

1416 Coney Is. Realty LLC v Wesco Ins. Co.
2022 NY Slip Op 32920(U)
August 24, 2022
Supreme Court, Kings County
Docket Number: Index No. 502686/2019
Judge: Ingrid Joseph
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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of August 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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1416 CONEY ISLAND REALTY LLC and MITCHELL SPITZ,

Index No.: 502686/2019

Plaintiffs,

DECISION & ORDER

-against-

WESCO INSURANCE COMPANY,

Defendant.

MELVIN MEYER as Executor of the Estate of MICHELLE MEYER, MOLLINE CASSUTO and ALAN KWARTNER,

Nominal Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant’s motion.

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion/Affidavits/ Affirmations Annexed.....	125 – 146; 79-96
Affirmation in Opposition Papers.....	147 – 153; 98-107
Reply to Opposition Papers.....	154; 108

In this matter, plaintiffs, 1416 Coney Island Realty LLC and Mitchell Spitz (“Mr. Spitz”), referred to collectively as (“plaintiffs”) seek a judgment declaring that their commercial general liability insurer, defendant Wesco Insurance Company (“Wesco”) must defend and indemnify nominal defendants, Melvin Meyer, as Executor of the Estate of Michelle Meyer, and Molline Cassuto and Alan Kwartner, referred to collectively as (“the lessors”), in an action

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captioned *Ira Spodek, et al. v Michelle Meyer, et al.*¹, in the Supreme Court of the State of New York, County of Kings, Index No. 502549/2017 (“premises liability case”), as additional insureds under the commercial general liability policy. Plaintiffs and the nominal defendants previously moved for summary judgment (in motion sequence 5) on the First, Third and Fifth causes of action for declarations that Wesco is obligated to defend, indemnify and pay all legal fees for a counsel of their choosing and litigation costs incurred to defend the premises liability case. In the cross motion (motion sequence 6) Wesco sought summary judgment declaring that it has no duty to defend or indemnify the nominal defendants (lessors) in the premises liability case. However, the court, upon Wesco’s failure to appear for oral argument on August 4, 2021, granted the plaintiffs’ motion on default (“August 2021 order”) and marked Wesco’s cross motion for summary judgment (motion sequence 6) off the calendar.

In this case Wesco moves (motion sequence 8) pursuant to CPLR § 5015 to vacate the August 2021 order which granted plaintiffs’ underlying motion for summary judgment (motion sequence 5). Upon vacatur, Wesco seeks an order denying plaintiffs’ motion and further, an order pursuant to CPLR § 3025 granting Wesco leave to amend its answer to include a counterclaim against Mr. Spitz. Wesco also requests an order pursuant to CPLR § 3124 compelling plaintiffs and nominal defendants to fully respond to Wesco’s First Set of Interrogatories and an order pursuant to 22 NYCRR 202.21(e) vacating plaintiffs’ note of issue and extending the time within which to move for summary judgment.

In support of the branch of its motion to vacate, Wesco submitted, among other items, the affirmation of its attorney, Max W. Gershwier (“Mr. Gershwier”), who affirms that he

¹ In that matter, Ira Spodek seeks damages against the fee simple owners (the nominal defendants named herein) and Mitchell Spitz (lessee of the premises) for personal injuries he allegedly sustained due to an alleged defect on the sidewalk adjacent to the property.

inadvertently failed to appear for oral argument, because he was unaware of the scheduled court appearance. Mr. Gershwier states that his failure to appear was the result of law office failure, because the firm's calendar clerk did not receive an alert that prompted internal scheduling of the matter. However, Mr. Gershwier affirms that on August 5, 2021, one day after the date scheduled for oral argument, a conference call was held between counsels for all parties and the court clerk, who advised them that while Wesco's cross-motion would remain marked off, the court would consider Wesco's responsive papers in opposition to the Owner's motion. Mr. Gershwier points out that the Owner's motion was nevertheless decided without reference to the arguments in opposition to the motion. Additionally, Mr. Gershwier argues that Wesco has a meritorious defense inasmuch as the insurance policy at issue contains two exclusions relevant to bodily injury that would exclude the claims pursued by Ira Spodek in the premises liability case.

In opposition to the branch of Wesco's motion to vacate, plaintiffs contend that Wesco did not set forth a reasonable excuse and failed to provide a full accounting of its prior defaults. The plaintiffs assert that Wesco has exhibited a pattern of default and neglect, starting with its failure to timely interpose an Answer and its subsequent failures to appear for oral argument on May 26, 2021² and August 4, 2021 for motion sequences 5 and 6. Additionally, plaintiffs argue that Wesco has failed to demonstrate a meritorious defense, as Wesco's duty to defend plaintiffs and the nominal defendants arise from the commercial general liability policy of insurance³ which names the nominal defendants as additional insureds. Moreover, plaintiffs point out that the Court of Appeals has held that an insurer's duty to defend its insured arises whenever allegations in a complaint state causes of action that give rise to the reasonable possibility of

² May 26, 2021 was the initial return date for motion sequences 5 & 6

³ Wesco issued to 1416 Coney Island Realty LLC a commercial general liability including Mr. Spitz as a named insured and the Owners as additional insureds.

recovery under the policy. Plaintiffs contend that it is undisputed Wesco's duty to defend and indemnify was triggered, because the complaint in the premises liability case alleges that the plaintiffs/nominal defendants were negligent by failing to properly maintain and repair the accident location.

In response, Wesco points out that its duty to defend is terminated due to the statutory liability exclusion in the policy, which removes any factual or legal ground that would obligate Wesco to be defend or indemnify plaintiffs or the nominal defendants.

Generally, in order to vacate a default pursuant to CPLR § 5015(a)(1), the party seeking to vacate the default must demonstrate both a reasonable excuse for the default and a potentially meritorious defense (*see* CPLR § 5015[a][1]; *Millard v Wyche*, 164 AD3d 778, 779 [2d Dept 2018]; *Gazetten Contr., Inc. v HCO, Inc.*, 45 AD3d 530 [2d Dept 2007]). Such a motion must be "made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party" (CPLR § 5015[a][1]). Ultimately, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see Rugieri v Bannister*, 7NY3d 742, 744 [2006]). In exercising that discretion the trial court may accept law-office failure as an excuse (*see* CPLR § 2005). Among the relevant factors to be considered in determining motions to vacate defaults emanating from law office failure are whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy favoring resolving cases on the merits (*Gomez v Gomez-Trimarchi*, 137 AD3d 972, 973 [2d Dept 2016]; *Sicoli v Sasson*, 76 AD3d 1002 [2d Dept 2010]; *Peters v Pikard*, 143 AD2d 81 [2d Dept 1988]; *Assn. for Children with Learning Disabilities, Nassau Ch., Inc. v Zafar*, 115 AD2d 580 [2d Dept 1985]; *Stolpiec v Wiener*, 100 AD2d 931 [2d Dept 1984]).

In this case, the Part Rules provide that oral argument is required on all motions via Microsoft Teams⁴, and a party's failure to appear may result in the motion being marked off. The Part 83 clerk also announces, during the virtual session, that the court may, in the exercise of its discretion, adjust markings after the calendar call. No adjustment was made in this case; however, Wesco's attorney, Mr. Gershwier, has affirmed that his failure to appear at the August 4, 2021 court date was neither willful or deliberate but rather, the result of his calendar clerk not internally calendaring the matter for oral argument. Additionally, Mr. Gershwier immediately filed the instant motion after receiving a copy of the order with notice of entry. Based on this minimal delay, and plaintiffs and the nominal defendants failure to show that they are prejudiced, the court finds that Wesco's counsel has demonstrated a reasonable excuse for failing to appear for oral argument on August 4, 2021. Further, Wesco has demonstrated the existence of a meritorious defense to the extent of proffering the subject insurance policy, which contains a Statutory Liability Exclusion⁵ that could relieve Wesco of any duty to defend and indemnify the Owners if it is determined that the Owners' liability, if any, arises solely out of the duty imposed upon the owners of the premises by Section 7-210 of the Administrative Code of the City of New York.

In support of the branch of Wesco's motion to amend its original answer, Wesco contends that Mr. Spitz, as a named insured on the Insurance Policy, breached such policy by making payments towards the Owner's legal fees and expenses without first obtaining Wesco's consent. Wesco argues that Mr. Spitz's actions gave rise to a counterclaim for a judgment

⁴ The Part Rules for IAS Part 83 which contain the hyperlink and dial-in information to access Part 83's virtual courtroom was electronically filed on New York State Courts Electronic Filing ("NYSCEF") prior to the appearances for motion sequences 5 & 6 (the notices were filed on May 19, 2021 and July 28, 2021).

⁵ The Statutory Liability Exclusion states in pertinent part that this insurance does not apply to liability for bodily injury arising from a duty imposed on the additional insured by statute, ordinance or law.

declaring that Wesco has no duty to indemnify Mr. Spitz with regard to any amount he has paid toward the plaintiffs' and nominal defendants' legal costs incurred to defend the premises liability case.

In general, an application for leave to amend a pleading pursuant to CPLR § 3025(b) should be freely given, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*DeLuca v Pecoraro*, 109 AD3d 636, 638 [2d Dept 2013]).

Here, the court finds that Wesco's counterclaim does not prejudice or surprise the plaintiffs or nominal defendants, since Mr. Spitz, as the sole member of 1416 Coney Island Realty LLC, requested defense and indemnification from Wesco. The Owners also failed to show that Wesco's claim is palpably insufficient or devoid of merit. Wesco's claim for a declaratory judgment is based upon its contention that Mr. Spitz breached a policy condition by failing to obtain Wesco's consent prior to paying the legal fees and cost to defend the premises liability case.

Accordingly, after oral argument and upon review of the submitted documents, it is hereby

ORDERED, that the motion of Wesco Insurance Company (Motion Sequence 8) is granted to the extent that the Decision and Order dated August 9, 2021 is hereby vacated, and it is further

ORDERED, that plaintiffs' underlying motion (Motion Sequence 5) is denied on the ground that there exists issues of fact concerning Wesco's obligations under the commercial general liability policy of insurance, and it is further

ORDERED, that the remaining branches of Wesco's motion (Motion Sequence 8) for leave to amend is granted and to compel are granted to the extent that Wesco shall serve its amended answer upon all parties herein within twenty (20) days of the date of entry of the instant Order, and plaintiffs' and nominal defendants, shall fully respond to Wesco's First Set of Interrogatories.

This constitutes the decision and order of the court.

ENTER



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**