

Philadelphia Indem. Ins. Co. v Thompson
2020 NY Slip Op 32420(U)
July 24, 2020
Supreme Court, New York County
Docket Number: 158807/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 158807/2019

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DOUGLAS THOMPSON,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for JUDGMENT - DEFAULT.

In this action seeking to recover for property damage allegedly sustained by plaintiff Philadelphia Indemnity Insurance Company ("Philadelphia Insurance"), as subrogee of nonparty Dewitt Supportive Housing, L.P. ("Dewitt"), Philadelphia Insurance moves, pursuant to CPLR 3215, for a default judgment against defendant Douglas Thompson ("Thompson") (Doc. 3). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew upon proper papers**.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 23, 2019, a unit occupied by Thompson and located at 437 Dewitt Avenue in Brooklyn ("the premises") sustained severe damage as a result of a fire, which Philadelphia Insurance asserts was caused by Thompson's negligence (Doc. 1 ¶ 1-5). In September 2019, Philadelphia Insurance commenced this action as against Thompson to recover an amount no less than \$55,677.71, plus interest, for payments made under an insurance policy to Dewitt, the owner

of the premises, relating to losses occasioned by the fire (Doc. 1 ¶ 6-11). Thompson failed to interpose an answer or otherwise appear in this action (Doc. 5 ¶ 12).

In March 2020, Philadelphia Insurance filed the instant motion seeking a default judgment against Thompson, which is not opposed (Doc. 3-11).

LEGAL CONCLUSIONS:

"Where a plaintiff moves for leave to enter a default judgment, he or she is required to submit proof of service of the summons and complaint, proof of facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (*Unitrin Advantage Ins. Co. v Advanced Orthopedics & Joint Preserv. P.C.*, 2018 NY Slip Op 33296[U], 2018 NY Misc LEXIS 6421, *5 [Sup Ct, NY County 2018] [internal quotation marks and citations omitted]; see *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). However, "CPLR § 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action," such "as an affidavit executed by a party with personal knowledge of the merits of the claim" (*Unitrin Advantage Ins. Co. v Advanced Orthopedics & Joint Preserv. P.C.*, 2018 NY Misc LEXIS 6421 at *5; see CPLR 3215 [f]).

This Court finds that Thompson was properly served with the summons and complaint, and he has failed to answer or otherwise appear in this action (Docs. 8, 5 ¶ 12) . However, Philadelphia Insurance has failed to establish the facts constituting the claim. Philadelphia Insurance submits the affidavit of its senior subrogation examiner, John Smith ("Smith"), who asserts, in conclusory fashion that, "[a]s a result of [Thompson's] negligence, recklessness and/or failure to use due care, Dewitt sustained damages in an amount in excess of \$61,233.14 together

with appropriate interest thereon from February 23, 2019" (Doc. 4 ¶ 6).¹ Since Smith fails to set forth the alleged negligent conduct that resulted in the property damage, Philadelphia Indemnity's proof is insufficient to establish the facts constituting the claim, and the motion must be denied (*see Geico Ins. v Sullivan*, 56 Misc 3d 12, 14 [2d Dept, App Term 2017]; *Utica First Ins. Co. v Vollrath Co., LLC*, 2019 NY Slip Op 30321[U], 2019 NY Misc LEXIS 548, *3-4 [Sup Ct, NY County 2019]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Philadelphia Indemnity Insurance Company's motion for a default judgment against defendant Douglas Thompson is denied, with leave to renew upon proper papers within 30 days of service of this order with notice of entry, upon penalty of dismissal; and it is further

¹ The amount of damages claimed by Smith is different from the amount alleged in the complaint (Doc. 4). Philadelphia Insurance provides no explanation for the apparent discrepancy.

ORDERED that plaintiff Philadelphia Indemnity Insurance Company shall serve a copy of this order, with notice of entry, on defendant Douglas Thompson within 20 days after this order is uploaded to the New York State Courts E-filing System (NYSCEF); and it is further

ORDERED that this constitutes the decision and order of this Court.

7/24/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE