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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ZELJKO SARIC,

Plaintiff,

-against-

BAYROCK/SAPIR ORGANIZATION, LLC, BOVIS LEND LEASE LMB, INC., SAPIR ORGANIZATION SPRING STREET, LLC, BAYROCK GROUP, LLC, TRUMP ORGANIZATION, LLC, PERRY COHEN CARPENTRY CORP., F & I TRUCKING CORP., GREEN BALL LEASING CORP., and PATTERSON WOODWORKING, INC.,

Defendants.

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Index No.: 150009/2011

Motion Seq. Nos. 006 and 007

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries: (1) defendant F & I Trucking Corp. ("F & I") moves pursuant to CPLR 3221 (motion sequence no. 006) to reargue and renew its motion to vacate the default judgment entered against it on or about April 2, 2013; and (2) plaintiff Zeljko Saric ("plaintiff") cross-moves for an order: (a) denying F & I's motion or, in the alternative, (b) pursuant to 22 NYCRR 130-1.1[a] and CPLR § 8303-a, sanctioning F & I's counsel for wasteful and frivolous conduct, and (c) pursuant to Rules of Professional Conduct 1.7 and 1.8, disqualifying Lawrence and Walsh, P.C. as counsel for both F & I and Green Ball Leasing Corp. ("Green Ball").

Defendants F & I and Green Ball move pursuant to CPLR 3215 (motion sequence no. 007) for default judgment as to their cross-claims regarding contribution and indemnification against co-defendant Patterson Woodworking, Inc. ("Patterson").[1]

[1] Motions bearing sequence nos. 006 and 007 are consolidated for joint disposition and decided herein.

Factual Background

The facts set forth below are undisputed.

Plaintiff alleges that on or about May 26, 2009, he sustained personal injuries due to defendants' negligence while unloading a truck at a job site located at 246 Spring Street in Manhattan. Plaintiff served the initial complaint in this matter on or about January 14, 2011. Thereafter, on or about March 16, 2011, plaintiff served all parties (except Green Ball and Patterson, who had not yet been named as defendants at that time) with a first amended complaint.

In June 2011, plaintiff and defendants Bayrock/Sapir Organization, LLC, Bovis Lend Lease LMB, Inc., Sapir Organization Spring Street, LLC, Bayrock Group, LLC, and Trump Organization, LLC obtained a default judgment against F & I as to liability, due to F & I's failure to answer the first amended complaint.

In December 2011, F & I retained Lawrence and Walsh, P.C. as counsel and appeared in the action in February 2012.

On or about March 16, 2012, plaintiff served all defendants with a "second amended verified complaint," adding Green Ball and Patterson as defendants. All parties except Patterson answered. Lawrence and Walsh, P.C. answered on behalf of F & I (despite being in default) and Green Ball.

In July 2012, plaintiff obtained a default judgment against Patterson as to liability. To date, Patterson has not appeared or responded to any of the pleadings directed toward it.

In response to plaintiff's motion made in November 2012 to strike all the defendants' answers and/or to compel discovery, F & I cross moved to vacate the default judgment against it.

The court denied F & I's cross-motion for failure to establish a reasonable excuse.[2]

F & I and Green Ball's two instant motions ensued.

F & I's Motion to Renew and Reargue its Motion to Vacate the Default Judgment

F & I claims that its original motion to vacate was necessitated by a "Catch-22" scenario in which F & I's insurance carrier refused to indemnify it unless plaintiff's counsel agreed to withdraw its default judgment, but simultaneously, plaintiff's counsel agreed to vacate the judgment only if the carrier first agreed to indemnify F & I without reservation.

With respect to reargument, F & I contends that the court should vacate the default because F & I filed a timely answer to plaintiff's second amended complaint, which occurred after the default judgment was entered. Service of the second amended complaint superseded the first amended complaint and therefore became the only complaint upon which a default judgment may be taken.

