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Second Department Affirms Summary Judgment Based On Insured's Failure To Reside at Residence Premises

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In a recent case entitled *Megafu v. Tower Ins. Co. of N.Y.*, 2010 NY Slip Op 3883, 2010 N.Y. App. Div. LEXIS 3747 (2d Dep't May 4, 2010), the Appellate Division, Second Department, affirmed the Supreme Court's grant of summary judgment based on the insured's failure to reside at the residence premises.[1] In *Megafu*, the insured purchased a two family dwelling on or about December 14, 2005, and obtained a homeowners policy covering the policy period of January 27, 2006 through January 27, 2007. On or about February 7, 2006, the insurer conducted an inspection of the property, which was noted to be vacant. Thereafter, the insurer cancelled the policy, with the effective cancellation date of April 10, 2006. Prior to the cancellation date, the property sustained a fire loss on or about February 28, 2006.[2] This insurer disclaimed coverage based on, *inter alia*, the insured's failure to reside at the residence premises. The insured's homeowners policy defined the insured location as the "residence premises." The phrase "residence premises" was defined, in pertinent part, as "[t]he one family dwelling, other structures, and grounds…where you reside and which is shown as the 'residence premises' in the Declarations." Subsequently, the insured sued and both parties moved for summary judgment.

During the course of discovery, the insured admitted that he never resided at the insured location prior to the time of the fire and never turned on the electrical service. However, the insured alleged that he intended to reside at the premises after completing some repair work. The insured also argued that his homeowners policy implicitly allowed for a "reasonable" amount of time to move in, which plaintiff stated was 60-90 days. The insurer cross-moved for summary judgment based on, *inter alia*, the insured's failure to reside at the residence premises, which it argued was a condition precedent to coverage. In upholding the grant of summary judgment, the *Megafu* court held that "the defendant made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it properly concluded that the subject premises were not covered under the policy at issue, and that it properly disclaimed coverage on that basis (*see Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014, 1015)." In opposition, the plaintiff failed to raise a triable issue of fact.

Although the *Megafu* court provided limited analysis, its citation to *Marshall* in upholding summary judgment is significant, and supports a growing body of case law holding that actual residency of the insured at the location is a condition precedent to building damage coverage. In *Marshall*,[3] the insured purchased the location in January 2005 but did not intend to live at the premises, and never, in fact, resided there. After sustaining a fire loss on March 13, 2005, the insurer denied the claim based on the insured's failure to reside at the premises. The Supreme Court denied the insurer's motion for summary judgment. However, the Second Department, reversed the lower court decision and granted the insurer summary judgment. The Second Department reviewed the policy, which defined "residence premises," in relevant part, "as the one family dwelling…where you reside and which is shown as the residence premises in the Declarations." The *Marshall* court held that the residency provisions were not ambiguous, and that "[a]s the parties do not dispute that the plaintiff, the named insured under the policy, did not reside at the subject premises, the defendant Tower Insurance Company of New York properly concluded that the subject premises were not covered under the policy and properly disclaimed on that basis."

By citing to *Marshall*, the *Megafu* court affirmed its holding that the policy language defining "residence premises" as "where you reside" is unambiguous, and that since the insured never resided at the residence premises, there was no building coverage for the property under the policy. Similar to other residency cases,[4] the insured in *Megafu* attempted to argue that it was his intent to reside at the residence premises, and that the policy implicitly provides for a "reasonable" time period to move in. The *Megafu* court seemingly rejected both arguments by citing to the *Marshall* case, and by holding that the insured failed to raise any triable issues of fact. Indeed, while the *Marshall* court did state that "the insured never intended to reside" at the insured location, there is nothing in the opinion to suggest that the policyholder's "intent" would have in any way altered the outcome. The *Marshall* court's only consideration in finding summary judgment for the insurer was whether or not the objective facts demonstrated that the insured *actually* resided at the residence premises, which he did not. Also, in *Megafu*, as in *Marshall*, the court gives no credence to the fact that the loss occurred shortly after the inception of the policy.

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[1] The *Megafu* opinion does not provide any detail as to the underlying facts. However, we have reviewed the court file, which contains the underlying motion papers.

[2] The property apparently sustained a second fire loss on or about April 11, 2006.

[3] *Marshall v. Tower Ins. Co. of New York*, 12 Misc.3d 1170A, 820 N.Y.S.2d 843 (Sup. Ct., Kings Co. 2006), rev'd 44 A.D.3d 1014, 845 N.Y.S. 90 (2d Dep't 2007).

[4] *See Alvarado v. First Liberty Ins. Co.*, Index No. 208/2008, Nassau County, Supreme Court, Hon. T. Feinmen, decided October 6, 2009; *Shannet Demetrius v. State Farm Fire & Casualty Co.*, Index No. 5015/2006, Nassau County, Supreme Court, Hon. Bruce Cozzens, decided June 25, 2008.

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