

**Clemente v Federal Ins. Co.**

2023 NY Slip Op 33330(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 654046/2022

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42**

*Justice*

-----X

RAYMOND CLEMENTE,

Plaintiff,

- v -

INDEX NO. 654046/2022

MOTION DATE 9/5/2023

MOTION SEQ. NO. 001

FEDERAL INSURANCE COMPANY, CHUBB GROUP OF  
INSURANCE COMPANIES and CHUBB LIMITED,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 29

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

The plaintiff in this action, Raymond Clemente, was seriously and permanently injured on November 15, 2012, when a ceiling collapsed on him while he was performing construction work in Apartment 4B at 205 West 103<sup>rd</sup> Street in Manhattan, a residential cooperative. In 2013, he commenced a personal injury action against 205 West 103<sup>rd</sup> Street Owners Corp. (Owners Corp.) in the Supreme Court, Bronx County (*Clemente v 205 West 103 Owners Corp.*, Index No. 301074/2013). The plaintiff claims that throughout the several years of discovery in that action, which was scheduled for trial in June 2022, Owner’s Corp. repeatedly failed to disclose the entirety of its insurance coverage until the eve of trial and then, when notified of the claim, the defendants herein, Federal Insurance Company, Chubb Group of Insurance Companies and Chubb Limited, disclaimed coverage on the ground of late notice. The underlying action was resolved on June 29, 2022, when Owner’s Corp. conceded liability and confessed judgment in the sum of \$5 million to the plaintiff. A judgment in that amount was entered in New York County on September 2, 2022 (*Clemente v 205 West 103 Owners Corp.*, Index No. 157508/2022). It remains unsatisfied.

On October 16, 2022, the plaintiff commenced this action against the defendants pursuant to Insurance Law § 3420(a)(2), seeking the amount of the unpaid judgment. The defendants were served with the summons and complaint on or about November 8, 2022. They did not timely answer. On December 22, 2022, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment against them, submitting, *inter alia*, the verified complaint, the Judgment by Confession, proof of service and the docket in the underlying personal injury action. On February 2, 2023, the defendants filed a joint answer which the plaintiff rejected as untimely on February 6, 2023.

On February 7, 2023, the defendants filed an affirmation in opposition to the default motion. The affirmation was late and they did not cross-move pursuant to CPLR 3012(d) to compel the plaintiff to accept their late answer. Even if the affirmation, the only submission made in opposition, was deemed to be such a cross-motion, it fails to establish entitlement to that relief. In so determining, the court takes into account the excuse offered for the delay in responding, any possible prejudice to the plaintiff, the absence or presence of willfulness, and the potential merits of the defendants' defenses. See Emigrant Bank v Rosabianca, 156 AD3d 468 (1<sup>st</sup> Dept. 2017); Jones v 414 Equities LLC, 57 AD3d 65 (1<sup>st</sup> Dept. 2008). The untimely answer, which consists of general denials, conclusory affirmative defenses (see CPLR 3013; Commr. of State Ins. Fund v Ramos, 63 AD3d 453 [1<sup>st</sup> Dept. 2009]; Mfrs. Hanover Trust Co. v Restivo, 169 AD2d 413 [1<sup>st</sup> Dept. 1991]), and two counterclaims which allege, without legal or factual support, that there was no coverage, was properly rejected by the plaintiff. The defendants proffer no cogent basis to deny the plaintiff relief under Insurance Law § 3420. Compare Bahnuk v CountryWay Ins. Co., 214 AD3d 1218 (3<sup>rd</sup> Dept. 2023) [triable issue as to whether defendant in underlying personal injury action colluded with plaintiff in confessing judgment]. The defendants do not substantially dispute the facts as alleged by the plaintiff or that the plaintiff exercised due diligence in seeking the identity of Owners Corp's insurers. Indeed, any argument that they were not notified of the claim in a timely manner, within the meaning of CPLR 3420, is undermined by the well documented delay of their own insured in disclosing that information and the plaintiff's expediency in notifying them upon that disclosure

Insurance Law §3420(a)(2) permits an injured party to recover any unsatisfied judgment against an insured, directly from the insurer. Subsection 3420(a)(3) requires the injured party to exercise due diligence in attempting to ascertain the identity of, and thereafter notifying, the insurer. See e.g. Zurich Am. Ins. Co., 214 AD3d 846 (2<sup>nd</sup> Dept. 2023); Mt. Hawley Ins. Co. v

Seville Electroncis Trading Corp., 139 AD3d 921 (2<sup>nd</sup> Dept. 2016). Here, it was not until April 29, 2022, just prior to trial, that Owner's Corp. finally notified the plaintiff of the existence of an excess insurance policy issued to it by the defendant insurers. The plaintiff notified the defendants of the claim on May 5, 2022, and they disclaimed coverage on May 18, 2022, on the ground of late notice. When informed of the late disclosure by their insured, the defendants refuse to rescind the disclaimer. In that regard, the court notes that the docket in the underlying case includes a court order dated May 7, 2014, which expressly directs, *inter alia*, that the defendant, Owners Corp., was to provide "insurance information, policies, declaration pages, additional insured, etc. within 10 days." Earlier and later orders direct the same, expressly requiring disclosure of primary and excess policies. On March 24, 2016, Owners Corp. represented by affirmation that there was only one policy in effect on the date of the accident, and that was a policy of Leading Insurance Group Insurance Co., Ltd. with a coverage of \$1 million per occurrence and \$2 million in the aggregate. The same affirmation states that "your affirmant is not aware of any other excess insurance coverage at this time." A subsequent motion by the plaintiff to compel further information regarding excess insurance coverage was denied by that court.

Therefore, the plaintiff's motion is granted on the issue of liability since he has submitted proof of service of the summons and complaint, proof of the facts constituting his claim under Insurance Law § 3420, and proof of the defendants' default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). The issue of damage is reserved. In that regard, the parties shall comply with all directives in the Order of Reference to Commercial ADR Program dated September 26, 2023, and, as per that order, shall appear for a conference with the court on December 14, 2023, at 10:30 a.m. The parties need not appear on December 14, 2023, if a settlement is reached and a Stipulation of Discontinuance is filed *prior* to that date.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is granted on the issue of liability, and the issue of damages is reserved, and is further

ORDERED that the parties shall comply with all directives in the Order of Reference to Commercial ADR Program dated September 26, 2023, and appear for a conference with the court on December 14, 2023, at 10:30 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

*Nancy M. Brown*  
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9/27/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: