Supreme Court of the State of New York
County of Kings

Part 91

DARYL O HUGGINS AND VERM PUT REALTY, LLC,

Plaintiff,

against

ALLSTATE INSURANCE COMPANY, ADA INSURANCE AGENCY, INC., EUGENE B GRANT, AND CEFALU & KLETTER INSURANCE AGENCY INC.,

Defendants.

Index Number 506345/2018
Seq. 005

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, defendant's motion to re-argue and vacate (Seq. 005) is decided as follows:

Introduction

This action is based on a fire that happened at a premises owned by the plaintiffs. Allstate denied plaintiffs' insurance claim after the fire because, Allstate alleged, the premises was tenant-occupied and not owner-occupied, in violation of the policy. The plaintiffs claim that they are entitled to payment on their claim for damage caused by the fire because, after discovering that the premises was tenant-occupied, Allstate continued to issue policies and accept premiums from the plaintiffs.

Factual Background and Procedural Posture

Motion sequences 001 and 002 were filed in October 2018 and made returnable before the then-assigned IAS Justice Paul Wooten. After multiple judicial reassignments and a series of adjournments necessitated by the Covid-19 pandemic, the motion was scheduled for oral argument on April 7, 2021. On April 2, 2021, the court issued a Microsoft Teams meeting link

to all parties, including Allstate's counsel. This is undisputed. However, defendant contends that the court sent two links—this assessment is incorrect. The second link that counsel provides appears to have been generated when the court's original message was forwarded within the movant's firm.

At the calendar call on April 7, 2021, all parties except for Allstate and the unrepresented corporate defendant appeared to argue motion sequences 001 and 002. Importantly, the motions were fully briefed. The plaintiff's motion was granted and Allstate's motion was denied both in light of Allstate's default *and* based upon the papers submitted to the court, as indicated in the court's prior order. Specifically, plaintiffs' motion for summary judgment was granted because they proved prima facie that Allstate continued to accept premiums and issue policies after denying plaintiffs' claim on the basis that the unit was tenant-occupied, not owner-occupied.

Allstate filed a motion to vacate its April 7, 2021 default, designated sequence 004. On December 15, 2021, that motion was adjourned by so-ordered stipulation with a briefing schedule to March 16, 2022. Importantly, that briefing stipulation marked the motion "final." In the evening on March 15, 2022, the parties filed a stipulation to adjourn the motion without the authorization of the court and without notifying the court. That stipulation was rejected because the appearance had previously been marked final, and the motion was marked off on March 16, 2022, because no party appeared at the calendar call.

Allstate then filed the instant motion, designated sequence 005, on June 30, 2022, over three months after the prior motion was marked off. This motion seeks to reargue motion sequences 001 and 002, and alternatively seeks vacatur of the order dated April 7, 2021, which granted plaintiff's motion for summary judgment (Seq. 001) and denied Allstate's motion for summary judgment (Seq. 002).

Analysis

As an initial matter, the request for re-argument pursuant to CPLR 2221 is improper here. To establish a basis for reargument, defendant must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998 1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]). Defendant does not claim that the court misapprehended any elements of the law or the facts, but instead advances new arguments well after the time to move for reargument has passed (CPLR 2221 [d] [3]). Defendant's motion also requests vacatur of the April 7, 2021 order as the defendant contends its failure to appear was caused by issues with Microsoft Teams.

"A defendant seeking to vacate a default in answering or appearing pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*Beltran v New York City Hous. Auth.*, 206 AD3d 873, 875 [2d Dept 2022]). Such motion "must be made within one year after service upon the moving party of a copy of the judgment, with notice of its entry. . . . The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion" (*Redding v JQ III Assoc., LLC*, 204 AD3d 849, 849–50 [2d Dept 2022] [internal citations omitted]).

Here, motion sequence 005 was filed after the one-year period afforded by CPLR 5015 (a) (1). The movant's affirmation in support affords one sentence to noting that a motion seeking the same relief was previously filed (Aff. in Supp. at ¶ 3) but does not address the previously issued briefing schedule nor the rejection of the stipulation by the court. Even if movant believed there was a reasonable, good faith excuse for failing to appear on March 16, 2022, defendant needed to make that argument in its papers.

Ultimately, the movant fails to provide a "detailed and credible explanation" of its failures to appear (*Diamond v Leone*, 173 AD3d 686 [2d Dept 2019]). As to the first default, counsel claims to have received "two links from the Court," when the exhibits annexed to the movant's papers demonstrate that the second link was generated from within counsel's firm. Moreover, the photograph of the Microsoft Teams waiting room attached to counsel's moving papers cuts off the date and timestamp that would have been on the bottom right-hand side of the screen, which would have ensured that the waiting screen corresponded with the correct date and time of oral argument. The papers are silent as to the second failure to appear. Finally, the movant does not provide an explanation for the over three-month delay between its motion being marked off and filing this motion.

As a final point of emphasis, it must be noted that the underlying order resolving the parties' summary judgment motions was decided not solely on Allstate's default, but also upon consideration of the papers submitted on the fully-briefed motions. This prior determination also diminishes Allstate's ability to contend that it has a potentially meritorious defense, but the court need not reach this consideration in light of the foregoing analysis.

Conclusion

Allstate's motion (Seq. 005) is denied.

This constitutes the decision of the court.

May 5, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court