Utica First Ins. Co. v Vollrath Co., LLC
2019 NY Slip Op 30321(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 158973/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY**, ***Justice*** — **PART** **IAS MOTION 56EFM**

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UTICA FIRST INSURANCE COMPANY AS SUBROGEE OF WHYNOT MY WAY LLC D/B/A AKASHI,

Plaintiff,

- v -

THE VOLLRATH COMPANY, LLC,3 STAR ELECTRIC INC., BALTER SALES CO. INC., and E & M ELECTRICAL NY CORP.

Defendants.

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INDEX NO. 158973/2018

MOTION DATE 01/04/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - DEFAULT.

In this subrogation action by a property insurer to recover benefits paid to its insured in connection with fire damage, the insurer moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant E&M Electrical NY Corp. (E&M). E&M submits no opposition. The motion is nonetheless denied, albeit without prejudice to renew upon proper papers.

CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "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 [*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]" (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649 [2d Dept. 2011]). While the "quantum of proof necessary to support an application for a default judgment is not exacting

. . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). The proof submitted must establish a prima facie case (*see id.; Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

A subrogation action such as the instant matter "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). Upon payment of the amount of the loss to its insured, the insurer becomes the equitable owner of any right of action of the insured to recover a corresponding amount from the person responsible for the loss (*see Antonitti v City of Glen Cove*, 266 AD2d 487 [2d Dept 1999]; *see also Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]; *Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366, 373 [1990]).

To prove the facts constituting its claim of negligence against E&M, the plaintiff submits the complaint, which was verified only by its attorney, and the affidavit of Kurt Dellers, its property claims supervisor.

In its complaint, the plaintiff alleges that it issued a liability insurance policy to its subrogor, Whynot My Way, LLC, d/b/a Akashi (hereinafter Akashi), which operated a restaurant in a portion of a Manhattan building. The complaint asserts that, prior to January 5, 2017, E&M performed work on a portion of the building's electrical system as part of a construction, renovation, maintenance, repair, and improvement project, and that Akashi sustained damage to its property and business operations as a result of a January 5, 2017, fire. The plaintiff alleges that it paid Akashi under the insurance policy for losses occasioned by the fire. The complaint further asserts that the defendant Vollrath Company, LLC (hereinafter Vollrath), manufactured an electric fryer employed by Akashi, the defendant Balter Sales Co. (hereinafter Balter) distributed the fryer, and that the defendant 3 Star Electric, Inc. (hereinafter 3 Star), along with E&M, performed electrical work related to the fryer. The complaint alleges, in

conclusory fashion, that Vollrath and Balter manufactured and distributed a negligently designed or manufactured product, that 3 Star and E&M negligently performed electrical work, and that the defendants' negligence contributed to the fire.

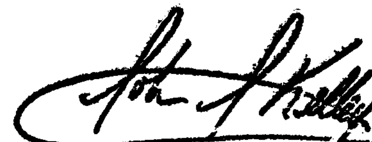
In his affidavit, Dellers states only that "[a]n investigation conducted by Plaintiff revealed that the proximate cause of the Fire was negligent acts and omissions of the Defendants, including, but not limited to, the improper and negligent performance of the Work." Dellers does not further specify what type of electrical work was performed by E&M, how it was negligent, or how that negligence proximately caused the outbreak of the fire. The plaintiff does not attach a copy of any investigatory report and does not submit an affidavit from the investigator, let alone identify the investigator or the date and circumstances of the investigation. Nor does Dellers describe what the investigation revealed as to the cause of the fire, or how that investigation implicated any particular work performed by E&M.

"In this action, plaintiff was required to show, in an affidavit by someone with personal knowledge of the facts surrounding the [in]cident, that, among other things, defendant [E&M] was legally responsible for the loss, i.e., that defendant [E&M] was negligent" (*Geico Ins. v Sullivan*, 56 Misc 3d 12, 14 [App. Term, 9th & 10th Jud. Dists. 2017]). A complaint verified by an attorney is insufficient to support a default motion pursuant to CPLR 3215 where, as here, the attorney lacks personal of the fact constituting the claim (*see Joosten v Gale*, 129 AD2d at 534). "Neither the conclusory allegations of negligence in the 'verified complaint,' which had been verified by plaintiff's 'representative,' nor the affidavit of plaintiff's recovery examiner, who relied upon the description" of the fire in an unrevealed investigatory report "to imply that [E&M] was negligent, was sufficient to support plaintiff's motion, as neither demonstrated personal knowledge of the facts relating to the underlying [in]cident so as to establish [E&M's] liability therefor" (*Id.* at 14; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]; T*rawally v East Clarke Realty Corp.*, 92 AD3d 471 [1st Dept 2012]; *Thelen, LLP v Omni Contracting Co. Inc.*, 79 AD3d 605 [1st Dept 2010]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendant E&M Electrical NY Corp. is denied, without prejudice to renew upon proper papers.

This constitutes the Decision and Order of the court.



2/11/2019
DATE

JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE