

Chubb Indem. Co. v Uberto, Ltd.

2020 NY Slip Op 31106(U)

April 30, 2020

Supreme Court, New York County

Docket Number: 155282/2019

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
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

CHUBB INDEMNITY COMPANY A/S/O ADAM
PIEKARSKI AND KATE STAMELL,

Plaintiff,

INDEX NO. 155282/2019

MOTION DATE _____

MOTION SEQ. NO. 001 002 003

- v -

**DECISION + ORDER ON
MOTION**

UBERTO, LTD.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4-16, 32, 33, 46-49, 54

were read on this motion to _____ extend time to serve _____.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18-24, 35, 50-53 were read on this motion for _____ default judgment _____.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25-31, 34, 36-45, 55, 56 were read on this motion to _____ dismiss _____.

Plaintiff commenced this subrogation action against defendant on May 28, 2019. On September 30, 2019, plaintiff served defendant with the summons and complaint in this action by service on the Secretary of State pursuant to CPLR 308(4), after its agent had failed to effectuate timely service. (NYSCEF 2). It admits that it served defendant five days after the expiration of the 120-day period elapsing after commencement of the action. By stipulation dated October 21, 2019, the parties agreed that defendant had until November 21, 2019 to respond to the summons and complaint. (NYSCEF 23).

In the meantime, by notice of motion dated November 12, 2019, plaintiff efiled the instant motion sequence one seeking, pursuant to CPLR 306-b, an order extending the time

within which to serve defendant with its summons and complaint. It articulates a reason for its five-day delay in service; defendant's allegation that it is prejudiced is conclusory.

Then, by notice of motion dated November 22, 2019, plaintiff moves pursuant to CPLR 3215(a) for an order granting it a default judgment against defendant (mot. seq. two), alleging that defendant did not and has not responded to the complaint on or before the agreed-on November 21 deadline. Defendant does not deny missing the deadline. Rather, it alleges that after agreeing to extend the deadline further, plaintiff engaged in sharp practice by then seeking an extension of time to serve it with the pleadings.

Instead of answering the complaint, by notice of motion dated December 2, 2019, defendant moves pursuant to CPLR 3211 (a) (1), (5), (7), and (8) for an order dismissing it (mot. seq. three). Briefly, it maintains that documentary evidence reveals that defendant cannot be held liable, having been terminated from the construction project seven months before the damage was discovered. For the same reason, defendant argues that plaintiff also fails to state a cause of action. Defendant additionally maintains that plaintiff's action is untimely and that the court has no jurisdiction over it given plaintiff's failure to serve the pleadings in a timely fashion. In addition to reiterating the allegations it had previously advanced in opposition to plaintiff's motion for an order extending the time within which to serve it, defendant now alleges that it is prejudiced by plaintiff's delay in commencing and prosecuting this action as it "cannot inspect the alleged damage because the conditions cannot be recreated as a result of completed repairs." Thus, it maintains that "[t]here is no way to assess whether [it] was in any way responsible for the [damage]." (NYSCEF 55).

In light of plaintiff's brief delay in serving defendant, and defendant's failure, in its opposition to plaintiff's motion to extend, to articulate prejudice sufficient to withstand the

motion to extend, there is an insufficient basis for denying plaintiff the relief of finding service timely *nunc pro tunc*, in lieu of granting an extension. That defendant supports its allegation of prejudice in its motion to dismiss does not substitute for its conclusory assertion of prejudice in opposition to plaintiff's motion.

Although defendant does not deny having failed to answer the complaint by November 21, it soon thereafter filed its motion to dismiss which, in light of the preference that cases be decided on the merits, warrants denial of plaintiff's motion for a default judgment.

Defendant offers no documentary evidence establishing a defense that utterly refutes plaintiff's allegations as a matter of law, and the denial that it proximately caused plaintiff's damages does not demonstrate that plaintiff fails to state or has no valid claim against it.

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion for an order extending its time to serve the pleadings on defendant is granted to the extent of deeming plaintiff's service of pleadings on defendant on September 30, 2019 to have been timely made, *nunc pro tunc* (mot. seq. one); it is further

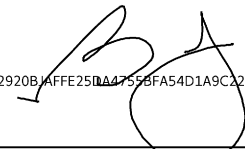
ORDERED, that plaintiff's motion for an order granting it a default judgment is denied (mot. seq. two); it is further

ORDERED, that defendant's motion for an order dismissing the complaint is denied (mot. seq. three); it is further

ORDERED, that defendant serve its answer on plaintiff within 20 days of the date of this order. As the court is not currently accepting non-emergency filings, defendant should e-file its answer within 10 days after the court has resumed normal e-filing operations; and it is further

ORDERED, that the parties appear for a preliminary conference on July 1, 2020 at 2:15 pm, if the court has reopened.

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4/30/2020

DATE

BARBARA JAFFE, 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