

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21417
W/kmg

_____AD3d_____

Argued - November 20, 2008

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
RUTH C. BALKIN
WILLIAM E. McCARTHY, JJ.

2008-03548

DECISION & ORDER

639 Bushwick, LLC, respondent,
v American Western Home Insurance Company,
appellant, et al., defendant.

(Index No. 3518/07)

White Fleischner & Fino, LLP, New York, N.Y. (Renee S. Schwartz, Janet P. Ford,
and Nancy Davis Lyness of counsel), for appellant.

Allyn & Fortuna, LLP, New York, N.Y. (Megan J. Muoio of counsel), for respondent.

In an action for a judgment declaring, inter alia, that the defendants are obligated to defend and indemnify the plaintiff, 639 Bushwick, LLC, in an underlying action entitled *Rueda v City of New York*, pending in the Supreme Court, Kings County, under Index No. 11124/06, the defendant American Western Home Insurance Company appeals from so much of an order of the Supreme Court, Kings County (Jacobson, J.), dated March 24, 2008, as denied that branch of the defendants' motion which was for summary judgment declaring that it is not so obligated.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the defendants' motion which was for summary judgment declaring that the defendant American Western Home Insurance Company is not obligated to defend and indemnify the plaintiff, 639 Bushwick, LLC, in the underlying action is granted, the action against that defendant is severed, and the matter is remitted to the Supreme Court, Kings County, for the entry of judgment declaring that it is not so obligated.

The defendant American Western Home Insurance Company (hereinafter the

December 9, 2008

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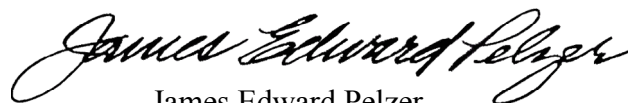
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defendant) made a prima facie showing of its entitlement to judgment as a matter of law by submitting an uncontroverted affidavit of service and other evidence demonstrating that the plaintiff was served with process in the underlying action in April 2006. Contrary to the determination of the Supreme Court, the plaintiff's conclusory and unsubstantiated denial of receipt of the papers was insufficient to rebut the presumption of proper service (*see Kihl v Pfeffer*, 94 NY2d 118, 122; *Malik v Noe*, 54 AD3d 733; *Coyle v Mayer Realty Corp.*, 54 AD3d 713; *Trini Realty Corp. v Fulton Ctr., LLC*, 53 AD3d 479, 480; *Koyenov v Twin-D Transp., Inc.*, 33 AD3d 967, 968-969). Accordingly, the plaintiff's failure to provide the defendant with notice of the commencement of the underlying action until September 2006 constituted a breach of its obligation under the subject policy to provide such notice as soon as practicable. The defendant's disclaimer of coverage therefore was valid, and the Supreme Court erred in denying its motion for summary judgment.

Since this is a declaratory judgment action, the matter must be severed against the defendant and remitted to the Supreme Court, Kings County, for the entry of a judgment declaring that it is not obligated to defend and indemnify the plaintiff, 639 Bushwick, LLC, in the underlying action (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

MASTRO, J.P., MILLER, BALKIN and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court