2019 WL 462854 (N.Y.Sup.), 2019 N.Y. Slip Op. 30286(U) (Trial Order)
Supreme Court of New York.
New York County

**1 INTEGON NATIONAL INSURANCE COMPANY, Plaintiff,

v.

James CHEN, Jie Ting Li, Denise Daskalakis and Kevin Reilly as Administrators of the Estate of Kevin Jack Reilly, Mia Reilly by Her Mother and Natural Guardian Denise Daskalakis, Denise Daskalakis, and Kevin Reilly, Defendants.

No. 157215/2017.
February 6, 2019.

Decision, Order and Judgment

Present: Hon. W. Franc Perry, Justice.

MOTION DATE *11/20/2018*

MOTION SEQ. NO. *002*

**1 The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for *JUDGMENT - SUMMARY*.

In this action for declaratory judgment, plaintiff Integon National Insurance Company ("Plaintiff"), moves for an order, pursuant to CPLR 3211 and 3212, granting Plaintiff summary judgment against defendants James Chen ("Chen"), Jie Ting Li ("Li"), Denise Daskalakis and Kevin Reilly, individually, and as the Administrators of The Estate Of Kevin Jack Reilly, and Mia Reilly by her mother and natural guardian, Denise Daskalakis (collectively, "Defendants"), dismissing all counter-claims, and declaring that Plaintiff has no duty to defend or indemnify Chen and Li in the related lawsuit entitled *Denise Daskalakis and Kevin Reilly as the Administrators of the Estate of Kevin Jack Reilly, Mia Reilly by her Mother and Natural Guardian Denise Daskalakis, and Denise Daskalakis and Kevin Reilly individually v. James Chen and Jie Ting Li*, which is pending in the Supreme Court, Kings County, New York, under Index No.: 502031/2018 (the "Underlying Action"). The motion is submitted without opposition.

2 **BACKGROUND

This action arises out of the death of Kevin Jack Reilly (the "Decedent"), which occurred on April 27, 2017, when a planter box located underneath a front window of the building located at 2224 Ryder Street, Brooklyn, New York (the "Premises"), came loose and fell on him (the "Accident"). Decedent was a tenant at the Premises. At the time of the Accident, the Premises was owned by Defendants Chen and Li (together, the "Insureds").

At the time of the Accident, the Premises was covered by a dwelling policy issued by Plaintiff to Insureds under policy number 2004390648, for the policy period from February 5, 2017 to February 5, 2018 (the "Policy"). The Policy provided, *inter alia*, for $500,000.00 in liability coverage for certain occurrences at the "residence premises." The Policy defined the "residence premises" as "the one family dwelling where you reside" or the "two, three or four family dwelling where you reside in at least one of the family units..." (NYSCEF Doc. No. 57).

Plaintiff received initial notice of the Accident on April 29, 2017. Plaintiff retained Roman & Associates to conduct a site investigation and obtain a written statement from Defendant Chen. On May 4, 2017, Roman & Associates interviewed Chen, who, with the assistance of his own interpreter, Ken Ho, provided a written statement (the "Statement"). In the Statement, Chen admitted that he did not reside at the Premises, and that he had been living at 2230 Ryder Street, Brooklyn since 2004.

Although Chen purchased the Premises on February 5, 2016 with the intent to reside in the building, he changed his mind after the New York City Department of Buildings (the "DOB") denied his application for a permit to add another floor to the Premises. After the DOB denied the application, Chen listed the Premises with a rental agency. Ultimately, Chen leased the Premises to Tiffany Daskalakis for the period from August 1, 2016 through July 31, 2017.

***2** ****3** Based on its investigation, on May 24, 2017, Plaintiff issued a disclaimer of coverage for the loss to the Insureds stating that the Premises was not an "insured location" under the Policy as it did not qualify as a "residence premises" because neither of the Insureds maintained a residence at the Premises at the time of the Accident. In particular, Plaintiff disclaimed coverage pursuant to Exclusion E.4, *"Insured's" Premises Not An "Insured Location"*, which precludes coverage for bodily injury arising out of a premises rented to others by the insured that is not an "insured location." Plaintiff also disclaimed coverage pursuant to Exclusion E.2., *"Business"*, which precludes coverage for bodily injury arising out of business conducted at a premises, except, under certain circumstances, the rental or holding for rental of an "insured location." Finally, Plaintiff disclaimed coverage for the alleged material misrepresentation by Chen that the Premises would be owner occupied. Accordingly, Plaintiff asserts that the Premises is not an "insured location" for purposes of the Accident and thus Plaintiff is not obligated to defendant or indemnify Insureds in the Underlying Action.

