American Empire Surplus Lines Ins. Co. v L&G Masonry Corp.
2020 NY Slip Op 31332(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 652695/2018
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiffs,

DECISION AND ORDER

- v - Index No. 652695/2018

L&G MASONRY CORP., D AND G MASONRY CORP., HG & ML, INC., STEVE GRUBB, FULTON FRANKLIN HOUSING DEVELOPMENT FUND CORPORATION, ST. AUGUSTINE APARTMENTS LLC, MEGA CONTRACTING GROUP, LLC, EDISON PACHECO

MOT SEQ 001, 002

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action by an insurer seeking to compel its insureds to submit to a premium audit, the plaintiff, American Empire Surplus Lines Insurance Company, moves pursuant to CPLR 3215 against non-answering defendants L&G Masonry Corp. and D and G Masonry Corp. for a declaration that they are to submit to a premium audit and that failure to do so would result in the plaintiff no longer having any obligation to defend or indemnify them under the commercial general liability and excess liability insurance policies it issued to them (MOT SEQ 001). Defendant Mega Contracting Group LLC (Mega) opposes and cross-moves for an order (i) granting summary judgment and dismissing the complaint as against it, (ii) declaring that the plaintiff's disclaimer of

coverage based upon the defaulting defendants' failure to submit to a premium audit is improper and without effect, and (iii) attorneys' fees. Defendants St. Augustine Apartments LLC (Augustine) and Fulton Franklin Housing Development Fund Corporation (Franklin) move for the same relief requested in Mega's cross-motion and for sanctions (MOT SEQ 002). The plaintiff's motion is denied, without prejudice to it seeking to compel the non-answering defendants to submit to an audit upon proper papers, and the motion is otherwise denied with prejudice. Mega's cross-motion is granted in part. Augustine's and Fulton's motion is granted in part.

II.BACKGROUND

The plaintiff issued a commercial general liability insurance policy to the defaulting defendants and defendant HG & ML, Inc. under policy number 16G0206867 for the period of September 29, 2016 to September 29, 2017. The premium charged was to be computed as a percentage of the gross receipts of L&G Masonry Corp., D and G Masonry Corp., and HG & ML, Inc. The policy included an advance premium of $250,000.00 which was subject to adjustment if an audit by the plaintiff revealed that the gross receipts exceeded the plaintiff's initial estimate. A second excess liability policy was issued to L&G Masonry Corp., D and G Masonry Corp., and HG & ML, Inc. under policy number

16CX0206866 for the same period, also containing an advance premium of $117,500.00 subject to adjustment by an audit. During the term of the policy, two individuals Steve Grubb and Edison Pacheco claimed to have sustained injuries while performing construction work on or about August 3, 2017 and February 9, 2017 respectively. Each individual subsequently commenced a personal injury action which may implicate the two insurance policies. Unrelated to the personal injury actions, the plaintiff alleges that it repeatedly attempted to schedule and conduct an audit of the gross receipts of L&G Masonry Corp., D and G Masonry Corp., and HG & ML, Inc. and that due to non-cooperation, no audit has been performed. Plaintiff now seeks a default judgment compelling the defaulting defendants to submit to an audit or vitiating their coverage.

In their Notice of Motion, the plaintiff initially sought a declaration that the non-answering defendants' failure to submit to the premium audit would result in the plaintiff not having any obligation to defend or indemnify any party under the insurance policies. As a result of the initial relief sought, Mega cross-moved and Augustine and Fulton moved to, in effect, prevent the plaintiff from disclaiming coverage. The plaintiff, in its reply, withdrew the portion of its motion inasmuch as it seeks relief as against any party except L&G Masonry Corp. and D

and G Masonry Corp. However, Mega has not withdrawn its cross-motion, nor has Augustine and Fulton withdrawn their motion.

III.DISCUSSION

"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." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011); see also CPLR 3215. "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 also Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., supra. 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 Guzetti v City of New York, supra.

In support of its motion for default judgment, the plaintiff submits, *inter alia*, the underlying insurance policies, the affidavit of its attorney Maureen O'Connor, and the affidavit of Randy Myers, the divisional assistant vice president for the plaintiff.

Initially, the court notes that the affidavit of Randy Myers is notarized in the State of Ohio and does not include a certificate of conformity as required by CPLR 2309(c). See Lefkowitz v Kelly, 170 AD3d 1148 (2nd Dept. 2019); Discovery Bank v Kagan, 8 Misc 3d 134(A) (App Term 2nd & 11th Jud Dists 2005). Thus, the assertions therein cannot be considered as competent proof on this motion. Without the affidavit, the plaintiff does not able to establish that it requested an audit from L&G Masonry Corp. and D and G Masonry Corp. or that those entities failed to submit to an audit. While the defect may be corrected (see Bank of New York v Singh, 139 AD3d 486 [1st Dept. 2016]), the plaintiff's motion to compel the non-answering defendants to submit to an audit must nonetheless be denied.

The plaintiff seeks to vitiate the non-answering defendant's insurance coverage if it fails to appear for an audit. However, the plaintiff fails to point to any contractual

provision or law that supports its argument that a failure to submit to an audit is sufficient cause for a denial of coverage. In an opinion letter dated February 8, 2005, the State Insurance Department's Office of General Counsel (OGC) issued an informal opinion on the topic of a party's failure to submit to an insurance premium audit. Although not binding, an interpretation by the OGC will be upheld in deference to its special competence and expertise with respect to the insurance industry unless it is irrational or unreasonable or it runs counter to the clear wording of a statutory provision. See Aetna Health Plans v Hanover Ins. Co., 27 NY3d 577 (2016); New York Public Interest Research Group, Inc. v New York State Dept. of Ins., 66 NY2d 444 (1985).

In its opinion, the OGC stated that under 11 NYCRR 161.10 "if an insured fails to cooperate with the insurer in its attempt to conduct an audit of a policy subject to audit to determine a proper premium, then the insurer shall nonrenew such insured upon completion of the current policy period." The opinion further states that an insurer may not cancel a commercial general liability policy midterm because of the noncooperation, as a failure to cooperate with a premium audit does not "constitute an act or omission, or a violation of a policy condition, that substantially and materially increases the hazard insured against under N.Y. Ins. Law 426(c)(1)(D)…[or]

constitute a material change in the nature or extent of the risk which causes the risk of loss to be substantially and materially increased beyond that contemplated at the time the policy was renewed that would permit mid-term cancellation under N.Y. Ins. Law 3426(c)(1)(E)." As such, the plaintiff fails to establish, *prima facie*, that it is entitled to vitiate the non-answering parties' coverage should they not submit to an audit.

Turning to Mega's cross-motion and Augustine and Fulton's motion, those defendants, in essence, seek a judgment declaring that the plaintiff cannot void or cancel the commercial general liability or excess liability insurance policies and disclaim coverage as to the answering defendants because of the non-answering defendants' purported failure to comply with an audit request. As discussed herein, a failure to submit to an audit request is not a valid reason to disclaim coverage, and therefore Mega's cross-motion and Augustine and Fulton's motion are granted to the extent that they are requesting such declaratory relief. Additionally, the branches of Mega's cross-motion and Augustine and Fulton's motion seeking to dismiss the complaint as against them, *i.e.* the third and fourth causes of action seeking to deny coverage under the insurance policies based upon the non-answering defendants' failure to submit to an audit are also granted.

Mega, Augustine, and Fulton also contend that they are entitled to all costs and fees associated with defending this action. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592 (2004). The moving parties do not cite to any statute or agreement, but rather argue that as "insured[s] who [are] cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations, and who prevails on the merits, [they] may recover attorneys' fees incurred in defending against the insurer's action." Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 21-22 (1979); see also American Home Assur. Co. v Port Authority of New York and New Jersey, 123 AD3d 633 (1st Dept. 2014). However, as stated above, the plaintiff has withdrawn the portion of its motion seeking to disclaim coverage against the answering defendants. Additionally, it is well settled that CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. *See* Woodson v Mendon Leasing Corp., 259 AD2d 304 (1st Dept. 1999). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full

and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., *supra*; Frolish v Ryder Truck Rental, supra. As such, the answering defendants were not "put in a defensive posture" such that the recovery of attorneys' fees is warranted.

Finally, the application of Augustine and Fulton for sanctions pursuant to 22 NYCRR 130-1.1(a) is denied. That provision states, in relevant part, that the court, "in its discretion, may award . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, or is undertaken primarily to harass or maliciously injure another. See 22 NYCRR 130-1.1(c). Upon applying this standard, the court concludes that the plaintiff has not engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1.

IV.CONCLUSION

Accordingly, it is,

ORDERED that the plaintiff's motion for a default judgment seeking to compel L&G Masonry Corp. and D and G Masonry Corp. to submit to an audit, and for a declaration that a failure to comply with the audit would result in their coverage under policy numbers 16G0206867 and 16CX0206866 being vitiated is denied without prejudice to renew on proper papers to the extent that it seeks to compel L&G Masonry Corp. and D and G Masonry Corp. to submit to an audit, and the motion is otherwise denied; and it is further,

ORDERED that Mega Contracting Group LLC's cross-motion for summary judgment is granted to the extent that it is entitled to the declaratory relief sought and the complaint is dismissed as against it; and is otherwise denied, and it is further,

ORDERED that St. Augustine Apartments LLC and Fulton Franklin Housing Development Fund Corporation motion for summary judgment is granted to the extent that it is entitled to the declaratory relief sought and the complaint is dismissed as against it; and is otherwise denied, and it is further,

ADJUDGED and DECLARED that the plaintiff cannot void or cancel the commercial general liability or excess liability insurance policies (policy numbers 16G0206867 and 16CX0206866) and disclaim coverage as to the answering defendants because of

L&G Masonry Corp. and D and G Masonry Corp.'s purported failure to comply with an audit request.

This constitutes the Decision and Order of the Court.

Dated: May 7, 2020

ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON