SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

INDEX No.: 705199/2014

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JOSE LUNA,

Plaintiff(s),

ORDER WITH NOTICE OF ENTRY

-against-

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant(s).

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S I R S :

PLEASE TAKE NOTICE, that the within is a true copy of an Order duly entered in the office of the Clerk of the within named court on August 24, 2015.

Dated: HICKSVILLE, NEW YORK
August 31, 2015

BERGMAN, BERGMAN, GOLDBERG,
FIELDS & LAMONSOFF, LLP
By: Allen Goldberg
Attorneys for Plaintiff(s)
801 S. Broadway
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(516) 739-2220

To:

LAW OFFICE OF MAX W. GERSHWEIR
Attorney For Defendant
100 William Street - 7th Floor
New York, NY 10038

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. ROBERT L. NAHMAN**
Justice

IAS PART 19

JOSE LUNA,

Plaintiff,

- against -

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

Index No.: 705199-2014

Motion Date: June 30, 2015

Motion Calendar No.: 10

Seq. No.: 1

Upon the following papers numbered 1 through 43 on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/Affirmation-Exhibits.....	1 - 9
Notice of Cross Motion/Affirm.-Exhibits/Memorandum...	10 - 20
Affirmation in Opposition to Cross-Exhibits.....	21 - 36
Reply Affirmation/Memorandum.....	37 - 40
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Supplemental Memorandum	42
Correspondence dated June 30, 2015.....	43

IT IS ORDERED that plaintiff Jose Luna's motion for summary judgment against the defendant Tower Insurance Company compelling the defendant Tower Insurance Company to satisfy the judgment entered against their insured, Ray and Frank Liquor Store Inc., in the underlying personal injury action is denied; and it is further

ORDERED that defendant Tower Insurance Company's cross motion for summary judgment against the plaintiff Jose Luna dismissing the plaintiff's action upon the grounds that the insured Ray and Frank Liquor Store Inc., breached the insurance policy's cooperation clause, or in the alternative granting Tower Insurance Company partial summary judgment dismissing the allegations in the complaint that the defendant Tower Insurance Company is liable for that portion of the judgment that exceeds the

policy limits of $300,000, and to disqualify plaintiff's counsel from representing plaintiff in this action pursuant to Rule 3.7 of the Rules of Professional Conduct is denied.

This is an action brought pursuant to Insurance Law §3420(a)(2) to recover an unsatisfied judgment entered against the defendant's insured.

On November 19, 2002, plaintiff was allegedly injured at Ray and Frank Liquor Store Inc., while trying to retrieve a box for his sister Gladys Luna, the sole shareholder of Ray and Frank Liquor Store Inc. Plaintiff commenced an action to recover damages for his alleged injuries on November 1, 2005. Defendant Tower Insurance Company who insured Ray and Frank Liquor Store Inc., was first notified of the accident after the suit was filed, some three years after the accident.

Defendant Tower Insurance Company proceeded to provide a defense to it's insured Ray and Frank Liquor Store Inc., by the law firm of White & McSpedon, but issued a letter disclaiming indemnification based upon it's insured's alleged breach of the policy's notice of occurrence condition. A separate declaratory judgment action was brought by Tower Insurance Company.

The personal injury action continued during the pendency of the declaratory judgment action and eventually was set down for trial. By correspondence dated February 6, 2008, just prior to trial, Ira S. Lipsius, Esq., advised Tower Insurance Company that his firm had been retained by Gladys Luna and Ray and Frank Liquor Store Inc., to represent their interests in the personal injury action brought by Jose Luna. Ira S. Lipsius, Esq., stated in the letter that

> "Unless Tower withdraws its declination and accepts full coverage, our client will dismiss White & McSpedon as counsel and this firm will take over the defense. In such an event, based on the facts of this case and the fact that liability does not appear favorable to our client, we will consent to a judgment on liability, allow plaintiff to go to inquest solely as to damages, and plaintiff will consent to limit his recovery to insurance assets."

Counsel for Tower Insurance Company responded by correspondence dated February 25, 2008 to the effect that retention of new counsel would be deemed a violation of the insurance policy's cooperation requirement and that the consent to liability "smacks of collusion between the parties which would further imperil the insured's right under the policy."

The parties agree that at the trial of the personal injury action held on February 27, 2008, Ira S. Lipsius, Esq., conceded liability and did not contest damages. The verdict after the trial was in favor of Jose Luna in the amount of $500,000.

Although it is argued in the papers that the plaintiff Jose Luna agreed to limit his recovery to the policy limits of $300,000 if Ray and Frank Liquor Store Inc., conceded liability, the complaint against the defendant Tower Insurance Company demands $500,000 plus interest. There is no evidence of an agreement between plaintiff and Ray and Frank Liquor Store Inc.

Subsequent to the trial, in the declaratory judgment action, the Appellate Division First Department held that Tower Insurance Company was obligated to indemnify it's insured Ray and Frank Liquor Store.

Thereafter, plaintiff commenced this action against defendant Tower Insurance Company to recover the judgment in the underlying action. The complaint alleges that defendant Tower Insurance Company is obligated to pay pre-judgment and post-judgment interest on $500,000.

Defendant Tower Insurance Company asserts three affirmative defenses in its answer: (1) that defendant is not bound by the judgment in the underlying action due to lack of privity with Frank and Ray Liquor Store Inc., resulting from the insured's refusal to permit White & McSpedon to defend the insured at trial; (2) that plaintiff cannot recover the judgment against defendant since the insured colluded with plaintiff in advance of and during the trial; and (3) that the insured breached the insurance policy's cooperation clause by refusing the defense at trial and otherwise failing to assist in the defense of that action.

No discovery has taken place in this action.

"A valid and enforceable judgment is a condition precedent to maintaining an action pursuant to Insurance Law §3420(a)(2)," *Hernandez v American Transit,* 2 AD3d 584, 585 (2nd Dept., 2003), *citations omitted.* A judgment entered through fraud, misrepresentation, or other misconduct practiced on the court is a nullity and is subject to collateral attack, *Id.*

The evidence submitted on the cross motion is sufficient to raise a triable issue of fact as to whether plaintiff has a valid judgment.

Dated: August 21, 2015

FILED

AUG 24 2015

COUNTY CLERK
QUEENS COUNTY

Robert L. Nahman, J.S.C.