With respect to renewal, F & I argues that subsequent to the court's denial of the cross-motion, F & I, its carrier and plaintiff engaged in further negotiations regarding the default, but plaintiff would only agree to vacate the default if the carrier would agree to liability greater than that provided by the policy. However, because F & I's carrier has agreed to indemnify F & I without reservation, the default should be vacated.

Plaintiff's Cross-Motion/Opposition

Plaintiff argues, *inter alia*, that the addition of Patterson to the caption *via* the second

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[2] F & I filed a notice of appeal. In its pre-argument statement, F & I argued that the second amended complaint superseded the first amended complaint, thus becoming the only complaint upon which a default judgment could be taken. As F & I served a timely answer to the second amended complaint, it is no longer in default. F & I's appeal has yet to be perfected.

amended complaint did not render F & I's default a nullity. The cases F & I cites do not support the conclusion that service of an amended complaint acts to vacate a prior default.

F & I's motion cannot be considered as one for renewal, because F & I failed to offer new facts and reasonable justification for the failure to present such facts in the prior motion. Here, plaintiff argues that the purported "new" fact of plaintiff's offer to accept a late answer upon certain conditions is ineffective because the offer expired and/or was rejected.

Plaintiff maintains that F & I's motion for reargument is untimely pursuant to CPLR 2221(d)(3), because it was not made within 30 days after May 22, 2013, the date on which plaintiff served the order with written notice of entry.

Plaintiff reiterates his position that F & I failed to offer any excuse for its default. As to sanctions, plaintiff argues that because nothing has changed since the original motion to vacate, the instant motion is frivolous.

Plaintiff further argues that Lawrence and Walsh, P.C., should be disqualified due to a conflict between its clients F & I and Green Ball. Plaintiff claims that, although some of the parties have asserted that F & I owned the truck that was involved in the alleged incident, counsel for F & I and Green Ball asserted that it is actually Green Ball that owned the truck. According to plaintiff, this assertion creates a conflict which ethically prohibits counsel from exchanging either of its clients' inculpatory or exculpatory documentation, because doing so would implicate either or both of its clients. Plaintiff further contends that any waiver by its clients would be invalid due to the potential for irreconcilable conflict; thus, disqualification is warranted. Plaintiff contends that he has standing to make the application on the grounds that an adverse party may move to disqualify an attorney for an adversarial party if a conflict exists.

In opposition to plaintiff's cross-motion and in further support of its own motion, F & I argues that the cross-motion is untimely, and that its application for reargument is timely because F & I never received the court's order denying the original motion to vacate with notice of entry, and that plaintiff's affidavit of service regarding the notice of entry is incredible. F & I further claims that new facts warrant renewal, as F & I's carrier is willing to indemnify F & I without reservation if the default is vacated.

F & I argues that the demand for sanctions is inappropriate because its motion is meritorious. As to disqualification, F & I argues that plaintiff's application is based mainly on personal *animus*, and that the request for disqualification would become moot if the default is vacated, because the case would be transferred to another law firm.

F & I and Green Ball's Motion for a Default Judgment Against Patterson

F & I and Green Ball allege that they served Patterson with their answer to the second amended complaint and cross-claims on or about April 25, 2012, but have not received an answer and/or reply to same. They further argue that plaintiff swore in a June 6, 2012 affidavit that he was injured solely due to Patterson's actions and/or inactions.

Plaintiff, the only party that opposes the motion, argues that F & I and Green Ball should be precluded from obtaining a default judgment because, pursuant to CPLR 3215, a default judgment must be taken within one year after the default (which occurred here in May 2012). F & I also cannot move for default because F & I itself is in default, and thus its answer and cross-claims are nullities.

In reply, F & I and Green Ball argue that plaintiff lacks standing to oppose their motion. They offer that the reason the motion was made more than a year after Patterson's default is

because they had only recently been able to confirm that the court had personal jurisdiction to enter a default judgment against Patterson.

Discussion

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR 2221(e)). A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*Rubinstein v. Goldman*, 225 AD2d 328, 638 NYS2d 469 [1st Dept 1996]).

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and shall be made within 30 days after service of the order determining the prior motion and written notice of entry (CPLR 2221(d)).

A combined motion for leave to renew and leave to reargue shall identify separately and support separately each item of relief sought. The court, in determining a combined motion...shall decide each part of the motion as if it were separately made (CPLR 2221(f)).

F & I's motion to renew fails because it does not present new facts[3] which establish that it had a reasonable excuse for its default. F & I's purported new fact is that its carrier agreed in writing to indemnify F & I without reservation of rights. However, in actuality, this "agreement" was merely an offer contingent upon the default judgment being vacated, whether by stipulation

[3] F & I does not claim that the "change in the law" prong of CPLR 2221(e) is applicable in this motion.

of the parties or by court order. In response to F & I's offer, plaintiff proposed additional terms for F & I's carrier regarding coverage and reservation of rights. F & I rejected the counteroffer and no agreement was reached.

As plaintiff correctly argues, the facts relevant to the original motion to vacate have not changed. A breakdown in negotiations, which returned the parties back to the *status quo*, is not a "new fact" that establishes reasonable excuse. Thus, the request for leave to renew is denied.

Further, the motion for reargument is denied on the grounds that is untimely.

A motion for reargument must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry (CPLR 2221(d)(3)). This 30-day period was triggered on May 22, 2013 by plaintiff's service of the original order with notice of entry. The instant motion was made on or about December 31, 2013, well after the 30 day deadline expired. Thus, the motion is untimely.

F & I's claim that it never received a notice of entry of the original order is unpersuasive. Plaintiff attached a copy of the affidavit of service regarding the notice of entry in the cross-motion/opposition. In reply, F & I argues only that the affidavit is "dubious at best," because the purported affidavit of service was not e-filed, and the e-file record shows that plaintiff routinely e-filed the notice of entry related to other orders in the action. This conclusion is speculative, and does not address the fact that in the affidavit, counsel averred that he served the order with notice of entry *via mail*.

In any event, even assuming that: (a) the motion to reargue is timely, and (b) the court exercises its discretion to consider an untimely motion to reargue (*see Onglingswan v. Chase Home Finance, LLC*, 104 AD#D 543, 961 NYS2d 149 [1st Dept 2013]; *Garcia v. Jesuits of*

Fordham, Inc., 6 AD3d 163, 774 NYS2d 503 [1st Dept 2004]), vacatur of the default judgment against F & I is unwarranted.

At the outset, the court finds that none of the cases cited in F & I's moving papers stands for the proposition that the filing of an amended complaint automatically renders a previously entered default judgment a nullity.

Further, the "second amended complaint" is, in actuality, a supplemental complaint which does not serve to render the first amended complaint and default judgment against F & I (based on the first amended complaint) a nullity. It is well-settled that there are distinctions between amended and supplemental pleadings. Supplemental pleadings seek to add to the pleading some fact, claim or matter that only came into being, *or into the pleader's knowledge*, after the original pleading was served (*see* CPLR 3025; *Fisher v. Bullock*, 204 AD 523, 198 NYS 538 [4th Dept 1923]; *Long Island Pine Barrens Soc., Inc. v. Town of Brookhaven Town Bd.*, 2011 WL 303855 [Sup. Ct. Suffolk Cty. 2011]; *Rummell v. Blanchard*, 173 AD 695, 160 NYS 235 [1st Dept 1916]; *Horowitz v. Goodman*, 112 AD 13, 98 NYS 53 [1st Dept 1906] (emphasis added)).

In contrast, an amendment seeks to make a change in a pleading (*see* CPLR 3025[b]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3025:9; *Lovisa Const. Co., Inc. v. Facilities Development Corp.*, 148 AD2d 913, 539 NYS2d 541 [3d Dept 1989]). Typical examples of amendments to pleadings include when new injuries and new categories of damages are added to the pleading (*see Mendrzycki v. Cricchio,* 58 AD3d 171, 868 NYS2d 107 [2d Dept 2008]; *Fuentes v. City of New York*, 3 AD3d 549, 771 NYS2d 178 [2d Dept 2004]).

Courts have considered the addition of a new party to the caption to constitute a

supplement to the complaint (*see Jones v. 414 Equities LLC*, 57 AD3d 65, 80-81, 866 NYS2d 165 [1st Dept 2008]; *Citidress II v. 207 Second Ave. Realty Corp.*, 21 AD3d 774, 802 NYS2d 393 [1st Dept 2005]; *see also Gindi v. Intertrade Intern. Ltd.*, 12 Misc.3d 1182(A), * 6, 824 NYS2d 762 [Sup. Ct. New York Cty. 2006] (purported amended complaint constituted a supplemental pleading, as the new pleading served only to alter the names listed on the caption); *Peterson v. JJ Real Estate, Inc.*, 2009 WL 8642025 [Sup. Ct. Kings Cty. 2009] (new complaint in which plaintiffs merely revised the caption and neither asserted new injuries, nor a new category of damages, deemed a supplemental complaint which did not supersede the original)).

A supplemental complaint, unlike an amended complaint, does not supersede the original. Accordingly, in cases where the defendant answered the original complaint, and the plaintiff later files a supplemental complaint, the original answer continues to remain in effect (*see Mendrzycki v. Cricchio*, 58 AD3d 171, 868 NYS2d 107 [2d Dept 2008]; *Stella v. Stella*, 92 AD2d 589, 459 NYS2d 478 [2d Dept 1983]; *Peterson*, 2009 WL 8642025, *supra*).

Here, the "second amended complaint" is, in reality, a supplemental complaint --- especially as to F & I -- because the only difference between it and the first amended complaint is the addition of Patterson and Green Ball as defendants. Critically, the allegations as to F & I in both pleadings are identical.

Accordingly, F & I's argument fails. Had F & I served a timely answer to the first amended complaint, that answer would have remained in effect following service of the "second amended complaint," and would not have been rendered a nullity by such subsequent service. In the same way, the default judgment entered *apropos* of the first amended complaint was not disturbed by the filing of plaintiff's later pleading, and remains in effect.

The court also notes that the default judgment has been thoroughly litigated, both in plaintiff's motion for a default judgment and in the original cross-motion to vacate, and there is no basis to disturb this Court's previous finding that F & I failed to establish a reasonable excuse for default. Thus, upon reargument, the Court adheres to its earlier determination to deny vacatur of the default entered against F & I.

As to plaintiff's cross-motion, said cross-motion is untimely, as it was served one day before the return date of F & I's motion. Pursuant to CPLR 2214(b), a notice of motion must be served at least eight days before the return date. CPLR 2215 provides that a notice of cross-motion must be served at least three days before the return date of the original motion, which plaintiff failed to do.

Nonetheless, although the cross-motion is untimely, F & I was not prejudiced, as it was able to submit opposition to the cross-motion/reply in support of its motion, and plaintiff did not submit further papers in reply (*see Edwards v. Devine*, 111 AD3d 1370, 975 NYS2d 277, 278 [4th Dept 2013] ("contrary to defendants' contention, the court did not abuse its discretion in considering the papers submitted by plaintiff in opposition to the motion even though they were not timely served...defendants were not prejudiced by the late service inasmuch as they were able to submit a reply affidavit"); *see also Einheber v. Miller,* 2006 WL 7126735 [Sup. Ct. New York Cty. 2006]). Thus, the court will consider the branches of the cross-motion seeking sanctions and disqualification.[4]

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[4] The branch of plaintiff's cross-motion seeking denial of F & I's motion is deemed as opposition to the motion (*see Saideman v. Fortwest H, LLC*, 2012 WL 9321557, * 2 [Sup. Ct. New York Cty. 2012] ("[T]here is no such thing as a motion to deny a motion. The proper course is to oppose a motion. Accordingly, the cross-motion has been considered herein as opposition to the cross-motion by [the defendant]")). As detailed *supra*, F & I's motion to renew and/or reargue is denied.

Plaintiff's request for sanctions is denied. Despite denying F & I's motion to renew and/or reargue, the court finds that F & I had reasonable grounds to make its motion, and as such, its conduct was not frivolous so as to warrant sanctions (*see* 22 NYRCC 130-1.1[a]; *In Re Matseoane*, 110 AD3d 607, 974 NYS2d 357 [1st Dept 2013]).

As to disqualification, a party seeking disqualification of counsel must show there was an attorney-client relationship in the underlying matter or former matter, that the matters are substantially related and that the interests of the present client and the client in the underlying matter are materially adverse (*Jamaica Pub. Serv. Co. Ltd. v. AIU Ins. Co.*, 92 NY2d 631, 636 [1998]). Where there is a conflict of representation, doubts as to the existence of a conflict are to are to be resolved in favor of disqualification (*Lammers v. Lammers*, 205 AD2d 432, 613 NYS2d 906 [1st Dept 1994]). An attorney may not place himself in a position where a conflict interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship (*see Roddy v. Nederlander Producing Co. of America, Inc.*, 96 AD3d 509, 949 NYS2d 10 [1st Dept 2012]).

The potential for a conflict exists in joint representation of parties when each defendant has a competing interest in minimizing its proportional share of the damages (*see Roddy*, 96 AD3d at 509-510).

"An attorney 'may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship' . . . and 'doubts as to the existence of a conflict of interest must be resolved in favor of disqualification'" (*Roddy v. Nederlander Producing Co. of America, Inc.*, 96 AD3d 509, 949 NYS2d 10 [1st Dept 2012] (internal citations omitted)). Although parties are permitted to waive

potential conflicts of representation under certain conditions, parties whose pecuniary interests are in conflict with one another may not be represented by the same counsel under any circumstances, as such conflict is "irreconcilable" in the professional allegiance of counsel and cannot be waived (*see Alcantara v. Mendez*, 303 AD2d 337, 388, 756 NYS2d 90 [2d Dept 2003]; *Big Brows LLC v. Devitt*, 32 Misc 3d 1231(A), 936 NYS2d 57 [Sup. Ct. Kings Cty. 2011].

In the present case, plaintiff seeks to disqualify Lawrence and Walsh, P.C. as counsel to F & I and Green Ball.[5]

The question of whether plaintiff has standing to move for disqualification is irrelevant, as the court has the authority to act *sua sponte* to disqualify counsel if it finds a conflict of interest warranting counsel's disqualification (*see Flushing Sav. Bank v. FSB Properties, Inc.*, 105 AD2d 829, 482 NYS2d 29 [2d Dept 1984]; *Zambrotta v. 2935 Equities LLC*, 37 Misc3d 1208(A), 961 NYS2d 362 [Sup. Ct. Kings Cty. 2012]; *Marinozzi v. Saunders*, 37 Misc3d 1225(A), 964 NYS2d 60 [Sup. Ct. Orange Cty. 2012]; *see also Woodson v. Mendon Leasing Corp.*, 253 AD2d 669, 677 NYS2d 568 [1st Dept 1998] (granting plaintiffs' motion to disqualify truck lessor defendant's counsel, who previously represented truck driver involved in plaintiff's accident)). Accordingly, while the motion is directed at prior counsel, the court is inclined to evaluate whether MHMS may carry on with its representation of F & I and Green Ball.

In F & I's original motion to vacate, counsel asserted that Green Ball, and not F & I, owned the truck that was involved in the alleged incident. Further, F & I furnished the vehicle registration information for the purported Green Ball truck to plaintiff. In effect, counsel argued

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[5] The court notes that, as per the NYS E-filing system, Lawrence and Walsh, P.C., was substituted out as counsel earlier this month and replaced by one law firm, Montfort, Healy, McGuire & Salley LLP ("MHMS"), which assumed the representation of both F & I and Green Ball.

that his client F & I should not be liable despite the default because *his other client* (which plaintiff does not have a default judgment against) may be liable.

This is precisely the kind of "irreconcilable" conflict involving pecuniary interests described above. Because F & I can only litigate damages at this juncture, its attempt to deflect liability onto Green Ball in this regard cannot be considered anything but a play to reduce the potential damages it may ultimately owe to plaintiff. It is of no concern that F & I and Green Ball appear to be affiliated to some degree and may feature an overlap in management; the controlling fact here is that the parties' pecuniary interests are clearly in conflict.

Since F & I and Green Ball fail to rebut this showing in reply, and because the conflict cannot be waived by the parties, MHMS is disqualified as counsel and may not represent either party going forward. Thus, this matter is stayed for 30 days to permit F & I and Green Ball to each obtain new, separate counsel.

As to F & I and Green Ball's motion for a default judgment against Patterson, F & I and Green Ball formally asserted two cross-claims; one sounding in contribution and common-law indemnification, and the other in contractual indemnification.[6]

"CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action" (*Joosten v. Gale*, 129 AD2d 531, 514 NYS2d 729 [1st Dept 1987] *citing* 4 Weinstein, Korn and Miller, New York Civil Practice, ¶¶ 3215:22–27).

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[6] For purposes of this decision, and because pleadings are to be construed liberally, the court evaluates the motion as if F & I and Green Ball are both moving for a default judgment as to the three articulated cross-claims, as delineated above.

Notwithstanding the court's ruling regarding F & I's default, F & I's and Green Ball's motion for a default judgment on their cross-claims for contribution against Patterson is granted on default.

It is undisputed that Green Ball timely answered the "second amended complaint" and asserted its cross-claims with its answer. Further, F & I, though in default, may pursue its cross-claims. A defendant in default has standing to prosecute a cross-claim because the claim, liberally construed, can be viewed as a third-party complaint (*see Guido v. New York Telephone Co.*, 145 AD2d 201, 538 NYS2d 87 [3d Dept 1989]). Also, a default judgment in favor of a plaintiff against a defendant does not preclude the defendant from asserting cross-claims, because the default only entails that the defendant admit the allegations of fault *in the plaintiff's complaint* (*see Vierya v. Briggs and Stratton Corp.*, 184 AD2d 766, 585 NYS2d 468 [2d Dept 1992] (emphasis added)). In a similar vein, a defendant whose answer is stricken as the result of a default must admit all allegations in the complaint regarding liability, but not damages. As such, the portion of a stricken answer containing cross-claims will be left unruffled by a default (*see Cillo v. Resjefal Corp.*, 13 AD3d 292, 787 NYS2d 269 [1st Dept 2004]).

Moreover, the court has discretion to permit entry of a default judgment even when the one-year period provided under CPLR 3215(c) has expired, assuming the party seeking the judgment provides cause as to why his claim should not be dismissed (*see Malik v. Noe*, 54 AD3d 733, 864 NYS2d 82 [2d Dept 2008]; *Charles F. Winson Gems v. D. Gumbiner, Inc.*, 85 AD2d 69, 448 NYS2d 471 [1st Dept 1982]). Here, F & I and Green Ball presented sufficient justification in reply showing that they waited until after the one-year deadline to move for a default judgment, because they had been unable to ascertain whether the court had personal

jurisdiction over Patterson to enter a default judgment against it.

