

**Commissioners of the State Ins. Fund v FGT Constr.  
Corp.**

2009 NY Slip Op 32161(U)

September 21, 2009

Supreme Court, New York County

Docket Number: 400782/09

Judge: Judith J. Gische

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

PRESENT: Grisches  
Justice

PART 10

Commissioners of DHS

-v- STATE INSURANCE FUND

FBI Construction Corp

INDEX NO. 1400782/09

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

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |
|-----------------|
| _____           |
| _____           |
| _____           |

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
SEP 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

~~THE ACCOMPANYING MEMORANDUM DECISION~~

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION**

*and the prelim conference is scheduled for October 29, 2009 @ 9:30 AM in Part 10 Room 232*

Dated: September 21, 2009 \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

FOR THE FOLLOWING REASON(S):

FILED IN VEST FILED TO JUSTICE

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

-----x  
Commissioners of the State Insurance Fund,

Plaintiff (s),

-against-

FGT Construction Corp.,

Defendant (s).  
-----x

**DECISION/ORDER**

Index No.: 400782/09

Seq. No.: 001

**PRESENT:**

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

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

| <b>Papers</b>  | <b>Numbered</b> |
|--|-----------------|
| Def's OSC (vacate default) w/ RPS affirm, JB and FT affids, exhs . . . . . | 1               |
| Pltf's opp w/JIG affirm, TV affid, exhs . . . . .                          | 2               |
| Def's reply w/ RPS affirm . . . . .  | 3               |

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

This is an action by the Commissioners of the State Insurance Fund, a state agency providing worker's compensation and/or employer's liability insurance. Defendant FGT Construction Corp. is plaintiff's insured. Plaintiff brought this action to recover unpaid insurance premiums and it obtained a money judgment against defendant on default. Defendant now moves to vacate its default and the judgment that was entered against it on the basis that it has excusable default and meritorious defense. Plaintiff opposes the motion, but argues if defendant's excuse is accepted by the court, defendant should be required to post a bond as a condition of vacating the money judgment.

## Arguments

Defendant's principal and president, Fred Tahliambouris, contends that he did not know this action was commenced and only learned plaintiff obtained a money judgment against his business when the corporate account was frozen on June 24, 2009. This action was commenced April 3, 2009 with the filing of the summons and complaint. Defendant being a domestic corporation, service was made upon the Secretary of State on April 24, 2009, as BCL 306 (b) provides. It is undisputed that in addition to the statutory designation of the Secretary of State, defendant designated its accountant as its agent for service of process. The accountant ("Besselman"), however, states in his sworn affidavit that he moved eight (8) years ago and did not notify the Secretary of State of his new address.

Thereafter, in accordance with CPLR 3215 (g) (4) (i), plaintiff gave defendant additional notice of this action. That notice was provided May 12, 2009 and it refers to the earlier date of service on the Secretary of State. Tahliambouris acknowledges he received the additional notice, but did not act on it, thinking the case had not been started.

It is undisputed plaintiff sent defendant a statement indicating the premiums for its insurance had been increased. That statement was sent in April 2008. Tahliambouris avers that he turned the matter over to Besselman (his accountant) to handle and that he sent a letter to the plaintiff objecting to the computations. Tahliambouris' letter to the fund requests a copy of the audit statement for the period of January 17, 2006 through January 17, 2007. He also states in his letter that he believes "a review of the report will disclose substantial errors in the computation of the

invoiced amount.” There is another letter from Tahliambouris to the fund dated June 11, 2008. In that letter, Tahliambouris identifies a failure by the fund to properly credit him for purchases; one purchase is for \$100,000. Tahliambouris requests a meeting with Tara Vickers to resolve these disputes. Vickers is plaintiff’s underwriter; she has provided her sworn affidavit that she contacted defendant to set up the meeting but defendant did not respond.

Defendant contends that it has an excusable default and meritorious defense. The defense is that the premiums have been miscalculated and based upon erroneous computations. Furthermore, defendant argues that the money judgment against it is a nullity because it was entered on a disputed amount, and therefore not a sum certain. The defendant objects to posting a bond for that reason and claims it should be allowed to defend against the claims without the imposition of that condition.

### **Discussion**

To vacate an order or judgment entered on default, the party seeking that relief must set forth excusable default and a meritorious defense. CPLR § 5015 (a); Gray v. B.R. Trucking Co., 59 N.Y.2d 649 (1983). “[T]he quantum of proof needed to prevail on a CPLR § 5015 (a) (1) motion is not as great as that required to successfully oppose a motion for summary judgment.” Winney v. County of Saratoga, 252 A.D.2d 882, 676 N.Y.S.2d 356 (3<sup>rd</sup> Dept 1998).

Due process requires that this case and the defenses thereto be decided on the merits. While plaintiff challenges every statement by defendant’s principal and his accountant, Besselman, none of them are so implausible that they should be rejected out of hand. The excuses, while imperfect, are taken at face value. There is no

indication that defendant deliberately defaulted to gain some advantage in this litigation. The delay involved has been of a relatively short duration and there had been no showing of undue prejudice sustained by plaintiff. Stolpiec v. Wiener, 100 A.D.2d 931 (2<sup>nd</sup> Dept 1984).

The defendant has also presented a meritorious defense which is that the plaintiff's computations are wrong or based upon erroneous data. Although Vickers states she attempted to set up an audit of defendant's accounts, even if this is accurate, the information required can now be obtained through discovery.

The court has considered defendant's argument that plaintiff was wrong to enter judgment through the clerk. That argument is, however, without any factual or legal basis. Plaintiff's claim against the defendant is based upon an account stated. The essential elements of an account stated are that the plaintiff sent bills to the defendant which were retained without any objection within a reasonable period of time. Herrick Feinstein LLP v. Stamm, 297 AD2d 477 (1<sup>st</sup> Dept 2002). Although defendant contends the computations are erroneous, and it sent letters to the plaintiff after the April statement, it did not specifically object to the August statement that is the basis for plaintiff's claims against the defendant. Therefore, while defendant may have a defense to the account stated, and it can assert that defense in its answer, plaintiff was within its right to enter judgment through the clerk because it had billed defendant for a sum certain.

The court has also considered the other (plaintiff's) side of this argument, which is that having secured a default judgment against defendant, defendant should now have to post a bond as a condition of having it vacated. A court can vacate any

judgment upon such terms that may be just. Here, there is no evidence to suggest that security for relieving defendant of its default is required. In the absence of such circumstances, it is improper to require defendant to post a bond as a condition of opening its default. Liberty Taxi Management, Inc. v. Gincherman, 32 A.D.3d 276, 277 (1<sup>st</sup> Dept 2006) (*citing* Mark IV Homes, Inc. v. Evans Gardens, Inc., 57 A.D.2d 701, 702 [4<sup>th</sup> Dept 1977]). Therefore, plaintiff's request that defendant post a bond or other security is denied. Defendant's motion to vacate its default is vacated, however, is granted in its entirety. The judgment entered by the clerk on June 17, 2009 (\$526,310.58) is hereby vacated forthwith as are the information subpoenas and restraining notices that plaintiff issued pursuant to that judgment. Defendant shall serve its answer with a copy of this decision/order with notice of entry. Such service shall be made within Ten (10) Days of this decision/order being entered.

Plaintiff's demand for discovery in opposition to defendant's motion exceeds the boundaries of the issues before the court on this motion. Both sides reserve the right to serve discovery demands, as permitted under Article 31 of the CPLR. The preliminary conference in this case is hereby scheduled for **October 29, 2009 at 9:30 a.m.** and the court will address any discovery disputes at that time, if necessary. No further notices of that conference will be sent.

### **Conclusion**

It is hereby

**ORDERED** that defendant's motion pursuant to CPLR 5015 (a) (1) is hereby granted in its entirety; and it is further

ORDERED that the default judgment entered by the Clerk on June 17, 2009 in the principal amount of \$526,310.58 is hereby vacated forthwith; and it is further

ORDERED that the information subpoenas and restraining notices that plaintiff issued pursuant to that judgment are also vacated forthwith; and it is further

ORDERED that plaintiff's request that defendant post a bond or other security as a condition of vacating the default judgment is denied; and it is further

ORDERED that defendant shall serve its answer on plaintiff with a copy of this decision/order with notice of entry; such service shall be made within Ten (10) Days of this decision/order being entered;


ORDERED that the preliminary conference in this case is hereby scheduled for **October 29, 2009 at 9:30 a.m.**; No further notices will be sent; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated:           New York, New York  
                  September 21, 2009

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

SEP 23 2009

COUNTY CLERK'S OFFICE  
NEW YORK