

**Park Ins. Co. v Luxury One Corp.**

2021 NY Slip Op 31567(U)

May 5, 2021

Supreme Court, New York County

Docket Number: 654458/2020

Judge: Andrea Masley

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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. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

PARK INSURANCE COMPANY Plaintiff,
INDEX NO. 654458/2020
MOTION DATE 02/22/2021
MOTION SEQ. NO. 001

- v -

LUXURY ONE CORP., Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - DEFAULT

On February 21, 2021, plaintiff Park Insurance Company filed this motion, pursuant to CPLR 3215, for a default judgment against defendant Luxury One Corp. for failure to timely answer plaintiff's September 15, 2020 complaint. Prior to this filing, on November 18, 2020 the parties executed a stipulation extending defendant's time to answer, move, or otherwise respond to December 17, 2020. (NYSCEF Doc. No. [NYSCEF] 6, Stipulation.) On December 15, 2020, defendant's former attorney filed an undated Consent to Change Attorney, substituting Juan P. Luciano, Esq. as defendant's new counsel. (NYSCEF 10, Consent to Change Attorney.) Defendant failed to answer, move, or otherwise respond by December 17, 2020.

Plaintiff now seeks a default judgment on its claims for breach of contract to recover unpaid insurance claims owed to plaintiff by defendant under the insurance policy agreement between the parties. This motion was returnable in the E-Submissions Part (Room 130) on March 12, 2021. (NYSCEF 12, Notice of Motion [Seq.

001].) Defendant did not oppose this motion. Rather, on March 12, 2021, defense counsel e-filed an “Affirmation: Request for Extension”. (NYSCEF 35, Luciano aff.) In his affirmation, counsel for defendant requested an extension to file opposition to this motion, citing his voluminous work as solo practitioner as the reason for his failure to timely respond. (*Id.* ¶¶ 3, 4.) Defense counsel admits he received the Notice of Motion on February 22, 2021. (*Id.* ¶ 3.) This affirmation was not e-mailed to the court pursuant to the Part 48 Practices, and the court was not otherwise notified to its filing.

On April 20, 2021, after reviewing the fully submitted motion and docket, the court e-mailed the parties to confirm whether there was an agreement to extend defendant’s time to oppose. The parties answered that an agreement was not reached. On April 26, 2021, defendant e-filed a late answer with counterclaims. On April 27, 2021, defendant e-filed an untimely cross motion for leave to file a late answer and counterclaims and vacatur of any default. (NYSCEF 41, Notice of Cross Motion.)

The court considers the motion fully submitted on March 12, 2021 and unopposed. Pursuant to CPLR 2214(b), any opposition papers or cross motion was due on March 5, 2021. Defense counsel’s affirmation, filed at 3:49 PM on March 12, 2021, the motion’s submission date, was not a timely request for an extension. Further, defendant’s answer and cross motion are also not timely. The court will decide the motion accordingly.

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or

appearing” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, \*6-7 [Sup Ct, NY County 2018] [citations omitted]).

### Proof of Service

CPLR 3215 (g)(4)(i) provides,

“[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.”

In support of this motion, plaintiff provides proof of service of the summons and the complaint upon the defendant evidenced by affidavits of service. (NYSCEF Doc. Nos. 3 and 5, Affidavits of Service.) Defendant also waived all defenses related to service of process in the November 18, 2020 stipulation entered into by the parties. (NYSCEF 6, Stipulation ¶2 [“Defendant waives all defenses pertaining to service of process and personal jurisdiction].)

### Proof of Claim

CPLR 3215 (f) requires a plaintiff to submit “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ... .” Here, plaintiff submits the affidavit of Thomas Polsinelli, plaintiff’s President. (NYSCEF 13, Polsinelli aff.) In his affidavit, Polsinelli affirms that he is a custodian of plaintiff’s records and has personal knowledge of the facts. (*Id.* ¶¶ 1, 2.) Polsinelli affirms that plaintiff provided defendant with livery insurance coverage with a high deductible plan pursuant to which defendant was responsible for paying 100% of claims in accordance with the said insurance policies. (*Id.* ¶ 6.) Polsinelli further affirms that plaintiff extended coverage and paid out or settled hundreds of claims in accordance with its obligations under the

policy, but defendant has failed satisfy its obligations by not paying to Plaintiff the amounts due under policy. (*Id.* ¶ 7.) According to Polsinelli, as of of January 31, 2020, \$2,560,061.91 in unreimbursed claims and related claims handling fees remain outstanding, and as of February 10, 2021, seventy-two settlement claims amounting to an estimated aggregate payout of \$909,000.00 are open. (*Id.* ¶¶ 39, 40, n3, n4.) Polsinelli states that defendant did not object to any invoices sent. (*Id.* ¶ 42.)

“To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages.” (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted].)

Plaintiff has presented sufficient proof of fact that the parties entered into an insurance policy agreement for a coverage period from 2016-2017, as well as two later agreements extending the coverage periods to 2017-2018 and from 2018-2019. (NYSCEF1, Complaint ¶¶ 3, 16, 30; NYSCEF 13, Polsinelli aff. ¶¶ 9-34; NYSCEF 14 and 17, Policy Agreements 2016-2017 and 2017-2018; NYSCEF 20 and 21, Policy Quote and Financing Agreement.) Further, plaintiff has presented sufficient proof of fact that it performed its obligations under the policy agreements, and that defendant defaulted on its obligation to pay plaintiff pursuant to those agreements. (NYSCEF 13, Polsinelli aff ¶ 7.) As a result, plaintiff alleges that it suffered damages. (NYSCEF 1, Complaint ¶ 50; NYSCEF 13, Polsinelli aff. ¶ 45.)

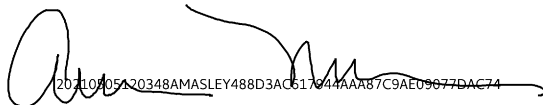
Proof of Default

Finally, plaintiff's attorney affirms that defendant has not responded to the complaint in the time set forth by the parties' stipulation, and in compliance with the rules of this court (NYSCEF 24, Lafont aff), and the record reflects the same.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment, motion sequence number 001, is granted, in part, as to liability only; and it is further

ORDERED that the parties are to appear for an inquest on damages on June 22, 2021 at 2:15PM via Microsoft Teams.



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5/5/2021  
DATE

ANDREA MASLEY, 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