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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

QUEENS BLVD. - 40th OWNERS CORP., x

Plaintiff,

-against-

STONINGTON INSURANCE COMPANY, MAURICIO CRIOLLO,

Defendants.
x

Index Number 14630 2011

Motion Date May 1, 2012

Motion Cal. Number 27

Motion Seq. No. 1

The following papers numbered 1 to 34 read on this motion by plaintiff Queens Boulevard - 40th Owners Corp. (Queens Blvd), for a default judgment against Stonington Insurance Company (Stonington), for failing to answer the complaint ; and cross motion by Stonington to extend its time to answer and, alternatively, to compel plaintiff to accept the answer already served by Stonington, pursuant to CPLR 3012(d).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 5
Notice of Cross Motion - Affidavits - Exhibits	6 - 28
Reply Affidavits.....	29 - 34

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

This is a declaratory judgment insurance coverage action filed by plaintiff against Stonington seeking defense and indemnification of plaintiff under commercial general liability policy No. PSG023873-00, issued to named insured Queens Blvd, for the policy period of October 20, 2008 to October 20, 2009. This policy was cancelled on March 15, 2009 (the Stonington Policy). Queens Blvd. commenced the instant declaratory judgment action on June 17, 2011. Plaintiff filed a Supplemental Summons and Amended Complaint

on October 25, 2011, adding Mauricio Criollo as a defendant. Plaintiff's declaratory judgment action seeks defense and indemnification from Stonington in a lawsuit filed on April 1, 2010, by Criollo against Queens Blvd., in the Supreme Court, County of Queens under Index No. 14630/2011 (the Criollo Action). The underlying Criollo action alleges that on or about February 10, 2009, Criollo fell from a ladder in the course of an asbestos removal project at 45-08 40th Street, Queens, New York (the Criollo occurrence). These premises are owned by Queens Blvd.

In support of its motion for a default judgment, plaintiff argues that Stonington was served with the summons and complaint in the instant action via service upon the New York State Department of Insurance on August 26, 2011. Stonington maintains that it had no knowledge of plaintiff's declaratory judgment action until Stonington was mailed a copy of plaintiff's motion for a default judgment at its Plano, Texas office, on or about December 30, 2011, at which time Stonington retained an attorney to defend it in the declaratory judgment action. Upon receipt of the motion, Stonington's attorney appeared on behalf of Stonington at a Preliminary Conference on January 19, 2012. At that time, a request was made to plaintiff's counsel at the conference to accept late service of the Answer to plaintiff's Amended Complaint. Counsel for plaintiff refused thus necessitating the instant motion practice. On January 19, 2012, Stonington served its Answer to plaintiff's Amended Complaint. To date, plaintiff's counsel has not formally rejected the answer to the amended complaint.

The motion for a default judgment is denied, and the cross motion to compel plaintiff to accept Stonington's answer is granted.

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (*see, Cleary v East Syracuse-Minoa Cent. School Dist.,* 248 AD2d 1005 [1998]; *Lichtman v Sears, Roebuck & Co.,* 236 AD2d 373 [1997]). Stonington's delay in serving its answer was brief and not willful, and there is no evidence that the plaintiff was prejudiced by the delay (*see, Khanna v Premium Food & Sports Enter.,* 279 AD2d 508 [2001]; *Trent v Bedford Stuyvesant Restoration Ctr.,* 277 AD2d 444 [2000]).

On August 26, 2011, plaintiff attempted to effectuate service upon Stonington through delivery of the summons and complaint in this action upon the Insurance Department, State of New York, pursuant to Insurance Law §1212. An August 29, 2011 document exchanged by plaintiff in support of its motion, signed by Clark J. Williams, the Special Deputy Superintendent, at the New York State Insurance Department, states that a copy of the Summons and Complaint was received by the Insurance Department and then sent by Mr.

Williams to "CT Corporate System Stonington Insurance Company", located at 111 Eighth Avenue, New York, New York 10011. Prior to August, 2011, Stonington had designated CT Corporation System (CT Corp.), to accept service of legal process on its behalf as Stonington's statutory agent. However, according to the accompanying affidavit of Ken Uva, Esq. of CT Corp., any service of legal process on Stonington through CT Corp. would, as a matter of regular procedure, be transmitted by CT Corp. to Stonington via the use of a web site operated by CT Corp. called "CTAdvantage", and the legal document at issue would be scanned by CT Corp., and recorded on that web site. Uva states in his affidavit that CT Corp. has conducted a search and has no record of ever receiving the summons and complaint at issue and that it was never transmitted to Stonington.

Also, the affidavit of Acksone Namuonglo, Administrative Assistant to Stonington, indicates that she would, as a matter of regular procedure, receive all such legal process on behalf of Stonington from CT Corp., via an alert sent from the CTAdvantage web site to Stonington's Plano, Texas office, and that the alert would be recorded on the web site. Ms. Namuonglo states that she never received the summons and complaint, or an alert regarding the same, and the CTAdvantage web site does not indicate that CT Corp ever received it or transmitted it to Stonington. Namuonglo attaches printouts from the CTAdvantage web site indicating that there is no record of the summons and complaint being received by CT Corp., scanned into the CTAdvantage web site, or sent to Stonington.

In addition, the affidavit of Matthew Morrison, Vice President of Claims Legal at QBE North America (Stonington is a wholly-owned subsidiary of QBE North America), indicates that if Stonington had received the summons and complaint via the CTAdvantage system, it would have been forwarded to him and he would have sent it to a Stonington claims handler for case management, which would have included the retention of defense counsel to defend Stonington. However, according to Morrison, Stonington never received it, and thus it was not forwarded to a claims manager.

Plaintiff asserts in paragraph 6 of its attorney's affirmation in support of its motion, that it made an "additional mailing" of the summons and complaint in this action to Stonington on June 18, 2011. First, this date is more than two months before the service of the summons and complaint via the Department of Insurance on August 26, 2011, and as such has no bearing on any alleged default by Stonington and may not be used by plaintiff in support of its default motion. Plaintiff appears to rely on CPLR 3215 in his argument regarding the "additional mailing". However, CPLR 3215(g)(4)(ii) states that the "additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant", not (as in this case) more than two months before the service on the defendant.

Second, plaintiff does not attach a copy of the alleged additional mailing, or an affidavit of service regarding such a mailing to its motion papers. Thus, there is no contemporaneous proof presented by plaintiff that such a mailing was ever made.

Furthermore, plaintiff asserts that it mailed its supplemental summons and amended complaint on November 6, 2011, to Stonington addressed to "Stonington Insurance Company, 88 Pine Street, New York, NY 10005". Stonington submits the affidavit of Maria Thorpe, a Claims Program Manager for QBE North America. Ms. Thorpe avers that Stonington is a wholly owned subsidiary of QBE, with offices located at 88 Pine Street, New York, New York 10005. Ms. Thorpe further avers that neither the summons and complaint nor the supplemental summons and amended complaint were ever received at QBE North America's Pine Street office at any time in 2011. Stonington's address is 5801 Tennyson Pkwy, suite 600, Plano, TX 75024, not 88 Pine Street in New York. As such, any mailing to "Stonington Insurance Company" at 88 Pine Street, New York, NY would have been incorrectly addressed. Indeed plaintiff admits in paragraph 6 of its attorney's affirmation in support of its motion that Stonington's "home office address" is 5801 Tennyson Pkwy, suite 600, Plano, TX 75024, which address is also confirmed by the New York Insurance Department's web site.

None of the documents attached to plaintiff's motion indicate that Stonington's address is at the Pine Street location noted above, and further documents printed off QBE's website identify Stonington's main office address as "5801 Tennyson Pkwy, suite 600, Plano, TX 75024", while QBE's office is listed as 88 Pine Street, New York, NY 10005. Stonington, therefore, has a reasonable excuse for its delay due to the fact that plaintiff mailed the supplemental summons and amended complaint to the wrong address and, in any event, it was not received at QBE's 88 Pine Street office, and was therefore not forwarded to Stonington or its third-party administrator for proper handling (see *New York and Presbyterian Hosp. v Allstate Ins. Co.*, 29 AD3d 968 [2006]; *Marine v Federal Ins. Co.*, 293 AD2d 721 [2002]).

