

Coney Is. Payroll Servs., Inc. v First Cent. Sav. Bank
2012 NY Slip Op 32163(U)
June 4, 2012
Supreme Court, New York County
Docket Number: 112189/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 112189/2011
CONEY ISLAND PAYROLL
vs.
FIRST CENTRAL SAVINGS
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 8, were read on this motion ~~to~~ for a default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3-6</u>
Replying Affidavits _____	No(s). <u>7-8</u>

Upon the foregoing papers, it is ordered that ~~this motion is~~:

The court denies plaintiff's motion for a default judgment pursuant to the accompanying decision. C.P.L.R. § 3215(F).

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

FILED

AUG 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/4/12

Lucy Billings, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x
CONEY ISLAND PAYROLL SERVICES, INC.,

Index No. 112189/2011

Plaintiff

- against -

DECISION AND ORDER

FIRST CENTRAL SAVINGS BANK, M&T BANK,
AKAM ASSOCIATES, INC., and XINOS
CONSTRUCTION CORP.,

Defendants

FILED

AUG 16 2012

-----x
LUCY BILLINGS, J.S.C.:

Plaintiff claims entitlement to the proceeds of checks issued by defendant Akam Associates, Inc., to defendant Xinos Construction Corp.; cashed by plaintiff, despite forged endorsements; and deposited by it in defendants First Central Savings Bank and M&T Bank. Plaintiff seeks a declaratory judgment regarding its entitlement to the checks' proceeds and an injunction prohibiting defendant banks from debiting its accounts for the amounts of the forged checks.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for a default judgment against Akam Associates and Xinos Construction. C.P.L.R. § 3215(d). Akam Associates' insurer, Zurich American Insurance Company, moves to intervene as a counterclaimant. C.P.L.R. § 1013.

I. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

A. Defendants' Excuses for Defaulting

In opposing plaintiff's motion for a default judgment, Akam Associates and Xinos Construction each explain the reasons for

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their failure to answer timely. Upon receiving the summons and complaint, Akam Associates responded promptly by forwarding the pleadings to Akam Associates' insurer for it to defend and indemnify its insured. Through no fault of Akam Associates, the insurer delayed in retaining an attorney to represent the insured corporation. See C.P.L.R. § 321(a). Immediately upon retention, however, the attorney responded promptly by contacting plaintiff's attorney, requesting an extension, and, when denied the request, promptly serving an answer less than two months after the original service of the summons and complaint on the insured client.

When Xinos Construction received the summons and complaint, an employee mistakenly misfiled the pleadings rather than forwarding them to Xinos Construction's attorney as directed by the corporation's office manager, who then did not discover the error until he received plaintiff's motion for a default judgment. Upon his realizing the inadvertence, Xinos Construction promptly forwarded the pleadings to its attorney, who promptly contacted plaintiff's attorney, requested an extension, and, when plaintiff denied this request as well, requested and was granted an adjournment of plaintiff's motion from the court. This defendant, like Akam Associates, timely opposed plaintiff's motion and simultaneously served an answer. As Xinos Construction had secured the extension, this defendant served its answer approximately two and a half months after the original service of the summons and complaint on the corporation.

These explanations by Akam Associates and Xinos Construction furnish a reasonable excuse for their short delay in answering the complaint. C.P.L.R. § 3012(d); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008); Obermaier v. Fix, 25 A.D.3d 327 (1st Dep't 2006); Wilson v. Sherman Terrace Coop., Inc., 14 A.D.3d 367 (1st Dep't 2005). The failure by Akam Associates' insurer to communicate with an attorney to represent the insured and Xinos Construction's inadvertent filing of the summons and complaint without forwarding them to its defense attorney, in particular, demonstrate both a reasonable excuse for defendants' late answers and the absence of a willful default on their part. Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484 (1st Dep't 2010); Hegkel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307 (1st Dep't 2005); Palmieri v. Aliberti, 281 A.D.2d 156 (1st Dep't 2001); Parker v. I.E.S.I. N.Y. Corp., 279 A.D.2d 395 (1st Dep't 2001). Nor does plaintiff show or the court discern any willfulness on either defendant's part or any prejudice to plaintiff from either defendant's short delay in answering.

B. Extending the Defaulting Defendants' Time to Answer

Although Akam Associates and Xinos Construction do not expressly move to extend their time to answer, particularly in the context of a motion for a default judgment, the court may extend the time to answer absent a cross-motion for that relief. C.P.L.R. § 3012(d); Higgins v. Bellet Constr. Co., 287 A.D.2d 377 (1st Dep't 2001); Vines v. Manhattan & Bronx Surface Tr.

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Operating Auth., 162 A.D.2d 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Shure v. Village of Westhampton Beach, 121 A.D.2d 887, 888 (1st Dep't 1986). See Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484; Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008); Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999). C.P.L.R. § 3012(d) allows a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just." Although the latter provision may include a showing of a meritorious defense against plaintiff's claims, § 3012(d) does not specifically require a meritorious defense, and such a showing is unnecessary to support acceptance of a late answer. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81; Spira v. New York City Tr. Auth., 49 A.D.3d 478. While defendants' explanations recounted above, absent any discernible prejudice to plaintiff, satisfactorily excuse their late answers, Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81, in opposing a default judgment, these defendants cite deficiencies in the admissible evidence supporting plaintiff's claim and also present defenses.

C. The Merits of Plaintiff's Claim and the Defaulting Defendants' Defenses

In supporting a default declaratory judgment, plaintiff presents no admissible evidence attesting on personal knowledge

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or otherwise demonstrating that the endorsements on the checks in question are genuine, as alleged in the complaint and claimed by plaintiff's attorney in support of its motion. Defendants respond that plaintiff, as the first party in the collection of the checks' proceeds, was best positioned to identify their transferor, determine the genuineness of their endorsements and whether the transferor was a wrongdoer, discover a forgery, prevent the fraud, and thus protect plaintiff's interests. N.Y.U.C.C. (UCC) §§ 3-404(1), 3-406, 4-401, 4-406(3); Guardian Life Ins. Co. of Am. v. Chemical Bank, 94 N.Y.2d 418, 420 (2000); Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d 322, 327 (1997); Royal Ins. Co. of Am. v. Citibank, 306 A.D.2d 158, 159 (1st Dep't 2003); Robinson Motor Xpress, Inc. v. HSBC Bank, USA, 37 A.D.3d 117, 119 (2d Dep't 2006). See UCC §§ 3-417(1), 4-207(1); CNA Holdings, Inc. v. Citibank, N.A., 10 A.D.3d 517, 518 (1st Dep't 2004); Manufacturers & Traders Trust Co. v. North Fork Bank, 16 A.D.3d 467, 468 (2d Dep't 2005). In that position, and in moving for a default judgment, plaintiff bears the burden to establish that the endorsements are authentic: a burden plaintiff's motion fails to meet. C.P.L.R. § 3215(f); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon

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Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007).

II. THE MOTION TO INTERVENE

Only in response to a motion by Zurich American Insurance Company, Akam Associates' insurer, to intervene as a counterclaimant, does plaintiff set forth the basis for plaintiff's claim, gleaned from Akam Associates' answer. Akam Associates' own employee, Han Bae, created false invoices from Xinos Construction to Akam Associates, for which it issued checks that Bae intercepted. He forged Xinos Construction's endorsements and cashed the checks at plaintiff's check cashing service.

In pointing out that Zurich American Insurance, having reimbursed Akam Associates for its losses from its employee's wrongdoing, may maintain only the insured's defenses and counterclaims, Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 206 (2004); Costello v. Geiser, 85 N.Y.2d 103, 109 (1995); Federal Ins. Co. v. Andersen & Co., 75 N.Y.2d 366, 372 (1990); NYP Holdings, Inc. v. McClier, 65 A.D.3d 186, 189 (1st Dep't 2009), plaintiff, for the first time, propounds its claim that, because Akam Associates' employee caused the loss, Akam Associates bears responsibility for the loss. UCC § 3-405(1)(c); Guardian Life Ins. Co. of Am. v. Chemical Bank, 94 N.Y.2d at 422, 424; Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d at 327-28; Andre Romanelli, Inc. v. Citibank, N.A., 60 A.D.3d 428, 429-30

(1st Dep't 2009); Sybedon Corp. v. Bank Leumi Trust Co. of N.Y., 224 A.D.2d 320 (1st Dep't 1996). Any negligence on the part of plaintiff, the check cashing service, is irrelevant. Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d at 330-31; Prudential-Bache Secur., Inc. v. Citibank, 73 N.Y.2d 263, 273, 276 (1989); Touro Coll. v. Bank Leumi Trust Co. of N.Y., 186 A.D.2d 425, 427 (1st Dep't 1992); James Miller Mar. Serv., Inc. v. MTW Check Cashing Corp., 16 A.D.3d 378, 379 (2d Dep't 2005). UCC § 3-405(1), on which plaintiff relies, provides that:

An indorsement by any person in the name of the named payee is effective if

. . . .

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

Here, Bae, an employee of the checks' maker, Akam Associates, supplied it with invoices for payment to Xinos Construction as payee, knowing and intending that Xinos Construction had no interest in payment of the invoices and would have no interest in the checks drawn for that purpose.

While these facts may have placed Akam Associates in the best position to inquire into the checks' purpose and prevent the loss, this rule of loss allocation applies only if the checks' endorsement was "in the name of the named payee." UCC § 3-405(1). In the record set forth by the current motions, the endorsements on the checks in question do not make clear whose name Bae signed. In fact, the endorsements bear no resemblance

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to the name "Andon Iksino," the only person who appears throughout plaintiff's records with authority for the named payee Xinos Construction. Reply Aff. of Richard S. Naidich Ex. A (Jan. 11, 2012). See Sybedon Corp. v. Bank Leumi Trust Co. of N.Y., 224 A.D.2d 320.

Although plaintiff's negligence may not constitute a defense assuming UCC § 3-405(1)(c) applies, its actual knowledge of a fraudulent scheme, its own dishonesty, or its complicity in Bae's dishonest conduct would raise a viable defense. Getty Petroleum Corp. v. American Express Travel Related Servs. Co., 90 N.Y.2d at 331; Prudential-Bache Secur., Inc. v. Citibank, 73 N.Y.2d at 274-75; Peck v. Chase Manhattan Bank, 190 A.D.2d 547, 548-49 (1st Dep't 1993); Touro Coll. v. Bank Leumi Trust Co. of N.Y., 186 A.D.2d at 427. Again, however, the current record, particularly since defendants had no opportunity to confront plaintiff's claim as it has evolved after their opposition to the motion for a default judgment, does not permit an assessment of any such potential defense or counterclaim on behalf of Akam Associates or Zurich American Insurance standing in its insured's shoes. Prudential-Bache Secur., Inc. v. Citibank, 73 N.Y.2d at 275, 277; Peck v. Chase Manhattan Bank, 190 A.D.2d at 549. See Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d at 307; Manufacturers & Traders Trust Co. v. North Fork Bank, 16 A.D.3d at 468.

Plaintiff's current claim does, nevertheless, show that Xinos Construction's defenses parallel plaintiff's claim and

defenses to counterclaims. Like plaintiff, Xinos Construction may maintain that, because Akam Associates' employee caused the loss, Akam Associates was best positioned to prevent the loss, and Akam Associates or its insurer bears responsibility for the loss.

Finally, the scant record and the parties' inconsistent claims raise questions regarding the identity and amounts of the checks, the proceeds of which the parties claim entitlement to. Plaintiff claims the checks total \$136,955.59. Akam Associates counterclaims for a total of \$300,000.00. Zurich American Insurance claims it reimbursed Akam Associates \$255,239.04. The record does not reconcile these discrepant claims, raising questions whether the same fact pattern regarding Bae's dishonest conduct pertains to all the proceeds plaintiff claims and whether defendants may offset plaintiff's claims with counterclaims for losses arising from different facts.

No party opposes Zurich American Insurance's substitution for Akam Associates as a defendant and counterclaimant, to stand in its insured's shoes and seek indemnification from any other party responsible for the forged checks. C.P.L.R. § 1018; Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d at 206; Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co., 92 N.Y.2d 363, 373 (1998); Costello v. Geiser, 85 N.Y.2d at 109; NYP Holdings, Inc. v. McClier, 65 A.D.3d at 189. This relief provides the insurer the opportunity now to propound claims that Akam Associates was foreclosed from fleshing out

11] based only on the complaint and motion for a default judgment, before plaintiff's response to the motion to intervene.

III. CONCLUSION

Since Akam Associates and Xinos Construction adequately excuse their short delays in answering and need not establish a meritorious defense for the court to allow their late answers, C.P.L.R. § 3012(d), and plaintiff does not articulate, nor does the court discern, how their delay has changed plaintiff's position to its prejudice, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011), the court extends these defendants' time to answer. Id.; Tanpico v. Royal Caribbean Intl., 79 A.D.3d 484; Pagan v. Four Thirty Realty LLC, 50 A.D.3d 265 (1st Dep't 2008). See Mut. Mar. Off., Inc. v. Joy Constr. Corp., 39 A.D.3d 417, 419 (1st Dep't 2007); Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d at 307-308. The articulated defenses on Xinos Construction's behalf and the opportunity for the substitute defendant to articulate its defenses, however, as well as the defaulting defendants' excuses for their delay and the absence of prejudice, provide just terms on which to allow the proposed answers by both Xinos Construction and the defendant substituting for Akam Associates. C.P.L.R. § 3012(d); Gazes v. Bennett, 70 A.D.3d 579; Forastieri v. Hasset, 167 A.D.2d 125, 126 (1st Dep't 1990); Shure v. Village of Westhampton Beach, 121 A.D.2d at 888. See Aloizos v. Trinity Realty Corp., 171 A.D.2d 426, 427 (1st Dep't 1991). Their answers are considered served and filed when served and filed in

12] connection with the motion for a default judgment.

The lack of admissible evidence supporting plaintiff's claim as set forth in its motion for a default judgment constitutes grounds to deny its motion, but the defaulting defendants' excuses for failing to answer timely, which provide grounds to allow their late answers, constitute further grounds to deny a default judgment. Spira v. New York City Tr. Auth., 49 A.D.3d 478; Guzetti v. City of New York, 32 A.D.3d 234 (1st Dep't 2006); Rodriguez v. Dixie N.Y.C., Inc., 26 A.D.3d 199, 200 (1st Dep't 2006); Terrones v. Morera, 295 A.D.2d 254, 255 (1st Dep't 2003). See Maverson Stutman, LLP v. Most, 30 A.D.3d 261 (1st Dep't 2006); Tulley v. Straus, 265 A.D.2d at 401. Therefore the court denies plaintiff's motion for a default judgment, extends defendants' time to serve and file their answers as set forth above, and grants Zurich American Insurance Company's motion to intervene to the extent of substituting Zurich American Insurance Company for defendant Akam Associates, Inc. C.P.L.R. §§ 1013, 1018, 3012(d), 3215(f). Within 20 days after service of this order with notice of entry, Zurich American Insurance may serve and file an amended answer combining Akam Associates' prior defenses and counterclaims that Zurich American Insurance adopts with its own claims in its proposed pleading that supports its motion to intervene. This decision constitutes the court's order.

DATED: June 4, 2012

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Lucy Billings **FILED**
LUCY BILLINGS, J.S.C. AUG 16 2012

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