

**Lexington Ins. Co. v Comprehensive
Enters., Inc.**

2007 NY Slip Op 31174(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0109802/2006

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT.

PART 10

Index Number : 109802/2006

LEXINGTON INS.CO.

vs

COMPREHENSIVE ENTERPRISES, INC.

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

default

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~

FILED

MAY 14 2007

NEW YORK
COUNTY CLERK'S

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: MAY 07 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Lexington Insurance Company and
Newmarket Underwriters Insurance
Company, *as subrogees of*
Buckingham Trading Partners and
El Kam Realty *and all other*
entities insured under policy
number 7474250,

Plaintiffs

DECISION/ORDER
Index No.: 109802/06
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

-against-

Comprehensive Enterprises, Inc. a/k/a
Pakwan Restaurant and NY Fire
System Cleaning, Inc.

Defendants.

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-----x
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

Papers	Numbered
Pitff's N/M [3215] w/RB affirm, JRP affid, exhs	1
Proof of service	2

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiff Lexington Insurance Company is the insurer and Newmarket Underwriters Insurance Company the underwriter (collectively "plaintiffs" or "subrogees") of a commercial property insurance policy insuring Buckingham Trading Partners, El Kam Realty and other entities (hereinafter, collectively, "the subrogors" or "insured parties"). The subrogors filed claims under the policy (Policy Number

7474250) which Lexington Insurance Company paid. Before the court is plaintiffs' motion for entry of a default judgment pursuant to CPLR § 3215 against the defendants, jointly and severally, because they have defaulted in answering. Since this motion is timely [CPLR § 3215 (c)], and proof of service has been filed, it will be heard and decided on the merits.

Background

The insured parties filed their claims with the plaintiffs following a grease fire at the Pakwan Restaurant. The Pakwan Restaurant, is owned, run and operated by Comprehensive Enterprises, Inc., the tenant of the insured parties who are the landlord and owner of the building where the restaurant is located.

Plaintiffs allege that the restaurant defendant (e.g. Comprehensive Enterprises Inc. a/k/a Pakwan Restaurant) was negligent in causing a fire in the kitchen and that they failed to maintain the kitchen duct work, allowing the accumulation of grease which caused certain safety mechanisms to fail. Plaintiffs allege further that defendant NY Fire Cleaning Systems, Inc. was also negligent in that it improperly inspected and serviced the ducts.

Plaintiff also contends that the restaurant tenant was required to obtain and maintain insurance for the benefit of the landlord and owner (the insured parties), but it failed to do so, thereby causing the insured parties to sustain further monetary damages that their own carrier had to pay. Based upon the foregoing, plaintiffs seek to recover money damages in the amount of \$110,466.59 against the defendants, jointly and severally.

[4]

The court has before it plaintiffs' motion for a default judgment against the defendants. Plaintiff has filed proof of service of the underlying summons and complaint. Service was made upon Comprehensive Enterprises Inc. on July 28, 2006 pursuant to BCL § 306 because it is a domestic corporation. Service was made in the same manner and on the same date upon NY Fire System Cleaning, Inc. as it too is a domestic corporation. Neither defendant has appeared or answered the complaint and their time to do so has not been extended by the court. Therefore, both the defendants have defaulted in answering the complaint.

Plaintiffs have complied with the additional notice requirements of CPLR § 3215 (g) (4) because it mailed copies of the summons and complaint to both defendants more than 20 days before entry of judgment. This motion which is timely [CPLR § 3215 (c)] is itself additional notice of this action. Although proof of service has been filed, the motion is before the court without opposition.

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom, [Rokina Optical Co. Inc. v. Camera King, Inc., 63 NY2d 728 (1984)] plaintiff is entitled to a default judgment in its favor, provided it demonstrates it has a prima facie cause of action. [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)]. In support of its motion, plaintiffs provide the sworn affidavit of Mr. Prout, their claims adjuster who states that there was a fire at the Pakwan Restaurant on January 31, 2005 in the basement kitchen and that it was due to a grease fire.

Mr. Prout also states that the kitchen ducts were not cleaned, were improperly

maintained and were identified by the fire department in its Fire Incident Report dated March 10, 2005 ("incident report") as a reason the fire spread. The incident report states that there was a "cooking fire extending to clothing or combustibles." It also states that cooking oil spilled onto a open flame.

Plaintiffs provide an investigative report that was prepared on their behalf by a private fire investigator (Mr. Russo) who reviewed the fire incident report, examined the premises and took photographs. He opines that the fire was caused by a fire that originated in the kitchen (a wok) which then spread. Mr. Russo further opines that because the exhaust system was clogged with accumulated grease, a fire suppression system within the hood was only partially activated. Mr. Russo notes that the presence of a service sticker by NY Fire Cleaning, Inc. dated January 15, 2005 indicating that service had been performed that day, which was only two weeks before the fire.

Based upon these submissions which are not opposed, plaintiffs have proved that the restaurant defendant and New York Fire Cleaning, Inc. were each a proximate cause of the fire. Since the damages are in an ascertainable amount, plaintiffs shall have judgment on their first and second causes of action against Comprehensive Enterprises, Inc. a/k/a Pakwan Restaurant and against NY Fire System Cleaning, Inc., on their 4th cause of action. The judgment shall be in the amount demanded in the complaint, to wit: \$110,466.62 with interest thereon from the date of loss (January 31, 2005)

Plaintiffs' motion for entry of default judgment on their 3rd cause of action is, however, denied. There is no statement by anyone with knowledge as to whether the

tenant did, or did not, obtain the insurance they were required to as per their lease agreement with the insured parties. Therefore, that claim is hereby severed.

Conclusion

Accordingly,

It is hereby

ORDERED THAT plaintiffs' motion for entry of default judgment is granted as to the first, second and fourth causes of action, but it is denied as to the 3rd cause of action which is hereby severed; and it is further

ORDERED THAT the Clerk shall enter judgment in favor of Lexington Insurance Company, against Comprehensive Enterprises, Inc. a/k/a Pakwan Restaurant and NY Fire System Cleaning, Inc. in the amount demanded in the complaint, to wit: \$110,466.62 with interest thereon from the date of loss (January 31, 2005); and it is further

ORDERED THAT any relief not expressly addressed has been nonetheless considered and is hereby denied; and it is further

ORDERED THAT this shall constitute the decision and order of the court.

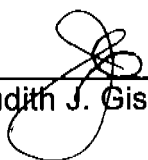
Dated: New York, New York
May 7, 2007

So Ordered:

FILED

MAY 14 2007

**NEW YORK
COUNTY CLERK'S OFFICE**



Hon. Judith J. Gische, J.S.C.