Chicago Tit. Ins. Co. v Accurate Land Abstract Co., Ltd.
2015 NY Slip Op 31691(U)
September 4, 2015
Supreme Court, New York County
Docket Number: 152797/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CHICAGO TITLE INSURANCE COMPANY,

Plaintiff,

-against-

ACCURATE LAND ABSTRACT CO., LTD., a/k/a ACCURATE ABSTRACT, LTD., JENNIE NG, and MICHAEL D. LEOPOLD,

Defendants.

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Index No. 152797/14

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, submitted on default, plaintiff moves pursuant to CPLR 3215 for a default judgment against defendants Accurate Land Abstract Co., Ltd. and pursuant to CPLR 3211(b) for an order dismissing the affirmative defenses of defendant Michael D. Leopold.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff is a title insurance carrier; defendant Accurate Land Abstract Co., Ltd. is its agent and is authorized to issue policies on its behalf. On June 28, 1996, plaintiff entered into an issuing agency agreement with Accurate, which provides, in pertinent part:

> [Accurate] shall be liable to and agrees to indemnify and to save harmless [plaintiff] for all attorney fees, court costs, expenses and loss or aggregate of losses resulting from:
>
> A. Omissions or other inaccuracies in any commitment or policy which are disclosed by the application, the approved examiner's report, or which are known to [Accurate];

(NYSCEF 11, Exh. L).

Included in the agreement are personal guarantees executed by Leopold, Accurate's president, and Ng in favor of plaintiff, whereby they promise to indemnify plaintiff for all loss "it may hereafter sustain by virtue of the failure of [Accurate] to perform its duties and obligations under said agency contract." (*Id.*).

On or about July 20, 2001, Accurate issued on plaintiff's behalf a title insurance policy to owners of real property in Westchester County. Schedule B of the policy excludes from coverage loss or damage arising from irregularities and encroachments outlined in an accompanying survey, which states, as pertinent here:

> Survey made by Kulhanek & Plan, P.C., dated 7/13/01 shows . . . . two walks at or near southerly record line. Also shows irregular walk generally along northerly record line. Also shows irregular wall and driveway encroaching 6'6" onto adjacent parcel north of northerly record line and onto Elizabeth Street. No other encroachment. Policy will except any changes from the date thereof.

(*Id.*, Exh. M).

By letter dated May 29, 2012, plaintiff advised the insureds that it had investigated the claim they had earlier submitted and was thus settling it by paying them $22,197.36, which included reimbursement of legal fees incurred as a result of their appearances before a city planning board and the cost of fixing the encroachment. (NYSCEF 11, Exh. N).

By letter dated February 26, 2014, plaintiff informed Leopold that it had investigated the claim and found that the encroachment constituted a wall and not a walk, and that therefore, the encroaching wall was covered and not exempted from coverage under the policy. It thus demanded indemnification from Accurate, alleging that it had failed to "exercise due care as a policy issuing agent, in identifying an encroaching 'walk' rather than a 'wall' along the northern property line." (NYSCEF 11, Exh. O).

On March 26, 2014, plaintiff commenced this action seeking to enforce the agency agreement against Accurate, and against Leopold and Ng on their personal guarantees, alleging that Accurate had "erroneously failed to exclude the Encroaching Wall along the northern property line," and "misidentified the wall as a 'walk' along the northern property line apparently due to a clerical error." It advances causes of action for contractual and common law indemnification, negligence, breach of fiduciary duty, and breach of contract, and seeks to recover the amount of the settled claim plus its expenses in investigating and negotiating same. (NYSCEF 1, 11). On March 27, 2014, plaintiff served Accurate by delivering the summons and complaint to an agent of the Secretary of State (NYSCEF 11, Exh. B), and on July 24, 2014, followed up by regular mail at Accurate's last known address. (*Id.*, Exh. E).

Although it had initially moved for a default judgment against all defendants (NYSCEF 5), by stipulation dated September 22, 2014, plaintiff agreed to withdraw its motion against Accurate and Leopold only, allowing them time to serve answers. (NYSCEF 8). It subsequently also withdrew the motion as against Ng.

By answer dated October 13, 2014, Leopold alleges as affirmative defenses that plaintiff fails to: (1) state a cause of action; (2) provide defendants notice of the insureds' claims; (3) defend its insureds' right to ingress and egress to and from their property, which he alleges was the real subject of their title claim; (4) correct the obvious typographical error in the policy and thus settled a baseless claim rather than defend its insured in several lawsuits addressing the insureds' right to ingress and egress as a covered loss under the policy; and (5) notify defendants of its intent to settle its insureds' claim, or invite defendants to discuss same, which it alleges was unwarranted under the terms of the policy. (NYSCEF 9).

Accurate has neither answered nor appeared.

II. MOTION TO DISMISS LEOPOLD'S AFFIRMATIVE DEFENSES

A. Applicable law

To dismiss a defense pursuant to CPLR 3211(b), the movant bears the burden of demonstrating that the defense is not stated or is without merit as a matter of law. (*S. Point, Inc. v Redman,* 94 AD3d 1086, 1087 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Gordon,* 84 AD3d 443, 443-444 [1st Dept 2011]). In deciding the motion, the court must give the defendant the benefit of every reasonable intendment of the pleading, which is to be liberally construed. (*Id.; Warwick v Cruz,* 270 AD2d 255, 255 [2d Dept 2000]). A defense should not be dismissed where questions of fact exist. (*Id.; Atlas Feather Corp. v Pine Top Ins. Co.,* 128 AD2d 578, 578-579 [2d Dept 1987]). However, dismissal is warranted where the affirmative defenses only plead conclusions of law without any supporting facts. (*Bank of Am., NA v 414 Midland Av. Assoc, LLC,* 78 AD3d 746, 750 [2d Dept 2010]; *Firemans' Fund Ins. Co. v Farrell,* 57 AD3d 721, 723 [2d Dept 2008]).

B. General contentions

Plaintiff contends that Leopold's second through fifth affirmative defenses are not legally cognizable, and observes that as Accurate admits all of the allegations in the complaint by virtue of its default, its liability inures to Leopold, as Accurate's guarantor, and thus Leopold's affirmative defenses must be dismissed. (NYSCEF 11).

It is well-settled that a judgment entered upon default against a principal is not binding upon the surety, but is only *prima facie* evidence against the surety (*Corless v Leonardo II,* 298 AD2d 693, 695 [3d Dept 2002]), and the surety remains at liberty to contest its own liability "by

establishing affirmatively that the principal was not liable" (*Weiss v Hagopian*, 251 AD2d 400, 401 [2d Dept 1998], *quoting Firedoor Corp. of Am., Inc. v Merlin Indus., Ltd.*, 86 AD2d 577, 577 [1st Dept 1982]). Thus, to the extent Accurate, as principal, has admitted liability under the agency agreement by failing to answer or appear, Leopold is nonetheless free to challenge Accurate's liability and his affirmative defenses to that end are appropriate. (*Cf. Mount Vernon City Sch. Dist. v Nova Cas. Co.*, 30 Misc 3d 1231[A], 2008 NY Slip Op 52725[U], *12-13 [Sup Ct, Westchester County 2008] [plaintiff's motion for partial summary judgment denied as against defendant surety based on principal defendant's default]).

C. Failure to state a cause of action (first affirmative defense)

Plaintiff contends that Leopold's defense that plaintiff fails to state a cause of action is conclusory and factually unsupported, amounting to surplusage. (NYSCEF 11).

Generally, the defense that the complaint fails to state a cause of action may be properly interposed in an answer (*Butler v Catinella*, 58 AD3d 145, 148 [2d Dept 2008]), and no relief pursuant to CPLR 3211(b) is available striking a defense that is "harmless surplusage," as entertaining the motion would either be unnecessary or "amount[] to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (*Id.* at 150, *citing Riland v Todman & Co.*, 56 AD2d 350, 353 [1st Dept 1977]; *see also Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2d Dept 2012]). Accordingly, Leopold's defense, however conclusory, is harmless surplusage.

D. Failure to provide notice of claim (second affirmative defense)

Plaintiff alleges that Leopold's assertion that it failed to provide notice of the claim is refuted by documentary evidence, specifically the February 2014 letter seeking from it indemnification, and does not state a valid defense. (NYSCEF 11).

Leopold plainly references a failure to provide to defendants notice of the claim made by plaintiff's insureds, not notice of this action. Consequently, plaintiff fails to provide a factual or legal basis for dismissal of this defense.

E. Failure to defend claim (third affirmative defense)

Plaintiff argues that what would have been the insureds' cause of action against it, namely, that it failed to defend their right to ingress and egress to and from their property, may not be asserted by Leopold here, and thus, the pleading is "perplexing" and fails to state a defense. It contends that rather, this defense suggests an additional error in the policy and reasserts that Accurate's clerical error resulted in the failure to exclude the encroaching wall from coverage. (NYSCEF 11).

Where a proposed indemnitor receives no notice of the underlying settled claim, in order to be indemnified, the indemnitee must establish that it would have been liable on the claim, that there is no good defense to liability, and that the amount of the settlement is reasonable. (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 39-40 [1st Dept 2010]; *Nat. Union Fire Ins. Co. of Pittsburgh, PA v Red Apple Group, Inc.*, 309 AD2d 657, 657 [1st Dept 2003]; *Fidelity Nat. Tit. Ins. Co. of New York v First New York Tit. & Abstract Ltd.*, 269 AD2d 560, 561-562 [2d Dept 2000]).

While this defense may not be artfully pleaded, plaintiff's allegations are no less inartful, and are otherwise fatally conclusory. (*See Smith ex rel. Smith v Kinsey*, 50 AD3d 1456, 1457 [4th Dept 2008] [conclusory contention that affirmative defense was frivolous or without merit insufficient to strike defense]; *Fried v Tucker*, 27 Misc 3d 871, 878 [Sup Ct, Kings County 2010] ["Given that . . . in this instance plaintiff has not so much as made clear to this court that he

knows what affirmative defense he is attacking, the court has no choice but to deny plaintiff's motion . . . ."]). In any event, affording Leopold's answer the most liberal construction and every reasonable inference, whether plaintiff undertook its insureds' defense on the question of their right to ingress and egress is relevant to the availability of a good defense and/or whether plaintiff's settlement of the claim was reasonable. (*Cf. Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1228 [1st Dept 2015] [granting third-party defendant's request to amend by adding affirmative defense that third-party plaintiff's settlement not reasonable, as defense had merit in light of third-party plaintiff's failure to offer evidence that settlement was reasonable]). Consequently, to that extent, the third affirmative defense is not without merit as a matter of law.

F. Failure to correct error in policy and settlement of baseless claim (fourth affirmative defense)

Plaintiff argues that Leopold admits the error in the policy, that Accurate should have caught the error, and that it has no obligation to cure defendants' admitted error. Moreover, it maintains that having acted on its behalf in the underlying transaction, defendants owe it attendant fiduciary duties, and that Leopold's defense constitutes an attempt to reverse defendants' indemnification obligations. (NYSCEF 11).

According to the agreement, it was Accurate's duty, not plaintiff's, to ensure that the policy was free of errors, omissions, and/or inaccuracies. Consequently, plaintiff had no duty to correct any errors or inaccuracies. (*Cf. Marine Midland Bank, N.A. v Yoruk*, 242 AD2d 932, 933 [4th Dept 1997] [defendant's affirmative defense alleging plaintiff breached an implied covenant of good faith and fair dealing dismissed as obligation inconsistent with terms of parties' agreement]). The rest of this defense is duplicative of other affirmative defenses.

G. Failure to provide notice of proposed settlement (fifth affirmative defense)

Plaintiff denies any obligation pursuant to the agency agreement to notify defendants of its intent to settle its insureds' claim. (NYSCEF 11).

For reasons set forth (*supra*, II.E), although no prior notice of claim is required under the agreement, as it is undisputed that no notice was given, plaintiff is obliged to demonstrate, *inter alia*, that the settlement was reasonable (*Cf. Thome*, 125 AD3d at 1228), and to the extent Leopold contends that the settlement was unwarranted, the defense has merit.

III. MOTION FOR DEFAULT JUDGMENT AGAINST ACCURATE

A. Applicable law

Pursuant to CPLR 3215, a default judgment may be entered on a party's failure to answer or appear timely. The moving party must file proof of service of the summons and complaint, proof of the default, and proof of the facts constituting the claim and default. (CPLR 3215[f]). A plaintiff's right to recover on default requires that it set forth a viable cause of action, and the court may consider the complaint, affidavits, and affirmations to that end. (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

To establish entitlement to contractual indemnification, the intent to indemnify must be clearly expressed or implied in the pertinent agreement and from the surrounding circumstances. (*Dzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]; *Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). The right of contractual indemnification depends on the specific language of the contract. (*Campisi v Gambar Food Corp.*, 130 AD3d 854, 855 [2d Dept 2015]).

B. Discussion

In support of its motion, plaintiff submits sufficient proof of proper service as to Accurate and has established that Accurate failed to answer or appear in a timely manner. Common to all of plaintiff's claims is the allegation that Accurate knowingly misidentified the wall as a walk in the subject policy, thereby obligating plaintiff to reimburse the claim, that the error triggered Accurate's obligation to indemnify it, and that Accurate further breached their agency agreement by refusing to do so. In support of these claims, plaintiff includes the pertinent contractual provision, along with evidence that it paid the claim and that it demanded indemnification from Accurate.

Plaintiff does not, however, allege facts establishing that Accurate's obligation to indemnify it was triggered, absent any indication that the alleged inaccuracy was disclosed in the application or that it was known to Accurate. (*Cf. Hartz Consumer Group, Inc. v JWC Hartz Holdings, Inc.*, 33 AD3d 555, 555-556 [1st Dept 2006] [in dispute between buyer and seller of company, alleged defective products constituted less than three percent of inventory and did not breach warranty that "substantially all" product was useable and thus did not trigger their agreement's indemnity clause; indemnity claim dismissed on summary judgment]; *Tighe v Am. Compressed Gases, Inc.*, 247 AD2d 278, 278-279 [1st Dept 1998] [summary dismissal warranted of contractual indemnification claim as terms of agreement did not obligate distributor of propane gas to indemnify supplier for noncompliance with federal standards unless distributor's agent or representative ordered noncomplying gas, and there was no evidence of such request]). Contrary to plaintiff's contention, it is not apparent that the exclusion schedule is inaccurate, as it references both a wall and a walk. Absent the land survey or other pertinent documentation on

which the provision in the exclusion schedule is presumably based, it cannot be determined that there was an actionable error triggering Accurate's duty, and plaintiff's conclusory assertion is insufficient. Although not argued by plaintiff in support of its motion for a default judgment as against Accurate, in any event, Leopold's apparent admission in his answer of an error in schedule B of the policy for exceptions from coverage may not be considered on plaintiff's motion for a default judgment as against Accurate.

Moreover, absent any allegation of a duty owed by Accurate to plaintiff's insureds, its claim for common law indemnification fails as a matter of law. (*See Fidelity Nat. Tit. Ins. Co. v New York Land Tit. Agency LLC*, 121 AD3d 401, 404 [1st Dept 2014] [implied indemnification failed as plaintiff title insurer did not allege that title searching company owed duty to injured party]; *State Workers' Compensation Bd. v Madden*, 119 AD3d 1022, 1024 [3d Dept 2014] ["[T]he gravamen of the claim is that defendants breached contractual and fiduciary duties that were owed, not to third parties, but to . . . plaintiff. Thus, plaintiff's claims against defendants . . . are direct, and do not sound in common-law indemnification." (internal citations omitted)]).

As plaintiff's remaining claims against Accurate are premised on the indemnity provision and are thus supported by the same facts and seek identical damages, they are barred as duplicative of the contractual indemnification claim. (*See Bd. of Mgrs. of ONYX Chelsea Condominium v 261 W. LLC*, 2012 WL 10020665, *12 [Sup Ct, NY County 2012] [dismissal warranted of contractual indemnification claim as duplicative of breach of contract claim]; *see also Orok Edem v Grandbelle Intl., Inc.*, 118 AD3d 848, 848-849 [2d Dept 2014] [affirming dismissal of nine causes of action based on the same facts as underlying breach of contract action]; *Church of S. India Malayalam Congregation of Greater New York v Bryant*

Installations, Inc., 85 AD3d 706, 707 [2d Dept 2011] [plaintiff failed to establish entitlement to default on fraud claim, as allegations were not sufficiently distinct from breach of contract allegations to constitute separate cause of action]).

While plaintiff has established that Accurate has defaulted in answering, it has not otherwise demonstrated that its causes of action are viable, and thus the matter shall be set down for an inquest on the issues of liability and damages. (*See Danvers v Siskin*, 2010 NY Slip Op 31931[U], *4 [Sup Ct, NY County 2010] [as plaintiff provided sufficient proof of default but insufficient proof of liability, matter set down for inquest on liability]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order dismissing defendant Michael L. Leopold's affirmative defenses is granted to the extent that the fourth affirmative defense is dismissed, and the motion is otherwise denied; it is further

ORDERED, that plaintiff's motion for a default judgment as against defendant Accurate Land Abstract Co., Ltd. is granted to the extent that said defendant has defaulted in answering; and it is further

ORDERED, that defendant Accurate Land Abstract Co., Ltd.'s liability shall be determined at an inquest at the time of or following the trial or other disposition of the causes of action against the nondefaulting defendants.

ENTER:

Barbara Jaffe, JSC

DATED: September 4, 2015
New York, New York