SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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BURLINGTON INSURANCE COMPANY,

Plaintiff

Index No. 654724/2018

-against-

DECISION AND ORDER

C&S BUILDERS, INC., CMR CONSTRUCTION & ROOFING OF NY, LLC, and ANTONIO MARTINEZ,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendant Martinez moves to vacate the order dated July 10, 2020, granting plaintiff's motion for default judgment against defendants C&S Builders, Inc., and CMR Construction & Roofing of NY, LLC. C.P.L.R. § 5015(a)(1). The court granted plaintiff's motion without opposition from any defendants. Martinez timely moved to vacate the order within one year after plaintiff served notice of entry of the order. Id. He seeks to vacate the default judgment against C&S Builders only.

I. THE EXCUSE FOR MARTINEZ'S DEFAULT

To vacate Martinez's default in responding to plaintiff's motion for default judgment, Martinez must demonstrate a reasonable excuse for his default and a meritorious defense to plaintiff's motion. GEM Invs. Am., LLC v. Marquez, 180 A.D.3d 513, 513 (1st Dep't 2020); Country-Wide Ins. Co. v. Power Supply,

Inc., 179 A.D.3d 405, 406-407 (1st Dep't 2020); Malon 433, Inc. v. Metro Elec. Contractors, Inc., 178 A.D.3d 439, 439 (1st Dep't 2019); Karimian v. Karlin, 173 A.D.3d 614, 615 (1st Dep't 2019). If Martinez fails to satisfy either requirement of this two-part test, the court need not consider the other requirement. GEM Invs. Am., LLC v. Marquez, 180 A.D.3d at 513; Besler v. Uzieri, 179 A.D.3d 628, 628 (1st Dep't 2020); Country-Wide Ins. Co. v. Power Supply, Inc., 179 A.D.3d at 407; Hyman v. 400 W. 152nd St. Hous. Dev. Fund Corp., 159 A.D.3d 606, 607 (1st Dep't 2018).

Martinez's attorney insists that he did not oppose plaintiff's motion because plaintiff moved only against Martinez's co-defendants, C&S Builders and CMR Construction & Roofing of NY. The attorney's deliberate, willful inaction, however, is not a reasonable excuse that supports vacatur. GEM Invs. Am., LLC v. Marquez, 180 A.D.3d at 513; Gaulsh v. Diefenbach PLLC, 162 A.D.3d 585, 585 (1st Dep't 2018). Even though plaintiff did not move against Martinez directly, a default judgment against his co-defendants directly threatened his pecuniary interests in collecting a judgment against one or both co-defendants through their insurance. It was impossible for the court to grant the relief plaintiff sought, a declaration that plaintiff did not owe insurance coverage to Martinez's co-defendants, without impairing his interests.

Plaintiff's action sought no independent relief against

Martinez. The sole reason he was a necessary named party in this action was to permit him to oppose plaintiff's position on its insurance coverage of his co-defendants. C.P.L.R. § 1001(a); Jerusalem Ave. Taxpayer, LLC v. Liberty Mut. Ins. Co., 137 A.D.3d 600, 600-601 (1st Dep't 2016). See Morgan v. de Blasio, 29 N.Y.3d 559, 560 (2017); Amazing Home Care Servs., LLC v. Applied Underwriters Captive Risk Assur. Co. Inc., 191 A.D.3d 516, 519 (1st Dep't 2021); Cabrera v. City of New York Civ. Serv. Commn., 181 A.D.3d 540, 541 (1st Dep't 2020). Plaintiff's motion for a default judgment was the time and place for Martinez to have submitted that opposition, rather than now. See Hermitage Ins. Co. v. 186-190 Lenox Rd., LLC, 142 A.D.3d 422, 423 (1st Dep't 2016).

II. THE INTERESTS OF SUBSTANTIAL JUSTICE

Nevertheless, the court may vacate the default judgment against C&S Builders "for sufficient reason and in the interests of substantial justice," Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 68 (2003); City of New York v. OTR Media Group, Inc., 175 A.D.3d 1163, 1163 (1st Dep't 2019); Smith v. Pataki, 150 A.D.3d 460, 461 (1st Dep't 2017); Goldman v. Cotter, 10 A.D.3d 289, 293 (1st Dep't 2004), particularly when the vacatur will allow the action to be adjudicated on its merits. Aegis SMB Fund II, L.P. v. Rosenfeld, 189 A.D.3d 472, 473 (1st Dep't 2020); 801-803, LLC v. 805 Ninth Ave. Realty Group, LLC, 188 A.D.3d 478,

478 (1st Dep't 2020); Maurice v. Maurice, 183 A.D.3d 455, 456 (1st Dep't 2020); Santiago v. Valentin, 125 A.D.3d 459, 459 (1st Dep't 2015). A "client will not be deprived of his day in court on account of his attorney's 'neglect or inadvertent error, especially where the other party cannot show prejudice and his position has merit.'" Maurice v. Maurice, 183 A.D.3d at 455 (quoting Chelli v. Kelly Group, P.C., 63 A.D.3d 632, 633-34 (1st Dep't 2009)).

Plaintiff does not claim that it will be prejudiced if the judgment against C&S Builders is vacated. Plaintiff claims only that the "misunderstanding" by Martinez's attorney in failing to apprehend the consequences of plaintiff's motion, Santiago v. Valentin, 125 A.D.3d at 459, "tantamount to law office failure," id. at 460, is "not particularly compelling," Aegis SMB Fund II, L.P. v. Rosenfeld, 189 A.D.3d at 474; Marine v. Montefiore Health Sys., Inc., 129 A.D.3d 428, 429 (1st Dep't 2015), and that the judgment is meritorious. Martinez, however, as demonstrated below, presents meritorious defenses.

Perhaps more importantly, other than his attorney's failure to respond to the motion for a default judgment, Martinez continuously showed his interest in litigating this action on its merits. He answered the complaint, requested a preliminary conference, and timely filed the current motion. He also belatedly requested a conference with the court and leave to

oppose the motion for a default judgment, but his correspondence was overlooked because it was filed well after the motion was submitted and, if mailed or delivered, it was to an incorrect address in June 2020 during the pandemic. The record thus shows that Martinez's default was due not to his disinterest in the outcome of this action, but to his attorney's failure to perceive the consequences of a default judgment against plaintiff's insureds. Although the attorney unquestionably failed to protect Martinez's interest by neglecting to oppose plaintiff's motion in an insurer's standard declaratory judgment action disclaiming coverage of its insureds and the person injured, the attorney's shortcomings need not deprive Martinez of an opportunity to recover his judgment in his underlying personal injury action. Martinez v. Gorbaty, Index Number 1812/2015 (Sup. Ct. Nassau Co. Mar. 22, 2019).

III. THE MERITS

1. Unmeritorious Defenses

Among Martinez's defenses to plaintiff's motion for a default judgment disclaiming coverage of C&S Builders, Martinez insists that plaintiff's motion falsely maintained that the statute of limitations had run against any claim by C&S Builders that plaintiff had breached its insurance contract to defend and indemnify C&S Builders. Plaintiff's motion, however, did not apply any statute of limitations to C&S Builders.

Plaintiff maintained only that CMR Construction & Roofing of NY was prohibited from claiming against plaintiff or C&S Builders because the statute of limitations had run. Plaintiff did not take the same position against C&S Builders. Therefore this defense by Martinez is inapposite.

Martinez also points out that plaintiff's disclaimer dated August 1, 2012, did not disclaim coverage based on C&S Builders' noncooperation, the ground on which the court granted plaintiff's motion for a default judgment. The disclaimer only limited plaintiff's liability to $50,000 based on the failure by C&S Builders' subcontractor to obtain insurance as required to trigger full coverage of C&S Builders under plaintiff's policy. Martinez insists that plaintiff therefore is precluded from relying on noncooperation as a basis for a default judgment against C&S Builders.

Plaintiff could not have disclaimed coverage based on C&S Builders' noncooperation, however, because the alleged noncooperation did not occur until after plaintiff issued its disclaimer. Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp., 22 N.Y.3d 571, 577 (2014); Continental Cas. Co. v Stradford, 11 N.Y.3d 443, 449-50 (2008). Plaintiff's disclaimer also included a reservation of rights, which preserved its right to disclaim coverage later for reasons other than a subcontractor's lack of insurance.

2. Meritorious Defenses

Nevertheless, Martinez rebuts plaintiff's showing that C&S Builders deliberately failed to cooperate in the underlying action. Plaintiff showed C&S Builders' noncooperation through an affidavit by Peter Williams, plaintiff's Regional Claim Manager, that C&S Builders did not respond to two deposition notices. Aff. of Mark R. Bernstein Ex. G. Upon the fuller record presented by the current motion, however, Martinez points out that C&S Builders mounted an active defense throughout the underlying action. C&S Builders answered, deposed Martinez and the defendant Gorbaty, opposed Martinez's motions for summary judgment and for reargument, and defended itself at the trial. Id. Exs. B, L-O. These efforts belie the "willful and avowed obstruction" required to constitute an insured's deliberate noncooperation. Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp., 22 N.Y.3d at 576; Hunter Roberts Constr, Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 410 (1st Dep't 2010); State Farm Indem. Co., 58 A.D.3d 429, 430 (1st Dep't 2009); Liberty Mut. Ins. Co. v. Roland-Stine, 21 A.D.3d 771, 773 (1st Dep't 2005)(quoting Thrasher v. U.S. Liab. Ins. Co., 19 N.Y.2d 159, 168 (1967)). See Continental Cas. Co. v. Stradford, 11 N.Y.3d at 450. Depending on the circumstances, nonappearance for a deposition does not necessarily amount to the required deliberate noncooperation. New York Cent. Mut. Fire Ins. Co. v. Salomon, 11

A.D.3d 315, 316 (1st Dep't 2004); Allcity Ins. Co. v. 601 Crown St. Realty Corp., 264 A.D.2d 315, 316-17 (1st Dep't 1999). See Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp., 22 N.Y.3d at 577.

Plaintiff suggests that, when an insured like C&S Builders initially fails to respond to plaintiff during its investigation of a claim, the investigation is obstructed, witnesses lose recollection or become unavailable, or other evidence grows stale, even if the insured later cooperates. Neither in support of plaintiff's motion for a default judgment, nor in opposition to Martinez's current motion, however, has plaintiff presented any evidentiary support for such a loss of evidence or of other advantage in the underlying action here.

The complaint does not support the second ground on which plaintiff sought relief: that C&S Builders failed to provide timely notice of Martinez's claim. The complaint's causes against C&S Builders include only: (1) noncoverage of C&S Builders due to its failure to cooperate and (2) a $50,000 cap on plaintiff's liability. Plaintiff alleges no failure to provide timely notice nor any breach of contract claim that would encompass such a failure. Because plaintiff did not allege C&S Builders' late notice in the complaint, plaintiff may not rely on such an allegation as a basis for a default judgment. See Idelfonso v. City of New York, 187 A.D.3d 576, 576 (1st Dep't

2020); Price v. TuneCore, Inc., 182 A.D.3d 481, 481 (1st Dep't 2020); Anonymous v. Mount Sinai Hosp., 164 A.D.3d 1167, 1168 (1st Dep't 2018); Shantay P. v. City of New York, 147 A.D.3d 438, 439 (1st Dep't 2017).

Although the court did not grant plaintiff's motion for a default judgment based on its alternative cause of action, that its liability is limited to $50,000, plaintiff did not support this cause of action either. Plaintiff moved for this alternative relief on the ground that C&S Builders' subcontractor, Renew It Corp., lacked insurance coverage as required for C&S Builders' full coverage under plaintiff's policy. Plaintiff's only evidence of Renew It's lack of insurance was a "Pre-Hearing Conference Statement" submitted to the New York State Workers' Compensation Board. Aff. of Anna Karin F. Manalaysay Ex. C, NYSCEF Doc. No. 19. Plaintiff failed to authenticate this document, lay a foundation for the document's admissibility, or explain how the document pertains to anything other than whether Renew It carried Workers' Compensation insurance, as opposed to whether Renew It carried general liability insurance in accordance with plaintiff's policy.

IV. CONCLUSION

For all the reasons explained above, in the interests of substantial justice, the court grants defendant Martinez's motion

to vacate the order dated July 10, 2020, granting plaintiff a default judgment against defendant C&S Builders, Inc. C.P.L.R. § 5015(a); Woodson v. Mendon Leasing Corp., 100 N.Y.2d at 68; City of New York v. OTR Media Group, Inc., 175 A.D.3d at 1163; Smith v. Pataki, 150 A.D.3d at 461; Goldman v. Cotter, 10 A.D.3d at 293. Because Martinez fails to demonstrate a reasonable excuse for his default, however, the court conditions the vacatur on payment of $2,500.00 by Martinez's attorney to plaintiff for its attorneys' fees and expenses incurred in opposing his belated motion contesting plaintiff's default judgment, which Martinez ought to have interposed when plaintiff moved for the default judgment. C.P.L.R. § 5015(a); Bengal House Ltd. v. 989 3rd Ave., Inc., 118 A.D.3d 575, 576 (1st Dep't 2014); Gradaille v. City of New York, 52 A.D.3d 279, 279 (1st Dep't 2008); Goldman v. Cotter, 10 A.D.3d at 293. If Martinez's attorney fails to pay this amount to plaintiff within 30 days after entry of this order, plaintiff may enter a judgment against the attorney.

The default judgment against defendant CMR Construction & Roofing of NY, LLC, remains unaffected. Plaintiff is not entitled to attorneys' fees and costs attributable to its motion for a default judgment against this defendant.

DATED: November 30, 2021

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C