

**Preferred Contrs. Ins. Co. v 107 Wickapogue  
Constr., LLC**

2019 NY Slip Op 30124(U)

January 14, 2019

Supreme Court, New York County

Docket Number: 155658/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 155658/2017

PREFERRED CONTRACTORS INSURANCE COMPANY, RISK
RETENTION GROUP,

MOTION DATE 12/04/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

107 WICKAPOGUE CONSTRUCTION, LLC, WILIAN ESQUIVEL,
JARED ABRAMS, and LELAND ABRAMS

DECISION AND ORDER

Defendants.

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NYSCEF Doc Nos. 21-26, 30-34, 36-37 and 39 were read on this motion for an order directing the entry of a
default judgment.

Motion by Plaintiff Preferred Contractors Insurance Company, Risk Retention Group ("PCIC")
pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of PCIC
and against defendant 107 Wickapogue Construction, LLC ("Wickapogue") is granted.

BACKGROUND

Defendant Wilian Esquivel ("Esquivel") commenced the underlying negligence action on
December 2, 2015, by e-filing a summons and complaint (index no. 162350/2015 [the
"Underlying Action"]). The complaint alleged that Esquivel was injured on February 26, 2015,
due to the negligence of defendants Jared Abrams and Leland S. Abrams (the "Abrams"). On
June 23, 2016, the Abrams' commenced a third-party action against Wickapogue for
indemnification and contribution. On October 11, 2016, counsel for Esquivel filed a
supplemental summons and amended complaint naming Wickapogue as a direct defendant.

Esquivel alleges in the underlying action, which is assigned to this Court, that the
Abrams' retained Wickapogue to perform certain work and provide certain services as the
general contractor of a project (the "Project") at a building and premises located at 107
Wickapogue Road, Southampton, New York 11968 (the "Premises"), which the Abrams'
allegedly owned/operated/leased/etc. (Underlying Action, NYSCEF Doc No. 16 [Esquivel
Complaint] ¶¶ 8-29.) The Esquivel Complaint further alleges that Wickapogue hired nonparty
M. Laieta Contracting ("Laieta") to perform work at the Premises. (Id. ¶¶ 32.) The Esquivel
Complaint alleges that Esquivel was employed by Laieta on the date of the accident. (Id. ¶ 34.)

As to the happening of his accident, the Esquivel Complaint alleges that Esquivel was
working at the Premises when he was caused to fall through a hole in the floor, landing in the
basement, due to the negligence of the Abrams' and Wickapogue. (Id. ¶ 38.) The Esquivel
Complaint alleges causes of action based upon Labor Law §§ 200, 240, and 241 (6) and
common-law negligence.

In the instant declaratory judgment action (the “DJ Action”), PCIC is an insurer seeking a declaration that it has no duty to defend or indemnify its insured, Wickapogue, based on certain policy exclusions in a general liability insurance policy allegedly issued by PCIC to Wickapogue under policy number PC98325-MA effective December 12, 2014, to December 12, 2015. (Martin affidavit, exhibit A [the “Policy”].) As is relevant here, the Commercial General Liability Coverage Form of the Policy indicates in section (I) (2), titled “Exclusions,” with subsection (b) (1), titled “Employer’s Liability,” that

“[t]his insurance does not apply to . . . ‘bodily injury’ to[ ] [a]ny ‘employee’ of any insured or any contractor or subcontractor working directly or indirectly on any insured’s behalf arising out of and in the course of: (i) employment by the insured; or (ii) performing duties related to the conduct of the insured’s business or the business of any contractor or subcontractor working directly or indirectly on the insured’s behalf.”

(Policy at 9.)

As Wickapogue has failed to answer or appear in the DJ Action, PCIC now seeks an order pursuant to CPLR 3215 directing the entry of a default judgment in the DJ Action declaring that the Policy does not provide defense or indemnification coverage for the claims arising out of Esquivel’s alleged accident of February 26, 2015, and that PCIC is entitled to withdraw its defense to Wickapogue of the claims arising out of the alleged accident.

In support of the merits of its default judgment motion, PCIC argues in its moving papers, as is relevant here, that the Employer’s Liability exclusion applies to the facts of this case because Esquivel was an employee working for Wickapogue’s subcontractor, Laieta, on the day of the alleged accident. (Affirmation of Martin ¶ 16.)

Counsel for the Abrams’ submitted an affirmation in opposition to the instant motion. Counsel argues in his opposition papers, as is relevant here, that “[t]here are still open questions of fact as to whether Esquivel’s purported injuries were sustained because of his work for M. Laieta Contracting while working on the 107 Wickapogue property.” (Affirmation of Cosgrove ¶ 29.) Counsel further argues that the coverage afforded under the Policy is illusory. Counsel also argues that discovery has yet to be completed in this matter and that the issues should be decided on their merits and not on default. Counsel further argues that a declaration of no coverage would be prejudicial to the Abrams’, in part because the Abrams’ have counterclaimed for contractual indemnification from PCIC and Wickapogue and for additional insured coverage under the Policy for the Underlying Action.

PCIC argues in its reply papers that New York courts have routinely held that exclusions such as the Policy’s Employer’s Liability exclusion at issue here are clear and unambiguous, precluding coverage where, as here, an employee of the insured’s subcontractor is injured in the course of his employment. PCIC further argues that “Wickapogue’s failure to appear should not impact PCIC’s right to obtain a declaration. Otherwise, the defendant in a declaratory judgment action would be encouraged to default because the matter could never be adjudicated.” (Reply affirmation of Bucci ¶ 24.)

The Court held oral argument on the motion on December 4, 2018. At the oral argument, counsel for PCIC and the Abrams' appeared and reiterated the arguments in their motion papers. Counsel for Esquivel, who has not appeared in the DJ Action, and counsel for Wickapogue in the Underlying Action also put in appearances for the purposes of the oral argument, only.

Oral argument narrowed the issues for consideration by the Court today to the extent that counsel for PCIC focused her argument on "rely[ing] on the Employer Liability Exclusion to defeat coverage conclusively in this case." (Tr at 7, lines 10–12.)

Counsel for the Abrams' argued in opposition that discovery in the underlying action was not complete, the note of issue had not been filed, and dispositive motions had not been filed. (*Id.* at 8, lines 14–21.) When the Court stated, "I'm certain that there is no dispute, by anybody, in the pleadings that Esquivel was an employee of Laieta; and I don't believe there is any dispute that Laieta was a subcontractor of Wickapogue," counsel for the Abrams' replied, "[w]e can't say that definitively at this moment . . . as there ha[ve]n't been dispositive motions in the underlying action . . . or in this action either." (*Id.* at 9, lines 13–16, 19–25.) Counsel for the Abrams' further argued that "there is nothing in the motion, whether it be exhibits or anything, that indicates, other than just words, that Esquivel [wa]s an employee of Laieta. There's no contract, there's no payroll records, there's nothing along those lines . . ." (*Id.* at 10, lines 13–17.) When the Court indicated that in the underlying action the pleadings indicate that Esquivel was working for Laieta when he was injured, counsel for the Abrams' again indicated that discovery in the Underlying Action was not yet completed and that the Court should await dispositive motions in the Underlying Action or in the DJ Action. (*Id.* at 12.)

The Court found at the oral argument that PCIC has shown prima facie that Wickapogue was served with process and an additional mailing pursuant to CPLR 3215 (g) (4) (i). (*Id.* at 13–14.) The Court then reserved decision on the question of whether PCIC has made a sufficient showing of the proof of the facts constituting its claim, noting that "we have sworn testimony either by the Complaint, or in the EBT's [sic], I assume that the Court can take notice of. (*Id.* at 16, lines 13–15.)

The Court takes judicial notice of all filings in the Underlying Action. On December 11, 2018, plaintiff Esquivel filed the note of issue. (Underlying Action, NYSCEF Doc No. 30.) On December 21, 2018, the Abrams' filed a motion pursuant to CPLR 3212 for summary judgment dismissing any and all claims against them. The moving papers state that "Esquivel [] was an employee of Laieta" (Underlying Action, NYSCEF Doc No. 33, affirmation of Cosgrove ¶ 35) and indicate that Esquivel was working on the Project at the Premises on February 26, 2015, helping other Laieta employees to lift and move a portion of a wall when, after taking three steps, he fell into the hole, resulting in his injuries (*id.* ¶¶ 36–43; *see also* Underlying Action, NYSCEF Doc No. 32, memorandum of law of Cosgrove at 8–9). The Abrams' have annexed the deposition transcripts of Esquivel and Laieta to their summary judgment motion papers. (Underlying Action, NYSCEF Doc Nos. 48, 49, exhibits N and O, respectively.) Deponent Mark Laieta indicates that the work on the Project was being done by his "employees" (Laieta tr, at 17, line 12) and that Esquivel was one such employee who was paid cash (*id.* at 27). Esquivel also indicated at his EBT that he was employed by Laieta at the time of his alleged accident earning \$150 a day as a helper while working on the project. (Esquivel tr, at 10–17.)

## DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a motion for a default judgment pursuant to CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

The Court found at the December 4, 2018 oral argument that PCIC has shown prima facie that Wickapogue was served with process and an additional mailing of process pursuant to CPLR 3215 (g) (4) (i). Service of process is uncontested in the Abrams’ opposition, and it is undisputed that Wickapogue has failed to appear, answer, or move in response to the complaint in the DJ Action (the limited appearance at the December 4, 2018 oral argument notwithstanding).

The Court, having reviewed the papers and held oral argument, finds in the instant motion that there is adequate proof of the facts constituting PCIC’s claims in the record available to the Court as to the Employer’s Liability exclusion of the Policy. In *Utica Ins. Co. v RJR Maintenance Group, Inc.* (90 AD3d 554, 554 [1st Dept 2011]), the Appellate Division, First Department granted a plaintiff’s motion for summary judgment declaring that it was not obligated to defend or indemnify the defendant in an underlying personal injury action where “[t]he employee exclusion in the subject insurance policy unambiguously states that the insurance did not apply to bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured, or to any employee of such contractor sustained during the course of employment.” Here, the Court finds that the Employer’s Liability provision of the Policy is similarly unambiguous.

The Court finds that for the purposes of the instant default judgment motion Esquivel fits into the exception in the Employer’s Liability provision of the Policy insofar as he is claiming bodily injury as an employee of Laieta working directly or indirectly on Wickapogue’s behalf that arose out of and in the course of performing duties related to the conduct of Laieta working directly or indirectly on Wickapogue’s behalf. While, at the time of the oral argument, discovery was still open in the Underlying Action, a week later, on December 11, 2018, Esquivel filed the note of issue. Ten days later, on December 21, 2018, the Abrams’ moved for summary judgment. In their summary judgment motion, the Abrams’ have effectively conceded the fact that Esquivel was an employee of Laieta and was allegedly injured on February 26, 2015, while working for Laieta on the Project. Moreover, the depositions annexed to the Abrams’ summary judgment motion serve as adequate proof of the facts constituting PCIC’s claims in the DJ Action as to whether Esquivel was an employee working on the Project at the Premises on the date of his alleged accident.

As such, PCIC is entitled to its declaratory judgment relief requested, and the Abrams’ counterclaims against PCIC are dismissed, as there is no coverage under the Policy.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiff Preferred Contractors Insurance Company, Risk Retention Group ("PCIC") pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of PCIC and against defendant 107 Wickapogue Construction, LLC ("Wickapogue") is granted; and it is further

ADJUDGED and DECLARED that policy number PC98325-MA does not provide defense or indemnification coverage for the claims arising out of Wilian Vasquez Esquivel's alleged accident of February 26, 2015 under index number 162350/2015; and it is further

ORDERED that the counterclaims of defendants Jared Abrams and Leland Abrams against PCIC are dismissed; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, PCIC shall serve a copy of this order within notice of entry on all parties and on the clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision, order, judgment, and declaration of the Court.

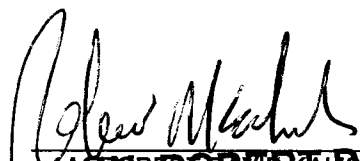
1/14/2019  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

  
HON. ROBERT D. KALISH  
S.C.