Nationwide Gen. Ins. Co. v Campos
2021 NY Slip Op 33430(U)
June 22, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 616645/2019
Judge: Andrew A. Crecca
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SHORT FORM ORDER

INDEX No. 616645/2019

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 57 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW A. CRECCA
Justice of the Supreme Court

MOTION DATE 8/6/20 (002)
MOTION DATE 12/1/20 (003)
ADJ. DATE 12/18/20
Mot. Seq. # 002 MotD
Mot. Seq. # 003 MotD

NATIONWIDE GENERAL INSURANCE COMPANY,

Plaintiff,

- against -

CARLOS CAMPOS, RINA CAMPOS, FRANCISCO A. LIEVANO-RIVERA and CATCO ASSOCIATES, LP,

Defendants.

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Upon the following papers read on this motion for summary judgment and cross motion for leave to amend, etc.: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, dated July 6, 2020 (including Memorandum of Law); Notice of Cross Motion and supporting papers by defendants Campos, dated November 13, 2020; Answering Affidavits and supporting papers by defendant Campos, filed November 13, 2020, by defendant Lievano-Rivera, dated November 12, 2020, and by defendant Catco Associates, dated September 14, 2020 (including Memorandum of Law); and Replying Affidavits and supporting papers by plaintiff, dated December 11, 2020 (including Memorandum of Law); it is

ORDERED that the motion by plaintiff for, inter alia, an order granting summary judgment in its favor is granted in part and denied in part; and it is further

ORDERED that the cross motion by defendants Carlos Campos and Rina Campos for, inter alia, an order extending their time to serve an answer is granted in part and denied in part.

The within action seeks a declaratory judgment that plaintiff has no duty to defend or indemnify defendants Carlos Campos, Rina Campos or Catco Associates, L.P. in a case filed against them by Francisco A. Lievano-Rivera ("Lievano-Rivera"), in Supreme Court, Nassau County under index number 614958/2018 ("underlying action"), and that it has no duty to provide coverage to Lievano-Rivera. In the underlying action, Lievano-Rivera alleges that he was injured by exposure to carbon monoxide gas while living as a tenant in a basement apartment at a residence owned by defendant Catco Associates, L.P. Plaintiff had issued a tenant's policy of insurance to Carlos Campos and Rina Campos (collectively, "Campos defendants"), who had rented the house at issue. In an examination under oath conducted by plaintiff in the course of its claims investigation, Carlos Campos testified that he rented the house from a realty company, that he was unfamiliar with Catco Associates, and that he believed the realty company was responsible for the boiler, as it regularly came and inspected the smoke and carbon monoxide detectors. He further testified that while living in the house with his family he did rent rooms to tenants, but that Lievano-Rivera was not a tenant; rather, he was a coworker who needed a place to stay for a short period who did not pay rent or have his own room. Plaintiff asserts that the policy of insurance excludes coverage for injuries arising out of business activities or rental of the premises, and that defendants violated the policy by failing to provide notice of the incident and by misrepresenting the number of people living at the premises. At the time of filing of the within motion, issue was joined only as to Catco Associates.

Plaintiff now moves for an order granting it summary judgment as against all defendants. Alternatively, it seeks an order granting summary judgment against Catco Associates and leave to enter a default judgment against the remaining defendants.

Subsequent to the filing of the within motion, Lievano-Rivera filed an answer and plaintiff withdrew the portion of its motion which sought a default judgment against him. The Campos defendants filed a cross motion for an order granting leave to serve an answer, compelling plaintiff to accept such answer, and awarding them costs and attorneys' fees. In response, plaintiff withdrew the portion of its motion seeking a default judgment against the Campos defendants.

CPLR 3212 provides that a summary judgment motion may be brought after issue has been joined (***Shaibani v Soraya***, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]). "A motion for summary judgment may not be made before issue is joined (CPLR 3212 [a]) and the requirement is strictly adhered to" (***City of Rochester v Chiarella***, 65 NY2d 92, 101, 490 NYS2d 174 [1985]; *see also* **Cremosa Food Co., LLC v *Amella***, 164 AD3d 1300, 81 NYS3d 749 [2d Dept 2018]; ***Lindbergh v SHLO 54, LLC***, 128 AD3d 642, 9 NYS3d 105 [2d Dept 2015]; ***Gaskin v Harris***, 98 AD3d 941, 950 NYS2d 751 [2d Dept 2012]). Joinder of issue requires service of a complaint by the plaintiff and service of an answer or counterclaim by the defendant (***Shaibani v Soraya***, *supra*). Plaintiff's motion was filed prior to issue being joined as to the Campos defendants and Lievano-Rivera; therefore, its application for summary judgment as against those defendants is denied as procedurally improper. However, issue was joined with respect to Catco Associates prior to filing of the motion.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v Bank of the West.***, 28 NY3d 439, 448, 45 NYS3d 864 [2016], quoting ***Alvarez v Prospect Hosp.***, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (***S.J. Capelin Assoc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer***, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned or speculative and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer***, *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93 [1968]; ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]; ***Columbus Trust Co. v Campolo***, 110 AD2d 616, 487 NYS2d 105 [2d Dept], *affd* 66 NY2d 701, 496 NYS2d 425 [1985]). Pursuant to CPLR 3212 (f), summary judgment may be precluded under circumstances where discovery is incomplete; however, the discovery sought must be more than a fishing expedition. It may not be predicated upon speculative hope that evidence supporting a theory may be uncovered (***Price v County of Suffolk***, 303 AD2d 571, 756 NYS2d 758 [2d Dept 2003]; ***Greenberg v McLaughlin***, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]; ***Zarzona v City of New York***, 208 AD2d 920, 920, 617 NYS2d 534, 535 [2d Dept 1994]). A mere hope that further discovery will uncover some helpful fact is insufficient to deny summary judgment as premature; there must be a real basis for the assertion that such discovery is necessary (***Price v County of Suffolk***, *supra*; ***Greenberg v McLaughlin***, *supra*; ***Zarzona v City of New York***, *supra*).

Plaintiff argues that defendants are not entitled to coverage for losses arising out of the February 17, 2017 incident which is the subject of the underlying action, as renters resided at the premises, Lievano-Rivera had been boarding at the premises, and it did not receive notice of the claim until January 22, 2019, when counsel for Catco Associates notified it that a lawsuit had been commenced. Plaintiff issued a reservation of rights letter to the Campos defendants dated May 8, 2019, followed by similar correspondence dated June 5, 2019, and finally a letter dated August 7, 2019, which denied the obligation to provide coverage based upon cited policy exclusions and alleged violation of policy provisions. The August correspondence stated that a courtesy interim defense would be provided, but that if a court determined that plaintiff had no duty, such defense would be discontinued and no indemnification would be provided. Some of the provisions cited by plaintiff in support of its no coverage position are located in the "Liability Exclusions" section of the policy and exclude coverage for injury "arising out of business pursuits of an insured" or injury "arising out of the rental or holding for rental of any part of any premises by an insured" except where such rental is "part of [an insured's] residence premises . . . unless intended as a residence by more than two roomers or boarders."

Plaintiff references Carlos Campos' testimony at his examination under oath that he rented four second-floor bedrooms to tenants unrelated to him, and that Lievano-Rivera was a coworker whose family had relocated, leaving him in need of a temporary place to stay. Lievano-Rivera did not have his own room and did not pay rent. According to Carlos Campos' testimony, Lievano-Rivera was permitted to sleep on the couch in the living room or basement, and had been staying at the residence about two months when the incident occurred. It is plaintiff's position that Lievano-Rivera's alleged injury either arose out of the alleged business of Carlos Campos in renting rooms, or out of the rental of part of the residence premises to more than two roomers or boarders. Both positions are predicated upon the presumption that Lievano-Rivera was a renter and that his injuries arose out of such situation. Plaintiff also asserts that defendants failed to comply with the notice provision of the policy, and that Carlos Campos violated the policy condition against concealment or fraud with respect to the number of people living in the premises and the presence of subtenants.

