

**Starnet Ins. Co. v Kipling Arms LLC**

2023 NY Slip Op 32841(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 151617/2021

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

*Justice*

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STARNET INSURANCE COMPANY,  
Plaintiff,

- v -

KIPLING ARMS LLC, CAROL PERRY,  
Defendant.

INDEX NO. 151617/2021  
MOTION DATE 04/27/2023,  
06/26/2023  
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

-----X

KIPLING ARMS LLC  
Plaintiff,

Third-Party  
Index No. 595910/2022

-against-

COUSINS PAINTING CORP.  
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

This is a subrogation action brought by plaintiff, Starnet Insurance Company as subrogee of Michael Oliver to recover for property damage arising out of a fire sustained on June 7, 2020 at 145 W 96<sup>th</sup> Street, New York, New York (Action 1).

On November 15, 2022, defendant/third party plaintiff Kipling Arms LLC (Kipling) commenced a third-party action against Cousins Painting Corp. (Cousins Painting) for common negligence, law and contractual indemnification, and failure to procure insurance.

On December 8, 2022, non-party Allstate Insurance Company, as subrogee of Michael Oliver, commenced an action against Kipling Arms LLC, David Einsenstein Real Estate Corp, and Carol Perry in New York County Civil Court under index number 016359/2022 (Action 2). Action 2 seeks recovery for the property damages allegedly sustained in the same accident as Action 1.

Kipling now moves for a default judgment against third-party defendant Cousins Painting Corp. (Cousins Painting) (MS 002) and to consolidate this action with the related Action 2 pending in New York County, Civil Court (MS 003). No opposition has been submitted in response to either motion. The motions are consolidated herein for disposition.

#### **I. Motion for Default Judgment (MS 002)**

In its motion for a default judgement against Cousins' Painting, Kipling Arms argues that Cousins Painting has failed to make an appearance, answer, or reply to the third-party summons and complaint. No opposition has been submitted.

In support of the motion, Kipling relies upon the affidavit of service of the third-party summons and complaint, dated November 22, 2022 and December 1, 2022. *See* NYSCEF doc. no. 29. Kipling Arms further submits a letter of default sent to corporate defendant Cousins Painting with a copy of the summons and complaint attached. *See* NYSCEF doc. no. 35. Lastly, Kipling Arms submits an affidavit of merit by Isaac Einstein, its managing agent, in which he asserts that he has a meritorious cause of action against Cousins Painting for negligence, indemnification and/or contribution. *See* NYSCEF doc. no. 36.

To date, Cousins Painting has failed to answer, appear, or obtain an order from the Court extending its time to do so. Additionally, the time to answer or otherwise appear has expired. *See* CPLR 3012 (a). Therefore, Kipling's motion for a default judgment against Cousins Painting is granted.

## II. Motion to Consolidate (MS 003)

Kipling also moves to consolidate this action with Action 2, *Allstate Insurance Company, as subrogee of Michael Oliver v Kipling Arms LLC, David Einsenstein Real Estate Corp, and Carol Perry*, New York County Civil Court, index number 016359/2022 (Action 2). Action 2 seeks recovery for the property damages allegedly sustained in the same accident as Action 1. No opposition has been submitted.

Kipling argues that both actions that it seeks to consolidate arise out of property damage resulting from a fire that allegedly took place on June 7, 2020. The pleadings in each of the subrogation actions at issue involve the property damages arising out of the same alleged occurrence. Action 1 and Action 2 are both in the early discovery stages, no depositions have been held in both cases, and no notes of issue have been filed in either action.

As common issues of law and fact predominate in both actions, consolidation is warranted in this matter and will serve to promote judicial economy. *See* CPLR 602. Thus, movant's motion to consolidate is granted. Consolidation in this matter will also serve avoid a multiplicity of suits in multiple courts involving substantially all the same issues, facts, and parties.

## III. Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendant/third party plaintiff Kipling Arms LLC for a default judgment against third-party defendant Cousins Painting Corp. (MS 002) is granted, with the inquest to be held at the time of trial; and it is further

ORDERED that the motion of defendant/third party plaintiff Kipling Arms LLC to consolidate is granted and the above-captioned action is joined for trial in this Court with Kipling also moves to consolidate this action with Action 2, *Allstate Insurance Company, as subrogee of*

*Michael Oliver v Kipling Arms LLC, David Einsenstein Real Estate Corp, and Carol Perry*, index no. 016359/2022, Civil Court of the City of New York, New York County; and it is further

ORDERED that the consolidation shall take place under index no. 151617/2021 and the consolidated action shall bear the following caption:

X-----X

STARNET INSURANCE COMPANY as subrogee of  
MICHAEL OLIVER and ALLSTATE INSURANCE  
COMPANY, as subrogee of MICHAEL OLIVER,

Plaintiffs,

- v -

KIPLING ARMS LLC, CAROL PERRY, AND DAVID  
EISENSTEIN REAL ESTATE CORP.

Defendants.

X-----X

KIPLING ARMS LLC,

Third-Party Plaintiff,

- v -

COUSINS PAINTING CORP.

Defendants.

X-----X

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a certified copy of this order on the Clerk of the Civil Court, New York County, shall pay the appropriate transfer fee, if any, and shall contact the staff of said Clerk and cooperate in arranging the transfer of the file; and it is further

ORDERED that the Clerk of the Civil Court, New York County shall transfer to the Clerk of the Supreme Court, New York County the file in the action venued in that court; and it is further

ORDERED that service upon the Clerk of the Civil Court, New York County shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Civil Court, New York County and the Clerk of this Court shall coordinate the transfer of the documents being removed to this court so as to ensure an efficient transfer and to minimize insofar as is practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a copy of this order with notice of entry on the Clerk of this Court (60 Centre Street, Room 141B) who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred pursuant to this order under the New York County Index Number of the transferred action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents; and it is further

ORDERED that, upon the service of such documents, the Clerk of the General Clerk's Office shall mark the court's records to reflect the transfer and assign the transferred action to the undersigned Justice of this court; and it is further

ORDERED that service upon the Clerk of this Court and the Clerk of the General Clerk's Office shall be made in hard-copy form if the application herein has been made in hard-copy format or, if the application has been electronically filed, shall be made in accordance with the procedures

set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh)); and it is further

ORDERED that, upon the service of such documents, the Clerk of the General Clerk's Office shall mark the court's records to reflect the transfer and assign the transferred action to the undersigned Justice of this court; and, it is further

ORDERED that within 30 days of entry of this order, counsel for the moving party shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

The foregoing constitutes the decision and order of the Court.

8/9/2023

DATE

  
LESLIE A. STROTH, 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