DISCUSSION

Declaratory Judgment

Now, Plaintiff moves for an order granting summary judgment and (1) declaring that Integon has no duty to defend or indemnify Defendants Chen and Li in the Underlying Action and (2) dismissing all counter-claims. For the following reasons, Plaintiff's motion is granted.

"The proponent of a motion for summary judgment 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]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (****4** *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact' " (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], *quoting Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, moving Plaintiff has established that the Premises does not qualify as an "insured location" as defined by the Policy and, as a result, they are not obligated to defend or indemnify Defendants Chen and Li in the Underlying Action.

The Policy provides coverage for certain occurrences at "residence premises" and defines such premises as:

> (a). The one family dwelling where you reside; (b). The two, three or four family dwelling where you reside in at least one of the family units; or (c). That part of any other building where you reside: and which is shown as the "residence premises" in the Declarations.

The definition of a "residence premises", as set forth in the Policy, is unambiguous and requires an insured to reside at the premises when the loss occurs (*See Marshall v. Tower Ins. Co. of New York*, 44 AD3d 1014, 1015 [2d Dept 2007]); *see. also Vela v. Tower Ins. Co. of N.Y.*, 83 AD3d 1050, 1051 [2d Dept 2011] [holding that the definition of "residence premises" is not ambiguous and must be accorded its plain and ordinary meaning]).

In his written statement, Chen admitted that Insureds never resided at the Premises, and that the Premises was occupied by tenants at the time of the Accident. Accordingly, the Premises does not qualify as an "insured location" under the Policy. Thus, Exclusion E.4, "Insured's" Premises Not An "Insured Location", and Exclusion E.2., "Business", apply, precluding coverage for the Accident under the Policy.

****5** New York Courts have routinely held that exclusions such as Exclusion E.4., which preclude coverage for bodily injury arising out of a premises that is "owned by an 'insured'...or rented to others by an 'insured' that is not an 'insured location,' " applies to bar coverage for an underlying action in instances where the insured did not reside at the subject premises at the time of the accident. (*See Metro. Prop. & Cas. Ins. Co. v. Pulido*, 271 A.D.2d 57, 61 [2d Dept 2000] [holding homeowners policy "only intended to afford coverage for places where the insured lives"]; *CastlePoint Ins. Co. v. Kum*, 2018 N.Y. Slip Op. 32275U, 2018 WL 4407537 [Sup Ct NY Cnty 2018] [policy definition of insured location requires insured to reside at premises as a condition to coverage]; *Tower Ins. Co. of N.Y. v. Monroy*, 2008 N.Y. Slip Op. 33518U [Sup Ct NY Cnty 2008] [holding clear language of policy requires insured to reside at insured location for coverage]).

***3** Likewise, Insureds' failure to maintain a residence at the Premises precludes Chen and Li from availing themselves of the limited "insured location" exception to the E.2 Exclusion, which bars coverage for bodily injury arising from business activity at a premises that is not an "insured location." (*See Tower Ins. Co. of New York v. Parris*, 2013 WL 577804 [Sup Ct NY Cnty 2013] [finding that to the extent that insured did not reside in the four family premises, but rather used it solely as a rental, coverage would be excluded]; *see also Bleckner v. General Acc. Ins. Co. of Am.*, 713 F. Supp. 642 [SDNY 1989] [holding rental exclusion is clear and unambiguous]).

Indeed, following the denial of his application to renovate the Premises on April 29, 2016, Chen listed the Premises with a realtor as a rental property. On July 26, 2016, Chen entered into a one-year lease agreement with Tiffany Daskalakis for the term August 1, 2016 through July 31, 2017. Accordingly, Chen and Li are not entitled to coverage under the Policy and Plaintiff is not obligated to defend and indemnify Chen and Li in the Underlying Action.

****6 Counter-Claims**

In their First, Second and Third Counter-Claims, Chen and Li assert claims for breach of the covenant of good faith and fair dealing and breach of contract. These Counter-Claims are based on Plaintiff's purported wrongful repudiation of coverage under the Policy for the Underlying Action. However, here, Insureds admittedly did not satisfy the Policy's residency requirement, and thus had no reasonable expectation that coverage would be provided under the Policy for the Underlying Action (*See Marshall v. Tower Ins. Co. of New York*, 44 A.D.3d 1014, 1015 [2d Dept 2007] [holding that the "residence premises" definition is unambiguous and requires the insured to reside at the premises when the loss occurs]).

