

Hereford Ins. Co. v Diallo
2020 NY Slip Op 33859(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 657009/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

HEREFORD INSURANCE COMPANY

Plaintiff,

- v -

KALIDOU DIALLO,

Defendant.

-----X

INDEX NO. 657009/2019

MOTION DATE 10/30/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for RESTORE.

Upon the foregoing documents, it is

ORDERED that the Respondent Kalidou Diallo's application for an order granting Respondent leave for the Court to vacate the default order dated January 17, 2020 which granted Petitioner Hereford Insurance Company's motion, restoring this proceeding to active status, and for re-argument and renewal of Petitioner's motion (Motion Seq. 002) is denied in its entirety; and it is further

ORDERED that Petitioner's application to dismiss Motion Seq. 002 is granted; and it is further

ORDERED that this proceeding remains disposed in accordance with this Court's Decision and Order dated January 17, 2020 resolving Motion Seq. 001; and it is further

ORDERED that counsel for Petitioner Hereford Insurance Company shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 75 proceeding, Respondent Kalidou Diallo moves for an order (i) pursuant to CPLR 2221, granting Respondent leave for the Court to vacate the default order and/or review the Order dated January 17, 2020 which granted Petitioner Hereford Insurance Company's motion; (ii) for re-argument and renewal of Petitioner's motion to permanently stay the uninsured motorist arbitration demanded by Respondent, or in the alternative, staying said arbitration and setting the matter down for a framed issue hearing on the issues raised in Petitioner's motion; (iii) upon such review and re-argument, reversing the decision of the Court dated January 17, 2020, and denying Petitioner a permanent stay in arbitration; and (iv) restoring the matter to active status so that the above requested relief may be heard (Motion Seq. 002).

Petitioner opposes the motion in its entirety.

BACKGROUND FACTS

This motion stems from an underlying arbitration dispute between the parties.

On May 8, 2019, Respondent was standing outside his parked vehicle and in the process of retrieving items from the vehicle when he was struck by an electric bicycle at an intersection in the Bronx, New York (NYSCEF doc No. 12, ¶ 4).

On November 4, 2019, Respondent served a demand for uninsured motorist arbitration on Petitioner (NYSCEF doc No. 18). On November 25, 2019, Petitioner filed a motion with this Court to permanently stay the arbitration on the grounds that Respondent was not a qualified person under the uninsured motorist endorsement of Petitioner's policy (Motion Seq. 001).

As Respondent did not oppose Petitioner's motion to stay the arbitration or otherwise appear, this Court granted the relief sought in Motion Seq. 001 on default by Decision and Order dated January 17, 2020:

“Petitioner HEREFORD INSURANCE COMPANY has established that Respondent KALIDOU DIALLO failed to meet conditions precedent to uninsured motorist coverage and that the respondent is not a qualified person under the uninsured motorist endorsement of the petitioner’s policy. The alleged motor vehicle accident on 5/8/19 reportedly involved Respondent KALIDOU DIALLO, as a pedestrian, and a bicycle operated by WILFRIDO PENA MATOS. The accident did not arise out of an uninsured motor vehicle's ownership, maintenance or use. As such, Respondent KALIDOU DIALLO is not entitled to receive uninsured motorist coverage under the petitioner’s policy.”

(NYSCEF doc No. 8 at 2).

On March 9, 2020, Respondent filed the motion now before this Court, seeking vacatur of this Court’s January 17 decision. Respondent argues that this Court overlooked issues of fact and law in its prior decision and respectfully requests re-argument and renewal of Petitioner’s motion. Respondent argues that critical facts were not offered by Petitioner in its motion, namely that at the time of the accident, Respondent was not acting as a pedestrian but rather a vehicle operator who was in the process of exiting his vehicle, and was therefore a qualified person under Petitioner’s policy (NYSCEF doc No. 12, ¶ 10).

