure speculation. Counsel lacks personal knowledge, and, thus, his affirmation lacks evidentiary value (*see Tower Ins. Co. of N.Y. v Zaroom*, 145 AD3d at 557 [attorney's unsupported claim that insurer was aware insureds did not reside at insured premises but continued to accept premiums failed to raise triable issue]). Counsel claims that the married couple lived in the Premises for a period of time, for four months in 2008 according to Ginin's statement, and when they experienced marital difficulties, Ginin moved out but they still continued to pay Tower the insurance premiums for the same policy. He asserts that they expected that the home was covered by the same policy that covered it up until Ginin's "recent departure" (defendant Crespo's affirmation of counsel at 11-14). He contends that it was a violation of public policy for Tower to disclaim coverage. Again, these statements are not based on any personal knowledge, and, in any event, their expectations of their coverage do not demonstrate that they were covered under the Policy provisions. Contrary to defendant's contentions,

there was no violation of public policy in requiring insureds, when their insurance policy requires them to reside in the premises, to make changes to the policy when the named insured moves out of the premises. Finally, there was no procedural irregularity in Tower moving for summary judgment based on the same arguments and facts set forth in its prior default motion papers. Therefore, summary judgment is granted to Tower on its complaint.

Crespo's counterclaim is dismissed. This counterclaim seeks the reverse declaration -- that Tower has a duty to defend and indemnify Ginin and Capoverde in the Underlying Action, which as discussed above, is denied (exhibit G to notice of motion, answer with counterclaim, at 3). Not only has Tower presented prima facie proof that it has no such duty, Crespo has failed to raise a triable issue of fact, and this claim was determined by the prior default by Ginin and Campoverde. Accordingly, it is

ORDERED that the motion of Tower Insurance Company of New York for summary judgment is granted, and it is declared that Tower Insurance Company of New York has no duty to defend and indemnify defendants Walter Ginin and Nelly Campoverde against the claims being made by defendant Jose Luis Crespo in the personal injury suit entitled *Jose Luis Crespo v Nelly Campoverde and Walter Ginin* (Index No. 51946/2015) (Sup Ct, Westchester County), and defendant Crespo's counterclaim is dismissed.

Dated: JUNE 28, 2019

ENTER:

J.S.C.

11 HON. DAVID B. COHEN
J.S.C.

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