Also devoid of merit is Insureds' Fourth Counter-Claim, for a violation of unspecified provisions of Insurance Law § 2601, the Unfair Claims Settlement Act, which prohibits insurers from engaging in "unfair claim settlement practices." The Court of Appeals has made it clear that there is no private right of action under Insurance Law § 2601 (*see e.g., Rocanova v. Equitable Life Assur. Soc*, 83 N.Y.S.2d 603 [1994]; *see also Kantrowitz v. Allstate Indem. Co.*, 48 A.D.3d 753. 753 [2d Dept 2008]; *Maimonides Medical Center v. First United American Life Ins. Co.*, 116 A.D.3d 207, 218, 981 N.Y.S.2d 739, 748 [2d Dept 2014] [Insurance Law § 2601 concerns general business practices and is enforceable only by the Superintendent of Insurance]).

Finally, in the Fifth Counter-Claim, Insureds allege that Plaintiff violated General Business Law ("GBL") § 349, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." Like the counter-claims for breach of contract and breach of the covenant of good faith and fair dealing, Insureds' cause of action under GBL § 349 is predicated on Plaintiff's purported "wrongful ****7** repudiation of coverage for the Underlying Action under the Policy, which denial Insureds allege has a "broad impact on consumers at large."

To successfully assert a claim under General Business Law § 349, a party must allege that a defendant has engaged in "(1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." (*City of New York v. Smokes-Soirits.Com. Inc.*, 12 N.Y.3d 616, 621-22 [2009] [citation omitted]). However, New York courts have routinely held that disputes between policyholders and insurance companies concerning the scope of coverage and the handling of claims are private contractual disputes that lack the consumer-oriented impact necessary to state a claim pursuant to GBL § 349 (*See e.g., Zawahir v. Berkshire Life Ins. Co.*, 22 A.D.3d 841, 842 [2d Dept 2005] [dismissing GBL § 349 claim because "[t]his action simply involves a private contract dispute involving coverage under the subject policies, in contrast to the consumer-oriented conduct aimed at the public at large that General Business Law 349 is designed to address"] [citations omitted] *see also Pellechia & Pellechia v. American National Fire Ins. Co.*, 244 A.D.2d 395 [2d Dept 1997] [dismissing GBL § 349 claim because the complaint essentially alleged a private contract dispute over policy coverage and the processing of a claim which is unique to the parties rather than conduct which affects the public at large]).

***4** Here, Insureds fail to establish that the dispute regarding Plaintiff's denial of coverage for the Underlying Action involves the consumer-oriented conduct necessary to sustain a claim under GBL § 349. Moreover, in his Statement Chen admitted that Insureds did not satisfy the Policy's residence requirement, and thus had no reasonable expectation that coverage would be provided under the Policy for the Accident at the Premises. Plaintiff was well within its rights to disclaim coverage for the Accident under the Policy.

****8 CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment on the First and Second cause of action in the Amended Complaint against Defendants, James Chen, Jie Ting Li, Denise Daskalakis and Kevin Reilly, as The Administrators of The Estate of Kevin Jack Reilly, Mia Reilly, by her Mother and Natural Guardian, Denise Daskalakis, and Denise Daskalakis and Kevin Reilly, Individually, is granted; and it is further

ORDERED that the First, Second, Third, Fourth and Fifth Counter-Claims asserted by Defendants James Chen and Jie Ting Li against Plaintiff Integon National Insurance Company are dismissed; and it is further

ORDERED, ADJUDGED and DECLARED that Plaintiff Integon National Insurance Company has no duty to defend or indemnify Defendants James Chen and Jie Ting Li, or any other party, in the Underlying Action entitled *Denise Daskalakis and Kevin Reilly as the Administrators of the Estate of Kevin Jack Reilly, Mia Reilly by her Mother and Natural Guardian Denise Daskalakis, and Denise Daskalakis and Kevin Reilly Individually v. James Chen and Jie Ting Li*, which case is pending in the Supreme Court of the State of New York, Kings County, New York, under Index No. 502031/2018; and it is further

ORDERED that the cross-claims against Defendants Denise Daskalakis and Kevin Reilly, As The Administrators of The Estate Of Kevin Jack Reilly, Mia Reilly, By Her Mother And Natural Guardian, Denise Daskalakis, and Denise Daskalakis and Kevin Reilly Individually, and against Defendants James Chen and Jie Ting Lie are severed and shall continue.

****9** Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision, order and judgment of the Court.

February 6, 2019

DATE

<<signature>>

W. FRANC PERRY, J.S.C.

End of Document