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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: FAVIOLA SOTO J.S.C. PART 7

Index Number : 107372/2002

KILADZE, ANAIT

IO. _____

VS

COUNTRY-WIDE INSURANCE CO.

DATE 5/19/06

Sequence Number : 003

SEQ. NO. _____

RESTORE ACTION TO CALENDAR

CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... noticed cross-motion - Affidavits - Exhibits	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion and cross-motion are

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 23 2006

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: June 14, 2006

FAVIOLA SOTO J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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ANAIT KILADZE and GEORGE KILADZE,

Plaintiffs,

-against-

Index No. 107372/02

COUNTRY WIDE INSURANCE COMPANY,
INFINITY TRUCKING, INC.,
D.L.M. TRUCKING CORP. and
JOHN DOES 1-5,

DECISION & ORDER

Defendants.

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HONORABLE FAVIOLA A. SOTO, J.:

The plaintiffs Anait Kiladze and George Kiladze (plaintiffs), in a four-page, single spaced notice of motion, move for an order: restoring a prior motion to the calendar; granting leave to renew and reargue; compelling non-party Progressive Insurance Company to appear for a deposition; compelling the defendant Country Wide Insurance Company (Country Wide) to produce its file containing the first reports of the accident, and producing the protocol for denying claims based on lack of notice; granting summary judgment striking Country Wide's fourth, fifth and sixth affirmative defenses of failure to serve a copy of the underlying judgment, and lack of notice; granting summary judgment against Country Wide; granting leave to amend the complaint to add that notice of entry was served on Country Wide; granting leave to amend the pleadings to conform to the proof; extending the time to file the note of issue; restoring this action to the calendar; and granting a default against the defendant Infinity Trucking, Inc.

The defendant Country Wide cross-moves, pursuant to CPLR 3212, for an order awarding summary judgment dismissing the complaint.

The plaintiffs were involved in a motor vehicle collision with a truck. This is, inter alia, a direct action pursuant to the Insurance Law, against the owners of the truck, and their insurer, Country Wide, seeking to enforce an underlying judgment in the sum of $248,404.50. Country

Wide has disclaimed coverage based on an alleged lack of notice from its insured. The truck's owners have defaulted. Non-party Progressive was the plaintiffs' insurer.

A prior motion by the plaintiffs resulted in an order dated January 6, 2006, granting various relief, including denying as moot both the plaintiffs' motion to direct Country Wide to produce documents, and to extend the deadline for filing the note of issue. The order also directed the non-party Progressive to produce documents. The motion for a default judgment was denied with leave to renew for failure both to explain the delay in moving, and the failure to prove an additional mailing. The motion was otherwise denied.

In a 16 page attorney's affirmation in support of their motion, the plaintiffs make the following arguments. Progressive had sufficient details of the accident to place multiple calls to Country Wide's insured; Country Wide deflected the notice given to it by Progressive and erroneously claimed that it does not insure the garbage truck. Plaintiffs are entitled to an order directing Progressive to produce a witness and otherwise to comply with the subpoena; any witness with sufficient knowledge to identify the records and testify respecting their origin, purpose and custody will do. Country Wide either lost, misplaced or failed to properly make a record of the telephone call received from Progressive. Plaintiffs had information to provide the court in response to Progressive's opposition, but no opportunity to address those arguments because Progressive's papers were not received. Progressive's multiple contacts with Country Wide's insured renders untenable Country Wide's basic position regarding the principal factual dispute in this action. The disclaimer by Country Wide is ineffective, defective and improper. Attached is proof of the additional mailing required by CPLR 3215. The application for a default was not made within one year of the default because there was a sense in the mind of counsel that

it would be fruitless in a practical sense, coupled with the fact that the focus of the case was sidetracked, resulting in the pursuit of Infinity being placed on a back burner, to await an appropriate moment, which the present is deemed to be.

In opposition to the plaintiffs' motion, the non-party Progressive argues that its witness appeared numerous times to testify at a framed issue hearing, but that the plaintiffs repeatedly requested adjournments. Progressive offers to verify its records by affidavit.

In opposition to the plaintiffs' motion, and in support of its cross-motion, Country Wide argues that it is not obligated to defend or indemnify D.L.M. Trucking and its driver, for its insureds' failure to provide any notice of the accident and the plaintiffs' eight month failure to provide Country Wide with notice. In the alternative, Country Wide argues that its liability is limited to the sum of $100,000. Finally, it is argued that discovery is incomplete.

The court will first dispose of the plaintiffs' motion to restore and for renewal, reargument, for discovery, to amend, and granting a default judgment against Infinity, before turning to the motion and the cross- motion for summary judgment.

The plaintiffs' motion to restore, renew, and reargue, is denied. The plaintiffs fail to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its prior determination (Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]). Contrary to the plaintiffs' assertion, nothing in their reply papers to Progressive's original opposition, would have changed the court's earlier rulings.

The plaintiffs' motion to compel non-party Progressive to appear for deposition is denied. The plaintiffs may re-issue their subpoena in conjunction with the trial of this action (CPLR 2308 [b] and 3124; Velez v. Hunts Point Multi-Service Center Inc., __ AD3d __, 811 NYS2d 5 [1st

Dept 2006]).

The plaintiffs' motion, to compel the defendant Country Wide to produce its file containing the first reports of the accident, and produce the protocol for denying claims based on lack of notice, is granted. Country Wide offers an inadequate excuse for failing to produce the requested discovery.

The plaintiffs' motion to amend the complaint, made after a long delay and on the eve of trial, is denied for failure to attach a copy of the proposed amended pleading. Although permission to amend a pleading is to be freely given (CPLR 3025 [b]), examination of the underlying merits of the proposed amendment is warranted, and leave to amend will be denied where the court is unable to examine the proposed pleading (Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 NY2d 166 [1989]).

If, as here, a plaintiff fails to move for a default judgment against a non-appearing defendant, the court may dismiss the complaint as abandoned, unless the plaintiff demonstrates sufficient cause why the complaint should not be dismissed (CPLR 3215 [c]). Here, the plaintiffs' verified complaint may serve as an affidavit of merit. However, the plaintiffs fail to offer an adequate excuse for their failure to timely proceed upon the default following service of the summons and complaint in 2002, and the motion is denied.

Turning to the motion and the cross motion for summary judgment, the proponent of a dispositive motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to

make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

A triable issue of fact exists as to whether the plaintiffs made a reasonably diligent effort to locate the garbage truck's insurer, Country Wide, and to provide notice to Country Wide. Contrary to Country Wide's assertion, parties injured by the insured have an independent interest in the protection afforded by the insured's liability coverage (Lauritano v. American Fid. Fire Ins. Co., 3 AD2d 564 [1st Dept 1957], affd 4 NY2d 1028 [1958]). When, as here, the insured has failed to give notice, the injured parties, by giving notice themselves, can preserve their rights to proceed directly against the insurer (Insurance Law § 3420 [a] [3]). Notice given by the injured party is not judged by the same standards as govern notice by the insured. The test is one of reasonableness measured by the diligence exercised by the injured party under the circumstances (Jenkins v. Burgos, 99 AD2d 217 [1st Dept 1984]).

There is a triable issue of material fact concerning whether or not adequate timely notice of the accident was given by the plaintiffs, and their insurer, Progressive, to Country Wide. Where two claimants are similarly situated, notice by one may be applicable to the other (Rose v. State of New York, 265 AD2d 473 [2d Dept 1999]; Nat. Union Fire Ins. Co. of Pittsburgh Pa. v. Insur. Co. of North Am., 188 AD2d 259 [1st Dept1992] lv denied 81 NY2d 709 [1993]).

The injured party has the burden of proving that he, or she, acted diligently in attempting to ascertain the identity of the insurer and, thereafter, expeditiously notified the insurer (Rushing v. Commercial Cas. Ins. Co., 251 NY 302 [1929]). Ordinarily, the reasonableness of any delay, and the sufficiency of the excuse offered, are matters for trial (Eveready Ins. Co. v. Chavis, 150 AD2d 332 [2d Dept] appeal withdrawn 74 NY2d 844 [1989]).

Additionally, the alleged oral notice is disputed by Country Wide (Aetna Cas. and Sur. Co. v. Rodriguez, 115 AD2d 418, 419, [1st Dept 1985]). The court cannot determine the reasonableness of Country Wide's delay in disclaiming without a factual determination as to when Country Wide first received notice.

Therefore, the motion and the cross- motion for summary judgment must be denied.

Accordingly, it is

ORDERED that the plaintiffs' motion is granted only to the extent that the defendant Country Wide is directed, within 20 days of service upon it of a copy of this order with notice of entry, to produce its file containing the first reports of the accident and the protocol for denying claims based on lack of notice, and the motion is otherwise denied; and it is further

ORDERED that the cross- motion is denied; and it is further

ORDERED that the parties appear for a compliance conference on July 6, 2006, promptly at 9:30 a.m., 111 Centre Street, Room 949, to determine what discovery, if any, remains and to extend the note of issue; only counsel who are familiar with the action and discovery and who are fully authorized, including settlement, shall attend.

Dated: New York, New York
June 14, 2006

FAVIOLA A. SOTO, J.S.C.

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