

Pacific Indem. Co. v Silverlining Interiors, Inc.

2024 NY Slip Op 31712(U)

May 16, 2024

Supreme Court, New York County

Docket Number: Index No. 159907/2021

Judge: Judy H. Kim

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 04

Justice

-----X

PACIFIC INDEMNITY COMPANY A/S/O KEVIN PARKER
AND ULLA PARKER,

Plaintiff,

- v -

SILVERLINING INTERIORS, INC.,

Defendant.

-----X

INDEX NO. 159907/2021

MOTION DATE 07/03/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant’s motion to dismiss is granted.

Plaintiff commenced this action by filing a summons with notice on December 1, 2021 (NYSCEF Doc. No. 1). On February 11, 2022, plaintiff served defendant with the summons with notice pursuant to BCL §306(b) (NYSCEF Doc. No. 2). No further action was taken until June 29, 2023, when the parties executed a stipulation extending defendant’s time to “appear or otherwise move” to July 28, 2023 (NYSCEF Doc. No. 3).

Then, on July 3, 2023, defendant filed the instant motion to dismiss this action pursuant to CPLR §3215(c) based upon plaintiff’s failure to move for a default judgment within one year of defendant’s default. In opposition, plaintiff asserts that its delay in moving for a default judgment was due to the fact that the attorney handling this matter left the firm before a default motion could be made (though plaintiff also states that it has been engaged in “settlement activities” with defendant’s insurer “before and after the default”) (NYSCEF Doc. No. 13 [Adler Affirm. at ¶¶15,

18]). Finally, plaintiff argues that it demonstrated its intent not to abandon this case by executing the June 29, 2023 stipulation with defendant and that defendant has acted in bad faith by executing this stipulation and then filing the instant motion.

In reply, defendant argues that plaintiff's excuse for its delay is "convoluted and contradictory" insofar as plaintiff asserts that the attorney handling this matter left the firm but also that settlement negotiations with the insurer have been ongoing.

DISCUSSION

CPLR §3215(c) provides that

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(CPLR §3215[c]).

As a threshold matter, to the extent plaintiff argues, in sum and substance, that defendant has waived its right to make the instant motion by entering into the June 29, 2023 stipulation, the Court disagrees. Although a defendant may waive its rights under CPLR §3215(c) "by serving an answer or taking any other steps which may be viewed as a formal or informal appearance" such a "formal or informal" appearance requires defendant to "actively litigate the action before the Supreme Court or [otherwise] participate in the action on the merits" (Wells Fargo Bank, N.A. v Martinez, 181 AD3d 470 [1st Dept 2020] [internal citations and quotations omitted]). The parties' stipulation does not satisfy this standard (See id. ["defendant's participation in settlement conferences did not constitute either a formal or an informal appearance"]; MTGLQ Inv'rs, L.P. v Shay, 190 AD3d 527, 529 [1st Dept 2021] [interested nonparty "did not waive its CPLR §3215(c) argument by filing a notice of appearance without more, such as a responsive pleading"]; Sports

Legends, Inc. v Carberry, 38 AD3d 470 [1st Dept 2007] [“Defendant did not waive his right to move for dismissal under CPLR §3215(c) by appearing, even informally, on the merits”]).

Turning to the merits of the motion, as it is undisputed that plaintiff did not move for a default judgment within one year of defendant’s default, the Court must grant defendant’s motion unless plaintiff establishes “sufficient cause” to deny the motion by proffering “a reasonable excuse for the delay in timely moving for a default judgment and ... demonstrat[ing] that the cause of action is potentially meritorious” (Deutsche Bank Natl. Tr. Co. v Cruz, 173 AD3d 610, 610 [1st Dept 2019] [internal citations omitted]). Plaintiff has failed to do so.

Plaintiff’s excuse for its delay, law office failure resulting from the handling attorney’s departure, is insufficient (See Ibrahim v Nablus Sweets Corp., 161 AD3d 961, 963 [2d Dept 2018] [a brief paragraph in affirmation of associate that attorney who commenced action left law firm was vague, conclusory, and unsubstantiated and insufficient to warrant denial of CPLR §3215(c) motion]). Plaintiff has also failed to demonstrate that it has a potentially meritorious claim, as it has not filed a verified complaint or an affidavit of merit (See e.g., Solano v Castro, 72 AD3d 932, 933 [2d Dept 2010]).

Accordingly, it is

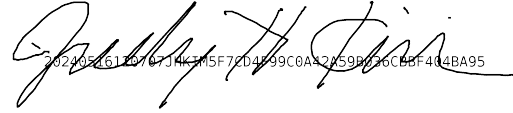
ORDERED that defendant’s motion to dismiss is granted and this matter is hereby dismissed; and it is further

ORDERED that counsel for defendant shall, within twenty days of the date of this decision and order, serve a copy of this decision and order with notice of entry upon plaintiff as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court 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 the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



0024092612076734435F72D4199C0A32859B26C8F404BA95

5/16/2024
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE