

Hudson Excess Ins. Co. v 230 Bushwick Realty LLC
2021 NY Slip Op 30846(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 651141/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. ARTHUR F. ENGORON</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>HUDSON EXCESS INSURANCE COMPANY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>230 BUSHWICK REALTY LLC, JUAN FRANCO</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 37EFM</p> <p>INDEX NO. <u>651141/2020</u></p> <p>MOTION DATE <u>09/29/2020,</u> <u>09/29/2020</u></p> <p>MOTION SEQ. NO. <u>001 002</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 61, 68, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 69

were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, plaintiff's motions, for a default judgment and for an extension of time to serve process, are granted, and defendant's cross-motion to dismiss is denied for the reasons set forth herein.

Background

On February 20, 2020, plaintiff, Hudson Excess Insurance Company ("Hudson"), commenced this action against defendants, 230 Bushwick Realty LLC ("Bushwick") and Juan Franco ("Franco"), to rescind a general liability insurance policy issued to Bushwick based upon material misrepresentations in the application for insurance. On February 24, 2020, Hudson filed an amended complaint seeking a judgment declaring that, inter alia, the insurance policy issued to Bushwick is rescinded due to material misrepresentations and is void ab initio.

The facts, simply stated, are as follows. Bushwick owns the property located at 230 Bushwick Avenue in Brooklyn ("the Property"). Bushwick submitted an application for insurance to Hudson dated January 17, 2019 ("the Application"), wherein Bushwick sought general liability coverage for the Property. The Application represented that the Property would be vacant, locked and that no renovation work was currently in process. Based on those representations, Hudson issued a general liability policy to Bushwick for the period of January 18, 2019 to October 18, 2019 ("the Policy"). The Policy was issued to cover a vacant building under classification code 68606 for a premium of \$851.96. Hudson's underwriting guidelines under said code used exclusively for vacant buildings expressly states that vacant buildings undergoing construction or renovation work are not eligible for coverage.

Despite the representations made in the Application, after the Policy was issued Bushwick began hiring contractors to perform renovation work at the Property in order to rent apartments to residential tenants (“the Project”). Franco alleges that he was injured on July 24, 2019 while working for his employer, MetroCity, on the Project (“the Accident”). As a result, Franco initiated a lawsuit against Bushwick in New York Supreme Court, Queens County, seeking to recover damages based on claims of negligence and violations of the Labor Law (“the Action”). Upon being notified of the Action, Hudson investigated the claim, which revealed that subsequent to the Policy being issued, Bushwick hired contractors to renovate the Property in order to rent refurbished apartments. The investigation also revealed that, as of July 1, 2019, during the term of the Policy and prior to the Accident, tenants began occupying certain apartments. By letter to Bushwick dated October 18, 2019, Hudson agreed to handle, investigate, and defend the Action on Bushwick’s behalf subject to a reservation of rights, including, inter alia, the right to seek rescission of the Policy based on material misrepresentations in the Application.

Hudson then commenced the instant action, to rescind of the Policy. On March 12, 2020, pursuant to Limited Liability Company Law § 303, Hudson caused the amended complaint to be served on Bushwick, and an affidavit of service was filed on May 26, 2020. Having been unable to find a proper address to serve Franco, Hudson attempted service via delivery to Silberstein Awad & Miklos, P.C., counsel for Franco in the Action (“the Silberstein Firm”); however, the Silberstein Firm refused to accept service.

Hudson now moves, pursuant to CPLR 3215, for judgment against Bushwick on default, declaring that the Policy is rescinded and void ab initio due to the material misrepresentations within the Application, and that Hudson has no duty to defend, indemnify or afford coverage to Bushwick under the Policy (“Motion Sequence 001”). Hudson also moves, pursuant to CPLR 306-b, 308(5), and 2004, to extend the time to serve Franco and to allow for substituted service of Franco by serving the Silberstein Firm (“Motion Sequence 002”).

Subsequent to Hudson filing Motion Sequence 002, on July 22, 2020, Franco appeared in this action by filing an answer generally denying all the allegations of the complaint and asserting several affirmative defenses, including, but not limited to, failure to state a cause of action; failure to serve process; failure to choose a proper venue; and Statute of Limitations. On August 17, 2020, Franco filed an amended answer, and on that same date Hudson filed a notice of rejection, rejecting the amended answer for failure to comply with CPLR 3025.

Franco also cross-moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint due to Hudson’s failure to comply with Insurance Law § 3420(d)(2), by failing to serve a timely notice of disclaimer of liability or denial of coverage.

Discussion

Franco’s cross-motion to dismiss the complaint must be denied. According to Insurance Law § 3420(d)(2), if an insurer, under a liability policy, disclaims liability or denies coverage for bodily injury arising out of any type of accident, the insurer must give written notice of its disclaimer or

denial to the insured and to the injured person as soon as possible. However, Hudson is not disclaiming liability or denying coverage, Hudson is seeking to rescind the entire Policy.

“To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented.” Interboro Ins. Co. v Fatmir, 89 AD3d 993, 993-94 (2nd Dept. 2011). Courts have considered this difference and have held that when an insurer is seeking rescission, such as is the situation here, then the written notice of disclaimer or denial is not necessary. See id. at 994 (“a disclaimer pursuant to Insurance Law § 3420(d) was not required because ... ‘the policy never provided coverage’ for the claim at issue”); see also Metro. Prop. & Cas. Ins. Co. v Pulido, 271 AD2d 57, 60 (2nd Dept. 2002) (“the issue of a timely disclaimer is irrelevant if, in the first instance, the policy never provided coverage for the particular claim at issue.”). Thus, Hudson had no legal duty to send such a notice to Franco or even Bushwick. Furthermore, Franco has no standing to oppose the motion for a default judgment as against Bushwick as Bushwick is in default due to its failure to appear in this action. Additionally, Franco’s arguments that there are issues of fact that require discovery prior to entry of a default judgment against Bushwick are misplaced. The appropriate standard of review for a motion for a default judgment is not whether there are material facts sufficient to warrant denial of the motion, instead on a motion for a default judgment, all a plaintiff must provide to the Court is proof of defendant’s default and first-hand confirmation of the facts constituting the claim.

Here, Bushwick was served on March 12, 2020 pursuant to Limited Liability Company Law § 303. On May 7, 2020, Hudson provided Bushwick with additional notice of this action by sending a letter to Bushwick enclosing a copy of the amended complaint. To date, Bushwick has failed to appear in this action, answer or otherwise respond to the complaint, and its time to do so has expired. Consequently, Bushwick is deemed to have admitted all factual allegations in the complaint and Hudson is entitled to a default judgment against Bushwick. CPLR 3215(a); Woodson v Mendon Leasing Corp., 100 NY2d 62, 71 (2003) (“defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.”). Moreover, Hudson established that is entitled to its requested relief by submitting, inter alia: (1) the Application, illustrating that Bushwick applied for insurance specifically for a vacant building; (2) the Policy; (3) the affidavit of Jaclyn Zimmerman, AU, ASLI, Hudson’s Product Manager and Underwriting Supervisor, attesting to Bushwick’s submission of the Application, Hudson’s issuance of the Policy based upon Bushwick’s representations within the Application under the classification code for vacant buildings, Hudson’s investigation after receiving notice of the Action, Hudson’s investigation findings, Hudson’s reservation of rights letter, and to the fact that Hudson would not have issued the Policy had it known that the Property was not vacant and would undergo construction; (4) Hudson’s underwriting guidelines; and (5) the affidavits of Jackie Tam and Tara Kearns, senior investigator and investigative analyst for Roman & Associates, Inc. (retained by Hudson to conduct the investigation), attesting to the investigation and its findings. See Schirmer v Penkert, 41 AD3d 688, 690-91 (2nd Dept. 2007) (“To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, ... that show that it would not have issued the same policy if the correct information had been disclosed in the application.”).

As for Motion Sequence 002, as stated above, Hudson filed its amended complaint on February 24, 2020, making the complaint due to be served on or before June 23, 2020, 120-days after commencement (also extended to August 6, 2020 pursuant to Executive Orders handed down as a result of the Coronavirus pandemic). See CPLR 306-b. Hudson was unable to serve process on Franco within the 120-day time period, as Hudson was unable to find a proper address to serve process on Franco. As a result, Hudson attempted to serve Franco on March 2, 2020 by delivering a copy of the amended summons to the Silberstein Firm, counsel for Franco in the Action (and counsel for Franco in the instant action); however, the Silberstein Firm refused to accept service. Since that time, Hudson has retained an investigator to locate, without success, a current address for Franco. Hudson now moves, pursuant to CPLR 306-b and 2004, to extend the time to serve process on Franco, and, pursuant to CPLR 308(5), for an order allowing substituted service of process on Franco on the Silberstein Firm. Franco has already appeared in this action by filing his answer on July 22, 2020. However, Franco has not opposed Motion Sequence 002.

Hudson has demonstrated good cause for the extension and for the use of substituted service, as Hudson was unable to locate an address to serve process on Franco, despite diligent efforts. Furthermore, Franco faces no prejudice as he has already appeared in this action by filing an answer.

Conclusion

The motion by plaintiff Hudson Excess Insurance Company for a default judgment against defendant 230 Bushwick Realty LLC is granted; the cross-motion to dismiss by defendant Juan Franco is denied; and the motion by plaintiff Hudson Excess Insurance Company to extend the time to serve process on defendant Juan Franco and for use of substituted service, is granted. Plaintiff's time to serve the summons and amended complaint upon defendant Juan Franco is hereby extended to and including April 30, 2021, and it is further ordered that plaintiff may utilize substituted service of process on Franco by serving process on Silberstein Awad and Miklos, P.C. The Clerk is hereby directed to enter judgment in favor of Hudson Excess Insurance Company and against 230 Bushwick Realty LLC declaring that: the Hudson general liability policy no. HBD 1003728100801 issued to 230 Bushwick Realty LLC for the period January 18, 2019 to October 18, 2019, is rescinded and void ab initio due to the material misrepresentations on the insurance policy submitted by 230 Bushwick Realty LLC to Hudson Excess Insurance Company; and declaring that Hudson Excess Insurance Company has no duty to defend, indemnify, or afford insurance coverage under said policy to 230 Bushwick Realty LLC or any party in the action entitled Juan Franco v 230 Bushwick Realty LLC, J.J.J. Handyman Inc. and AL Plumbing & Contracting, Inc., Index No. 715824/2019.


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3/17/2021 DATE	ARTHUR F. ENGORON, J.S.C.				
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