Mountain Val. Indem. Co. v Cabrera
2023 NY Slip Op 34941(U)
November 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 72666/22
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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MOUNTAIN VALLEY INDEMNITY COMPANY,

Plaintiff,

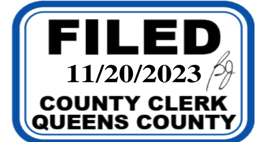
-against-

SUSANA CABRERA and PURA MONEGRO,

Defendants.

---x

Index No.: 72666/22
Mot. Date: 10/17/23
Mot. Seq. 1



The following papers were read on this motion by plaintiff for, *inter alia*, an order pursuant to CPLR 3215, for a default judgment against defendants Pura Monegro and Susana Cabrera; and, the cross-motion by defendant Pura Monegro for an order, pursuant to CPLR 2004 and 3012, granting her an extension of time to answer plaintiff's complaint, *nunc pro tunc*, and compelling plaintiff to accept her answer.

	PAPERS NUMBERED
Notice of Motion..	EF 4
Memorandum of Law..	EF 5
Affidavits -Exhibits..	EF 6-14
Answering Affidavit-Exhibits....................................	EF 18-21
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Notice of Cross-Motion..	EF 23
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Replying Affidavit..	EF 34

Upon the foregoing papers, it is ordered that the motion by plaintiff is denied; and, and the cross-motion by defendant Pura Monegro is granted, as set forth below.

Plaintiff Mountain Valley Indemnity Company (Mountain Valley) is an insurance company that issued a homeowner's insurance policy to defendant Susana Cabrera (Cabrera), with effective dates from July 23, 2019 to July 23, 2020, for the premises known as 38-04 99th Street, Corona, New York 13368. Defendant Pura Monegro (Monegro) is an individual who commenced a lawsuit in Supreme Court, Queens County, under Index No. 718822/2021 captioned: "*Pura Monegro v Idalia Luna Hernandez*, *The*

City of New York and Susana Cabrera" for injuries she allegedly sustained, on May 22, 2020, as the result of a fall on the public sidewalk of 99th Street (underlying action).

In this action, commenced by the filing of a Summons and Complaint on December 20, 2022, the plaintiff seeks a judicial declaration that the insurance policy does not provide coverage for claims arising out of an underlying incident, and that the plaintiff may withdraw from the courtesy defense it has provided Cabrera in the underlying action. It seeks a judicial declaration that it properly denied coverage under the relevant insurance policy issued to Cabrera due to the fact the 38-04 99th Street, Corona, New York 13368, was not a "residence premises" or an "insured location" under the policy's terms. According to the complaint, which is not verified, "Pura Monegro is named as a nominal defendant so that full and complete relief can be had by the parties herein".

In its complaint, the plaintiff alleges that its "investigation revealed that the premises was being used as a three family dwelling, instead of a two-family dwelling, containing a rental apartment on the first floor, a rental apartment on the second floor, and a basement apartment occupied by Susana Cabrera". Furthermore, allegedly, "Cabrera conceded to Mountain Valley during its investigation that she actively rented the premises and rented the premises to others at the time of the incident from which she derived income", and that she "admitted during Mountain Valley's investigation that the premises contains three apartments with two apartments being rented out to others while Susana Cabrera resided in the third basement apartment."

More specifically, in the first cause of action, the plaintiff alleges since at the time of the underlying incident, Cabrera resided in a basement apartment, while she rented out an apartment on the first floor and rented out an apartment on the second floor, the underlying incident did not occur at the "residence premises" because the premises consisted of three family dwellings, not two dwellings as defined by the policy. Furthermore, according to the plaintiff, since the premises does not meet the policy's definition of "resident premises," it also does not meet the policy's definition of an "insured location" and, that the policy's coverage does not apply to "bodily injury" arising out of a premises that is not an "insured location", Cabrera is not entitled to coverage. Based upon these contentions, thew plaintiff seeks a declaration that Mountain Valley has no obligation to defend or indemnify Cabrera, in connection with the underlying incident, including claims arising therefrom, and/or the Underlying Action. It also seeks a

a declaration that it may withdraw from the courtesy defense that it is currently providing Cabrera, in the underlying action.

In the second cause of action, the plaintiff alleges, that at the time of the underlying incident, Cabrera was renting apartment units at 38-04 99th Street to tenants for profit. Plaintiff contends that the underlying incident arose out of or in connection with the rental or holding out for rental of any part of any premises by an "insured" that is not an "insured location" and, that, accordingly, there is no coverage available for this matter as coverage is precluded by the policy's rental exclusion. Plaintiff seeks a declaration that has no obligation to defend or indemnify defendant Cabrera, in connection with the underlying incident.