Plaintiff also asserts that Catco Associates is not entitled to coverage with the Campos defendants as tenants, because the lease agreement between the parties does not obligate the Campos defendants to provide additional insured coverage to Catco Associates, and because the plain language of the policy does not provide for additional insured coverage. Catco Associates counters that summary judgment is premature, because discovery is needed to determine whether Nationwide failed to provide the proper coverage, whether there was adequate notice and whether the property was being rented out without plaintiff's knowledge. The lease agreement between Catco Associates and Campos indicates that tenant insurance is recommended to protect the tenant and his belongings; however, it contains no requirement to obtain any insurance for Catco Associates's benefit or otherwise. The policy of insurance does not include an additional named insured, and Catco Associates points to no language that would indicate that such coverage was part of the policy.

In making a determination as to whether or not a third-party is an additional named insured under an insurance policy, the intentions of the parties must be ascertained by looking to the plain language contained within the four corners of the policy (***Northside Tower Realty, LLC v Admiral Ins. Co.***, 180 AD3d 696, 118 NYS3d 181 [2d Dept 2020]; ***County of Nassau v Tech. Ins. Co.***, 174 AD3d 847, 107 NYS3d 348 [2d Dept 2019]; ***Superior Ice Rink, Inc. v Nescon Contr. Corp.***, 52 AD3d 688, 861 NYS2d 362 [2d Dept 2008]). An insurer's duty to defend is far broader than its duty to indemnify (***One Reason Rd., LLC v Seneca Ins. Co., Inc.***, 163 AD3d 974, 83 NYS3d 235 [2d Dept 2018]; ***Stout v 1 E. 66th St. Corp.***, 90 AD3d 898, 935 NYS2d 49 [2d Dept 2011]), and it arises when any of the allegations contained in a complaint, liberally construed, potentially fall within a coverage provision or rise from covered events (*see* ***Town of Massena v Healthcare Underwriters Mut. Ins. Co.***, 98 NY2d 435, 749 NYS2d 456 [2002]; ***Queens Org., LLC v. First Am. Title Ins. Co.***, 172 AD3d 932, 99 NYS3d 411 [2d Dept 2019]; ***One Reason Rd. LLC v Seneca Ins. Co., Inc.***, *supra*; ***East Ramapo Cent. Sch. Dist. v New York Sch. Ins. Reciprocal***, 150 AD3d 683, 54 NYS3d 413 [2d Dept 2017]; ***Frank v Continental Cas. Co.***, 123 AD3d 878, 999 NYS2d 836 [2d Dept 2014]; ***Stellar Mech. Servs. of New York, Inc. v Merchants Ins. of New Hampshire***, 74 AD3d 948, 903 NYS2d 471 [2d Dept 2010]). "However, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (***Allstate Ins. Co. v Zuk***, 78 NY2d 41, 44-46, 571 NYS2d 429 [1991]; *see also* ***Queens Org., LLC v First Am. Title Ins. Co.***, *supra*; ***East Ramapo Cent. Sch. Dist. v New York Sch. Ins. Reciprocal***, *supra*). It is the insured's burden to establish coverage and a duty to indemnify (***New York State Thruway Auth. v Ketco, Inc.***, 119 AD3d 659, 661–62, 990 NYS2d 72, 73–74 [2d Dept 2014]; ***Stout v 1 E. 66th St. Corp.***, *supra*), but it is the insurer's burden to establish that the allegations in the complaint are excluded from coverage (***Allstate Ins. Co. v Zuk***, *supra*; ***Town of Massena v Healthcare Underwriters Mut. Ins. Co.***, *supra*).

Here, plaintiff has made a prima facie case that Catco Associates was not an additional named insured under the policy. Catco Associates has failed to raise a triable issue of fact. Based upon the record before the court, Catco Associates's argument that the within motion is premature because additional discovery is needed is without merit. As Catco Associates was not an insured or additional named insured under the policy, plaintiff has no obligation to defend or indemnify Catco Associates in the underlying action. Accordingly, plaintiff is entitled to entry of a judgment declaring that it is not required to defend or indemnify Catco Associates in the underlying action, and the branch of its motion seeking such relief is granted.

As to the cross motion, CPLR 3012 (d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." To extend a party's time to answer a complaint and compel the plaintiff to accept the answer as timely, the moving party must present a reasonable excuse for the delay and potentially meritorious defense (***Glanz v Parkway Kosher Caterers***, 176 AD3d 686, 110 NYS3d 129 [2d Dept 2019]; ***Allstate Ins. Co. v North Shore Univ. Hosp.***, 163 AD3d 745, 82 NYS3d 61 [2d Dept 2018]; ***Yuxi Li v Caruso***, 161 AD3d 1132, 77 NYS3d 685 [2d Dept 2018]; ***HSBC Bank USA, N.A. v Powell***, 148 AD3d 1123, 51 NYS3d 116 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Kuldip***, 136 AD3d 969, 25 NYS3d 653 [2d Dept 2016]). In making its determination, the court should consider all relevant factors, including "the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (***Liu v CPS Contracting Co.***, 188 AD3d 1018, NYS3d 662, 663 [2d Dept 2020], quoting ***Harcztark v Drive Variety, Inc.***, 21 AD3d 876, 876-877 [2d Dept 2005]); *see also* ***JE & MB Homes, LLC v U.S. Bank N.A.***, 189 AD3d 1195, 134 NYS3d 271 [2d Dept 2020]; ***Rodie v Sahai***, 175 AD3d 1449, 106 NYS3d 609 [2d Dept 2019]).

Rina Campos avers that no one delivered the summons and complaint to her personally, as is attested in the affidavits of service, but that the Campos defendants did receive the papers by mail. Carlos Campos avers that he and his wife do not read English and did not understand the summons and complaint they received, so upon receipt of the papers he brought them to plaintiff's office at 1000 Woodbury Road, Woodbury, New York, seeking an explanation. He avers that Spanish-speaking person working at the office told him he would have to seek legal counsel and gave him the name and address of an attorney. Carlos Campos then visited the attorney, who could not help him, but offered to refer him to another attorney who would require payment of a large retainer in advance, which Mr. Campos did not have. Eventually, according to Carlos Campos, a neighbor who worked at a law firm put them in contact with an attorney. Shortly thereafter, the Campos' defendant made the instant cross motion.

The court notes that in determining the cross motion it considered Executive Order 202.8 issued on March 20, 2020 by Governor Andrew Cuomo in connection with the COVID-19 health emergency suspending statutes of limitations and other time limits for certain filings. Subsequent Executive Orders extended the suspension through November 3, 2020. Additionally, Administrative Order 45-20 of the Administrative Judge of Suffolk County, issued on May 28, 2020, provided that no default judgments pursuant to CPLR 3126 shall be granted unless the application for such relief was made prior to March 17, 2020 and proper notice was given. This directive was extended by subsequent Administrative Orders, with limited exceptions. Administrative Order 112-20, issued on December 22, 2020, lifted the restrictions on default judgments.

As their defense against plaintiff's claims, the Campos defendants assert that plaintiff failed to provide timely notice of disclaimer, and that the policy provisions cited by plaintiff do not preclude coverage in this case. They further argue that they did not violate the notice provision of the policy, as they had a good-faith belief of non-liability, and that there is insufficient evidence that they made material misrepresentations. In opposition to the Campos defendants' motion, plaintiff states that its application seeking a default judgment is withdrawn and that if the court denied plaintiff's summary judgment motion, the Campos defendants' application for an order compelling acceptance of their answer would be rendered moot. No opposition to the grant of leave to file an answer is asserted.

Based upon the foregoing, the court finds that the Campos defendants have presented a reasonable excuse for their default and a potentially meritorious defense, and that there is no evidence plaintiff has been prejudiced by the delay in answering. The Campos defendants' motion seeking an extension of time to answer is granted. Service of an answer upon plaintiff's counsel within twenty (20) days of entry of the within order shall be deemed timely. Additionally, the Campos defendants are directed to file their answer with the NYSCEF system. The portion of the Campos defendants' motion seeking costs and attorneys' fees is denied, as defendants have articulated no basis for the award of such relief.

The court directs that the claim as to which summary judgment was granted hereby is severed and the remaining claims are continued (*see* CPLR 3212 [e] [1]).

Dated: June 22, 2021

ANDREW A. CRECCA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION