

Cumis Ins. Socy., Inc. v Jennings

2007 NY Slip Op 33007(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0114339/2004

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

-----X
CUMIS INSURANCE SOCIETY, INC. a/s/o
NORTH EAST ALLIANCE FEDERAL CREDIT
UNION,

DECISION/ORDER

Index No.: 114339/04

Seq. No: 002

Plaintiff,

-against-

Present:

Hon. Judith J. Gische

J.S.C.

RODNEY JENNINGS,

Defendant.

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

Papers

Numbered

Pltf's motion [renew] w/DSM affirm in support, exhs 1
-----X

On November 30, 2005, this court denied without prejudice plaintiff's motion for a default judgment for the reasons stated in its written decision. That motion was denied because plaintiff failed to provide proof that the underlying complaint was properly served on the defendant and because plaintiff had "not adequately explained the facts constituting its *prima facie* case."

On March 1, 2007, this court directed plaintiff to either notify the court that it is abandoning this action or bring a motion for renewal within 90 days of the date of this decision. CPLR § 3216. Although plaintiff failed to comply with that order and this matter was dismissed on July 6, 2007 for unreasonably neglecting to proceed, plaintiff now moves to renew its prior motion for a default judgment.

Plaintiff now claims that it was unable to bring this motion sooner because it could not locate the process server who served the complaint until November 2006 and

thereafter, “this file was handled by an attorney who left this firm and the file was misplaced in our office and not located until receiving” the court’s order dated July 6, 2007.

Since the denial and subsequent dismissal were without prejudice and the defects as identified have been addressed, permission to restore the complaint and renew the prior motion is granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979).

Plaintiff served the underlying summons and complaint upon defendant, a natural person, by “Nail and Mail” service. Both the original and corrected affidavits of service establish due diligence by in hand delivery before resorting to such service. A posting was made on December 28, 2004. While the original affidavit of service further indicates that process was thereafter mailed on 1/6/04, the correct affidavit of service indicates that process was mailed on 1/6/05. The court finds that plaintiff has established adequate service of the underlying summons and complaint. CPLR § 308(4). Plaintiff has also provided the court with proof of service of the instant motion. CPLR § 3215.

Plaintiff is entitled to a default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd dept. 2001). 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 N.Y.2d 728 (1984)].

Based on the complaint and the affidavit of Don Briggs, general manager of North East Alliance Federal Credit Union (“North East”), plaintiff avers the following facts pertinent to this motion. Defendant had an account at North East bearing account

number 16275 (the “North East account”). During December 1999, defendant fraudulently deposited several checks into the North East account which were endorsed and deposited by him without the permission of the corporate entities to whom the checks were designated. Thereafter, defendant withdrew money from his account at North East prior to North East’s discovery of the alleged fraud. The loss was discovered on May 17, 2000. Plaintiff has provided copies of the fraudulent checks.

North East demanded that defendant return the funds, however, defendant refused to do so. North East had an insurance bond policy with plaintiff bearing policy number 031-2121-6 (the “insurance policy”). North East presented an insurance claim in connection with its claims against defendant, pursuant to the insurance policy, to plaintiff. Plaintiff investigated and adjusted this claim for \$51,724.65 and paid North East \$51,624.65 after application of a \$100.00 deductible. Plaintiff became subrogated to North East’s claims against defendant.

Plaintiff has also provided a proof of loss and other documentation from several of the corporate entities to whom checks were designated which were then fraudulently deposited by defendant into the North East account.

In the complaint, plaintiff has alleged two causes of action arising from these allegations: conversion (the first cause of action); and (2) fraudulent representation (the second cause of action). Plaintiff seeks damages in the amount of \$51,624.65 and interest from May 17, 2000.

The elements of a claim for fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it;

(3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury. Peach Parking Corp. v. 346 West 40th Street, LLC, 42 A.D.3d 82 (1st Dept. 2007). The above claims establish a *prima facie* cause of action for fraud. Accordingly, plaintiff's motion for a default judgment on the second cause of action is hereby granted against defendant. Plaintiff's motion for a default judgment on the first cause of action is denied as moot and the first cause of action is dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for a default judgment on the second cause of action is granted; and it is further

ORDERED that plaintiff's motion for a default judgment on the first cause of action is hereby denied and the first cause of action is hereby dismissed; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff Cumis Insurance Society a/s/o North East Alliance Federal Credit Union against defendant Rodney Jennings on th second cause of action in the amount of \$51,624.65 together with interest from May 17, 2000.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
September 24, 2007

So Ordered

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