Further, F & I and Green Ball submitted an affidavit of merit by Thomas Cuccurullo ("Cuccurullo"), F & I's president and Green Ball's manager. In the affidavit, Cuccurullo averred that any injury sustained by plaintiff was caused by Patterson and not F & I and/or Green Ball, pointing to plaintiff's affidavit of merit in support of plaintiff's previous motion for a default judgment against Patterson, in which plaintiff alleged that Patterson was responsible for his injuries. As such, F & I's cross-claims against Patterson regarding contribution remain viable, despite F & I's default. While F & I must be deemed to have admitted plaintiff's allegations directed toward it as to liability, it is permitted to litigate damages, and its cross-claim for contribution forms part of this prerogative. It is noted that plaintiff, the sole party in opposition to the motion has expressed no legitimate interest in preventing F & I and/or Green Ball from acquiring a default judgment over Patterson. Plaintiff already has obtained default judgments against F & I and Patterson, and there is no indication why F & I and/or Green Ball's motion for default judgment over Patterson prejudices plaintiff. Thus, since Patterson failed to reply to F & I's and Green Ball's cross-claim claims and an affidavit of merit has been submitted indicating that Patterson is liable to plaintiff, F & I and Green Ball have established their respective entitlements to the requested relief, and the branch of the motion for a default judgment as to contribution in favor of both F & I and Green Ball is granted.

However, the branch of the motion in which F & I and Green Ball seek a default judgment as to common-law indemnification is denied. A party seeking common-law indemnification must establish its freedom from wrongdoing (*see Aiello v. Burns Intern. Sec. Services Corp.*, 11 AD3d 234, 973 NYS2d 88 [1st Dept 2013]; *Richards Plumbing & Heating*

Co., Inc. v. Washington Group Intl., Inc., 59 AD3d 311, 312, 874 NYS2d 410 [1st Dept 2009]).

Pursuant to the court's ruling herein, F & I remains in default, and is therefore deemed to have admitted all allegations in plaintiff's complaint regarding liability. Accordingly, F & I cannot now pursue its cross-claim for common-law indemnification by alleging its nonliability for plaintiff's damages. To allow otherwise would create the problematic and inconsistent scenario in which F & I would be permitted to argue that, vis-à-vis its indemnification claim against Patterson, it is not liable to plaintiff, even though it has already been determined by the default judgment that F & I is liable to plaintiff.

Green Ball's request for default judgment as to common-law indemnification is also denied, because it has not established its freedom from wrongdoing. Green Ball's former counsel represented in F & I's original motion to vacate that Green Ball owned the truck that was involved in plaintiff's alleged incident. This issue is not addressed in Green Ball's moving papers, and therefore this branch of the motion must be denied.

The branches of the motion regarding contractual indemnification are denied as to both F & I and Green Ball. Cuccurullo makes no mention of any agreement between F & I and/or Green Ball providing indemnification, nor is any such agreement set forth in the moving papers.

Conclusion

Based on the foregoing, it is hereby

ORDERED that F & I's motion to renew and/or reargue its motion to vacate the default judgment against it is denied with prejudice; and it is further

ORDERED that the branches of F & I's and Green Ball's motion seeking a default judgment against Patterson as to contribution are granted on default and damages against

defendant Patterson shall be assessed at the time of the trial of the action or disposition of the action against the remaining defendants; and it is further

ORDERED that the branches of F & I's and Green Ball's motion seeking a default judgment against Patterson as to common-law indemnification and/or contractual indemnification are denied; and it is further

ORDERED that the branch of plaintiff's cross-motion seeking sanctions against Lawrence & Walsh, P.C. is denied; and it is further

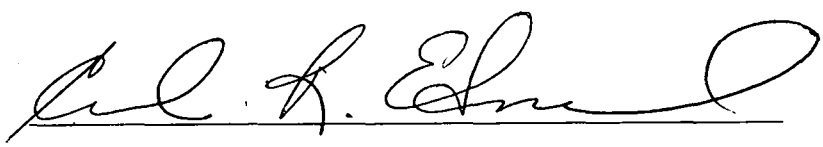
ORDERED that the branch of plaintiff's cross-motion seeking disqualification of counsel for F & I and Green Ball is granted, and MHMS is disqualified as counsel of F & I and Green Ball, and may not represent either party going forward; and it is further

ORDERED that the action is stayed for 30 days to permit F & I and Green Ball may each obtain new, separate counsel; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 4, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD