

**Verde Elec. Corp. v Federal Ins. Co.**

2007 NY Slip Op 34581(U)

September 12, 2007

Supreme Court, Westchester County

Docket Number: 03952/07

Judge: Alan D. Scheinkman

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This opinion is uncorrected and not selected for official publication.

**Order Appealed from - Hon. Alan D. Scheinkman  
dated September 12, 2007 (9-13)**

To commence the  
period of appeals as of right  
(CPLR 5513(a)), you are advised  
to serve a copy of this order,  
with notice of entry, upon all  
parties.

FILED AND ENTERED  
ON 9-13 2007  
WESTCHESTER  
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK  
COMMERCIAL DIVISION  
WESTCHESTER COUNTY**

Present: HON. ALAN D. SCHEINKMAN,  
Justice.

-----X  
VERDE ELECTRIC CORPORATION,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY, and RAILROAD  
CONSTRUCTION COMPANY, INC., and METRO-  
NORTH COMMUTER RAILROAD COMPANY, and  
AURORA ELECTRIC COMPANY,

Defendants.

-----X  
Scheinkman, J:

Defendants Federal Insurance Company ("FIC") and Railroad Construction Company, Inc. ("RCC") move pursuant to CPLR 5015(a)(1) to vacate a default judgment against FIC. Plaintiff opposes the motion.

Factual Allegations

On or about December 8, 2003, RCC entered into a written contract with Metro-North Commuter Railroad Company ("Metro-North") for the design and construction of new administrative and storage buildings, a new communications center, modifications of existing material distributions center, new guard house facility, the upgrade of existing power stations and related construction work, known as the "Harmon Shop Replacement - Phase II" ("the Agreement").

Following execution of the Agreement, RCC entered into a sub-contract agreement with Aurora Electric Inc. ("Aurora"), under, and by which, Aurora was to furnish all work associated with the electrical installations for the project that formed the subject matter of the Agreement. On or about January 30, 2004, Aurora entered into a written sub-contract agreement with Verde Electric Corporation ("Verde"), under, and by which, Verde was to furnish all of the work associated with the electrical installation for the project ("Sub-Contract Agreement").

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SEQ #1

DECISION & ORDER

In connection with the award of the contract to RCC from Metro North, RCC, as general contractor, was required to post a payment bond to secure payment for all labor, equipment and material performed for or delivered to the project for use therein. On or about December 17, 2003, FIC posted a payment bond in the sum of \$32,301,500, naming RCC as principal under the bond. The bond contained the following provision:

Now, therefore, the condition of this obligation is such, that if the said Principal shall promptly pay all monies due to all persons furnishing labor or materials to him or his Sub-contractors in the performance of the Work provided for in said Contract, then this obligation shall be void, otherwise to remain in full force and effect.

Pursuant to the Subcontract, Verde furnished labor and materials for the project. Verde alleges the value of the labor and materials provided for the project was \$7,411,244.56 and that Aurora paid Verde \$5,963,960.07, leaving a balance due of \$1,447,284.49. Verde alleges it demanded payment of the sums due from Aurora, but no part of the amount demanded has been paid.

On or about October 20, 2006, Verde filed a notice of claim with FIC demanding payment of the \$1,447,284.49 pursuant to the Bond. On or about November 30, 2006, FIC rejected Verde's claim under the Bond.

This action was commenced by the filing of a Summons and Verified Complaint, dated March 5, 2007 which was served on FIC on April 19, 2007, pursuant to Insurance Law §1212(b), which required that service be made upon a designated agent of the Superintendent of the Insurance Department of the State of New York. A copy of the Affidavit of Service, dated April 30, 2007, was annexed to movant's papers, and states that the Insurance Department was served with a copy of the Complaint on April 19, 2007. As such, FIC's answer to the complaint was due on May 21, 2007, 30 days thereafter.

FIC does not deny it received a copy of the Complaint from the Department of Insurance. FIC admits it was in receipt of the Complaint on May 1, 2007, and that it tendered the defense of the matter to RCC on May 3, 2007. FIC further alleges that RCC retained defense counsel on June 1, 2007, and thereafter served an answer to the Complaint on June 4, 2007. By letter dated June 7, 2007, Verde rejected FIC's answer as untimely. Verde asserts that FIC never contacted it to obtain an extension of its time to answer the complaint. Verde obtained a Judgment of Default against FIC on May 31, 2007, ten days after FIC's answer was due.

In support of its motion to vacate, FIC asserts its delay in answer the Complaint was due to the administrative process of FIC's tendering its defense to RCC and the administrative process associated with assigning defense counsel. It is claimed that this was, at worst, an unintentional oversight.

FIC further claims that Plaintiff has suffered no prejudice by the delay in filing FIC's answer and that it has a meritorious defense to the allegations raised in the Complaint.

Specifically, it asserts the construction project has not been closed out, the fair value for the work performed by each contractor involved is in dispute and the scope of the work performed by Verde is in dispute.

#### Legal Analysis

To succeed on a motion to vacate a judgment entered upon default, a defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to the underlying action. See, CPLR 5015(a)(1); *Gray v. B.R. Trucking Co.*, 59 N.Y.2d 649 (1983); *Chiulli v. Coyne*, 292 A.D.2d 413, 414 (2nd Dept. 2002); *Matter of Gambardella v. Ortov Light*, 278 A.D.2d 494 (2nd Dept. 2000); *Parker v. City of New York*, 272 A.D.2d 310 (2nd Dept. 2000). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court, and absent an abuse of that discretion, the court's decision will not be disturbed. *Cline v. Shorter*, 242 A.D.2d 660 (2nd Dept. 1997).

It is well settled that in order to substantiate its claimed excuse, the moving party must provide affidavits of individuals with direct knowledge of the facts underlying the default [*General Elec. Capital Auto Lease, Inc. v. Terzi*, 232 A.D.2d 449, 450 (2nd Dept. 1996)], and counsel "must submit facts in evidentiary form to justify the default" by means of "an affirmation ... [containing] a detailed explanation of [the] oversights." *Hospital for Joint Diseases v. Elrac, Inc.*, 11 A.D.3d 432, 433 (2nd Dept. 2004); see also, *Gourdet v. Hershfeld*, 277 A.D.2d 422 (2nd Dept. 2000) (conclusory affirmation of counsel as to law office failure insufficient to establish an excusable default).

In the instant matter, Defendants have failed to establish a reasonable excuse for their default. In addition to FIC's attorney's affirmation, FIC submitted the Affidavit of Vincent C. Miseo, sworn to June 25, 2007 and the Affidavit of Alfonso Daloisio, Jr., also sworn to June 25, 2007.

Mr. Miseo is a Surety Claims Attorney with the Chubb Group of Insurance Companies, and FIC is a wholly-owned subsidiary of the Chubb Corporation. In his Affidavit, he admits service of the Complaint on or about May 1, 2007, and that the Complaint was tendered to RCC on May 3, 2007. Although he states that the late filing of the answer was an "administrative oversight", he gives no explanation of what steps, if any, FIC took to follow up on RCC's handling of the complaint. Nor does he explain why FIC failed to seek an extension of its time to answer the complaint, since any default taken would be against FIC, and not its sub-contractor, RCC.

Alfonso Daloisio, Jr., President of RCC, also submitted an affidavit in support of the motion. Although he attempts to detail why RCC has a meritorious defense to the action, his Affidavit fails to explain why counsel was not assigned by RCC for a month after the Complaint was received. Nor does he explain why no extension of the time to answer was sought. Instead, he states in conclusory fashion that the delay in answering the Complaint was "due to administrative procedure involved in assigning counsel". What the procedure is, whether the process normally is expeditious, and, if so, why the procedure did not result in the timely assignment of counsel and filing of an answer in this instance, is not explained.

None of the supporting documents provide any factual basis for why FIC and RCC failed to respond to the complaint in a timely fashion or seek an extension thereof.

Moreover, the Appellate Division of this Department has affirmed the trial court's refusal to vacate a default in a situation virtually identical to the case at bar. *See, e.g., J.P. Equipment Rental & Materials, LLC v. Fidelity Guaranty Ins. Co.*, 288 A.D.2d 187 (2nd Dept. 2001) (where, in an action to recover upon two labor and material payment bonds, the Court affirmed the trial court's denial of defendants' motion to vacate default judgments as a result of defendants' failure to demonstrate a reasonable excuse for the default, and did not go on to consider whether a meritorious defense to the action existed). *See, also, Westchester County Medical Center v. Allstate Ins. Co.*, 283 A.D.2d 488 (2nd Dept. 2001); *Phillips, Nizer, Benjamin, Krim & Ballon v. Matteo*, 271 A.D.2d 422 (2nd Dept. 2000); *Perellie v. Crimson's Rest. Ltd.*, 108 A.D.2d 903 (2nd Dept. 1985).

In light of the foregoing, the Court shall deny Defendants' motion for failure to establish a reasonable excuse for their default.

#### CONCLUSION

The Court has considered the following papers in connection with this motion:

- 1) Order to Show Cause dated July 2, 2007; Affirmation in Support of Kevin A. Hickman, Esq. dated June 25, 2007; Affidavit of Vincent C. Miseo, sworn to June 25, 2007; Affidavit of Alfonso Daloisio, Jr., sworn to June 25, 2007, and the exhibits annexed thereto;
- 2) Affirmation of Samuel D. Friedlander, Esq. dated July 16, 2007 and the exhibits annexed thereto;
- 3) Memorandum of Law in Opposition to Motion to Vacate the Default Judgment dated July 16, 2007;
- 4) Reply Affirmation of Kevin A. Hickman, Esq. dated July 31, 2007.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that Defendants Federal Insurance Company and Railroad Construction Company, Inc.'s motion to vacate the default judgment of May 31, 2007 is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
September 12, 2007

ENTER:



Alan D. Scheinkman  
Justice of the Supreme Court

APPEARANCES:

ANDREW GREENE & ASSOC., P.C.  
by: Samuel D. Friedlander, Esq.  
Attorneys for Plaintiff  
202 Mamaroneck Avenue  
White Plains, New York 10601

MORRISON MAHONEY, LLP  
by: Kevin A. Hickman, Esq.  
Attorneys for Defendants  
Federal Insurance Co., and  
Railroad Construction Company, Inc.  
17 State Street, Suite 1110  
New York, New York 10004

Metro-North Commuter Railroad Company  
Defendant  
347 Madison Avenue  
New York, New York 10017

Aurora Electric Company  
Defendant  
145-04 Guy R. Brewer Road  
Jamaica, New York 11434