

Liberty Mutual Ins. Co. v Fiduciary Ins. Co. of Am.

2012 NY Slip Op 33714(U)

July 24, 2012

Supreme Court, Nassau County

Docket Number: 3853/11

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

- against -

FIDUCIARY INSURANCE COMPANY OF AMERICA,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 3853/11
Motion Seq. No.: 02
Motion Date: 05/31/12
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The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause, Affirmation Law and Exhibits</u>	1
<u>Affirmation in Opposition and Exhibits</u>	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 5015(a)(1), for an order vacating the default judgment that was entered against it on August 8, 2011, and releasing funds held on levy back to defendant's bank account. Plaintiff opposes the motion.

Defendant's counsel submits that, on June 25, 2010, defendant filed an Arbitration Claim against plaintiff pertaining to an October 23, 2009 accident. Plaintiff paid eighty percent (80%) of the claim to defendant and defendant withdrew the Arbitration Claim. *See* Defendant's Affirmation in Support Exhibit 2. Plaintiff had filed a cross-claim against defendant pertaining to the October 23, 2009 accident. Defendant paid plaintiff twenty percent (20%) of its claim, but

plaintiff neglected with withdraw said claim. *See* Defendant's Affirmation in Support Exhibit 3. Defendant contends that it inadvertently did not obtain settlement documents from plaintiff, but that plaintiff cashed defendant's settlement check for the agreed amount. Plaintiffs then went and obtained a default judgment against defendant. *See* Defendant's Affirmation in Support Exhibit 1.

Defendant's counsel argues that plaintiff violated the terms of its oral agreement with defendant and obtained a default judgment against defendant almost two years after plaintiff cashed the settlement check.

In opposition to defendant's motion, plaintiff argues, "[t]he defendant in this case is presented with a significant burden since there are technically two defaults that need to be explained with a reasonable excuse. The first default pertains to the Defendant's failure to serve responding contentions to the Plaintiff's Demand for Arbitration or to appear at the Arbitration Forums, Inc arbitration hearing of October 25, 2010. The end result was an arbitration award in Plaintiff's favor that was published on October 25, 2010 by Arbitration Forums, Inc. and also forwarded to Defendant on January 12, 2011....The vacating or modifying of an arbitration award falls within the confines of CPLR § 7511 and requires and application to be filed within ninety (90) days of the award being delivered. Since the award was published on October 25, 2010 and served upon Defendant on January 12, 2011 the Defendant is now outside the permissible period to move and is not permitted to vacate or modify the award....The second default is also problematic for the Defendant in that it was intentional. As stated above at paragraph 14, the Defendant was given notice of the Court Conference addressing the Plaintiff's petition to confirm the arbitration award and they affirmatively chose not to oppose the petition or attend the court

conference. Defendant then did nothing to address their default until the Sheriff's placed a levy on one of FICA's bank accounts. The conduct of being aware of a default judgment and taking no action to address it until your account is frozen renders the default intentional and not excusable....Hence, the Defendant's default can be considered to be intentional on multiple levels. Compounding the above is the fact that the Defendant's papers fail to articulate a reasonable excuse for ignoring the arbitration case or the petition to confirm the arbitration award. Defendant relies upon the inadmissible affirmation of counsel to state that FICA paid 20% of the Plaintiff's claim, failed to obtain settlement documents and Plaintiff neglected to withdraw their claim and leaves up to the court to construe an excuse." See Plaintiff's Affirmation in Support Exhibits A, B, C and D.

Relief under CPLR § 5015(a) is available where a party can demonstrate a reasonable excuse for the default *and* a showing of a meritorious cause of action/defense (emphasis added). See *Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998). The requirements are not alternative requirements and both requirements must be met in order to vacate the default judgment.

The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. See *Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

When viewing the moving papers in their best light, the Court finds that defendant has

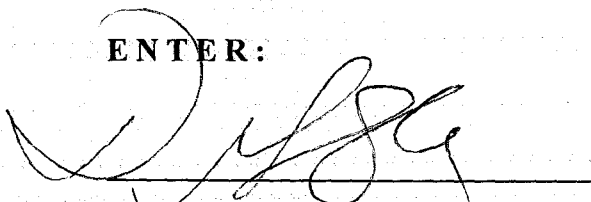
failed to demonstrate a reasonable excuse for the default and a meritorious cause of action.

Accordingly, defendant's motion, pursuant to CPLR § 5015(a)(1), for an order vacating the default judgment that was entered against it on August 8, 2011, and releasing funds held on levy back to defendant's bank account is hereby **DENIED**. And it is further

ORDERED that the stay of enforcement of the subject judgment is hereby lifted.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

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Dated: Mineola, New York
July 24, 2012

ENTERED

JUL 26 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE