American Guar. & Liab. Ins. Co. v Lynch
2007 NY Slip Op 32637(U)
August 15, 2007
Supreme Court, New York County
Docket Number: 0603761/2006
Judge: Judith J. Gische
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SCANNED ON 8/22/2007

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 603761/2006

AMERICAN GUARANTEE & LIABILITY

vs

LYNCH, THOMAS

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 _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

AUG 22 2007

COUNTY CLERK NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and PC scheduled for Oct 25, 2007 @ 9:30 am

Dated: AUG 15 2007

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

[* 2]

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

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American Guaranty and Liability
Insurance Company,

Plaintiff

-against-

Thomas Lynch, Dennis Maycher,
Campbell Maycher Lynch Smith, LLP and
Maycher Lynch, LLP,

Defendants.

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DECISION/ORDER
Index No.: 603761/06
Seq. No.: 001

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

FILED
AUG 22 2007
NEW YORK
COUNTY CLERK

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

Papers	Numbered
Pltff n/m (§3215) against TGL, CMLS & ML w/KFC and MT affids, exhs	1
TGL affid in opp w/exhs	2
KFC reply affirm w/exhs	3
Stip of adj	4

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

GISCHE, J.

This is an action for a declaratory judgment. The court has before it plaintiff's motion for entry of a default judgment against the defendants who have not yet answered the summons and complaint. CPLR 3215. The defendants oppose the motion and seek leave serve a late answer. The answer proposed includes the affirmative defense of lack of personal jurisdiction.

The background of this case is complicated. It informs, however, the court's decision to deny plaintiff's motion for a default judgment and to allow the defendants to answer, but with the caveat that the first affirmative defense (lack of personal jurisdiction) is stricken, for the reasons more completely addressed below.

The background of this case, and the parties' underlying dispute

Plaintiff is an insurance company that issued a lawyer's professional liability insurance policy to Campbell Maycher Lynch Smith, LLP ("CMLS") effective from March 10, 2005 to March 10, 2006 ("the policy"). At one point defendants Dennis Maycher ("Mr. Maycher") and Thomas G. Lynch ("Mr. Lynch") were partners of Maycher Lynch, LLP ("Maycher Lynch"). Maycher Lynch merged with another firm to form CMLS in February 2005. Both Messrs Maycher and Lynch were members of that firm. In January 2007, Mr. Maycher commenced an action in New Jersey Superior Court for legal dissolution of CMLS which was pending when plaintiff brought the action at bar.

Messrs Maycher and Lynch and Maycher Lynch are all now named defendants in a legal malpractice action against them in Supreme Court, Queens (the "Kim action"). It is alleged in that action that the attorneys and firm were negligent in failing to timely commence an action for personal injuries/wrongful death on behalf of Mr. Kim who died reportedly due to injuries he sustained in an accident.

In this declaratory judgment action, Mr. Maycher has answered the complaint and asserted a cross claim against his former partner, Mr. Lynch. Non-party Arch Insurance Company, Mr. Maycher's malpractice insurance carrier, has tendered a defense in the Kim action on his behalf. The plaintiff in the action at bar has been

contributing towards his defense, as well as the defense of Mr. Lynch and the Maycher Lynch firm. Plaintiff has, however, reserved the right to recover its expenditures.

Plaintiff now seeks a declaration (on default) that it has no contractual obligation to defend or indemnify Messrs Lynch, Maycher or Maycher Lynch for any liability they may incur in the Kim action because: 1) the malpractice alleged in that case is based on acts predating the inception of the CMLS policy and; 2) the defendants failed to timely notify plaintiff that it was possible a claim would be made against them for legal malpractice.

According to the complaint in the Kim action, Mr. Kim died in November 2000. A failed attempt to commence the negligence/wrongful death action was made in October 2002. No action was timely commenced by the time the statute of limitations expired at the end of October 2003. The malpractice action is based upon the legal services the defendants rendered during the period commencing November 2000 through and including March 2005.

The court now has before it plaintiff's motion for entry of a default judgment against CMLS, Mayer Lynch and Mr. Lynch on the basis that they have not answered the summons and complaint, and their time to move or answer has expired. Although the parties had stipulated that defendants' time to answer would be extended to January 2007, the defendants did not do so.

CMLS, Mayer Lynch and Mr. Lynch oppose the motion and now appear by counsel on the basis that they have excusable default and a meritorious defense to the claims plaintiff asserts. They seek permission from the court to serve a late answer and

also assert cross claims against Mr. Maycher. Mr. Lynch has provided an "affirmation," on behalf of himself and both law firms. He contends that he had intended to answer the complaint, as the parties had agreed, but by then Mr. Maycher had commenced the action for dissolution of CMLS which made things more complicated and raised concerns about conflicts of interest. Mr. Lynch also contends he was exploring whether his current malpractice insurer would assume his defense because of the timing of the Kim lawsuit.

As for a meritorious defense, Mr. Lynch claims (on behalf of all the defendants) that CMLS' policy with plaintiff does not exclude prior acts by him or Mr. Maycher, and although it is a new policy for a new firm, the malpractice alleged in the Kim action should be covered under the policy that was in effect from March 10, 2005 to March 10, 2006. The action was commenced in July 2005, while that policy was in effect.

Mr. Lynch also contends that this court does not have "personal" jurisdiction over him or either law firm. The basis of that claim is that: 1) he is not an attorney admitted to the New York bar, therefore he never practiced here, 2) he never handled New York matters at either Maycher Lynch or CMLS; they were handled exclusively by his former partner (Mr. Maycher), 3) he lives in New Jersey, and 4) he does not understand why he was served on behalf of Maycher Lynch and CMLS, and not Mr. Maycher.

In reply, plaintiff objects to giving defendant time to answer. It contends they have not shown excusable default, nor do they have a meritorious defense. CPLR 5015. Plaintiff contends Mr. Lynch's "affirmation" is a nullity because he is not their attorney, not admitted to the New York bar, and improperly notarized. The jurat

indicates the affidavit was prepared in the State of New Jersey, Bergen County, but it was notarized in New York State.

Plaintiff argues that the jurisdictional defenses alleged by Mr. Lynch are meaningless because not only was Mr. Lynch personally served on his own behalf and on behalf of the law firm defendants, Mr. Lynch and Maycher Lynch are defendants in the Kim action, CMLS has a New York office, and the defendant's were each "doing business" in New York, notwithstanding Mr. Lynch not being admitted to the New York bar. Finally, plaintiff contends that the defendants failure to timely notify them of a possible claim is reason alone to deny the defendant any extension of time to answer.

Discussion

There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to the plaintiff. Lirit v. S.H. Laufer World, Inc., 84 A.D.2d 704 (1st Dept 1981). Although plaintiff urges the court to deem Mr. Lynch's "affirmation" a nullity, it will be considered because it is a sworn notarized statement made under oath. Thus, the issue is whether the defendants have demonstrated a reasonable excuse for their delay in answering the complaint and whether they have a meritorious defense to this action. Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co., 67 N.Y.2d 138 (1986).

Mr. Lynch has set forth a justifiable explanation for why he did not timely answer the complaint on his behalf or on behalf of the two law firm defendants. Although plaintiff had extended the deadline, it coincided with Mr. Maycher's filing of the dissolution action in New Jersey, which significantly complicated the relationship among

these defendants. The extension that plaintiff agreed to was in January 2007. This motion was brought March 29, 2007. The delay is not inordinate and plaintiff has not established they will be prejudiced even though a trial is presently scheduled in the Kim action.

Turning to the merits, the defendants have set forth a potentially meritorious defense. St. Vincent's Hosp. & Medical Center v. Allstate Ins. Co., __AD3d___, 2007 WL 2127221 (2nd dept 2007). Though plaintiff argues these defenses are unprovable, they have set the bar too high. The defenses, which are supported by facts, and not just bald conclusions, defeat plaintiff's motion, which is for entry of a judgment on default, not for summary judgment. The quantum of proof needed in support of a motion to vacate a default judgment is not as great as that which is required to oppose a motion for summary judgment. Dodge v. Commander, 18 AD3d (3rd Dept 2005).

Plaintiff has, however, proved that it personally served Mr. Lynch, CMLS and Maycher Lynch. Service was proper upon Mr. Lynch on behalf of both the law firms since he is, or was, a member of CMLS at the time he was served and Maycher Lynch had already merged with CMLS. The court also agrees with plaintiff that even under Mr. Lynch's version of the facts, that all three defendants are non-domiciliaries they are subject to the jurisdiction of this court. Although both law firms are New Jersey professional partnerships and Mr. Lynch lives in New Jersey, all three had New York offices when this action was commenced [CPLR 302 (a) (1)] and the underpinnings of this dispute directly involves the tort claims (legal malpractice) asserted against all three of these defendants in the New York based Kim action [CPLR 302 (a) (2)]. Therefore,

the affirmative defense in the proposed answer (lack of personal jurisdiction) is without merit and it must be stricken from the proposed answer.

Although plaintiff contends that there is no point to their being forced to continue providing the defendants with defense and indemnification because at the conclusion of this case they will prevail and be entitled to recoup all their expenses, this is precisely why they have failed to demonstrate any prejudice to them by the court allowing the late answer. Whether these potentially meritorious claims survive a motion for summary judgment or trial is not for the court to decide at this time.

Conclusion

Plaintiff's motion for entry of a default judgment against Mr. Lynch, CMLS and Maycher Lynch is denied.

The time for these defendants to answer the complaint is extended to ten (10) days after service of a copy of this decision with notice of entry. The affirmative defense in the proposed answer, however, is stricken for the reasons set forth above.

The preliminary conference is scheduled for October 25, 2007 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

FILED
AUG 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
August 15, 2007

So Ordered:

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