

**Kleinberg Elec. Corp. v Travelers Cas. & Sur.  
Co. of Am.**

2007 NY Slip Op 32465(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0602458/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

KLEINBERG ELECTRIC CORP.,

Plaintiff,

INDEX NO. 602458/06  
MOTION DATE  
MOTION SEQ. NO. 003  
MOTION CAL.NO.

- v -

TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA,

Defendant.

**FILED**  
AUG 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to/for : vacate default

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is granted, for the reasons set forth below.

Background

Plaintiff, Kleinberg Electric, Inc. (Kleinberg), brings this action to recover from defendant Travelers Casualty and Surety Co. of America (Travelers) the sum of \$65,019.67, allegedly due under the terms of a payment bond Travelers issued to P. T. & L Contracting Corp. (PT&L) (Affidavit of John Scarpellino in Support of Motion [Scarpellino Aff.], at ¶ 3, and Ex. 1). The bond was issued in connection with work to be performed at the St. George Ferry Terminal in Staten Island, New York (*id.*). PT&L was the general contractor for the project and retained Kleinberg as the subcontractor to perform certain electrical repairs and improvements at the ferry terminal (Affirmation of Sandra DeFeo, Esq. in Support of Motion [DeFeo Aff. in Support], Ex. D [First Action Amended Complaint], at ¶¶ 5, 6). PT&L owed Kleinberg \$65,019.67 for the work it

perform (*id.*, at ¶ 8). The contract and State Finance Law § 137 required PT&L to furnish the New York City Economic Development Corporation (EDC), the owner of the project, a payment bond from a licensed surety (*id.*, at 11). Travelers was the surety on the payment bond involved in this matter.

Kleinberg commenced an action against PT&L and the surety to recover the remaining money owed for the project (the First Action), on or about March 2, 2006 (*see* DeFeo Aff. in Support, Ex. B {First Action Complaint}). Travelers moved to dismiss the complaint in the First Action, as Kleinberg had failed to comply with the notice provision in the bond (DeFeo Aff. in Support, Ex. E). In a decision entered on September 6, 2002, Hon. Shirley W. Kornreich of this Court, issued a decision and order dismissing the cause of action asserted against Travelers, as the surety, in the First Action, as Kleinberg had failed to comply with the notice provisions in the bond (DeFeo Aff. in Support, Ex. F).

After Travelers moved to dismiss the First Action, Kleinberg provided Travelers with written notice of its claim under the payment bond for the amount of \$65,0019.67 owed in connection with the St. George Ferry Terminal Project, by letter dated June 19, 2006 (Affirmation of Kenneth A. Elan, Esq. in Opp. [Elan Aff.], Ex. F). In accordance with directions from Travelers, Kleinberg prepared a claim form and forwarded it to Travelers on or about August 22, 2006 (Elan Aff., Ex. I). Nevertheless, prior to submitting the claim form to Travelers, Kleinberg commenced the instant action to recover the money owed pursuant to the payment bond from Travelers, on or about July 19, 2006 (DeFeo Aff. in Support, Ex. G; Scarpellino Aff., at ¶ 5).

When Travelers failed to appear or answer in response to the Second Action, Kleinberg moved for an order, pursuant to CPLR 3215, for leave to enter a default judgment. This Court granted Kleinberg's motion to enter a default judgment against Travelers in the Second Action, in an order entered on January 29, 2007 (DeFeo Aff. in Support, Ex. A). Travelers moved, by order to show cause signed by this Court on April 20, 2007, for an order, pursuant to CPLR 5015 (a) (1),

vacating the default judgment<sup>1</sup>.

### Discussion

A party seeking to vacate a default judgment must demonstrate both a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action (*see Sound Shore Med. Ctr. v Lumbermens Mut. Cas. Co.*, 31 AD3d 743 [2d Dept 2006]; *Triangle Transp., Inc. v Markel Ins. Co.*, 18 AD3d 229[1st Dept 2005]; *Burgos v Allcity Ins. Co.*, 272 AD2d 195 [1<sup>st</sup> Dept 2000]). In support of its motion to vacate the default, Travelers has submitted an affidavit from John Scarpellino, the Bond Manager for the payment bond the company had issued to PT&L (Scarpellino Aff., at ¶ 8). Mr. Scarpellino investigated the matter and found that the complaint in the Second Action was served on Travelers' Edison, New Jersey office a few days prior to the date when Kleinberg sent its notice of claim to the company (*id.*, at ¶ 5). The complaint in the Second Action was faxed to Patricia Ryan, who was a new claims representative in Travelers' Hartford, Connecticut office (*id.*, at ¶ 6). Ms. Ryan has left Travelers, so that Mr. Scarpellino was unable to contact her to discuss this matter and obtain her statement (*id.*, at ¶ 7). Mr. Scarpellino's investigation revealed that Ms. Ryan filed the complaint in the Second Action without giving a copy of the pleading to him (*id.*, at ¶ 8). Mr. Scarpellino believes that Ms. Ryan inadvertently disregarded the complaint in the Second Action, as she may have confused it with the First Action, which was pending at that time and in which Travelers had filed a motion to dismiss the complaint (*id.*).

Courts have granted motions to vacate default judgments entered against insurance companies in cases where employees at the companies made inadvertent clerical errors, as had occurred in the instant matter (*see Sound Shore Med. Ctr. v Lumbermens Mut. Cas. Co.*, 31 AD3d 743 [insurance company employee delayed in forwarding pleadings to attorney]; *Triangle Transp.*,

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<sup>1</sup> This Court declined to sign a prior order to show cause brought by Travelers to vacate the default judgment, as the papers failed to include the affidavit of John Scarpellino, which was allegedly based upon personal knowledge and explained the reason for Travelers' failure to appear or answer in response to the Second Action (DeFeo Aff. in Support, Ex. J).

*Inc. v Markel Ins. Co.*, 18 AD3d 229 [pleadings misfiled by insurer's claims administrator and never sent to counsel]; *Burgos v Allcity Ins. Co.*, 272 AD2d 195 [reasonable excuse established based upon insurer's failure to forward pleadings to attorney]). Similarly, the failure of Travelers' claims representative to forward the pleadings in the instant action to the company's attorneys appears to have been inadvertent and constitutes a reasonable excuse for the company's failure to appear and serve an answer to the complaint. It is also significant that Travelers moved to vacate the default promptly upon finding out about the Second Action (*see Burgos v Allcity Ins. Co.*, 272 AD2d 195). Accordingly, Kleinberg cannot assert that it is prejudiced by vacating the default. Indeed, due to the fact that the First Action was pending when the Second action was commenced, Kleinberg could have notified Travelers' attorneys about this action.

Regarding the merits of its defenses, Travelers asserts that, although Kleinberg complied with the notice provisions of the payment bond, albeit shortly after it filed the Second Action, it did not plead compliance with these requirements in its complaint. In addition, Travelers, as the surety, can assert all of the defenses available to its principal, PT&L (*see Spancrete Northeast, Inc. v Travelers Indem. Co.*, 112 AD2d 571, 572 [3d Dept 1985], *lv dismissed* 66 NY2d 909 [1985] and *lv denied* 66 NY2d 605 [1985]). In view of the strong policy preference for resolving disputes on the merits (*see Theatre Row Phase II Assocs. v H&L, Inc.*, 27 AD3d 216, 217 [1<sup>st</sup> Dept 2006]; *Atkins v Malota*, 1 AD3d 294 [1<sup>st</sup> Dept 2003]), this Court grants Travelers' motion to vacate its default, provided that Travelers serves its answer to the complaint in accordance herewith.

Accordingly, it is

ORDERED that the motion by defendant Travelers Casualty and Surety Company of America to vacate the default entered against it is granted and the default is vacated, provided that defendant serves and files its answer to the complaint within 30 days of the date of entry of this order; and, by separate order, this Court will schedule a preliminary conference on this matter, and it is further

ORDERED that within 20 days of entry, defendant shall serve upon plaintiff, a copy of this

decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 8/2/07

ENTER:   
Doris Ling-Cohan, JSC

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST  REFERENCE

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