

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

D15265
G/cb

_____AD3d_____

Submitted - March 7, 2007

STEPHEN G. CRANE, J.P.
FRED T. SANTUCCI
ANITA R. FLORIO
MARK C. DILLON
RUTH C. BALKIN, JJ.

2006-09294

DECISION & ORDER

Hermitage Insurance Company, appellant, v Trance
Nite Club, Inc., d/b/a Image Bar & Lounge, respondent,
et al., defendant.

(Index No. 11726/05)

Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury, N.Y. (Jeffrey B. Gold and
Melissa B. Levine of counsel), for appellant.

In an action for a judgment declaring, in effect, that the plaintiff is not obligated to defend and indemnify the defendant Trance Nite Club, Inc., d/b/a Image Bar & Lounge, in an underlying action entitled *Hilton v Kelly*, pending in the Supreme Court, Nassau County, under Index No. 4791/05, the plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (Murphy, J.), entered September 18, 2006, which denied its motion for leave to enter a judgment against that defendant upon its default in answering or appearing and declared that the plaintiff is obligated to defend and indemnify that defendant in the underlying action.

ORDERED that the order and judgment is reversed, on the law and in the exercise of discretion, with costs, the motion is granted, and it is declared that the plaintiff is not obligated to defend and indemnify the defendant Trance Nite Club, Inc., d/b/a Image Bar & Lounge, in the underlying action entitled *Hilton v Kelly*, pending in the Supreme Court, Nassau County, under Index No. 4791/05.

May 29, 2007

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HERMITAGE INSURANCE COMPANY v TRANCE
NITE CLUB, INC., d/b/a IMAGE BAR & LOUNGE

The Supreme Court improvidently exercised its discretion in denying the plaintiff's unopposed motion for leave to enter a default judgment against the defendant Trance Nite Club, Inc., d/b/a Image Bar & Lounge (hereinafter the insured). In support of its motion, the plaintiff submitted the affidavit of its claims examiner. That affidavit, which set forth the relevant language of the insurance policy issued by the plaintiff to the insured, was sufficient to show that the plaintiff was not obligated to defend and indemnify the insured in the underlying action. Since the defendants failed to oppose the motion, it should have been granted (*see* CPLR 3215; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71; *Zino v Joab Taxi, Inc.*, 20 AD3d 521; *see also* *Neuman v Zurich N. Am.*, 36 AD3d 601; *cf.* *Fappiano v City of New York*, 5 AD3d 627, 628-629).

CRANE, J.P., SANTUCCI, FLORIO, DILLON and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court