

**Arizona Premium Fin. Co., Inc. v Hudson Ins. Co.**

2011 NY Slip Op 30027(U)

January 5, 2011

Supreme Court, New York County

Docket Number: 107618

Judge: Judith J. Gische

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

PRESENT: Gischo  
Justice

PART 10

Arizona Premium

INDEX NO. 107618/08

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

- v -

MOTION SEQ. NO. 84

Hudson Insurance

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Vacate Judgment  
J. J. Smead

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JAN 07 2011

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**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 1/05/11

J. J. Smead  
HON. JUDITH J. GISCHÉ J.S.C.

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: PART 10

-----x  
Arizona Premium Finance Co., Inc.

Plaintiff,

-against-

Hudson Insurance Company,

Defendant.  
-----x

**DECISION/ORDER**

Index No.: 107618

Seq. No. : 003

**PRESENT:**

Hon. Judith J. Gische

J.S.C.

**FILED**

JAN 07 2011

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

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<b>Papers</b> .....	<b>Numbered</b>
Hudson's OSC w/LNAP affirm, DD affid, exhs .....	1
Arizona's opp w/ SFL, GB affids, exh .....	2
Prior motion w/exhs .....	3

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

This is defendant's motion to vacate the court decision awarding plaintiff summary judgment on default (Order, Gische J., 9/9/10). Defendant contends it has excusable default and a meritorious defense which the court should now consider by reopening the default and letting defendants oppose the summary judgment motion on the merits (CPLR 5015). Plaintiff opposes the motion, arguing that neither standard has been satisfied by the defendant and that, in any event, the court would reach the same conclusion even if defendant is allowed to oppose the prior motion.

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of action or defense (CPLR § 5015 [a] [1]). What constitutes a reasonable excuse for

default lies within the sound discretion of the trial court (Incorporated Village of Hempstead v. Jablonsky, 283 AD2d 553 [2d Dept 2001]).

In deciding the underlying motion, the court observed that it had been adjourned on consent several times for defendant to interpose opposition to the motion. Notwithstanding those adjournments, the motion was submitted to the court without any opposition. Counsel for defendant ("Palmer") states that he "mis-calendered" the motion and by the time he discovered this, the motion had been marked fully submitted (July 2010) on default. Once he became aware the motion was sub judice, no action was taken to open up the default. Palmer confirmed that the court has not yet issued a decision.

It was only after counsel received a copy of the court's decision, directing entry of a money judgment against defendant, that Palmer brought this motion to vacate the judgment obtained by the plaintiff.

Under certain circumstances, law office failure provides a reasonable excuse for why a party defaulted in an action (see Goldman v. Cotter, 10 AD3d 289 [1<sup>st</sup> Dept 2004]). Here, however, a strategic decision was made to take no action until after defendant learned what the court's decision on the motion was. Without excusable default, there is no basis to set aside the court's decision in favor of plaintiff (Cohen v. TLC Women's Services, Inc., 157 A.D.2d 764 [2<sup>nd</sup> Dept 1990]).

Even were the persuaded that defendant's default was unintentional, defendant has not shown a meritorious defense. On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence, in admissible form, to eliminate any material issues of fact

\* 4]

from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). This legal standard applies, even if the motion for summary judgment is without opposition (i.e. on default).

On the underlying motion, plaintiff proved its entitlement to summary judgment, as a matter of law by establishing that plaintiff, an insurance premium finance company, had entered into loan agreements with certain borrowers to finance insurance policies underwritten by the defendant. Plaintiff also proved that it maintained an interest in unearned premiums. Thus, if a borrower defaulted in repaying the loan, plaintiff could (and did) cancel the defaulting borrower's insurance policy with defendant. Under the loan agreements, plaintiff was entitled to a return of the unearned premiums due under the policy.

Defendant contends that any premiums it kept after the policies were canceled were earned, not unearned, and since defendant had no contractual privity with plaintiff, defendant had the right to keep those premiums.

Insurance Law § 3428 provides that:

"Whenever an insurance contract, issued by or on behalf of an authorized insurer or insurers, the premiums for which are advanced under a premium finance agreement as defined in section five hundred fifty-four of the banking law, is cancelled, upon such cancellation the authorized insurer or insurers shall return the gross unearned premiums due under the insurance contract or contracts, on a pro rata basis to the bank, lending institution, premium finance agency or premium finance company, for the benefit of the

insured, provided, however, that such authorized insurer or insurers shall be entitled to retain a minimum earned premium on the policy of ten percent of the gross premium or sixty dollars, whichever is greater."

Defendant does not address these statutes at all, but only concludes that it is owed money and since it is owed money, it can retain the premiums.

Such conclusory statements do not present a meritorious defense that would have defeated plaintiff's motion for summary judgment, or at least presented triable issues of fact. Therefore, absent a meritorious defense, there is no reason for the court to reopen the default judgment against defendant to allow them an opportunity to oppose plaintiff's motion for summary judgment on the merits.

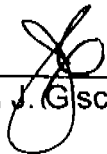
Having failed to present an excusable default and a meritorious defense, defendant's motion for an order vacating the judgment entered against it on default is DENIED. The money judgment entered September 9, 2010 is in effect and fully enforceable by the plaintiffs. The temporary restraint on plaintiff taking any action to enforce that judgment is vacated forthwith.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 5, 2011

So Ordered:

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

**FILED**

JAN 07 2011

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COUNTY CLERK'S OFFICE

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