In opposition, Petitioner argues that Respondent’s application must be dismissed as the relief sought first and foremost by Respondent is the vacatur of this Court’s default judgement, and Respondent has established neither a reasonable excuse for the default nor a meritorious defense (NYSCEF doc No. 20, ¶ 13). Petitioner further contends that *assuming arguendo* Respondent established grounds for vacatur, Respondent has not introduced any new arguments that would change the outcome of this proceeding, as the fact remains that Respondent’s accident was caused by a bicycle and thus Respondent is not entitled to uninsured motorist coverage (*id.* at ¶ 14).

DISCUSSION

It is well settled that on a motion to vacate a default judgment entered based upon a failure to appear or timely serve an answer, the movant must demonstrate both a reasonable excuse for the delay and the existence of a meritorious defense (*Young v Richards*, 26 AD3d 249, 250 [1st Dept. 2006]; *Simon & Schuster, Inc. v Howe Plastics & Chemicals Co., Inc.*, 105 AD2d 604, 605 [1st Dept. 1984]). While courts may, in their discretion, determine that law office failure constitutes a reasonable excuse for default pursuant to CPLR 2005, a mere allegation of law office failure, without any supporting facts to explain and justify the failure, is insufficient to establish excusable default for the purpose of a motion to vacate a default judgment (*Tandy Computer Leasing v Video X Home Library*, 124 AD2d 530 [1st Dept 1986]). Furthermore, claims of law office failure should be supported by a detailed and credible explanation of the default or defaults at issue (*Campbell-Jarvis v Alves*, 68 AD3d 701, 702 [2nd Dept. 2009]). Generally, to establish law office failure, an affidavit must be submitted by an individual with knowledge that clearly demonstrates facts establishing the claimed meritorious defense. (*Abrams v Abrams*, 56 AD2d 775, 775 [1st Dept. 1977]). The affidavit is insufficient if it is “patently indefinite, conjectural and conclusory, or devoid of a sufficient factual basis” to substantiate the movant’s contentions (*id.*).

Here, Respondent’s papers are silent regarding a reasonable excuse and meritorious defense with the exception of a single line that states: “Due to law office failure in properly calendaring the Petitioner’s motion, Respondent could not present its opposition, which attaches said police report, which includes pertinent facts omitted by Petitioner in its petition” (NYSCEF doc No. 12, ¶ 10). As the caselaw cited above establishes, this vague and unsubstantiated claim is insufficient to establish a reasonable excuse. Respondent’s submissions are mainly focused on the merits of Respondent’s argument for re-argument and renewal. However, given that

Respondent has not established a reasonable excuse or meritorious defense for failing to appear earlier in this proceeding, it would be an imprudent exercise of discretion for this Court to vacate the default judgment. As Respondent’s motion must be dismissed on this ground alone, the Court is precluded from assessing Respondent’s arguments for re-argument and renewal.

Accordingly, this Court adheres to its default order and judgment dated January 17, 2020 and declines to restore this case to active status. Respondent’s motion is thus denied in its entirety.

CONCLUSION

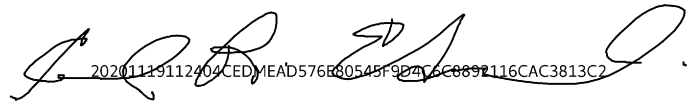
Based on the foregoing, it is hereby

ORDERED that the Respondent Kalidou Diallo’s application for an order granting Respondent leave for the Court to vacate the default order dated January 17, 2020 which granted Petitioner Hereford Insurance Company's motion, restoring this proceeding to active status, and for re-argument and renewal of Petitioner's motion (Motion Seq. 002) is denied in its entirety; and it is further

ORDERED that Petitioner’s application to dismiss Motion Seq. 002 is granted; and it is further

ORDERED that this proceeding remains disposed in accordance with this Court’s Decision and Order dated January 17, 2020 resolving Motion Seq. 001; and it is further

ORDERED that counsel for Petitioner Hereford Insurance Company shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.



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11/18/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: