

AIG Specialty Ins. Co. v DYMI Realty Corp.

2015 NY Slip Op 31826(U)

September 29, 2015

Supreme Court, New York County

Docket Number: 150921/2014

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: Hon. Robert D. Kalish
*Justice***

PART 29

**AIG Specialty Insurance Company (f/k/a
American International Specialty Lines
Insurance Company)**

INDEX NO. 150921/2014

- v -

MOTION DATE 9/1/2015

**DYMI Realty Corporation, Parkway Realty
Associates, LLP, Clay 1145, LLC**

MOTION SEQ. 004

The following papers, numbered 1 and 23 were read in determining the Defendant's motion for summary judgment and the Plaintiff's cross-motion for leave to file an amended complaint

Defendant's motion for summary judgment ----- — Affirmation — Affidavits — Exhibits	No(s). <u> 1 </u>
Plaintiff's cross-motion for leave to file Amended complaint----- — Affirmation — Affidavits — Exhibits	No(s). <u> 2 </u>
Defendant's opposition to Plaintiff's cross-motion and in further support ----- of Defendant's motion for summary judgment	No(s). <u> 3 </u>

Upon the foregoing submitted papers and having conducted oral argument, the defendant Parkway Realty Associates, LLC i/s/h/a Parkway Realty Associates LLP's motion for summary judgment pursuant to CPLR §3212 and reasonable attorneys' fees is hereby denied in part and granted in part. Further, the plaintiff's cross-motion pursuant to CPLR §§ 3025(b) and 3025(c) to amend the complaint is hereby granted to the extent as follows:

According to the file, the plaintiff AIG Specialty Insurance Company (“AIG”) commenced an action on or about February 6, 2014 by filing a summons and complaint naming DYMI Realty Corporation, Parkway Realty Associates, LLP and Clay 1145, LLC as defendants. AIG is clearly identified in the captions for both the summons and complaint as the plaintiff in the instant action. Similarly, Parkway Realty Associates LLP is named as one of the defendants in the captions for both the summons and complaint. However, the “Parties” section of the complaint (paragraph 3) identifies Parkway Realty Associates, LLC (as opposed to Parkway Realty Associates LLP) as the defendant company doing business at 1205 47th Street, Brooklyn NY. The court notes that this is the only place in the Complaint that specifically identifies Parkway Realty Associates, LLC as a defendant. Further, the caption for the affidavit of service as to the summons and complaint incorrectly identifies the plaintiff as “Chartis Specialty Insurance Company (f/k/a American International Specialty Lines Insurance Company)” not AIG. Said affidavit also identifies Parkway Realty Associates LLP as a defendant in the action. The Court does note that the affidavit indicates that on February 6, 2014 personal service was made on Parkway Realty Associates, LLC (as opposed to Parkway Realty Associates LLP) by service upon the secretary of state.

Thereafter, the plaintiff moved for a default judgment before Justice Tingling, erroneously naming Lexington Insurance Company in its papers as the plaintiff in the instant action rather than AIG. In addition, the plaintiff’s affidavits of service indicate that both the motion for a default judgment and the CPLR §3215(g) notice were mailed to Parkway Realty Associates, LLC at the listed address (1205 47th Street Brooklyn, NY). However, both of said affidavits erroneously identify Parkway Realty Associates LLP as a defendant in their captions. In all of its submitted papers, the Plaintiff continued to identify Parkway Realty Associates LLP as a defendant in the captions and not Parkway Realty Associates, LLC.

Justice Tingling granted the plaintiff a default judgement also erroneously naming Lexington Insurance Company rather than AIG as the plaintiff in his decision/order. Said decision/order further directed the clerk to enter judgment against Parkway Realty Associates LLP as one of the defaulting parties. Thereafter, the plaintiff filed a “statement of judgment” (attached to plaintiff’s attorney’s affirmation in opposition to the defendant’s motion and in support of plaintiff’s cross-motion as Exhibit C) with the clerk, again erroneously naming Lexington Insurance Company as the plaintiff. The plaintiff’s filed “statement of judgment” did correctly identify Parkway

Realty Associates LLC as a defendant rather than Parkway Realty Associates LLP. However, the "statement of judgement" that was actually signed by the clerk and filed on July 25, 2014 erroneously names Parkway Realty Associates LLP as a defendant in the caption. The signed statement of judgment indicated in the body that judgment was being entered against Parkway Realty Associates LLC, contrary to Justice Tingling's order directing the clerk to enter judgment against Parkway Realty Associates LLP.

Plaintiff's attorney indicates in the cross-motion that all of these mistakes were merely typing errors, and that his use of the wrong plaintiff's name and wrong defendant's name on almost every single paper filed in the underlying action, including affidavits of service and motion papers, did not in any way prejudice the defendant Parkway Realty Associates LLC. What the plaintiff's attorney fails to acknowledge is the great deal of judicial time and resources that have been wasted by this Court in identifying, analyzing and correcting the multiple mistakes that plaintiff's attorney has made in his submitted papers. Plaintiff's counsel's recurring mistakes also resulted in unnecessary appearances before this Court by the defendant Parkway Realty Associates LLC's attorney.

By decision dated May 6, 2015, this Court vacated the default judgment filed on July 25, 2014 and granted Parkway Realty Associates LLC time to file an answer, which Parkway Realty Associates LLC has done.

Plaintiff's attorney argues in his cross-motion that, notwithstanding the fact that the affidavit of service as to the summons and complaint identifies Parkway Realty Associates LLP as the defendant in the caption, the affidavit still indicates that service was affected upon Parkway Realty Associates LLC pursuant to BCL 306 by serving the secretary of state. It is the Plaintiff's position that notwithstanding the fact that the caption in the affidavit of service misidentifies Parkway Realty Associates LLP as a defendant in the action, the correct defendant, Parkway Realty Associates LLC, received the summons and complaint through the secretary of state. In effect, the Plaintiff claims that the defendant Parkway Realty Associates LLC was properly served with the summons and complaint, and that the only errors were the names in the caption of the summons and complaint.

Upon the submitted papers and having conducted oral argument, the Court finds that there is insufficient bases to grant summary judgment to the defendant Parkway Realty Associates LLC dismissing the underlying action on the grounds argued by the defendant. The Court notes that the defendant Parkway Realty Associates LLC does not argue that it did not receive the summons and complaint, nor that the plaintiff failed to comply with BCL 306. Further, the defendant Parkway Realty Associates LLC does not argue that it did not receive any of papers that the Plaintiff served upon the address at 1205 47th Street, Brooklyn NY. The Court further notes that any questions as to proper service and/or jurisdiction upon the defendant Parkway Realty Associates LLC are not being considered by the Court at this time.

Further, upon the submitted papers and having conducted oral argument, the Plaintiff's cross-motion to serve an amended complaint upon the defendant Parkway Realty Associates LLC in the form annexed to the moving papers is hereby granted (see CPLR 305(c), Sally v Keyspan Energy Corp., 106 AD3d 894 (NY App Div 2nd Dept 2013) lv denied 22 NY3d 860 (NY 2014)). Plaintiff shall serve said amended complaint including a copy of the instant order with notice of entry upon the defendant Parkway Realty Associates LLC attorney within 20 days of the filing of the instant order with notice of entry. The defendant Parkway Realty Associates LLC's answer to the amended complaint shall be served as per the CPLR requirements. The Court notes that the other issues raised by the Plaintiff going the merits of the underlying action have not been considered by the Court in rendering the instant decision.

Finally, for the reasons so stated in the instant decision, the portion of the defendant Parkway Realty Associates LLC's motion for reasonable attorneys fees is granted to the extent that the plaintiff shall pay to the defendant's attorney \$750.00 in reasonable attorneys' fees and costs associated with the additional legal work performed by the defendant's counsel due to plaintiff's counsel repeated errors in plaintiff's submitted papers.¹ Said payment shall be made within 30 days of the filing of the instant decision.

¹ The Court notes that it indicated at oral argument that it would be granting the Defendant \$1,500.00 in attorneys' fees and costs. However, upon reconsideration, the Court finds that \$750.00 is a reasonable sum for Defendant's reasonable attorneys' fees and costs incurred due to plaintiff's counsel's repeated errors in plaintiff's submitted papers.

Accordingly, it is hereby

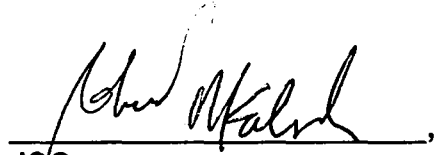
ORDERED that the defendant Parkway Realty Associates LLC's motion for summary judgment and reasonable attorneys' fees is granted solely to the extent that plaintiff is shall pay to the defendant's attorney \$750.00 in reasonable attorneys' fees and costs. Said payment shall be made within 30 days of the filing of the instant decision. It is further

ORDERED that the plaintiff's cross-motion to serve an amended complaint upon the defendant Parkway Realty Associates LLC in the form annexed to the moving papers is hereby granted to the extent that Plaintiff shall serve said amended complaint including a copy of the instant order with notice of entry upon the defendant Parkway Realty Associates LLC's attorney within 20 days of the filing of the instant order with notice of entry. The defendant Parkway Realty Associates LLC's answer to the amended complaint shall be served as per the CPLR requirements. It is further

ORDERED that the parties shall appear before the court on October 19, 2015 in Part 29 for a further conference.

The foregoing constitutes the order and decision of the court.

Dated: September 29, 2015


JSC
HON. ROBERT D. KALISH
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 as appropriate: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE