Progressive Cas. Ins. Co. v Excel Prods., Inc.
2018 NY Slip Op 33809(U)
January 3, 2018
Supreme Court, Nassau County
Docket Number: 002660/15
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 9

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PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE ADVANCED INSURANCE COMPANY, PROGRESSIVE GARDEN STATE INSURANCE COMPANY, PROGRESSIVE MAX INSURANCE COMPANY, PROGRESSIVE PREFERRED INSURANCE COMPANY, PROGRESSIVE PREMIER INSURANCE COMPANY OF ILLINOIS, PROGRESSIVE SPECIALTY INSURANCE COMPANY, and UNITED FINANCIAL CASUALTY COMPANY,

Plaintiffs,

-against-

Index No.: 002660/15
Motion Sequence...03
Motion Date...10/27/17
XXX

EXCEL PRODUCTS, INC,

Defendant.

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Papers Submitted:
Notice of Motion.......................................x
Affirmation in Opposition.....................................x
Reply Affirmation...x

Upon the foregoing papers, the motion by the Defendant, EXCEL PRODUCTS, INC (hereinafter "EXCEL"), made pursuant to CPLR §§ 2221(d) and (e), for leave to reargue and renew this Court's prior Short Form Order, dated May 26, 2017 (hereinafter referred to as the "Prior Order"), is determined as hereinafter provided.

As noted in this Court's Prior Order, the Plaintiffs commenced this action on or about March 24, 2015, by the filing of a Summons and Verified Complaint (*See* the Summons

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and Verified Complaint attached to the Notice of Motion as Exhibit "A"). The Verified Complaint seeks a declaration that the Defendant is not entitled to reimbursement for medical services and durable medical equipment purportedly rendered and billed to the Plaintiffs pursuant to the no-fault laws of New York's Insurance Law, based upon the Defendant's failure to satisfy the conditions precedent of its insurance policy or to verify its claims in a manner required by law.

By Short Form Order, dated July 10, 2015, this Court previously granted the Plaintiffs' motion (Mot. Seq. 01) for a default judgment against the Defendant upon the Plaintiffs' showing that they timely and properly served the Defendant with notice of the instant action and that the Defendant failed to timely appear. Thereafter, on January 24, 2017, more than a year and a half after the default judgment was entered against it, the Defendant filed a motion (Mot. Seq. 02) seeking an Order vacating and setting aside the Judgment, pursuant to CPLR §§ 317, 5015 (a)(1) and 3215, and granting it an extension of time to appear and answer in this action.

In its Prior Order, this Court denied the Defendant's motion to vacate and set aside the Judgment entered against it, finding that the Defendant failed to establish a credible excuse for not appearing in the action (*See* the Prior Order attached to the Notice of Motion as Exhibit "E"). Importantly, this Court found that the argument posed by EXCEL that it did not have actual notice of the instant action until January of 2017, lacked merit. Given that the Defendant failed to proffer a reasonable excuse for failing to answer the complaint, this Court was not required to determine the issue of whether EXCEL possessed a meritorious defense to the action.

However, in its Prior Order, this Court noted that the defenses asserted by the Defendant were unsupported by any evidence or persuasive arguments.

The Defendant now seeks leave to reargue and renew its underlying motion.

Initially, the instant motion (Mot Seq. 03) is procedurally defective for various reasons. As extrapolated from the motion papers, the Defendant is moving for both renewal and reargument. CPLR § 2221 (f), which allows the moving party to move for the combined relief of renewal and reargument in one application, expressly provides that on such an application the movant "shall identify separately and support separately each item of relief sought." However, the Defendant has failed to comply with this statutory directive.

Further, the Defendant's motion to reargue is untimely. CPLR § 2221 (d) (2) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. The Prior Order was served by the Plaintiffs with notice of entry on June 15, 2017. The Defendant filed the instant motion on September 5, 2017. Thus, the Defendant failed to move to reargue within the statutory thirty-day time period.

The Defendant's motion to reargue would also fail on its merits as there are no matters of fact or law that were overlooked or misapprehended by the Court in determining the prior motion. It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (*See McGill v. Goldman*, 261 A.D.2d 593, 594 [2d Dept. 1999]). It is not designed, however, to provide an unsuccessful party

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with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*McGill v. Goldman, supra*; *Mazinov v. Rella,* 79 A.D.3d 979 [2d Dept. 2010]). Here, the Defendant merely re-asserts its position that it possesses a reasonable excuse for its failure to timely appear. Moreover, counsel for the Defendant newly contends that this Court erred in granting the Plaintiffs a default judgment against the Defendant, as the Plaintiffs did not satisfy the requirements of CPLR 3215 (f). It is clear that the Defendant attempts to take a "second bite at the apple" by asserting new arguments in an attempt to re-litigate issues that have already been explicitly decided by this Court. Even still, counsel's arguments lack a sound basis. In support of its motion for default, the Plaintiff proffered both the Verified Complaint and a sworn affidavit. As such, the requirement of CPLR § 3215 (f) for the moving party to submit "proof of the facts constituting the claim" was sufficiently satisfied.

With respect to that branch of the Defendant's motion for renewal, the Defendant has failed to identify any new information upon which the instant motion is predicated. CPLR § 2221 (e) authorizes a motion for leave to renew based on "new facts not offered on the prior motion that would change the prior determination [provided there is] reasonable justification for the failure to present such facts on the prior motion." *Simpson v. Tommy Hilfiger, U.S.A. Inc.*, 48 A.D.3d 389 (2nd Dept. 2008). Although "the requirement that a motion for renewal be based upon newly discovered evidence is a flexible one, a court, in its discretion, may grant renewal even upon facts known to the movant at the time of the original motion." (*Wilder v. May Department Stores*, 23 A.D.3d 646, 648 (2nd Dept. 2005); *Granato v. Waldbaum's*, 289 A.D.2d 289 [2nd Dept. 2001]). The Defendant's only argument with respect to "new information" was

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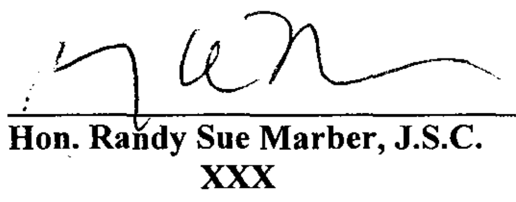
made in counsel's Affirmation in Reply, wherein counsel states that "the materials newly-provided were inadvertently omitted from the prior motion". However, counsel fails to identify what materials he is referring to. It is apparent that counsel's basis for renewal lacks muster.

Accordingly, it is hereby

ORDERED, that the Defendant's motion (Mot. Seq. 03) seeking reargument and renewal pursuant to CPLR § 2221 (d) and (e), is **DENIED.**

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York
January 3, 2018



Hon. Randy Sue Marber, J.S.C.
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HON. RANDY SUE MARBER

ENTERED

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