

Kurland v GEICO Ins. Agency, Inc.
2019 NY Slip Op 31527(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 656589/2017
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 37

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YETTA KURLAND,

Plaintiff,

Index No. 656589/2017

Motion Sequence No. 001

– against –

GEICO INSURANCE AGENCY, INC.,

Defendant.

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ENGORON, J:

Plaintiff Yetta Kurland brings this action against defendant GEICO Insurance Agency, Inc. (GEICO Agency), for breach of contract and violations of insurance regulations, New York State Insurance Law, and New York State and New York City statutes, based on GEICO Agency's alleged failure to honor the insurance claim plaintiff made following the theft of her motorcycle.

Plaintiff commenced the instant action on October 26, 2017, by filing a summons with notice. GEICO Agency failed to appear.

Plaintiff now moves for a default judgment pursuant to CPLR 3215. GEICO Indemnity Company (GEICO Indemnity), appearing as GEICO Indemnity Company s/h/a GEICO Insurance Agency, Inc., opposes the motion and cross-moves for leave to file a late notice of appearance and a demand for the complaint pursuant to CPLR 3012 (d).

Background

Plaintiff states that she "maintained motorcycle insurance which included coverage for theft" and that "[her] motorcycle was stolen in or around August 8, 2016." Kurland 12/29/17 affirmation, ¶ 3. She claims that Geico Agency failed to honor her insurance claim for the theft.

She submits a copy of the policy's declaration page, which shows that GEICO Indemnity issued plaintiff a policy on August 30, 2016, policy number 4408-31-48-80, for the coverage period of August 27, 2016 through August 27, 2017. *Id.*, exhibit C. As part of a later submission, plaintiff provides an older declaration page for policy number 4408-31-48-80, which shows that, on December 21, 2015, GEICO Indemnity issued an endorsement to plaintiff's policy for the coverage period of August 29, 2015 through August 29, 2016. Kurland 8/21/18 affirmation, exhibit A. Plaintiff claims that GEICO Agency owes her \$18,611.80 for her loss and an additional \$2,500 in attorneys' fees and \$270 in costs.

According to Robert Smid (Smid), a senior underwriter for GEICO Insurance Company, GEICO Agency does not issue policies and is unrelated to GEICO Indemnity. Rather, he explains, "[s]imilar to an insurance brokerage, [GEICO Agency] only provides access to other companies that issue policies for the specific needs of the consumer." Smid aff at 2. He states that GEICO Indemnity issued plaintiff's policy and that GEICO Agency "does not act as agent for, nor do[es] any work for [GEICO Indemnity]" and that "[t]he two companies are entirely septeate entities with separate offices, employees and management." *Id.*

In addition, Smid states that he has access to GEICO Indemnity's underwriter files and payment records, which are maintained in the regular course of business. According to Smid, a review of those records revealed that plaintiff's policy was cancelled for nonpayment prior to the alleged theft. Smid avers that plaintiff made monthly payments on her policy through a recurring credit card payment method and that, on April 29, 2016, plaintiff's bank declined payment for \$247.60. *See id.*, exhibit C. He states that a disconnect letter, dated May 6, 2016, was sent to plaintiff, informing her that the automatic payment process had been discontinued and instructing her to make a direct payment to avoid cancellation of her policy. *See id.*, exhibit D.

This was followed by a cancellation notice, mailed on May 9, 2016 and effective May 25, 2016, instructing plaintiff that she had 15 days to make a payment to maintain her coverage. See *id.*, exhibit A. Smid states that because plaintiff failed to make payment, the policy was canceled on May 25, 2016. In addition, he states that a call log, for a call made by plaintiff on June 27, 2016, indicates that plaintiff requested that the policy be cancelled retroactively, effective April 2016, because she was not using the motorcycle. According to the log, the agent advised her that this was not possible, because she had not turned in her tags and that, in any event, because the request was made after cancellation, the remaining insurance premium, covering the period from nonpayment to the effective date of the cancellation, was still due. See *id.* at 4.

Plaintiff claims that, based on her communications with her bank, there was never an attempted auto-debit in May of 2016. See Kurland 8/21/18 affirmation, exhibit B. By letter dated July 31, 2016, plaintiff attempted to reinstate her coverage. In it, she explained that her bank never dishonored any payment and that, because “GEICO” processed a July 28, 2016 check for \$247.60—which provided in the memo: “July 29, 2016 premium payment for policy #4408314880. Cashing this check acknowledges coverage w/out interruption through August 29, 2016 of policy”—it should reinstate her policy without interruption of coverage.¹ *Id.*, ¶ 5, exhibit D. After her motorcycle was stolen and she submitted a claim under the policy, plaintiff sent “GEICO Remittance Center” another letter, dated August 24, 2016, and three additional payments of the premium, again providing in the memo section of each check that cashing the check acknowledged coverage without interruption through August 29, 2016. *Id.*, ¶ 8, exhibit E. The checks were allegedly negotiated.

¹ The letter is addressed to “GEICO.” The check is also made out to “GEICO.”

On November 7, 2017, plaintiff served the summons with notice on GEICO Agency, an authorized foreign corporation, by personal service on an authorized agent of the Office of the Secretary of State of the State of New York, pursuant to Business Corporation Law § 306. *See* Kurland 12/29/17 affirmation, exhibit F. GEICO Agency failed to appear. On December 1, 2017, additional service of the summons with notice was made on GEICO Agency by first class mail at its last known address pursuant to CPLR 3215 (g) (4) (i). *Id.*, exhibit G.

On December 29, 2017, plaintiff moved for a default judgment. The motion was returnable on August 22, 2018. On January 3, 2018, counsel for GEICO Indemnity, appearing as “Attorneys for Defendant(s), GEICO Indemnity Company s/h/a GEICO INSURANCE AGENCY, Inc.,” filed a notice of appearance and a demand for the complaint. NYSCEF document numbers 12, 13. By letter dated January 21, 2018, plaintiff rejected the demand for the complaint, on the grounds that defendant was in default. By letter dated August 20, 2018, counsel for GEICO Indemnity requested that the motion for a default judgment be adjourned to September 5, 2018, which it was. On August 29, 2018, GEICO Indemnity cross-moved for leave to file a late notice of appearance and a demand for the complaint.

Discussion

Plaintiff contends that she is entitled to a default judgment because GEICO Agency failed to appear and her affirmations, with the annexed exhibits, demonstrate that GEICO Agency failed to honor the insurance policy it issued to plaintiff. GEICO Indemnity counters that plaintiff is not entitled to a default judgment, because she lacks privity of contract with GEICO Agency and because the policy had been cancelled for nonpayment prior to plaintiff’s loss. In addition, GEICO Indemnity argues that its default is excused because plaintiff served the wrong entity and its attorney incorrectly recorded the deadline to appear in the instant action.

On a motion for a default judgment, “the applicant shall file proof of service of the summons and the complaint, . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.” CPLR 3215 (f); *see also Loughran v Giannotti*, 160 AD3d 709, 710 (2d Dept 2018). “CPLR 3215 does not contemplate that default judgments are to be rubberstamped 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.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citation omitted). However, “[t]he standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.” *Id.* “In order to successfully oppose a [motion for a] default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense.” *Johnson v Deas*, 32 AD3d 253, 254 (1st Dept 2006) (internal quotation marks and citation omitted). “A determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court.” *Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 (1st Dept 2018) (citation omitted).

Here, while plaintiff demonstrates service on GEICO Agency and its failure to appear, she fails to demonstrate that she had an active policy with GEICO Agency at the time of the alleged loss. First, the policy declaration pages that plaintiff submits in support of her claim, show that GEICO Indemnity, not GEICO Agency, issued the subject policy. *See Kurland* 12/29/17 affirmation, exhibit C; *Kurland* 8/21/18 affirmation, exhibit A. Plaintiff insists that she has sued the correct entity but, aside from speculating about the relationship between GEICO Indemnity and GEICO Agency, plaintiff offers no evidence that would permit this court to hold GEICO Agency liable for a policy issued by GEICO Indemnity. *See Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 (1976) (“[o]rdinarily, [corporations’] separate personalities

cannot be disregarded”); *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181 (2011) (finding that “the failure to allege a relationship between the parties . . . [is] fatal to [a breach of contract] claim”); *Maki v Travelers Cos., Inc.*, 145 AD3d 1228, 1230-1231 (3d Dept 2016) (finding that plaintiff did not have a breach of contract claim against an insurance wholesaler or the parent corporation of the insurer that issued the subject policy, where plaintiff had no direct dealings with the wholesaler and failed to allege that the insurer was an agent or instrumentality of the parent corporation).

In addition, while plaintiff alleges that her motorcycle was stolen on August 8, 2016 (*see* Kurland 12/29/17 affirmation, ¶ 3), she submits proof of coverage for August 27, 2016 through August 27, 2017. *See id.*, exhibit C. As this postdates the theft, plaintiff fails to demonstrate *prima facie* that she had coverage at the time of the loss. Plaintiff attempts to correct this oversight by submitting an older declaration page, showing that GEICO Indemnity initially issued plaintiff a policy for the coverage period of August 29, 2015 through August 29, 2016. *See* Kurland 8/21/18 affirmation, exhibit A. However, this does nothing to demonstrate that coverage was continuous and uninterrupted at the time of the loss. Therefore, plaintiff fails to offer proof of facts constituting her claim and her motion for a default judgment against GEICO Agency is denied.

In any event, GEICO Indemnity demonstrates a reasonable excuse for its default and a meritorious defense.² First, while GEICO Indemnity did ultimately become aware of the instant

² The court notes plaintiff’s contention that because GEICO Indemnity is not the named defendant, it has “no right to standing in this proceeding to be heard, has no basis to assert affirmative defenses on Defendant’s behalf including reasonable excuse or meritorious defense.” Kurland 9/4/18 affirmation, ¶ 5. However, plaintiff’s own submissions establish that GEICO Indemnity issued the subject policy. The court sees no reason, and plaintiff offers none, to ignore GEICO Indemnity’s submissions, simply because plaintiff apparently named and served the incorrect entity.

action, plaintiff served the incorrect entity. GEICO Indemnity states that it did not receive the initial summons with notice until December 1, 2017 and that it never received the additional service made pursuant to CPLR 3215 (g) (4) (i). “[D]efendant’s nonreceipt of process . . . constitutes a reasonable excuse for the default in [appearing].” *Spearman v Atreet Corp.*, 238 AD2d 194, 194 (1st Dept 1997). Additionally, GEICO Indemnity’s attorney explains that the delay in receiving the summons with notice was compounded by his mistake in logging the date for a response, as he confused the date with a deadline on another matter. Such law office failure also constitutes a reasonable excuse for a default. *See* CPLR 2005; *see also Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445, 445 (1st Dept 2003) (finding that counsel offered a reasonable excuse for failure to appear at a conference, where “he inadvertently scheduled the wrong date”); *Riccardi v Otero*, 33 AD3d 571, 572 (1st Dept 2006) (finding that “failure to make the appropriate diary entry, constitute[d] law office failure”).

In addition, GEICO Indemnity offers two meritorious defenses. In the event that plaintiff chooses to press her claim against GEICO Agency, GEICO Indemnity points out that plaintiff lacks contractual privity with that entity. GEICO Indemnity issued the subject policy and, as Smid states in his affidavit, GEICO Agency is not an agent of GEICO Indemnity and “[t]he two companies are entirely separate entities with separate offices, employees and management.” Smid aff at 2. This constitutes a valid defense to plaintiff’s breach of contract claim. *See Maki*, 145 AD3d at 1230-1231. Furthermore, Smid’s affidavit and documentary evidence, showing that plaintiff’s coverage had been cancelled prior to the loss, also establish a meritorious defense. *See Kaufman v Puritan Ins. Co.*, 126 AD2d 702, 702 (2d Dept 1987) (granting insurer’s motion for summary judgment dismissing a claim for breach of insurance contract, where it presented evidence that, among other things, a notice of cancellation had been provided prior to the loss).

For the foregoing reasons, GEICO Indemnity's cross motion to file a late notice of appearance and a demand for the complaint is granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that defendant's motion to file a late notice of appearance and a demand for the complaint is granted and defendant is directed to do so within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 418, 60 Centre Street, on July 9, 2019, at 10:00 a.m.

Dated: 5/24/19

ENTER:



J.S.C.

HON. ARTHUR F. ENGORON