

**National Union Fire Ins. Co. of  
Pittsburgh, Pa. v Pagan**

2007 NY Slip Op 34081(U)

December 5, 2007

Supreme Court, New York County

Docket Number: 0100011/2007

Judge: Judith J. Gische

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

PRESENT: Judith J. Gische

*Justice*

PART 10

Index Number : 100011/2007

**NATIONAL UNION FIRE INSURANCE**

vs.

**PAGAN, DANIEL**

SEQUENCE NUMBER : 002

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

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**

DEC 18 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Motion decided in accordance with the annexed decision + order.

Dated: 12/5/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

-----x  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA, as subrogee  
of LCI MANAGEMENT SYSTEMS,

**Decision/Order**

Index No.: 100011/07  
Seq. No. : 002

Plaintiff,

-against-

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

DANIEL PAGAN,

Defendant.  
-----x

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

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERKS OFFICE

**Papers** **Numbered**  
Pltf's motion [d j/mt] w/BLG affirm, exh ..... 1

*Upon the foregoing papers, the decision and order of the court is as follows:*

In the underlying action, plaintiff, as subrogee of LCI Management Systems ("LCI Management"), seeks damages arising from defendant's allegedly fraudulent acts. Before the court is plaintiff's motion to renew its prior motion for a default judgment on the issue of liability against defendant and an inquest on damages. CPLR § 3215. The prior motion was denied because of defects identified in the court's order dated September 18, 2007 which have now been addressed. Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept. 1979).

Although defendant has not appeared, or answered the complaint within the time provided under the CPLR, the motion for entry of a default judgment must be denied, and the complaint dismissed in its entirety, for the reasons that follow.

[\* 3 ] .

This action is against an individual defendant. CPLR § 308. On the Summons, defendant's address is listed as: "921 Res Vista Hermosa EDF 43 P1536, San Juan, Puerto Rico 00921" (the "Summons Address"). Plaintiff claims that service of the summons and complaint on defendant at the Summons Address was attempted on January 18, 2007, but could not be completed because defendant does not reside at that address. Plaintiff has provided the affidavit of Reinaldo E. Cestero ("Cestero"), a process server for Aetna Central Judicial Service, who states that after due search, careful inquiry and diligent attempts, he was unable to serve defendant. However, plaintiff has not indicated why it believed, at one time, that defendant lived at the Summons Address.

Plaintiff now claims that the summons and complaint were properly served upon Juan Rievera, a relative of defendant and a person of suitable age and discretion at defendant's last known address, on February 28, 2007. Plaintiff claims that defendant's last known address is 472 Ridgewood Avenue, Apt 2F in Brooklyn. Plaintiff has not provided any basis for its believe that the Brooklyn address is in fact defendant's last known address.

Assuming *arguendo* that plaintiff has properly served the summons and complaint, as well as the instant motion, on defendant, plaintiff has failed to make a *prima facie* showing of entitlement to a default judgment. While 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 default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> dept. 2001)].

\* 4 ]

According to plaintiff, defendant was employed as a part-time teller for LCI Management ("LCI"). Plaintiff further claims that sometime after the commencement of his employment and up to the date of his firing on September 20, 2002, defendant "facilitated and master-minded a scheme whereby he stole multiple checks from LCI... and fraudulently made alterations and/or endorsements to said checks, which he subsequently cashed for his own personal use." Verified Complaint, ¶ 5. Plaintiff then claims that after LCI discovered defendant's allegedly fraudulent acts, defendant reimbursed to LCI \$4,000 "in an implied admission of wrongdoing." Verified Complaint, ¶ 6. Plaintiff alleges that the checks defendant allegedly stole from LCI have a total value of \$59,769.23.

Plaintiff states that pursuant to an insurance policy it issued to LCI, it paid to LCI the total amount of \$52,269.23 as a result of defendant's alleged conduct. In exchange, plaintiff claims that LCI's rights and remedies against defendant were assigned and subrogated to plaintiff.

Plaintiff has not provided any proof of the claims made herein. Plaintiff has not provided any evidence of defendant's alleged conduct, nor has it provided an affidavit in support of its claims. The complaint has been verified by Attorney Gordon, who does not have personal knowledge of the factual allegations made therein. Plaintiff has not provided any information from which the court could determine what effect, if any, defendant's reimbursement to LCI and implied admission of guilt, has on the claims made herein. Moreover, plaintiff has failed to provide the alleged insurance policy it issued to LCI or any proof of settlement of LCI's claims and subrogation of LCI's claims against defendant.

For the reasons set forth above, plaintiff has failed to prove its case. Since this

[\* 5 ]  
is the second time the court has given plaintiff an opportunity to establish its right to proceed, and movant has again been unsuccessful, the complaint and this case are hereby dismissed with prejudice.

**Conclusion**

In accordance with this decision, it is hereby:

**ORDERED** that plaintiff's motion for entry of a default judgment against defendant is denied; and it is further

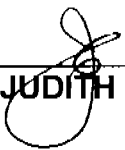
**ORDERED** that the complaint and each cause of action against defendant is dismissed, with prejudice.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York  
December 5, 2007

So Ordered:

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

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE