

Colony Ins. Co. v Danica Group, LLC

2013 NY Slip Op 32296(U)

September 26, 2013

Supreme Court, New York County

Docket Number: 116200/2010

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

COLONY INSURANCE COMPANY,
Plaintiff,
-against-
DANICA GROUP, LLC,
Defendant.

INDEX NO. 116200/10
MOTION DATE _____
MOTION SEQ. No. 007
MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1, 2, 5</u>
Answering Affidavits- Exhibits _____	<u>3, 6</u>
Replying Affidavits _____	<u>4</u>
CROSS-MOTION: _____ YES <input checked="" type="checkbox"/> NO	

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

FILED

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-26-13

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----- X
COLONY INSURANCE COMPANY,

Plaintiff,

Index No. 116200/2010

- against-

DANICA GROUP, LLC,

Defendant,

-and-

DECISION AND ORDER

ZURICH AMERICAN INSURANCE COMPANY and
PAV-LAK INDUSTRIES, INC.,

Defendants-Intervenors.

----- X

DONNA MILLS, J.S.C.:

FILED
SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Defendant Danica Group, LLC (Danica) moves to vacate its
default in answering the complaint, pursuant to CPLR 5015 (a)
(1).

Danica also moves, pursuant to CPLR 3211 (a) (7), for an
order dismissing the complaint on the ground that it fails to
state a cause of action for rescission, and for an order
dismissing the complaint pursuant to CPLR 3211 (a) (10), for
failure to join a necessary party.

In support of its motion, Danica submits the affidavit of
Helen Andreadakis, the office manager for Danica, asserting that
Danica had paid \$907,383 in premiums to Colony Insurance Company
(Colony), which Colony retained; that Colony and Danica were
engaged in settlement discussions between September 2010 and

April 2012; that Danica helped Colony settle personal injury claims during and after that period of time, and that Colony lulled Danica into not responding to the complaint. This is the only evidentiary submission by Danica on this motion.

Danica's failure to make an evidentiary showing of a meritorious defense to the verified complaint is fatal to its motion to vacate its default. The standard is well settled, as stated by the Appellate Division, First Department:

"in order to vacate its default pursuant to CPLR 5015 a defendant must demonstrate both a reasonable excuse for the failure to appear and a meritorious defense"

(*Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [1st Dept 2010]).

The Appellate Division, First Department, has also stated:

"[p]ursuant to [CPLR] 5015 ..., a court may relieve a party from an excusable default upon such terms as may be just We have held this to mean that a party who seeks to excuse a default must state facts explaining the default and must also furnish an affidavit showing that there is merit to his substantive position [internal quotations marks and citation omitted]"

(*Adam v Hilton Hotels Corp.*, 91 AD2d 884, 885 [1st Dept 1983]).

"[C]onclusory allegations unsupported by facts will not suffice"

(*David Sanders, P.C. v Harris A. Sanders, Architects*, 140 AD2d 787, 789 [3d Dept 1988]).

While a movant is required only to make a prima facie showing of the "existence of a possibly meritorious defense" (*Tat*

Sang Kwong v Budge-Wood Laundry Serv., 97 AD2d 691, 692 [1st Dept 1983]), "[t]here must be a sufficient factual showing to support such claims" (*Mandell v Stein*, 183 AD2d 488, 488 [1st Dept 1992]).

"[a] defendant in default does not establish a right to relief merely by presenting a proposed answer, containing denials and affirmatory defenses alleged principally in conclusory form. In addition, he must show that there is support in fact for his denials and defenses"

(*Investment Corp. of Philadelphia v Spector*, 12 AD2d 911, 911 [1st Dept 1961]).

According to the verified complaint, in 2005, Danica's predecessor entity entered into a consent order with the Department of Buildings in which it agreed not to engage in "business activities as a licensed plumbing company (verified complaint, ¶ 7). The complaint alleges that Danica represented to Colony in its application that its business was 100% plumbing, that it only subcontracted out 12% of its work, and that all of its subcontracts contained indemnity provisions in favor of Danica (*id.*, ¶ 24). The complaint alleges that each of these representations is false, and constitutes grounds for rescission.

Danica has not submitted any evidence demonstrating a defense to the allegations of the complaint that Danica made material misrepresentations in its application. Even if the conclusory allegation in the Andreadakis affidavit that Danica

was lulled into not responding to the complaint could be considered a sufficient excuse for not answering the complaint, the affidavit does not make a prima facie showing of a defense to the complaint.

While the Andreadakis affidavit contains evidence that plaintiff has not returned the premiums as is required for rescission, it falls far short of making a prima facie showing of a defense to the complaint, and plaintiff has submitted a December 6, 2010 letter from its counsel to Danica, stating , "[p]lease let us know if Danica is willing to accept the return of premiums in exchange for the rescission of the Colony policies" (ex. 3 to Zigelman aff).

Danica also submits an attorney's affirmation that states: "Danica demonstrates meritorious defenses to Colony's rescission claims, i.e., failure to state a cause of action for rescission of insurance policies and failure to join a necessary party," (DeCapua affirmation, ¶ 37). Even if an attorney's affirmation not based on personal knowledge were admissible as evidence, these bare conclusions would fall far short of the required evidentiary showing of a meritorious defense to the complaint.

The motion is denied in its entirety. Because Danica has not made an evidentiary showing of merit in support of its motion to vacate its default, the motion to vacate the default is insufficient as a matter of law. Therefore, Danica remains in

default and has no standing to move to dismiss the complaint for failure to state a cause of action or for failure to join a necessary party.

Accordingly, it is

ORDERED that the motion of defendant Danica Group, LLC pursuant to CPLR 5015 (a) (1) for an order vacating the default judgment entered against it on June 28, 2013, is denied, with costs and disbursements as taxed by the Clerk of the Court, upon presentment of an appropriate bill of costs; and it is further

ORDERED that the motion by defendant Danica Group LLC to dismiss the complaint pursuant to CPLR 3211 (a) (7) and CPLR 3211 (a) (10), is dismissed.

Dated:

E N T E R:

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Donna M. Mills

J. S. C.

DONNA M. MILLS, J.S.C.