

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

2010 NY Slip Op 30681(U)

March 19, 2010

Supreme Court, New York County

Docket Number: 400782/2009

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 — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 400782/2009

STATE INSURANCE FUND

vs
FGT CONSTRUCTION

Sequence Number : 002

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

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

*Submit judgment
to the court*

MAR 20 2010

Dated: _____


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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**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.: 002

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):

Papers	Numbered
Pltf's n/m (strike answer) w/ JIG affirm, TV affid, exhs	1
Proof of service	2

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 brought a motion to vacate its default and the judgment that was entered against it. That motion was granted for the reasons stated in the court's decision/ order dated September 23, 2009 which also scheduled the case for a preliminary conference. The preliminary conference was held on October 29, 2009 at which time the court set a discovery schedule ("PCO"). Among other requirements, the PCO ordered that discovery demands be exchanged by December 4,

2010 and that depositions be held on February 2, 2010.

This motion is for an order striking defendants' answer as a sanction for its failure to comply with plaintiff's discovery demands (CPLR 3126). Plaintiff also seeks an order entering a default judgment against the defendant (CPLR 3215). Plaintiff contends that despite an opportunity to defend the complaint on the merits by convincing the court to vacate the prior money judgment entered on default, defendant has made no effort to comply with discovery and provide the information that it so vehemently claimed provided a defense to plaintiff's claims.

Plaintiff's motion is granted in its entirety. Plaintiff has provided a good faith affirmation of the attempts it made to obtain defendant's compliance with its discovery demands. Furthermore, defendant has not opposed this motion which portrays it as being uncooperative and recalcitrant with discovery.

CPLR 3126 provides for sanctions for refusal to comply with an order to provide discovery, including entering a default judgment against the disobedient party (Infinity Records v. Pathe News, Inc., 89 AD2d [1st Dept 1982]). While striking a pleading is an extreme measure, it is still within the court's discretion to do so if the circumstances warrant it.

Defendant has failed to provide any excuse - let alone an adequate one- for why it has not complied with discovery. Plaintiff has been prejudiced because it had already obtained a judgment on default against defendant which the court vacated, based upon defendant's representation that it had excusable default and a meritorious defense which it was eager to prove (see Order, Gische J., 9/23/09). Under the circumstances

* 4]
presented, the court hereby strikes defendant's answer in its entirety.

Since there are no defenses to the complaint, plaintiff is entitled to entry of a default judgment against defendant, provided it has established a prima facie cause of action (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Plaintiff has established through the verified complaint and the sworn affidavit of Tara Vickers, a person with knowledge of the facts, the following:

Defendant owes unpaid insurance premiums from January 17, 2006 to June 23, 2008 in the amount of \$483,275.75 (1st cause of action), with interest from June 23, 2008. Plaintiff also has the right to recover 18% of the amount due and owing as its collection costs under State Finance Law § 18 [5].

Plaintiff shall submit its proposed judgment directly to the court with a copy of this decision/order with notice of entry and proof of service.

Conclusion

It is hereby

ORDERED that plaintiff's motion for an order striking the complaint and entering a default judgment is hereby granted in all respects on default; and it is further

ORDERED that defendant's answer is hereby stricken; and it is further

ORDERED that plaintiff has proved that defendant FGT Construction Corp. owes unpaid insurance premiums from January 17, 2006 to June 23, 2008 in the amount of \$483,275.75 (1st cause of action), with interest from June 23, 2008; plaintiff also has the right to recover 18% of the amount due and owing as its collection costs under State Finance Law § 18 [5]; and it is further

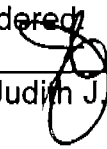
ORDERED that plaintiff shall submit its proposed judgment directly to the court with a copy of this decision with notice of entry and proof of service; and it is further

ORDERED that any relief requested not expressly addressed is hereby denied; and it is further

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

Dated: New York, New York
March 19, 2010

So Ordered



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