

Frost v Christiana

2015 NY Slip Op 32007(U)

October 27, 2015

Supreme Court, New York County

Docket Number: 153279/14

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 12

-----X
 DAVID FROST,

Plaintiff,

-against-

Index No. 153279/14

Motion seq. no. 002

DECISION AND ORDER

FRANK CHRISTIANA, DAWN CHRISTIANA, and
 THE LINER SPECIALISTS, INC.,

Defendants.

-----X
 BARBARA JAFFE, J.:

For plaintiff:

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For defendants:

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By order to show cause, defendants move pursuant to CPLR 2221(d) and (e) for an order granting leave to reargue and/or renew my decision and order dated July 15, 2015, by which I denied defendants' cross motion seeking leave to serve a late answer on the ground that they offered an insufficient excuse for their default. (NYSCEF 26). Defendants also move pursuant to CPLR 2201 for an order staying the proceedings. Plaintiff opposes.

I. MOTION TO RENEW

In support of their previous cross motion dated December 1, 2014, defendants claimed that once they were served with the pleadings in this action, they forwarded them to an unnamed insurance representative, an assertion based solely on the affidavit of defendant Frank Christiana. Christiana also contended in his affidavit that he had been assured by the insurance representative that Liberty Mutual Insurance Company was handling the matter. Here too, Christiana offered no

supporting documentation or corroboration. (NYSCEF 20).

Defendants now allege that although their insurance representative had advised that he had forwarded the pleadings to Liberty by email dated April 25, 2014, the pleadings were sent to the wrong department at Liberty Mutual and lost. By affidavit dated August 26, 2015, Paul Luis, defendants' insurance representative, states that on April 22, 2014, the Insurance Exchange received the summons and complaint in this action from Christiana, and that by email dated April 25, 2014, it sent the pleadings to Liberty Mutual. Luis therefore advised Christiana that Liberty Mutual would handle it. (NYSCEF 39).

By affidavit dated August 26, 2015, Kevin M. Reed, a Technical Claims Specialist II at Liberty Mutual, based on his review of the file, explains that Liberty Mutual opened a file on plaintiff's claim on July 30, 2013, began investigating it, and conferred several times with plaintiff's counsel in an attempt to resolve it. Notwithstanding these contacts, plaintiff's counsel never notified Liberty Mutual of his intent to file an action, that he had filed an action, or that he had filed a motion for a default judgment. Liberty Mutual first became aware of the action when it received plaintiff's motion. (*Id.*).

Reed states that because the pleadings had been emailed to the wrong department at Liberty Mutual and never forwarded to the right department, he was not aware of them and thus initially believed that Liberty Mutual had never received them pleadings. It was not until March 31, 2015, when he received a copy of the April 25, 2014 email with the pleadings attached that he became aware of the action. He thus asserts that he was mistaken in initially believing that the pleadings had not been received. (*Id.*).

Notwithstanding the requirement that a motion for leave to renew be supported by,

among other things, “reasonable justification for the failure to present such [new] facts on the prior motion” (CPLR 2221[e] [3]), the standard is flexible and the court, in its discretion, may nonetheless grant renewal “in the interest of justice, absent prejudice to the opposing party resulting from any delay.” (*Hines v New York City Transit Auth.*, 112 AD3d 528 [1st Dept 2013]; *Tishman Constr. Corp. of New York v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]). In justifying their failure to obtain affidavits from Luis and Reed to support their initial motion, defendants state that, “Liberty Mutual maintained the position that it had not received a copy of the underlying Summons and Complaint, which had been attached to the April 25, 2014 e-mail.” (NYSCEF 39). As neither Luis nor Reed rely on Christiana’s representations that he had been assured that the matter was being handled, to the extent that their affidavits establish one or the other’s office failure, they constitute a reasonable excuse. And absent a showing of prejudice to plaintiff or evidence that defendants’ default was willful, this result accords with the strong public policy favoring dispositions on the merits. (*Eg, Marine v Montefiore Health Sys.*, 129 AD3d 428, 429 [1st Dept 2015]).

However, defendants’ unfounded belief that Christiana’s conclusory affidavit was sufficient to obtain leave to file a late answer does not constitute a reasonable justification for failing to substantiate his account at the outset. (*See Matter of Colletti v Schiff*, 98 AD3d 887, 888 [1st Dept 2012] [“On renewal, plaintiff failed to offer reasonable justification for the submission of his expert’s new affidavit, which was apparently responsive to the portion of the motion court’s prior order stating that defendant’s medical evidence was unrefuted.” (internal quotation marks omitted)]). Although defendants do not demonstrate their compliance with CPLR 2221(e)(3), in the interest of justice, renewal is appropriate. (*See Salman v Rosario*, 87

AD3d 482, 482 [1st Dept 2011] [although certain medical information was available to plaintiff and could have been included in original motion, renewal appropriate in interest of justice]).

And while not determinative here, defendants cite no authority for the proposition that plaintiff's counsel had a duty to notify Liberty Mutual of its intent to file an action, a reasonably anticipated consequence of not settling.

II. MOTION TO REARGUE

That the cases cited in my July 15 decision and order are distinguishable on the facts is immaterial as they articulate the prevailing legal standard for motions seeking leave to file a late answer. What defendants fail to address is the conclusory nature of Christiana's affidavit, bare of detail, documentation, or corroboration, and reliant solely on his own statement, based on hearsay, namely, that he was told that Liberty Mutual was handling the case. Defendants also offer no explanation of their inability to obtain Luis's affidavit at the outset.

III. ATTORNEY FEES

In opposition to defendants' motion, plaintiff asks that should defendants prevail on this motion, attorney fees be given him for the motion practice and appearances necessitated by their default. (NYSCEF 44). Given defendants' unexplained failure to provide an affidavit from the Insurance Exchange on their original motion, plaintiff was needlessly obliged to litigate defendants' default a second time. Consequently, he is entitled to an award of fees covering his expenses in preparing opposition to this motion.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order granting them leave to renew is granted, and upon renewal, the court vacates its prior decision and order dated July 15, 2015, and grants

defendants' motion to file a late answer; it is further

ORDERED, that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; it is further

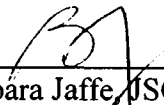
ORDERED, that defendants' motion for an order granting leave to reargue is denied; it is further

ORDERED, that defendants' motion for an order staying the inquest is granted and the order directing an inquest is vacated; it is further

ORDERED, that plaintiff's request for attorney fees is granted to extent of costs and attorney fees for preparing opposition to the instant motion; and it is further

ORDERED, that plaintiff's counsel submit and serve an affidavit setting forth the costs and attorney fees along with any supporting proof such as time sheets.

ENTER:



Barbara Jaffe, JSC

DATED: October 27, 2015
 New York, New York

BARBARA JAFFE
JSC