

Travelers Indem. Co. v Fred Todino & Sons, Inc.

2010 NY Slip Op 32841(U)

October 7, 2010

Supreme Court, New York County

Docket Number: 107795/09

Judge: Louis B. York

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

PRESENT: _____
Justice

PART _____

Travelers Indemnity Company

INDEX NO. 10795/09

MOTION DATE _____

- v -
Fred Rodino & Sons, et al.

MOTION SEQ. NO. 004

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 ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/7/10

Luy

J.S.C.

Oct. 07, 2010

LOUIS B. YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
TRAVELERS INDEMNITY COMPANY,

Plaintiff,

Index No. 107795/2009

-against-

FRED TODINO & SONS, INC., TODINO SEWER
AND WATER SERVICE, INC., FRED TODINO
SEWER AND WATER SERVICE, INC. THE CITY OF
NEW YORK, VICTOR MORALES, JOHN RIGOLINI,
MICHELE TAMAS AND STEPHEN TAMAS

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).-----X

-----X
LOUIS B. YORK, J.:

Plaintiff, an insurance company, commenced this action on June 2, 2009. The Todino defendants were served with process via mail and by service at their actual place of business as well as through the Secretary of State. Defendants have not filed an appearance or answer. Plaintiff moves for a renewed motion for default and/or summary judgment, monetary relief, and declaratory judgment or alternatively affirmative injunctive relief.

Plaintiff Travelers Indemnity Company ("Travelers") is the successor in interest to Gulf Insurance Company ("Gulf"), which issued a commercial general liability insurance policy (the "Policy") to Fred Todino & Sons. Two additional Todino entities – Todino Sewer and Water Service, Fred Todino Sewer and Water Service – were included under the Policy as named insureds (the "Todino defendants").

The Policy required that the Todino defendants, among other things, maintain a contract with an approved claims adjustment service at their own expense, give timely notice of an occurrence and cooperate in the investigation, defense or settlement of a claim. It further stated

* 3]

that Plaintiff's obligations would not be triggered until the Todino defendants exhausted the \$50,000 per occurrence SIR through payment of "damages" and/or "claim expenses," including attorney's fees. The Policy allowed Travelers, at its sole discretion, to assume control of any claim; Travelers' decision, though, would not relieve the Todino defendants of its obligations under the Policy.

Starting in 2002, fifteen separate personal injury claims were filed against the Todino entities both individually and jointly (the "Underlying Lawsuits"). These claims all arose from incidents that allegedly occurred during the policy period. After Plaintiff was notified of the first lawsuit, Plaintiff advised the Todino defendants of the policy's self-insured retention requirements ("SIR requirements") in a letter dated August 9, 2004.

Travelers later learned that the Todino defendants failed to pay defense counsel and that defense counsel had withdrawn from representation. On December 30, 2004, Plaintiff Travelers sent a letter to the Todino defendants notifying them that Plaintiff disclaimed coverage for the lawsuit because the Todino defendants' failure to maintain defense counsel violated the Policy terms. Defendants never challenged or even responded to the letter.

Subsequently, Plaintiff learned that the Todino defendants also had terminated the contract with an approved claims-adjustment service and failed to adhere to the notice and cooperation provisions of the SIR Endorsement. Travelers sent the Todino defendants several letters reiterating prior disclaimers of coverage, denying coverage for newly asserted lawsuits, or rendering the Policy to be void. The Todino defendants never challenged or responded to the letters and have not complied with the Policy's terms.

Despite these alleged Policy violations, Plaintiff defended the Todino defendants. Twelve of the underlying lawsuits were resolved through settlement, judgment or withdrawal and Travelers continues to fund the Todino defendants' defense in the three remaining lawsuits. Travelers has incurred \$210,509.09 in defense and indemnity costs to date.

[* 4]

On January 21, 2009, Travelers wrote to Fred Todino & Sons, Inc. to demand reimbursement from the Todino defendants for defense and indemnity expenses that Travelers has incurred on the Todino defendants' behalf. Plaintiff has never received a response to the letter or any payments from the Todino defendants.

On June 2, 2009, Plaintiff commenced this action on June 2, 2009. The Todino defendants were served with process via mail and by service at their actual place of business as well as through the Secretary of State. Defendants have not filed an appearance or answer. Plaintiff moves for a renewed motion for default, summary judgment, monetary relief, declaratory judgment or alternatively affirmative injunctive relief.

ANALYSIS

Breach of Contract

Plaintiff argues that Defendants have breached the contract by not complying with the Policy. A party seeking default judgment must establish the existence of a prima facie cause of action against the defaulting party. (*see Joosten v. Gale*, 129 AD2d 531, 531-532, 514 NYS2d 729, 730 [1st Dept. 1987]). Similarly, to prevail on summary judgment, the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. N.Y. Cty. 2008]). Pursuant to CPLR § 3215, parties which do not timely move against a complaint face default judgment. By defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability but not damages. (*Christian v. Hashmet Management Corp.*, 189 A.D.2d 597, 598, 592 NYS2d 306, 306 [1st Dept. 1993]). Therefore, to prevail here, Plaintiff must establish a prima facie case that the Todino defendants have breached the Policy as well as Defendants' default. (*see Allstate Ins. Co. v. Zuk*, 78 NY2d 41, 45, 571 NYS2d 429, 430 [Ct App 1991], *Santiago v. Filstein*, 35 AD3d 184, 185-186, 826 NYS2d 216, 217 [1st Dept 2006]).

Defendants have defaulted on this motion. They have not filed an appearance or served an answer even though the Todino defendants were served on June 2, 2009 and Defendant Victor Morales was served on October 27, 2009. Therefore, the Court turns to the question of whether or not Plaintiff has shown, through evidentiary support, a prima facie case. Because Plaintiff must also establish a prima facie case to prevail on summary judgment, the Court does not find it necessary to address default judgment and summary judgment separately as to the substantive issues.

Plaintiff argues that they have the right to disclaim coverage. An insurer may disclaim coverage where an insured deliberately fails to cooperate with the insurer. (*see State Farm Indem. Co. v. Moore*, 58 AD3d 429, 430, 872 NYS2d 82, 83 [1st Dept 2009]). To show deliberate failure to cooperate, an insurer must establish that it diligently sought the insured's cooperation, that its efforts were reasonably calculated to bring about the insured's cooperation, and that the insured's attitude was one of willful and avowed obstruction. (*see Moore*, 872 NYS2d at 82). The insurer is only required to infer that the insured's failure to cooperate was deliberate. (*see Id.*). For six years, Travelers has repeatedly demanded in writing that the Todino defendants retain defense counsel, retain an approved claims adjustment company and to pay the sums due pursuant to the Policy. Despite the repeated communications, the Todino defendants have not responded to the letters or complied with the Policy terms. In light of this, Plaintiff has established sufficiently that the Todino defendants deliberately chose not to cooperate.

Finally, under the SIR, plaintiff has the right to reimbursement from the Todino defendants. The Court notes that, as the Todino defendants are in default, they have not challenged or in any way raised an argument against their obligation to comply with this portion of the policy. Accordingly, judgment on this issue is warranted.

Declaratory Judgment

Plaintiff further alleges that it is entitled to rescind the Policy due to the Todino defendants' non-cooperation. The insurance contract gives plaintiff the right to rescind the contract for non-cooperation. The non-cooperation has been sufficiently substantiated to justify rescission. As the Court grants plaintiff's other requests for relief, it need not address plaintiff's alternative request for injunctive relief.

Based on the above, therefore it is

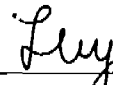
ORDERED that the Plaintiff's motion for default ~~judgment~~ judgment is granted with regard to liability and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against the Todino defendants in the sum of \$210,509.09 with interest at the statutory rate from May 12, 2009, the date of the Complaint, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk upon the presentation of a Bill of Costs; and it is further

ORDERED AND DECLARED that plaintiff may rescind its insurance agreement with the Todino defendants; and it is further

ORDERED that the remainder of the action, against the remaining defendants, shall continue.

Dated: 10/7/10
OCT. 07, 2010

ENTER:



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).