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

BARBARA JAFFE
J.S.C.

PART 5

Index Number : 111897/2010

STATE FARM MUTUAL AUTOMOBILE

VS

PATTON, BRIAN S.

Sequence Number : 002

RESTORE ACTION TO CALENDAR

CAL # 100

INDEX NO. 111897/10

MOTION DATE 5/24/11

MOTION SEQ. NO. 002

MOTION CAL. NO. 100

The following papers, numbered 1 to 5 were read on this motion to/for restore

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4,5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 7/28/11
JUL 28 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Petition of:
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

-against-

For an Order staying the arbitration attempted to be had by

BRIAN S. PATTON,

Respondent

-and-

FRIENDLY EXPRESS TRUCKING INC., ASHRAF S. ALAWANDA and PROFORMANCE INSURANCE COMPANY

Proposed Additional Respondents.

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Index No. 111897/10

Motion Date: 5/24/11
Motion Seq. No.: 002
Motion Cal. No.: 100

DECISION & ORDER

BARBARA JAFFE, JSC:

For petitioner:
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For Patton:
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For Proformance:
Kenneth T. Bierman, Esq.
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By notice of motion dated February 23, 2011, petitioner moves pursuant to CPLR 2221 for an order vacating an order of this court dated January 26, 2011, restoring this matter to the court's active trial calendar, temporarily staying the demanded arbitration, adding all proposed additional respondents as parties herein, and setting this matter down for a framed issue hearing.

Respondent and proposed additional respondent Proformance Insurance Company oppose.

I. BACKGROUND

On an unknown date before October 2, 2008, petitioner issued an automobile insurance policy to respondent, which was effective from September 7, 2008 to September 7, 2009. (Affirmation of Richard Halpern, Esq., dated Feb. 23, 2011 [Halpern Aff.], Exh. B). This policy contained the "Supplemental Uninsured/Underinsured Motorists Endorsement-New York," which provides that Patton may obtain uninsured motorist benefits only if the offending vehicle did not have insurance when the accident occurred. (*Id.*, Exh. K).

On October 2, 2008, respondent was involved in an automobile accident in Manhattan with another vehicle owned and driven by proposed additional respondents Friendly Express Trucking, Inc. and Ashraf S. Alawanda, respectively. (*Id.*, Exh. A).

On August 17, 2010, respondent served petitioner with a demand for arbitration, seeking uninsured motorist benefits pursuant to his automobile insurance policy. (*Id.*, Exh. B).

By notice of petition dated September 8, 2010, petitioner moved pursuant to CPLR 7503(c) for an order staying arbitration, relying on a police report and documents from the New Jersey Motor Vehicles Commission (NJMVC) showing that Friendly's vehicle was insured when the accident occurred. (*Id.*, Exh. C). More specifically, the police report reflects that Friendly's vehicle was insured by policy P600784 issued by an unidentified insurer set to expire April 28, 2009, and the NJMVC documents show that the vehicle was registered with proof of Proformance insurance policy 398001944 before the accident. (*Id.*). Originally returnable October 12, 2010, the petition was adjourned to October 26, 2010, then to November 16, 2010, and finally to January 18, 2011. (*Id.*, Exh. G).

Proformance served an affirmation in opposition dated November 8, 2010, claiming that the policy it issued to Friendly had been cancelled before the accident. (*Id.*, Exh. D). In so arguing, it relied on a notice of cancellation of policy 398001944, which was mailed on January 11, 2008 and provides that cancellation will take effect at 12:01 a.m. on February 14, 2008. (*Id.*).

In a reply affirmation dated November 15, 2010, petitioner argued that the Proformance's notice of cancellation was ineffective for non-compliance with sections 17:29C-9 and 17:29C-10 of the New Jersey Statutes. (*Id.*, Exh. E).

By affirmation in opposition dated November 8, 2010, Patton requested that the matter be temporarily stayed pending a framed issue hearing on whether the policy was properly cancelled. (*Id.*, Exh. F).

On January 18, 2011, petitioner failed to appear for oral argument, and, accordingly, by order dated January 26, 2011, I denied the petition. (*Id.*).

By affidavit dated February 17, 2010, Barbara Brooks, legal secretary for petitioner's counsel, states that she manages the office's calendar of petitions to stay arbitration, that she understood New York County to be "submissions-only" such that oral argument is not required unless the court notifies parties otherwise, that she assumed there was no oral argument scheduled in this matter because she did not receive such notification and the E-Law printout on which she relied referred to the "Submissions Part," and that she first realized there had been oral argument when she obtained the January 26, 2011 order. (*Id.*, Exh. I).

By affidavit dated February 17, 2010, Rory Stecker, the claims representative assigned to respondent's claim, states that an uninsured motorist claim pursuant to his policy is valid only if the offending vehicle was not insured at the time of the accident, that NJMVC documents reflect

that Friendly's vehicle was registered with Proformance insurance before the accident, and that Proformance violated sections 17:29C-9 and 17:29C-10 of the New Jersey Statutes by neither providing Friendly with 60 days advanced notice of cancellation nor offering a copy of the notice of cancellation certified contemporaneously with the original. (*Id.*, Exh. J).

II. CONTENTIONS

Petitioner contends that it has a reasonable excuse for its failure to appear at oral argument, as Brooks mistakenly believed that she would receive notification from the court had it been scheduled. (Halpern Aff.). Relying on Stecker's affidavit of merit, it also asserts that its defense to Patton's claim is meritorious, as its policy only provides uninsured motorist benefits where the offending vehicle is uninsured, documents from the NJMVC show that Friendly's vehicle was registered with proof of insurance by Proformance before the accident, and Proformance's notice of cancellation was void for failure to comply with N.J.S.A. §§ 17:29C-9 and -10. (*Id.*).

In opposition, Proformance claims that petitioner does not have a meritorious cause of action and has not provided a reasonable excuse for its failure to appear at oral argument. (Affirmation of Kenneth T. Bierman, Esq. in Opposition, dated March 16, 2011).

In opposition, Patton adopts Proformance's arguments and seeks a framed issue hearing be scheduled in the event that petitioner's default is vacated. (Affirmation of Jennifer L. Bailine, Esq. in Opposition, dated March 16, 2011).

In reply, petitioner maintains that Proformance's notice of cancellation does not comply with New Jersey law, as it was mailed less than 60 days before cancellation was to occur, and the copy Proformance offers contains no contemporaneous certification. (Affirmation of Richard

Halpern, Esq. in Reply, dated March 21, 2011). It also asserts that Brooks's failure to calendar the matter for oral argument constitutes a reasonable excuse for its default, as its counsel's default was not intentional. (Affirmation of Richard Halpern, Esq. in Reply, dated March 24, 2011).

III. ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). In contrast, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination[, and] shall contain a reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). Pursuant to CPLR 2221(f), a combined motion for leave to reargue and leave to renew "shall identify separately and support separately each item of relief sought."

Pursuant to CPLR 5015(a)(1), in order to restore a dismissed action, the moving party must demonstrate both a reasonable excuse for its default and a meritorious cause of action. (*Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]).

A. Reasonable excuse

Law office failure may constitute a reasonable excuse for default (CPLR 2005), as long as it was neither willful nor deliberate (*Chelli v Kelly Group, P.C.*, 63 AD3d 632 [1st Dept 2009]; *Franco Belli Plumbing & Heating & Sons, Inc. v Imperial Dev. & Constr. Corp.*, 45 AD3d 634

[2d Dept 2007]), and the party seeking to vacate a default on this ground must provide facts to explain and justify the default (*Ogunmoyin v 1515 Broadway Fee Owner, LLC*, 85 AD3d 991 [2d Dept 2011]; *Matter of Esposito v Esposito*, 57 AD3d 894 [2d Dept 2008]).

Here, petitioner's explanation for its failure to appear at oral argument reflects that it was reasonable and neither willful nor deliberate. (*See Shanker v 119 E. 30th, Ltd.*, 63 AD3d 553 [1st Dept 2009] [defendant's failure to appear at oral argument reasonably explained by its attorney's confusion as to court's calendaring practices]; *Perez v New York City Hous. Auth.*, 290 AD2d 265 [1st Dept 2002] [counsel's misunderstanding as to scheduled time for appearance constituted reasonable excuse for default where calendar tracking system did not alert him of appearance]; *see also Rugieri v Bannister*, 22 AD3d 299 [1st Dept 2005], *affd as mod* 7 NY3d 742 [2006] [where attorney failed to appear for oral argument, reasonable excuse found, as he submitted affirmation stating that he arrived late to and missed oral argument due to an "unanticipated scheduling overlap" and parking receipt stamped "within minutes of his required appearance" and described attempts to communicate with adversary regarding scheduling]).

B. Affidavit of merit

A party seeking to vacate default must submit an affidavit of merit from someone with personal knowledge of the facts underlying the claim (*Rugieri*, 22 AD3d at 305; *Katz v Robinson Silverman Pearce Aronsohn & Berman, LLP*, 277 AD2d 70, 74 [1st Dept 2000]; *City of New York v Elghanayan*, 214 AD2d 329 [1st Dept 1995]) "set[ting] forth facts sufficient to make out a *prima facie* showing of a meritorious defense" (*Aerovias De Mexico, S.A. v Malerba*, 265 AD2d 214, 215 [1st Dept 1999]). The party need not prove its defense. (*Id.*).

Petitioner's defense as to the effectiveness of Proformance's notice of cancellation is

grounded in sections 17:29C-9 and 17:29C-10, which provide, *inter alia*, that an insurer must give an insured "60 days advanced notice of its intention not to renew" and that a written notice of cancellation is only effective if "the insurer has retained a duplicate copy of the mailed notice which is certified to be a true copy." New Jersey courts have interpreted "true copy" to mean a copy certified "contemporaneously with preparation and mailing of the original." (*Celino v Gen. Accident Ins.*, 211 NJ Super 538, 512 AD2d 496 [App Div 1986]).

Here, Stecker's affidavit of merit offers facts related to petitioner's insurance policy, NJMVC documents showing that the Friendly vehicle was registered with Proformance insurance before the accident, and Proformance's failure to provide adequate notice or a true copy of the notice of cancellation. As these facts demonstrate a *prima facie* defense under sections 17:29C-9 and 17:29C-10, and as Stecker possesses personal knowledge of Patton's claim by virtue of being the claims representative assigned to it, petitioner's affidavit of merit is sufficient.

D. Joinder and framed issue hearing

As the effectiveness of Proformance's notice of cancellation may not be determined on the papers, Alawanda and Friendly are joined as respondents and a framed issue hearing is directed. (*See Matter of Victoria Select Ins. Co. v Munar*, 80 AD3d 707 [2d Dept 2011] [in petition to stay arbitration of uninsured motorist benefits where parties submitted documents raising issues of fact as to cancellation of policy, joinder of proposed additional respondents as necessary parties for framed issue hearing proper]; *Matter of N.Y. Cent. Mut. Ins. v Davalos*, 39 AD3d 654 [2d Dept 2007] [same]; *Matter of N.Y. Cent. Mut. Fire Ins. Co. v Hall*, 7 AD3d 629 [2d Dept 2004] [same]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that State Farm Mutual Automobile Insurance Company's motion to vacate this court's January 26, 2011order is granted; and it is further

ORDERED, that State Farm Mutual Automobile Insurance Company's motion to join proposed additional respondents as parties to this action is granted; and it is further

ORDERED, that the arbitration in this matter is temporarily stayed pending a framed issue hearing; and it is further

ORDERED, that, within 60 days from the date of this order, State Farm Mutual Automobile Insurance Company shall file with the Clerk of the Trial Support Office (Room 158) a copy of this order with notice of entry, a note of issue, and a statement of readiness, and shall pay the appropriate fees, if any; and it is further

ORDERED, that the parties must mutually contact the court to schedule same.

ENTER:

Barbara Jaffe, JSC

DATED: July 28, 2011
New York, New York

JUL 28 2011

BARBARA JAFFE
J.S.C.

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE