

**National Union Fire Ins. Co. of Pittsburgh, P.A. v
Curtis**

2014 NY Slip Op 33364(U)

December 22, 2014

Supreme Court, New York County

Docket Number: 651692/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Plaintiff,

- v -

Defendant.

W. ROBERT CURTIS,

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
651692/2014

**DECISION
and ORDER**

Mot. Seq. 001

In this action, plaintiff, National Union Fire Insurance Co. of Pittsburg, P.A. (“National Union”) seeks declaratory relief concerning the rights and duties of the parties under property and liability insurance package Policy No. BBA-015528011, issued by National Union for defendant, W. Robert Curtis (“Curtis”), for the policy period from December 6, 2010 to December 6, 2013 (“the Policy”) which respect to the lawsuit captioned *David Bouley v. W. Robert Curtis*, pending in the Supreme Court of the State of New York, County of New York, Index No. 151822/2012 (“the Bouley Action”). In the Bouley Action, Bouley alleges that Curtis made defamatory comments against Bouley in a complaint filed by Bouley, pending in the Supreme Court of Supreme Court of the State of New York, County of New York, Index No. 104558/2011 (“the Curtis Action”). In this pending action, National Union contends that despite its efforts to provide Curtis with a defense in the Bouley Action, Curtis has failed to cooperate with National Union by refusing to consent to National Union’s appointed defense counsel and cooperate with counsel, whether selected by him or appointed by National Union on his behalf. Accordingly, National Union seeks a declaration that it has no obligation to defend or indemnify Curtis in connection with the Bouley Action based upon Curtis’ material breach of his obligations under the Policy, including his duty of cooperation, as well as National Union’s right to defend the action under the Policy.

By Notice of Motion e-filed on August 20, 2014, National Union moves, pursuant to CPLR §3215(a), for an order directing the entry of default judgment in

National Union's favor and against Curtis. National Union submits the attorney affirmation of Lawrence Klein and the Affidavit of Facts of Marisa C. DeVito, a Senior Analyst at AIG Claims, the claims administrator for National Union.

DeVito avers that Curtis provided notice of the Bouley Action to National Union on or about June 1, 2012. By letter dated July 10, 2012, National Union advised Curtis that it was reserving its rights under the Policy but that it would provide him with a defense. National Union gave Curtis the option of either selecting counsel of his choice or accepting an attorney appointed by National Union. Curtis chose to select an attorney of his choice, but on or about December 6, 2012, that attorney filed a motion to withdraw. By decision dated December 18, 2012, the Court granted the motion to withdraw and Curtis entered an appearance and began representing himself pro se. National Union consented to the appointment of Curtis' selected attorney, David Aronstam, who entered an appearance in the Bouley Action on September 18, 2013. Curtis thereafter advised National Union that Mr. Aronstam could not devote sufficient time to provide him with an adequate defense, and Curtis had hired multiple attorneys to work on the case and he had assumed the role of defense counsel. By letter dated April 11, 2014, National Union advised that it had retained new defense counsel to represent him. Curtis refused the retained counsel's request to meet and to consent to his substitution as defense counsel. On April 25, 2014, Mr. Aronstam filed a motion to be relieved as defense counsel. Mr. Aronstam denied that he had stated that he had limited time to work on the defense and stated that Curtis had "deliberately excluded" him from a meeting on April 1, 2014 with National Union and its counsel. Mr. Aronstam's motion was granted on April 29, 2014. By letters dated May 23, 2014 and May 30, 2014, National Union advised Curtis that it did not approve of him assuming the role of defense attorney and allowed him to select from a list of three attorneys who had confirmed that they were able to serve as defense counsel. Curtis failed to retain any of the attorneys that had been listed in National Union's May 23, 2014 letter or contact to them. On June 2, 2014, Curtis appeared pro se in the Bouley Action. On June 3, 2014, National Union commenced this action by filing its Summons and Complaint.

As set forth in Klein's affirmation, this action was commenced by National Union on June 3, 2014, by filing a Summons and Complaint. Personal service of the Summons and Complaint was made upon Curtis on June 9, 2014. On June 25, 2014, Curtis requested a two week extension to answer the Complaint. National Union consented to the extension and provided Curtis with a stipulation extending the time. On July 10, 2014, Curtis requested a further extension until August 4, 2014 to answer the Complaint. National Union consented, but advised Curtis that it would not

consent to any further extension. On August 4, 2014, Curtis requested until August 8, 2014 to answer National Union's Complaint. On August 8, 2014, Curtis advised National Union that he was "working on the answer." By Notice dated August 11, 2014, National Union advised Curtis that Curtis was in default. On August 18, 2014, Curtis filed an affirmation requesting a 30 day adjournment to answer, counterclaim, and implead another party. On August 20, 2014, National Union filed the pending motion for default judgment.

On September 10, 2014, Curtis filed an affirmation seeking a six week adjournment to file an answer, counterclaim, and third party action. The referee in the Motion Support Office granted Curtis a three week adjournment, giving him until October 2, 2014 to file his opposition papers to National Union's motion.

On October 5, 2014, Curtis filed opposition to National Union's motion and argues that his default should be excused pursuant to CPLR §§2005 and 3012. Curtis claim he has a meritorious defense to National Union's claim. Curtis claims that he is entitled to independent counsel due to a conflict of interest with National Union's attorneys and that National Union rejected Curtis' "independent litigation plan in favor of its own plan to immediately settle the defamation case." Curtis further contends that his delay in serving the answer is excusable because he is a solo practitioner without employees and is handling seven other matters. As such, Curtis claims "law office failure" and "impossibility". Annexed as an Exhibit to Curtis' motion is a draft of a "Third Party Complaint Seeking Declaratory Judgment with Answer and Counterclaims." Certain sections, including the section identified as "Factual Allegations" is blank.

On October 15, 2014, National Union submitted a reply.

On October 16, 2014, National Union's motion was marked fully submitted.

On November 9, 2014, Curtis e-filed an "Answer with Counterclaims." On November 10, 2014, National Union, pursuant to CPLR 2101(f), served Curtis with a Statement of Objection rejecting his newly filed Answer and Counterclaim as untimely.

Pursuant to CPLR §3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In order to be permitted to serve an untimely answer as timely, Defendant must provide both a reasonable excuse for the delay and demonstrate

potentially meritorious defenses to the action. *Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dept 2008].

Pursuant to CPLR §2005, “Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.”

Here, albeit late, Curtis has now filed an Answer. National Union’s motion for default judgment is denied.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for default judgment against Defendant is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 22, 2014



EILEEN A. RAKOWER, J.S.C.