

**Commissioners of State Ins. Fund v MA Home
Improvement Inc.**

2019 NY Slip Op 32325(U)

July 30, 2019

Supreme Court, New York County

Docket Number: 450759/2017

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 450759/2017

COMMISSIONERS OF STATE INSURANCE FUND,

MOTION DATE 02/22/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

MA HOME IMPROVEMENT INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for STRIKE PLEADINGS and DEFAULT JUDGMENT .

In this action to recover alleged outstanding insurance policy premiums, plaintiff, the Commissioners of the State Insurance Fund, now moves pursuant to CPLR 3126(a)(3) to strike defendant, Ma Home Improvement, Inc.'s Answer, and further moves pursuant to CPLR 3215 for the court to enter default judgment against defendant. In the alternative, plaintiff moves pursuant to CPLR 3212 for summary judgment of its claims against defendant. While counsel for defendant appeared telephonically for oral argument in this matter, plaintiff's motion is unopposed.

Plaintiff is an agency of the State of New York created and authorized pursuant to the Workers' Compensation Law to issue workers' compensation and disability insurance policies (NYSCEF # 52, Amended Compl., ¶¶1-2). Plaintiff alleges that defendant failed to pay insurance policy premiums for a policy issued by plaintiff, and alleges claims for breach of contract, account stated, and under Workers' Compensation Law (WCL) § 95.

The drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith (Zletz v Wetanson, 67 NY2d 711, 713 [1986]). It is equally well settled that where a party disobeys a court order and his or her conduct frustrates the disclosure scheme provided for the CPLR, dismissal of a pleading is within the broad discretion of the trial court (see id.). A conditional order of preclusion has been held to constitute a proper exercise of the court's discretion (see Crawford v Toyota Motor Credit Corp., 283 AD2d 184 [1st Dept 2001]; Campbell v Peele, 289 AD2d 141[1st Dept

2001]; *Green v Mohamed*, 275 AD2d 599 [1st Dept 2000]). “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kilh v Pheffer*, 94 NY2d 118, 123 [1999]).

Here, defendant’s failure to comply with two discovery orders of this court warrants striking defendant’s Answer. Pursuant to the discovery order dated September 19, 2018 (September order), defendant was directed to respond to plaintiff’s discovery demands by October 26, 2018, including furnishing the documentation concerning cash withdrawals and a full accounting of the defendant’s payroll (NYSCEF # 76, September order; # 61, Totaro Aff., ¶21). At the status conference on January 16, 2019, the court again ordered that defendant furnish the previously ordered discovery by January 31, 2019 (the January order) and indicated that failure to do so may result in the striking of its Answer and pleadings (NYSCEF # 77, January order). The court heard oral argument on plaintiff’s instant motion on July 10, 2019, and defendants still had not furnished the ordered discovery and did not offer a reasonable excuse for failing to do so. Defendant’s continued non-compliance with the discovery orders constitutes willful and contumacious conduct. Accordingly, defendant’s Answer is stricken.

As the Answer is stricken, plaintiff’s motion for default judgment will be addressed. “On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (*see* CPLR 3215[f]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]).

Plaintiff has demonstrated its entitlement to default judgment on its claim for breach of contract: Plaintiff served defendant with the complaint (Totaro Aff. of Service, NYSCEF # 53); and plaintiff demonstrated the merit of its breach of contract claim against defendant.

The elements of a claim for breach of contract include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). Plaintiff submits the affidavit of Sonia Bethelmy, an underwriter employed by plaintiff, wherein she affirms that plaintiff and defendant entered into an agreement wherein plaintiff issued and maintained workers’ compensation on behalf of the defendant (Bethelmy Aff. ¶4). The policy of workers’ compensation insurance was provided from January 13, 2013 through September 6, 2016, at which point the policy was cancelled for nonpayment (*id.* ¶¶7-8).

Ms. Bethelmy further affirms that defendant owes \$242,780.06 for failure to pay the premiums for insurance coverage provided (*id.* ¶12). Plaintiff submits the

“INFORMATION PAGE AUDIT” for the years from 2013 through 2016, demonstrating the total policy premium amounts for the following policy periods: 1/16/2013 to 01/16/2014, \$475.99; 01/16/2014 to 01/16/2015, \$ 104,195.57; 01/16/2015 to 01/16/2016, \$70,437.85; 01/16/2016 to 09/06/2016, \$135,157.43 (*id.* ¶20). The total premiums from 2013 through 2016, including interest and service charges in the amount of \$5,343.58, equals to \$319,610.42. Less payments made by defendant, the total amount outstanding is \$242,780.06 (*id.*). Accordingly, plaintiff has supported its claim for breach the contract by providing proof that defendant failed to pay the policy premiums despite being provided with insurance under the agreement.

On plaintiff's account stated cause of action, plaintiff's evidence is insufficient to establish that defendants retained the invoices without objecting to them in a reasonable time (*see Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249, 250 [1st Dept 2007]). And plaintiff's third cause of action pursuant to WCL § 95 is not addressed in plaintiff's moving papers. Thus, these two causes of action cannot be sustained, and in any event, these issues are academic.

Since defendant's Answer has been stricken for failure to comply with this court's orders, and since plaintiff prevails on it breach of contract cause of action, plaintiff is entitled to a default judgment against defendant (*see Sony Corp. of America v Savemart, Inc.*, 59 AD2d 676, 677 [1st Dept 1977]). Plaintiff seeks damages in the amount of \$242,780.06 plus interest from September 6, 2016, the date the policy was cancelled. Because the sum the plaintiff has requested is certain, the application for default judgment may bypass an inquest and be submitted directly to the Clerk of the Court (CPLR 3215 [b]).

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3126 to strike defendant's Answer is granted without opposition; defendant's Answer is stricken; it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3215 for leave to file default judgment against defendant is granted, without opposition; it is further

ORDERED that the branch of plaintiff's motion for summary judgment against plaintiff is academic; it is further

ORDERED that the Clerk of the Court enter judgment in favor of plaintiff Commissioners of State Insurance Fund and against defendant Ma Home Improvement, Inc., in the sum of \$242,780.06, together with interest from

September 6, 2016, at the statutory rate of 9% per annum to be calculated by the Clerk; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within ten (10) days of entry.

This constitutes the Decision and Order of the court.

7/30/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE