

**Tishman Constr. Corp. of N.Y. v Lumbermens Mut.  
Cas. Co.**

2010 NY Slip Op 31255(U)

May 19, 2010

Supreme Court, NY County

Docket Number: 110284-2006

Judge: Saliann Scarpulla

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5-19-10  
J.C.

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

**PRESENT:**

**PART** 19

Index Number : 110284/2006

TISHMAN CONSTRUCTION

vs

LUMBERMENS MUTUAL CASUALTY

Sequence Number : 009

SUMMARY JUDGMENT

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

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

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

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

decided per the memorandum decision dated 5/19/10  
which disposes of motion sequence(s) no. 008

*This Constitutes Decision and Order of the Court.*

**FILED**

MAY 24 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

5/19/10

*Barbara Caspulle*  
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: CIVIL TERM: PART 19

----- X  
TISHMAN CONSTRUCTION CORPORATION,  
OF NEW YORK ,

Plaintiff

Index Number 110284-2006  
Submission Date Mar 17,2010  
Mot. Seq. No. 008 & 009

-against-

**DECISION and ORDER**

LUMBERMENS MUTUAL CASUALTY  
COMPANY and SEASONS CONTRACTING CORP.,

Defendants.

-----X

**Appearances: For Plaintiff :**  
Jones, Hirsch, Connors & Bull, P.C.  
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**For Defendant LMC:**  
Hitchcock & Cummings, LLP  
By Christopher B. Hitchcock, Esq.  
By Terry Cummings, Esq.  
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New York, New York 10017  
212-688-3025

	<i>Papers considered in review of the motions:</i>	
<b>Seq 008</b>	<b>Papers</b>	<b>Numbered</b>
	Affirm. in Supp. of LMC's Motion for Default Judg.....	1
	Memorandum of Law in Supp.....	2
	Tishman's Affirm in Opp.....	3
	Reply Affirm. in Supp.....	4
<b>Seq 009</b>	Notice of Motion and Affirm. in Supp. of Mot. for Summ. Judg.....	5
	Tishman's Memorandum in Supp. of Mot. for Summ. Judg.....	6
	LMC's Affirm. in Opp. to Tishman's Mot. for Summ. Judg.....	7
	LMC's Memorandum of Law in Opp.....	8
	Tishman's Reply Affirm.....	9
	LMC's Suppl. Attorney Affirm.....	10
	Tishman's Suppl. Attorney Affirm.....	11

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**HON SALIANN SCARPULLA, J.:**

This action for declaratory relief was commenced by plaintiff Tishman  
Construction Corporation of New York ("Tishman") on July 20, 2006, as a companion

case to the underlying personal injury matter pending in New York State Supreme Court, Queens County, *Jara v. New York Racing Association, Inc. et al.*, Index No. 18190/2005, in which Tishman was impleaded for indemnification as a general contractor or construction manager.

In its complaint Tishman asserts two causes of action for declaratory relief. The first cause of action is against defendant Lumbermens Mutual Casualty Company (“LMC”) for judgment declaring “that LMC has the sole primary duty to defend and, if necessary, to indemnify Tishman with respect to the underlying *Jara* action and that Tishman is entitled to reimbursement from LMC of the attorneys’ fees and expenses incurred or to be incurred by or on behalf of Tishman in its defense of the underlying *Jara* action.” In the alternative, in the second cause of action, Tishman seeks a judgment against Seasons Contracting Corp. (“Seasons”), Tishman’s subcontractor, for “the damages that Tishman has incurred and will incur as the result of Seasons’ breach of its contractual obligations to procure insurance for Tishman including, without limitation, the amount of any judgment against or settlement by or on behalf of Tishman with respect to the *Jara* action and the amount of the attorneys’ fees and expenses incurred...” This second cause of action mirrors Tishman’s cross-claim against Seasons in the underlying *Jara* action.

By leave of court granted on January 11, 2008, LMC served an amended answer, asserting a cross-claim against Seasons for a declaratory judgment to renounce and deny

coverage under the relevant policy. Seasons never appeared in this action, but defended the underlying action. Tishman never sought a default judgment against Seasons in this action.

By notice of motion dated April 14, 2009, LMC made a motion for summary judgment dismissing Tishman's first cause of action, seeking a declaration that LMC had no duty to defend Tishman, and on its cross-claim against Seasons for a declaration that LMC did not have defend Seasons. By notice of cross-motion dated June 26, 2009, Tishman cross-moved for the opposite declaration that LMC had to indemnify both Tishman and Seasons.

By order of the Court, dated October 16, 2009, and entered on October 26, 2009, Justice Edward H. Lehner granted LMC's motion dismissing Tishman's first cause of action, on the grounds that Tishman was not an additional insured under LMC's policy to Seasons, because Jara's accident occurred months before Seasons and Tishman executed a sub-contract for work. However, due to inadvertent oversight, Justice Lehner did not address LMC's cross-claim. Currently, an appeal from the October 16, 2009 decision is pending in the First Department.

Instead of making a motion to renew or reargue pursuant to CPLR 2221, on December 1, 2009, LMC filed motion seq.008 against Seasons for default judgment on its cross-claim pursuant to CPLR 3215. That same day, Tishman filed another motion for "summary judgment or reargument of the prior summary judgment," seq. 009, seeking

determination of the status of Seasons' coverage on LMC's cross-claim against Seasons. The two motions are joined for the purposes of this decision.

While these two motions were pending, the Supreme Court, Queens County, (Agate, J.), by order dated February 25, 2010, dismissed Tishman's cross-claim against Seasons in the underlying matter for failure to procure insurance for Tishman, which is identical to Tishman's second cause of action against Seasons in this matter. The Court (Agate, J.), however, granted Tishman summary judgment against Seasons on its contractual indemnification claim, which was not brought here.

### **Discussion**

An application for a default judgment is governed by CPLR 3215 which requires: proof of service of the summons, including a complaint or CPLR 305 (b) notice, proof of the claim and proof of the default. CPLR 3215(f); *see also* Siegel, New York Practice, sec. 295 (4th ed. 2005).

Here, LMC's motion for default judgment is not authorized by CPLR 3215. Because LMC did not demand an answer in its cross-claim against Seasons, pursuant to CPLR 3011, this cross-claim is automatically "deemed denied or avoided," with no default occurring. *See Fleet National Bank v Harley*, 153 A.D.2d 1005, 1005-06 (3<sup>rd</sup> Dep't 1989); *see also Green Point Savings Bank v Pagano*, 103 A.D.2d 735, 736 (2<sup>nd</sup> Dep't 1984).

Moreover, LMC failed to satisfy two requirements for the issuance of a default judgment. LMC did not provide either an affidavit of merit or a pleading verified by a person with first hand knowledge of the cross-claim. *See* CPLR 3215(f); *see also* Siegel, *New York Practice*, 4<sup>th</sup> ed. §§ 293 -296 (2005). Further, LMC does not show sufficient cause for a late default motion, as required by CPLR 3215(c), having made it about three years into the alleged default. For these reasons, LMC's motion for a default judgment is denied.

In motion sequence 009, Tishman is moving for a declaratory judgment that LMC's insurance policy to Seasons was in effect at the time of Jara's accident and that LMC "has a duty to defend and to indemnify defendant Seasons with respect to the *Jara* action." Effectively, Tishman is moving for summary judgment on a subrogation claim for declaratory relief. However, Tishman brought its first cause of action against LMC only as an alleged insured, and not as a subrogee of Season's pursuant to Insurance Law § 3420(b)(2).<sup>1</sup> As Tishman has not pled a claim as a subrogee of Season's, it may not move for a declaration of rights as between LMC and Seasons. *See Peripheral Equipment, Inc. v Farrington Manufacturing Co.*, 29 A.D.2d 11, 14 (1<sup>st</sup> Dep't 1967).

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<sup>1</sup>While Tishman mentioned, in passing, that the New Jersey law should apply to this action, this does not change the form and substance of Tishman's complaint. The complaint does not include a subrogation claim either under the New York or New Jersey law; on the contrary, it asserts only that LMC has "primary duty to defend" Tishman.

Because Tishman's first cause of action was dismissed by the October 16, 2009 decision, and its second cause of action against Seasons was rendered moot by the February 25, 2010 decision in a related matter, Tishman's entire complaint is dismissed. The Court is directing the remaining parties to appear for a conference on June 30, 2010, 2:15 p.m., at Room 279, 80 Centre Street, New York. LMC is directed to give notice of the conference date and time to Seasons and also to Seasons' counsel in the *Jara v. New York Racing Association, Inc. et al.* action. In the event that Seasons fails to appear for the conference, the Court will take appropriate action to dispose of the cross-claim.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Lumbermens Mutual Casualty Company for a default judgment on its cross-action against defendant Seasons Contracting Corp. is denied with prejudice; and it is further

ORDERED that the motion for summary judgment or reargument of the October 16, 2009 decision by plaintiff Tishman Construction Corporation of New York is denied, and the complaint is dismissed in its entirety and severed from the action; and it is further

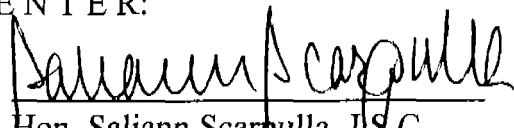
ORDERED that a conference shall be held on June 30, 2010 at 2:15 p.m. and proper notice shall be given in accordance with the instructions contained in the decision; and it is further

ORDERED that counsel for Lumbermens Mutual Casualty Company shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre

St., Basement), who shall enter judgment in accordance with the foregoing and sever and continue the claims which are not dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
May 19, 2010

ENTER:  
  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
MAY 24 2010  
NEW YORK  
COUNTY CLERK'S OFFICE