Finally, in the third cause of action, the plaintiff alleges that while Cabrera initially participated in Mountain Valley's investigation of the underlying incident, she subsequently failed to cooperate and that this "willful and avowed obstruction of Mountain Valley's ability to investigate and defend the claims" constitutes a breach of the policy conditions requiring cooperation. Therefore, the plaintiff disclaimed coverage. Plaintiff seeks a declaration that due to this breach, it is entitled to a declaration that it has no obligation to defend or indemnify Cabrera that it may withdraw from the courtesy defense that it is currently providing Cabrera in the underlying action.

On July 5, 2023, the plaintiff moved for a default judgment against Cabrera and Monegro, on the grounds that despite being properly served, neither Cabrera nor Monegro have timely appeared or answered. It requests that the Court issue an order declaring that: Mountain Valley Indemnity Company has no obligation to defend or indemnify Susana Cabrera, Pura Monegro or anyone else in connection with the underlying incident, or any other occurrence, claim, or suit, including the suit captioned *Pura Monegro v Idalia Luna Hernandez, et al.,* New York State Supreme Court, Queens County, Index No. 718822/2021; and, that Mountain Valley Indemnity Company may withdraw from the defense of Susana Cabrera in the suit captioned *Pura Monegro v Idalia Luna Hernandez, et al.,* New York State Supreme Court, Queens County, Index No. 718822/2021.

The court file reflects that, on July 25, 2023, counsel for Momegro in the underlying action filed a stipulation adjourning the motion, originally returnable on August 15, 2023, to September 12, 2023. The motion was then administratively adjourned to October 17, 2023.

No opposition has been served on behalf of Cabrera. Monegro opposes the motion and cross-moves for an extension of time to answer plaintiff's complaint, *nunc pro tunc*, and compelling plaintiff to accept defendant Monegro's answer. The cross-motion is opposed by plaintiff.

On a motion for leave to enter a default judgment, pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649 [2d Dept. 2008]; *see* CPLR 3215 [f]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept. 2008]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. (*see Zelnick v Biderman Indus. U.S.A., Inc.*, 242 AD2d 227, 229 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422, 422 [2d Dept 1996]).

"[A] default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that [the party seeking default] establish a right to a declaration" (*JBBNY LLC v Dedvukaj*, 171 AD3d 898, 902 [2d Dept. 2019]; *Dole Food Co., Inc. v Lincoln Gen. Ins. Co.*, 66 AD3d 1493, 1494 [4th Dept. 2009], quoting *Merchants Ins. Co. of N.H. v Long Is. Pet Cemetery*, 206 AD2d 827, 828 [1994]; *see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:23).

Here, it is undisputed that there was proper service and the defendants defaulted in answering or appearing. Thus, the issue is whether the plaintiff has submitted sufficient proof of the facts of its claim. The Court finds that plaintiff has not.

As stated above, the complaint is not verified. In support of its motion, plaintiff submits, *inter alia*: an affidavit of Jamie Moody, Senior Consultant II at National General Insurance Company, the claims administrator for Mountain Valley (Moody affidavit); a copy of a disclaimer letter on Mountain Valley letterhead signed by a Harry Bryant; and, a purported handwritten signed statement of Cabrera, although to the extent it can be deciphered, reads "My son Franklin Cabrera, Jr, has translated". Counsel for plaintiff argues that this "signed statement confirms that the Premises contains three dwelling units, thus, placing the Premises outside of the Policy's definitions of "insured location" and "residence premises."

Paragraph "11" of the Moody affidavit states that "[d]uring its investigation, Mountain Valley spoke to Ms. Cabrera via telephone, wherein Ms. Cabrera stated that she resided on the first-floor of the building, a family lived on the second-floor, and a man lived in the basement". However, the affidavit is silent as to who from Mountain Valley spoke with Cabrera and allegedly obtained this admission, or when this telephone conversation took place. There is no transcript of the telephone conversation, which this Court notes is routinely done when insurance company representatives take statements from policy holders. There are few details provided regarding Mountain Valley's investigation. There is no affidavit from an investigator or adjuster regarding a visit to, or an inspection of, the premises to determine if it was being used as a three family dwelling.

The statement of Cabrera does not "confirm" anything, as it is barely legible. There is no affidavit from the person who obtained the statement. It is also not notarized or affirmed under penalty of perjury. More importantly, since it appears that English is not Cabrera's native language, there is no affidavit of translation as required by CPLR 2101[b]. Thus, even if the statement was in affidavit form, it is "facially defective and inadmissible" (*see Raza v Gunik*, 129 AD3d700 [2d Dept. 2015]; *Reyes v Arco Wentworth Mgt. Corp,* 83 AD3d 47 [2d Dept. 2011]*; Martinez v 123-16 Liberty Ave. Realty Corp*, 47 AD3d 901 [2d Dept. 2008]).

The Moody affidavit and the inadmissible statement of Cabrera, are insufficient for the plaintiff to prove the facts of its claim, i.e, that the premises were being used as a three family dwelling. Plaintiff has also not met its "heavy burden" of demonstrating that it acted diligently in seeking Cabrera's cooperation, which another is "fact constituting its claim" (*see Foddrell v Utica First Ins. Co.,* 178 AD3d 901 [2d Dept. 2019]; *Thrasher v United States Liab Ins*. Co., 19 NY2d 159 [1967]). Accordingly, plaintiff's motion for a default judgment is denied.

Pursuant to CPLR 3012(d): "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and a showing of reasonable excuse for delay or default." "In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012[d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists (*Alonso v Lorimik Realty Corp*.

131 AD3d 496 [2d Dept. 2015]; *see Gonzalez v Seejattan*, 763 [2d Dept. 2014]; *Evans v Sandoval*, 121 AD3d 1037 [2014]; *Arteaga v Adom Rental Transp., Inc*., 121 AD3d 931 [2d Dept. 2014]; *EHS Quickstops Corp. v GRJH, Inc,* 112 AD3d 577 [2d Dept. 2013]; *Vellucci v Home Depot U.S.A., Inc.,* 102 AD3d 767 [2d Dept. 2013]).

Here, defendant Monegro Cabrera admittedly received the summons and complaint on January 3, 2023. She claims that she did not understand the documents due to the language barrier. This, alone, is not a reasonable excuse. However, in her affidavit, which contains a proper affidavit of translation, she affirms, that shortly after receiving the summons and complaint: she traveled to California to care for her daughter who was recovering from cancer; in January of 2023, she was focused on caring for her daughter; and, she did not return to New York until July 2023. At that point, she received the motion for a default judgment, made on July 5, 2023, and contacted her attorneys. As stated above, the court file reflects, that by July 25, 2023, her attorneys had obtained a stipulation adjourning the motion, and. thereafter, drafted, *inter alia*, opposition to the motion for a default and the instant cross-motion.

The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court" (*Giglio v NTIMP, Inc*., 86 AD3d 301, 308 [2d Dept. 2011]; *see Staples v Jeff Hunt Devs., Inc*., 56 AD3d 459, 460 [2008]; *Ewart v Maimonidies Med. Ctr*., 239 AD2d 543, 544 [2d Dept. 1997]). An attorney's stressful preoccupation with the health of a close family member has been found to constitute a reasonable excuse for a default (*see Goodwin v New York City Hous. Auth*., 78 AD3d 550 [1st Dept. 2010]). Accordingly, in its discretion, the Court will accept Cabrera's focus on the health of her daughter, who was recovering from cancer, as a reasonable excuse. Plaintiff's argument that Cabrera was represented by counsel in the underlying action at the time she was served is unavailing. As defense counsel argues, the plaintiff knew that Cabrera had counsel and did not forward a courtesy copy of the summons and complaint in the declaratory judgment action to her counsel.

The arguments set forth by Cabrera's counsel in opposition to the motion for a default judgment and in support of the cross-motion are sufficient to establish a potentially meritorious defense to the declaratory judgment action. Cabrera, a lay person claiming to have been injured in a trip and fall on the public sidewalk abutting the property insured by the plaintiff, cannot be expected to have knowledge of whether the property was being used as a three-family dwelling or as a two-family dwelling.

Where, as here, there is no evidence of willfulness, deliberate default, or prejudice to the defendants, the interest of justice is best served by permitting the case to be decided on its merits (*see Beizer v Funk*, 5 AD3d 619, 620 [2d Dept. 2004]; *Photovision Int'l v Thayer*, 235 AD2d 467 [2d Dept. 1997].

In light of the foregoing, the cross-motion by defendant Pura Monegro for an order granting her an extension of time to answer plaintiff's complaint, *nunc pro tunc*, and compelling plaintiff to accept her answer is granted and deemed timely filed, as directd below.

Accordingly, it is

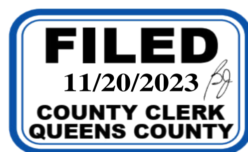
ORDERED that the motion for a default judgment by plaintiff Mountain Valley Indemnity Company is denied; and it is further

ORDERED that the cross-motion by defendant Pura Monegro granting her an extension of time to answer plaintiff's complaint, *nunc pro tunc*, and compelling plaintiff to accept her answer is granted; and it is further

ORDERED that the answer attached to Pura Monegro's cross-motion, as Exhibit "D" (NYSCEF Doc. NO. 28) is deemed timely served; and it is further

ORDERED that defendant Pura Monegro must upload the Answer to NYSCEF, within ten (10) days of the date that this Order with Notice of Entry is served.

Dated: November 20, 2023



TIMOTHY J. DUFFICY, J.S.C.