Furthermore, the proposed verified answer which Stonington submitted in support of its cross motion is sufficient to demonstrate the existence of a potentially meritorious defense (*see, Richard Kranis, P. C. v European Am. Bank,* 208 AD2d 904 [1994]; *Buderwitz v Cunningham,* 101 AD2d 821 [1984]). Stonington's meritorious defense to plaintiff's declaratory judgment action is that Queens Blvd's notice of the underlying Criollo occurrence was untimely as a matter of law. The Stonington Policy requires, as a condition of coverage, that it is notified "as soon as practicable" of an "occurrence" and "as soon as practicable" of a "claim" or a "suit" brought against any insured. The notice provision in the general liability policy operates as a condition precedent to coverage, and absent a valid excuse, failure to comply with the requirement vitiates the contract (*Great Canal Realty*

Corp. v. Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]). Plaintiff's principal failed to provide timely notice of the February 10, 2009 Criollo occurrence because it did not notify Stonington until August 9, 2010, over one year and a half after the accident. Indeed, the Appellate Division, Second Department has found shorter delays to be untimely *(Brownstone Partners/AF & F, LLC v A. Aleem Constr., Inc.,* 18 AD3d 204, 205 [2005] [five month delay]; *Paramount Ins. Co. v Rosedale Gardens,* 293 AD2d 235 [2002] [seven month delay]). An affidavit submitted by Dori Allen Silver, the claims consultant employed by Claims Administration Corporation (CAC), Stonington's third-party claims administrator, indicates that Stonington was first made aware of the February 10, 2009 Criollo occurrence, along with the suit in the Criollo action, on August 9, 2010. CAC then conducted an investigation in which it determined that Queens Blvd's principal was aware of the underlying Criollo occurrence at the time it occurred. Also, an affidavit of service of the Criollo action states that the Criollo action was served on Queens Blvd. on April 9, 2010. Queens Blvd was sent a "default letter" on June 8, 2010 by Criollo's counsel, Larry Dorman, Esq., which enclosed the summons and complaint and asked Queens Blvd. to notify its insurance carrier of the suit. As such, Stonington disclaimed coverage to Queens Blvd. on August 30, 2010, based on late notice of the Criollo occurrence and late notice of the lawsuit in the Criollo action.

Plaintiff's late notice was unreasonable as a matter of law (*Nationwide Mut. Ins. Co.*, 97 NY2d 491 [2002]) and Stonington need not show prejudice to rely on the defense of late notice (*see Argo Corp v Greater New York Mut. Ins. Co.*, 4 NY3d 332 [2005]). New York's new notice law, Insurance Law §3420 (L. 2008, ch. 388), which changed New York's long-established "no prejudice" rule, is not retroactive and only applies to policies issued on or after January 17, 2009. The Stonington Policy was issued on October 20, 2008, so the new prejudice rule is inapplicable here (*see Ponok Realty Corp. v United Natl Specialty Ins. Co.*, 69 AD3d 596 [2010] [prejudice amendments inapplicable to policies issued and delivered before January 17, 2009]).

Also, a default in a declaratory judgment action cannot be granted on the default and pleadings alone (*see Dole Food Co., Inc. v Lincoln General Ins. Co.*, 66 AD3d 1493 [2009]). It is necessary for plaintiff to establish a right to a declaration, and here, plaintiff did not establish its entitlement to the declaration sought.

Finally, the Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to timely serve an answer (*see Perellie v Crimson's Restaurant, Ltd.,* 108 AD2d 903, 904 [1985]). Here, this Court providently exercises its discretion in concluding that Stonington proffered a reasonable excuse. Furthermore, Stonington's delay in answering was brief, the default was not willful, there exists a potentially meritorious defense, and there was no evidence of prejudice to the

plaintiff (*see Jones v 414 Equities LLC,* 57 AD3d 65, 81 [2008]; *Spira v New York City Tr. Auth.,* 49 AD3d 478 [2008]; *Bunch v Dollar Budget,* 12 AD3d 391 [2004]; *Orwell Bldg. Corp. v Bessaha,* 5 AD3d 573 [2004]; *Sippin v Gallardo,* 287 AD2d 703 [2001]). Furthermore, once again, public policy favors the resolution of cases on the merits (*see Bunch v Dollar Budget, supra).*

Accordingly, the motion by plaintiff for a default judgment is denied.

The cross motion by defendant Stonington to compel plaintiff to accept its Answer is granted, and the Answer previously served by Stonington, annexed to the cross motion as Exhibit D, is deemed timely and valid.

Dated: July 18, 2012

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AUGUSTUS C. AGATE, J.S.C.